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.	)	

ORDER ON RESPONDENTS' MOTION FOR ISSUANCE OF SUBPOENAS

On June 23, 2017, Respondents filed a Motion for Issuance of Subpoenas ("Motion"), seeking to compel the testimony of various witnesses who they or the Agency may call to testify at hearing. The potential witnesses include Granta Nakayama, Jacqueline Robles Werner, Amelie Isin, Cleophas Jackson, Emily Chen, and Byron Bunker. Mot. at 1-2. The Agency filed a response in opposition to the Motion on July 10, 2017 ("Response").

This Tribunal "may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act [at issue in this proceeding], 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). In this case, the Clean Air Act provides the necessary authority. *See* 42 U.S.C. § 7607(a) ("[T]he Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.").

Granta Nakayama and Jacqueline Robles Werner

Mr. Nakayama is one of Respondents' proposed witnesses. Respondents' First Motion to Supplement the Prehearing Exchange at 4 (June 19, 2017). According to Respondents, Mr. Nakayama "is one of the primary authors of the Clean Air Act Mobile Source Penalty Policy ("Penalty Policy), which Complainant has relied upon in calculating its proposed penalty assessment." Respondents' First Motion to Supplement the Prehearing Exchange at 4. Respondents state that he will testify about the Penalty Policy, "the appropriateness of its application in the present matter, and whether Complainant has properly applied the Penalty Policy to calculate the proposed penalty assessment." Respondents' First Motion to Supplement the Prehearing Exchange at 4. Further, Mr. Nakayama "may qualify as the expert witness on the Penalty Policy." Respondents' First Motion to Supplement the Prehearing Exchange at 4. Respondents contend they "must have the opportunity to question the actual authors of the

Penalty Policy to ensure that Ms. Isin's[1] calculations adequately apply all 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. According to the Agency, Mr. Nakayama was the assistant administrator for its Office of Enforcement and Compliance Assurance from 2005 to 2009 and is now in private practice.[2] Response at 3 (incorporating argument from the Agency's Motion in Limine to Exclude Evidence and Testimony at 4 (June 23, 2017)). During that time, the Agency states, he signed the January 16, 2009 memorandum transmitting the final Mobile Source Civil Penalty Policy to the Agency's Mobile Source Enforcement Personnel. Motion in Limine to Exclude Evidence and Testimony at 4.

Ms. Werner is another of Respondents' proposed witnesses. Respondents' First Motion to Supplement the Prehearing Exchange at 4-5. According to Respondents, "Ms. Werner either co-authored the Penalty Policy or substantially assisted in its development." Respondents' First Motion to Supplement the Prehearing Exchange at 4; *see also* Mot. at 1 ("Ms. Werner appear[s] to be [one of] the authors of the Clean Air Act Mobile Source Penalty Policy"). Respondents claim that she "will likely testify regarding the Penalty Policy and whether Complainant accurately calculated its proposed penalty in accordance with the Penalty Policy." Respondents' First Motion to Supplement the Prehearing Exchange at 4-5. According to the Agency, at the time of the January 16, 2009 memo, Ms. Werner was an Agency attorney who was Chief of the Mobile Source Enforcement Branch and the point of contact for questions about the Penalty Policy. Agency's Motion in Limine to Exclude Evidence and Testimony at 4. Currently, she is the associate director of the Agency's Air Enforcement Division and supervises counsel for the Agency in this matter. Response at 5 n.1; Agency Motion in Limine to Exclude Evidence and Testimony at 4.

The Agency contends that Respondents provide no reason why Mr. Nakayama's or Ms. Werner's testimony is necessary to assess the adequacy of Ms. Isin's penalty calculations. Response at 3. Such testimony would have no probative value as to the appropriateness of the proposed penalty, the Agency argues. Response at 3. Moreover, because the Agency is presenting Ms. Isin as a witness, the Agency asserts this Tribunal on its own can determine whether the Penalty Policy was adequately applied because Ms. Isin will be subject to cross-examination by Respondents. Response at 4. The Agency further argues that any testimony elicited from Mr. Nakayama or Ms. Werner "would be rife with deliberative process and other privilege issues," and that Respondents have not explained how "their personal opinions concerning Complainant's application of the Penalty Policy . . . could be admissible as evidence." Response at 5.

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[1] Amelie Isin is an Agency environmental engineer and a witness who will testify about the vehicle inspections she performed; inspections she coordinated and oversaw; and the calculation of the proposed penalty. Complainant's Initial Prehearing Exchange at 4 (Aug. 25, 2016); Respondents' First Motion to Supplement the Prehearing Exchange at 5 (July 12, 2017).

