

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In the Matter of:

**Taotao USA, Inc.,
Taotao Group Co., Ltd., and
Jinyun County Xiangyuan Industry
Co., Ltd.,**

Respondents.

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**Docket No.
CAA-HQ-2015-8065**

RESPONDENTS' RESPONSE TO COMPLAINANT'S DISCOVERY REQUESTS

Pursuant to the Order Granting Complainant's Motion for Additional Discovery Through Requests for Production of Documents and Interrogatories, Respondents TaoTao USA, Inc., Taotao Group Co. Ltd., and Jinyun County Xiangyuan Industry Co., LTD. respectfully file their written response.

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**I.
PRELIMINARY STATEMENT**

Respondents, Taotao USA, Inc. ("Taotao USA"), Taotao Group Co., Ltd. ("Taotao Group") and Jinyun County Xianyuan Industry Co., Ltd. ("JCXI"), have not, at this time, fully completed their discovery and investigation in this action. All information contained herein is based solely upon such information and evidence as is presently available and known to Respondents upon information and belief at this time. Further discovery, investigation, research

and analysis may supply additional facts, and meaning to currently known information. Respondents reserve the right to amend any and all responses herein as additional facts are ascertained, legal research is completed, and analysis is undertaken. The responses herein are made in a good faith effort to supply as much information as is presently known to Respondents.

II. OBJECTIONS

Complainant's Requests for Production and Interrogatories are irrelevant because they seek information and documents to determine whether Respondents' received a "Beyond BEN Benefit" or "BBB" from importing/selling vehicles with catalytic converters that did not match the catalytic converters described in their COC applications. *See* Complainant's Motion for Additional Discovery Through Requests for Production and Interrogatories ("Motion") at 4-5. There is no probative value of the requested information as it pertains to BBB because there is nothing in the record to suggest that the violations in this matter could have caused Respondents to receive anything other than the economic benefit of noncompliance, i.e. the benefit of delayed costs and/or benefit of avoided costs ("BEN"). *See* CX022, Clean Air Act Mobile Source Penalty Policy ("Penalty Policy"), at 4. BBB is the benefit from competitive advantage gained as a result of the violation.¹ However, there is not even a scintilla of evidence that Respondents gained any competitive advantage from relying on their catalytic converter suppliers' representations, and subsequent laboratory tests (RX013; RX027), and accordingly listing the catalytic converter compositions on their COC applications.

¹ BBB reflects the benefits to the violator from business transactions that would not have occurred but for the illegal conduct, and/or the competitive advantage the violator obtained in the marketplace as compared to companies that have complied with the motor vehicle emission control laws and regulations. Penalty Policy at 7.

Additionally, there is nothing in the record to even suggest that Respondents' business transactions of importing and selling the vehicles would not have occurred if the catalytic converters installed on the subject vehicles were accurately described in their respective COC applications. Stated differently, regardless of the catalytic converter compositions listed on the subject vehicles' COC application, the applications would have been approved so long as the subject vehicles passed emission tests. *See* 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 ("Combined Response") at 12. In the Combined Response, Complainant admits that EPA has not prescribed specific standards for the content of catalytic converters, and made clear that it was Respondents' own standards that they set for themselves that caused the violation. *Id.* Clearly, Respondents' could have set any standards for themselves, i.e. they could have, on each COC applications, described the catalytic converters that were installed on the vehicles that were imported and sold; or they could have purchased the catalytic converters described on the COC applications from a different catalytic converter manufacturer. *See* RX015. Respondents could have also changed their production vehicles to be different from those described in the COC application, once they discovered that the catalytic converters were not accurately described in the COC applications, and notified EPA of the change, however, there is no evidence in the record to suggest that Respondents' had any knowledge that the catalytic converters described in their COC applications did not match those installed on the production vehicles.

On the other hand, the evidence does shows that the uncertified vehicles passed emissions, and so had Respondents' discovered the change, or accurately listed the catalytic

converter concentrations in their COC application, there is no dispute that the COC applications would have been approved. *See* CX099-CX122; RX018-RX019.²

Because EPA does not have any standards for catalytic converter compositions; and Respondents' simply listed the catalytic converter compositions that were provided, after catalytic converter testing, from the catalytic converter manufacturers and there is no dispute that Respondents' COC applications which purportedly covered the subject vehicles would not have been approved had the correct concentrations been listed on the application, there is no reasonable explanation for why Complainant seeks to consider BBB, i.e. information showing that Respondents' business transactions would not have occurred but for the illegal conduct or that Respondents gained any competitive advantage from providing an incorrect catalytic converter description. Complainant is merely fishing for some possibility of a BBB, where none exists. Because there is nothing in the record showing Respondents gained any competitive advantage from the violations, Complainant's discovery requests are irrelevant, lack probative value, and have no purpose other than to unduly burden Respondents with overly broad requests for information and production with less than a month left to the evidentiary hearing in this matter, and confuse the trier of fact.