[2] For purposes of this Order, I take official notice of the fact that Mr. Nakayama is a former Agency employee who is now an attorney in private practice. *See* 40 C.F.R. § 22.22(f); *see also* http://www.kslaw.com/people/Granta-Nakayama.

In this instance, Respondents have "not asserted that [Mr. Nakayama or Ms. Werner] are unable or would refuse to testify unless compelled by subpoena." *Strong Steel Products*, EPA Docket No. CAA-5-2003-0009, 2005 EPA ALJ LEXIS 6, at *22 (ALJ, Feb. 17, 2005). Consequently, they have not shown "grounds and necessity" for the issuance of a subpoena for their appearance at hearing. *See id.* at *22-23; *see also Norman Mayes*, EPA Docket No. RCRA-UST-04-2002-0001, 2004 EPA ALJ LEXIS 5, at *8 (ALJ, Feb. 27, 2004) (no showing of grounds and necessity for subpoena); *Julie's Lomousine and Coachworks, Inc.*, EPA Docket No. CAA-04-2002-1508, 2003 EPA ALJ LEXIS 28, at *3 (ALJ, Apr. 23, 2003) (no showing of grounds and necessity for subpoena although testimony may be material and relevant); *Robert and Susan Wheeler*, EPA Docket No. CWA-05-2001-0019, 2002 EPA ALJ LEXIS 63, at *5 (ALJ, Oct. 1, 2002) (subpoena granted where witness was unable to be present at hearing unless subpoena issued). Failure to meet this simple procedural requirement is reason enough to deny their request for subpoenas.

In addition, Respondents have failed to demonstrate the materiality and relevancy of the evidence to be adduced from these proposed witnesses in that there is no allegation of ambiguity in the Penalty Policy that would justify this Tribunal looking beyond the document itself for interpretation. Moreover, penalty policies are not regulations and are not binding upon an ALJ making penalty determinations. *M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 610 (EAB 2002) (penalty policies do not bind the ALJ because they have not been subject to rulemaking procedures of the Administrative Procedure Act and therefore lack the force of law). *See also Rhee Bros., Inc.*, EPA Docket No. FIFRA-03-2005-0028, 2006 EPA ALJ LEXIS 32, at *33 (ALJ, Sept. 19, 2006) (quoting *Green Thumb Nursey, Inc.*, 6 E.A.D. 782, 802 n.38 (EAB 1997) (internal quotations omitted)). It is consideration of the factors set forth in the statute that will ultimately control the penalty to be imposed in this case. *See* 42 U.S.C. § 7524(c)(2) (administrative penalty assessment criteria for mobile sources under the Clean Air Act).

Further, as to Mr. Nakayama, it appears the only material and relevant evidence he could offer is opinion testimony about the Agency's application of the Penalty Policy. To that extent, he would have to be qualified as an expert witness. Respondents can try to hire Mr. Nakayama to provide expert testimony at hearing, but they cannot force him to appear to give an opinion for which he has not been retained.[3] Although the procedural rules of 40 C.F.R. Part 22 do not specifically address the issuance of subpoenas to expert witnesses, the Federal Rules of Civil Procedure provide protection to an expert witness when a subpoena requires "disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party." Fed. R. Civ. P. 45(d)(3)(B)(ii).[4] That is because compulsion to testify and provide evidence without the ability

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[3] This Order does not rule on the admissibility of any testimony Mr. Nakayama might provide. As a former Agency attorney, presumably his testimony would also face scrutiny for privilege or conflict of interest issues.

[4] This Tribunal has previously held that Fed. R. Civ. P. 45, pertaining to subpoenas, may be applied to EPA administrative cases. *See Doug Blossum*, EPA Docket No. CWA-10-2002-0131, 2004 EPA Admin. Enforce. LEXIS 620, *5-6 (ALJ, May 7, 2004) (citing *In re Grand Jury Subpoena Duces Tecum Issued to the First National Bank of Maryland*, 436 F.Supp. 46, 48 (D. Md. 1977)).

to bargain for the value of the expert's services "can be regarded as a 'taking' of intellectual property. The rule establishes the right of [expert witnesses] to withhold their expertise, at least unless the party seeking it makes the kind of showing required for a conditional denial of a motion to quash . . . ." Fed. R. Civ. P. 45 Advisory Committee Notes (1991); *see also Daggett v. Scott*, 2015 U.S. Dist. LEXIS 68385, at *5-6 (D. Colo. May 26, 2015).[5]

Further, it is noted that Ms. Werner is the supervisor of Agency counsel in this case – someone presumably who approved of the penalty calculation and the penalty sought. Thus, any testimony she offered about the penalty calculation would at best be duplicative of information Ms. Isin can provide. She simply is not a necessary witness.

Finally, in their motion, Respondents cite *John A. Biewer Co. of Ohio, Inc.*, EPA Docket No. RCRA-05-2008-0007, 2009 EPA ALJ LEXIS 19 (ALJ, Dec. 23, 2009), for the proposition that they must be allowed to question the authors of the Penalty Policy to test its application in this case. Mot. at 1-2. But Respondents misconstrue *Biewer*. That case articulated a respondent's right to cross examine the Agency employee who applied the Penalty Policy, and Respondents are being afforded that opportunity in this case through the testimony of Ms. Isin.

Consequently, for the reasons stated above, Respondents' request to subpoena Granta Nakayama and Jacqueline Robles Werner is **DENIED**.

Amelie Isin

The Agency "intends to call Ms. Isin at the penalty hearing, and Respondents will have opportunity to cross-examine her" there. Response at 2. Moreover, Respondents have been permitted to depose Ms. Isin in advance of the hearing. *See* Order on Respondents' Motion to Take Depositions (July 7, 2017). Consequently, there is no need to subpoena Ms. Isin, and Respondents' request for such a subpoena is therefore **DENIED**.

Cleophas Jackson and Emily Chen

Mr. Jackson directs the operations of the Agency office that receives and reviews Certificate of Conformity ("COC") applications submitted for gasoline-powered vehicles. He may testify as an Agency fact witness and expert about the Agency's Clean Air Act vehicle and engine regulatory program and emissions testing. Complainant's Third Motion to Supplement the Prehearing Exchange at 4. Ms. Chen is an environmental engineer at the Agency whose duties include reviewing applications for COCs submitted for gasoline-powered engines. She may testify as an Agency fact witness about Respondents' COC applications and confirmatory test orders her office issued to Taotao USA. Complainant's Rebuttal Prehearing Exchange at 4 (Oct. 13, 2016). Respondents contend they "have first-hand knowledge regarding Respondents'

[5] The Federal Rules allow that a court may also "order [the] appearance [of an unretained expert witness] or production under specified conditions if the serving party: (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and (ii) ensures that the subpoenaed person will be reasonably compensated." Fed. R. Civ. P. 45(d)(3)(C). But Respondents have made no such showing in this case.

various efforts to achieve compliance and remedy harm, if any," and that "[t]heir testimony is crucial to the calculation of penalties." Mot. at 2.

The Agency first notes that Respondents have not identified either Mr. Jackson or Ms. Chen as witnesses on their behalf in their prehearing exchange material or provided a summary of their expected testimony. Response at 5. But beyond that, the Agency argues, Respondents have their own company witnesses who can address their compliance efforts, and they have not explained why they additionally need Mr. Jackson's and Ms. Chen's testimony. Response at 6.

Respondents have not identified Mr. Jackson or Ms. Chen as witnesses they intend to call, nor have they provided sufficient grounds to subpoena them. Moreover, there is every indication the Agency intends to make them available at hearing, and Respondents have been given the opportunity to depose Mr. Jackson before then. *See* Order on Respondents' Motion to Take Depositions. If the Agency's planned presentation of these witnesses changes, there may be reason for Respondents to refile their motion for subpoenas. But at this time, Respondents' motion to subpoena Cleophas Jackson and Emily Chen is **DENIED**.

Byron Bunker

Respondents "move to subpoena Byron Bunker, Director of the Office of Transportation and Air Quality . . . as a rebuttal witness." Mot. at 2. They say nothing further about Mr. Bunker. None of the parties have proposed Mr. Bunker as a witness. Consequently, Respondents' motion to subpoena Byron Bunker is **DENIED**.

Thus, for all of the reasons outlined above, Respondents' Motion is **DENIED**.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: July 18, 2017
Washington, D.C.

In the Matter of *Taotao USA, Inc., Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co., Ltd.,* Respondents. Docket No. CAA-HQ-2015-8065

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on Respondents' Motion for Issuance of Subpoenas,** dated July 18, 2017, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

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Dated: July 18, 2017
Washington, D.C.