Additionally, Complainant's discovery requests seek information regarding Respondents' economic benefit calculations, as provided in the report from Respondents' expert witness, Jonathan Shefftz. In response to Complainant's allegation that the Shefftz report is the only evidence of economic benefit Respondents have provided, Respondents point to the following

² Contrary to Complainant's Motion stating that "Respondents have not addressed BBB either in the Shefftz Report or elsewhere in their prehearing exchange," Respondents' have submitted RX018 and RX019, showing that the vehicles belonging to the engine families identified in the Amended Complaint would have been certified, as they later were, even if they had no catalytic converters of any design. *See* Complainant's Motion for Additional Discovery Through Requests for Production and Interrogatories at 4.

exhibits attached to their First Motion to Supplement the Prehearing Exchange: RX14-RX16. The exhibits include invoices for catalytic converters in fact purchased by Respondents and quotes from other catalytic converter manufacturers for catalytic converters in certified concentrations. The evidence the expert relied upon in his report has been included in the prehearing exchange. Complainant is seeking information protected by attorney-client and work product privilege. Even if any information requested by Complainant is not protected by privilege, there is no reason Complainant could not have obtained the information in the deposition of Jonathan Shefftz, held on September 26, 2017.

In addition to the foregoing objections, Respondents generally object to the discovery requests on the following grounds:

1. Respondents object to the requests that impose or seek to impose any requirement or discovery obligation greater than or different from those under the Federal Rules of Civil Procedure and the applicable Local Rules and Orders of the Court.
2. Respondents object to the requests to the extent they seek disclosure of information protected under the attorney-client privilege, deliberative process privilege, attorney work product doctrine, or any other applicable privilege or immunity. Should any such disclosure by Respondents occur, it is inadvertent and shall not constitute a waiver of any privilege or immunity.
3. Respondents object to these Requests to the extent that they seek information that is neither relevant to the claims or defenses of any party to this Complaint, nor reasonably calculated to lead to the discovery of admissible evidence.
4. In response to these Requests, Respondents do not concede that any of the responses or information contained herein is relevant or admissible. Respondents reserve the right to object,

on the grounds of competency, privilege, relevance, materiality, or otherwise, to the use of this information for any purpose, in whole or in part, in this action or in any other action.

Subject to and without waiving the foregoing objections, Respondents provide the following responses:³

REQUEST NO. 1

For each engine family identified in Counts 1 through 10 of the Amended Complaint, for vehicles imported or sold by Taotao USA, provide the following values, by year, from 2011 through 2015:

- (a) Gross profit from vehicles sold;
- (b) Cost of goods sold;
- (c) Net revenue from vehicles sold;
- (d) Other income associated with importing vehicles;
- (e) Total income associated with vehicles;
- (f) Deductions associated with vehicles;
- (g) Taxable income associated with vehicles;
- (h) Tax owed associated with vehicles;
- (i) Tax overpayment associated with vehicles.
- (j) Net income.

RESPONSE TO REQUEST NO. 1:

Respondents object to this request as it seeks information that is neither relevant to the claims or defenses of any party to this Complaint, nor reasonably calculated to lead to the discovery of admissible evidence. First, there is nothing in the record to suggest that Respondents' received

³ Each request not expressly admitted to, is denied.

any competitive advantage from the “illegal” conduct alleged in the Amended Complaint. Second, pursuant to the Penalty Policy, “to remove the economic incentive for violations that include BBB, normally it is appropriate to base the economic benefit penalty component on the net profits made from the improper transactions, i.e., the amount the violator's profits from the sale of uncertified vehicle(s) or engine(s) exceeded the amounts that would have resulted if the party had sold certified vehicle(s) or engine(s), the profits from the sale of illegal dtvice(s), or the profits from tampering.” *See* Penalty Policy at 7. However, the request is not limited to net profits, but instead seeks information is overly broad as to time and scope as to be an unwarranted annoyance, and is oppressive. To comply with the request would be an undue burden and expense on the Respondents Taotao USA, Inc. Finally, the Penalty Policy only permits the Agency to treat the gross proceeds from the sale of the noncompliant product as the measure of economic benefit in “appropriate cases.” Penalty Policy at 7, n. 9. Here Complainant has failed to show that the use of gross revenue is appropriate in this matter. The Penalty Policy clearly states that where BBB is present, “the litigation team should use a case-specific method of calculating the economic benefit, which should be described in the case documents.” Penalty Policy at 7. Here the only method of calculating described in Complainant’s case document is the “rule of method” calculation of economic method, and no method of calculating BBB is found in any case document.

Further, Respondents object to requested documents and information as overly broad in time and scope, duplicative and burdensome, particularly where there is no justification for production of such documents, and most of this information has already been provided. Respondents also object to this request because the burden or expense of the proposed information outweighs its likely benefit. The request calls for going over producing excessive

information, spanning four years and going back six years, that is not relevant to the narrow issue of calculating economic benefit derived from purchasing catalytic converters with precious metal concentrations in amounts allegedly different from those on corresponding COC applications, when there is no set standard for precious metal concentrations and there therefore no reasonable economic benefit, as alleged or otherwise, to purchase catalytic converters with “different” concentrations .

Finally, the interrogatory would necessitate the preparation of a compilation, abstract, audit or summary from documents in the possession of both parties; because such preparation would be similarly burdensome and/or expensive to both the propounding and responding parties, Respondent herewith points to the following exhibits CX161-CX163, CX171, and CX189 from which propounding party may obtain the information.

REQUEST NO. 2

Produce all Documents that Mr. Shefftz considered or relied upon in preparation of the Shefftz Report or his expected opinion testimony, including but not limited to documents Mr. Shefftz considered or relied upon relating to catalytic converter costs and pricing information.

RESPONSE TO REQUEST NO. 2:

Respondents objects to this discovery request in that it is unreasonable, duplicative, oppressive, and expensive, particularly because Complainant has already had the opportunity to take the deposition of Mr. Shefftz over the contents of his report and expected testimony.

Respondents further object to this discovery request because this information has already been supplied to Complainant. The documents Mr. Shefftz considered or relied upon in preparation of the Shefftz Report have been identified in said report. *See* RX004.

REQUEST NO. 3

Identify any officer, manager, staff, Consultant, or other agent of Respondents that Mr. Shefftz communicated with in development of his opinion for this case or considered in the preparation of his report. Describe in detail all communications provided to Mr. Shefftz relating to catalytic converter costs and pricing information. For each such person identified, describe in detail the information that was conveyed to Mr. Shefftz.

RESPONSE TO REQUEST NO. 3:

Respondents objects to this discovery request in that it is unreasonable, duplicative, oppressive, and expensive, particularly because Complainant has already had the opportunity to take the deposition of Mr. Shefftz over the contents of his report and the development of his opinion.

Respondents further object to the request to the extent that it seeks information protected by the attorney-client privilege, work product privilege, and/or subject to protection as trial-preparation material.

Subject to and without waiving the foregoing objections, communications provided to Mr. Shefftz, other than those already disclosed in Mr. Shefftz report and deposition, included communications by Respondents' attorneys and consisted of materials identified in Mr. Shefftz report and materials identified in Respondents' exhibits. *See* RX004, RX014, RX015, and RX016.

REQUEST NO. 4

Produce all spreadsheets in electronic, native, and unlocked format that were developed or prepared to publish the tables in the Shefftz Report. In addition, produce the spreadsheet in electronic, native, and unlocked format that is entitled "Penalty /Catalytic Converter Chart"

RESPONSE TO REQUEST NO. 4:

Respondents object to this discovery request because the requested documents have already been supplied to Complainant. *See* RX004. The discovery request is not of the sort that is covered by the rules on interrogatories and requests for production. Subject to and without waiving the foregoing objections, Respondents provide the responsive documents in electronic format as requested by Complainant.

REQUEST NO. 5

Produce all Documents considered or relied upon by Respondents and fully specify and relate all communications between Respondents or Respondents' Consultants and catalytic converter suppliers conducted to prepare the values in the "price of coc ratio "columns in the table included in "Addendum: Spreadsheet provided by Respondents relied upon for Table 6, specifically "cost of catalyster " (sic) and "price of coc ratio "columns " in the Shefftz Report.

RESPONSE TO REQUEST NO. 5:

Respondents object to this request for because it is duplicative, redundant, and the material has already been provided to Complainant. Subject to and without waiving the foregoing objection, Respondents point to the following exhibits: RX014 and RX015.

To the extent that the discovery request seeks communications between Respondents or Respondents Consultants and catalytic converter suppliers, the communication is privileged. Subject to and without waiving the foregoing objections, the communications involved asking the catalytic converter supplier to provide quotes for catalytic converters that contain precious metals in the quantity and concentrations specified in each of the ten COC applications, CX001-CX010. The price quotes provided are contained in Respondents' exhibit RX015.

REQUEST NO. 6

With regard to the untranslated Documents written in Chinese that are included in Respondents' prehearing exchange (RX014 and RX015), identify, describe and explain with particularity, by page, the specific information conveyed in each Document, and explain how the Documents correlate to each other. Identify the origin of each such Document and specify in detail the information from the Documents that were considered for the preparation of the Shefftz Report.

RESPONSE TO REQUEST NO. 6:

Respondents object to this request for because it is duplicative, redundant, and the material has already been provided to Complainant. Subject to and without waiving the foregoing objection, Respondents point to the following exhibits, which include translations of the Chinese documents in RX014 and RX015. The information contained in each document has been specified in Respondents' Prehearing Exchange Index. For example:

- RX014 at 000213: Invoice from Beijing ENTE Century Environmental Technology Co., Ltd. ("Beijing ENTE") for catalytic converters identified in the COC applications for DTAOX.124AAA and ETAOX0.12A1T.
- RX014 at 000208: Invoice from Nanjing Enserver Technology Co. Ltd. ("Nanjing Enserver") for catalytic converter identified in the COC applications for DTAOC.150MC2.

In lieu of identifying, describing and explaining with particularity, by page, the specific information conveyed in each Document, Respondents point to Respondents Prehearing Brief at 4-5, which provides a description of each of the five different catalytic converters purchased by Beijing ENTE and Nanjing Enserver as well as identifying information.

REQUEST NO. 7

Describe existing business or other relationships Respondents have with Nanjing Yingsi Weier.

RESPONSE TO REQUEST NO. 7:

Nanjing Yingsi Weier is one of Respondents' catalytic converter suppliers.

REQUEST NO. 8

For the period of January 1, 2015 to the present, identify all catalytic converter suppliers contacted by Respondents or Respondents' Consultants for pricing quotes associated with catalytic converters that meet specifications identified in Respondents' application for COCs and/or requirements for meeting vehicle certification compliance with COCs, and for each such catalytic converter supplier, describe the catalytic converter specifications provided to the supplier for the price quote and the price quote the supplier has provided to Respondents or Respondents' Consultants. Produce all Documents related to communications between Respondents or Respondents' Consultants and each such supplier relating to the price quote.

RESPONSE TO REQUEST NO. 8:

Respondents object to this request for because it is duplicative, redundant, and the material has already been provided to Complainant. To the extent that the discovery request seeks communications between Respondents or Respondents' consultants and each supplier, the communication is privileged. Subject to and without waiving the foregoing objections, please see Response to Request No. 5.

CERTIFICATE OF SERVICE

This is to certify that the foregoing written discovery 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 a copy of the foregoing instrument, and unlocked versions of the spreadsheets included in the Shefftz Report, were 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,



09/29/2017
Date

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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:)

Taotao USA, Inc.,)
Taotao Group Co., Ltd., and)
Jinyun County Xiangyuan Industry Co., Ltd.)

) Docket No. CAA-HQ-2015-8065
)
)

Respondents.)

MOTION FOR ADDITIONAL DISCOVERY THROUGH
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS
ATTACHMENT B

Statement of Certification

You are submitting the enclosed responses and Documents in response to Complainant's Motion for Additional Discovery Through Interrogatories and Requests for Production of Documents filed In the Matter of: Taotao USA, Inc., Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co. Ltd.

I certify that I am fully authorized by Tao Tao USA INC [corporate affiliation] to provide the above information on its behalf to EPA.

I certify under penalty of law that I have examined and am familiar with the information in the enclosed documents, including all attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are, to the best of my knowledge and belief, true and complete. I am aware that there are , significant penalties for knowingly submitting false statements and information, including the possibility of fines or imprisonment pursuant to 18 U.S.C. §§ 1001 and 1341.

Date:

9/28/2017

Name (Printed):

Xun Liu

Signature:

[Handwritten Signature]

Title:

Director