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.	)	

REPLY IN SUPPORT OF
MOTION *IN LIMINE* TO EXCLUDE EVIDENCE AND TESTIMONY

On June 23, 2017, the Director of the Air Enforcement Division of the U.S. Environmental Protection Agency's Office of Civil Enforcement ("Complainant") filed a Motion *in Limine* to Exclude Evidence and Testimony ("Motion"). On July 17, 2017, respondents in this matter, Taotao USA, Inc. ("Taotao USA"), Taotao Group Co., Ltd. ("Taotao Group"), and Jinyun County Xiangyuan Industry Co., Ltd. ("Jinyun") (collectively "Respondents") filed a Response opposing Complainant's Motion. Complainant now files this Reply in Support of its Motion *in Limine* to Exclude Evidence and Testimony. Respondents' Response is untimely, and does not demonstrate that documents and witnesses identified in the Motion are admissible for any purpose.

I. Respondents' Response is Late and Should Be Disregarded

Respondents' did not file their Response until 25 days after Complainant filed and served its Motion, making their response a full week late. The Consolidated Rules state that a "response to any written motion must be filed within 15 days after service of such motion." 40 C.F.R. § 22.16(b). Service may be accomplished by mail or by "electronic means, including but not necessarily limited to email, if service by such means is consented to in writing" or is authorized by order.[1] 40 C.F.R. § 22.5(b)(2) (2017). In the Prehearing Order dated May 11, 2016, the Presiding Officer directed that "[d]ocuments may be served by . . . e-mail if the party being served has provided a valid e-mail address in the record." Prehearing Order at 5. In this matter, Respondents' counsel has provided valid e-mail addresses in the record. *See* Respondent Taotao

[1] On January 8, 2017, the Agency promulgated revisions to the Consolidated Rules which, among other things, liberalized the use of electronic filing and service. 82 Fed. Reg. 2230 (Jan. 9, 2017) (Final Rule). The amendments became effective on May 22, 2017. Prior the amendment, service by electronic means was allowed if ordered by the Presiding Officer. 40 C.F.R. § 22.5(b)(2) (2016).

USA, Inc.'s Amended Answer and Request for Hearing at 19 (Aug. 17, 2016); Notice of Appearance of Counsel at 1 (Oct. 19, 2016).

Service "is complete upon mailing" or, for electronic means, "upon transmission." 40 C.F.R. § 22.7(c) (2017). "Where a document is served by U.S. mail . . . 3 days shall be added to the time allowed . . . for the filing of a responsive document." *Id.* No additional time is added when documents are served by electronic means. *Id.* When a responsive document is due on a Saturday, Sunday, or Federal holiday, "the stated time period shall be extended to include the next business day." 40 C.F.R. § 22.7(a).

On Friday, June 23, 2017, Complainant filed its Motion and served copies on Respondents' counsel by both U.S. Mail and, pursuant to the Prehearing Order, e-mail to counsel's e-mail addresses of record. Because the Motion was served by e-mail, no additional time was added to the time allowed for a response.[2] 40 C.F.R. § 22.7(c). The 15th day from June 23, 2017, was Saturday, July 8, 2017, so the responsive time period was extended to Monday, July 10, 2017. 40 C.F.R. § 22.7(a). Respondents filed their Response on July 17, 2017, making their Response 7 days overdue without explanation or request for leave to file out of time. The Response should be disregarded on this basis.

II. Respondents' Exhibits RX018 and RX019 Are Not Relevant or Probative of any Issues in Dispute

In their Response, Respondents' claim that RX018 and RX019 consist of certification applications and certificates issued for "vehicles which are nearly identical in all aspects to the vehicles identified in the Amended Complaint, except that these vehicles operate without any catalytic converters." Resp. at 3. Respondents argue that the documents show that the vehicles in the Amended Complaint "would have passed emission standards, and would have been approved for certification, even without any catalytic converter." *Id.* Consequently, Respondents claim that the documents are relevant to show that Respondents did not benefit from their violations because the catalytic converters were superfluous, and to show that the vehicles identified in the Amended Complaint did not exceed emissions standards and the violations were therefore "not egregious." *Id.* at 3–4.

Respondents' arguments are flawed. Other, different vehicles' emissions performance do not predict the performance of the vehicles identified in the Amended Complaint. By definition, different engine families are expected to have different emissions characteristics. *See* 40 C.F.R. §§ 86.420-78(a), 1051.230(a) (defining engine family). The fact that Respondents were able to certify some engine family designs without catalytic converters is not relevant to the question of

[2] Prior to the 2017 amendments, the Consolidated Rules added 5 days to the time allowed for a response where a document was "served by first class mail or commercial delivery service, but not by overnight or same-day delivery." 40 C.F.R. 22.7(c) (2016). Again, because the Motion was served by e-mail pursuant to the Prehearing Order, no additional time would be added to the responsive period.

how the vehicles identified in the Amended Complaint would have performed without the catalytic converters described in their certified designs, or whether they could have been certified with different emissions controls. Indeed, it is the height of speculation to claim that the vehicles in the Amended Complaint would still have been certified if the catalytic converters had been removed from the design. The fact that Respondents did use catalytic converters in the certified design suggests that the catalytic converters were required to meet Clean Air Act emissions standards. The documents in RX018 and RX019 are simply not probative of the gravity of the violations in this matter or the benefit Respondents gained.

In addition to their arguments about economic benefit and gravity, Respondents contend that the documents are relevant to whether Respondents' conduct was willful or negligent, because they show that "once Respondents were notified by the Agency and made aware that their catalytic converters suppliers may not be building their converters in accordance with the stated specifications, Respondents began building vehicles without catalytic converters . . . ." Resp. at 3. This argument places the cart before the horse. The actions Respondents took *after* the Agency discovered the violations has no bearing on whether the violations occurred in the first instance due to negligent, reckless, or willful conduct. RX018 and RX019 are not relevant or probative to any issue in the penalty hearing, and should be excluded.

III. Larry Doucet's Testimony is Not Relevant to the Determination of Penalty

Respondents contend that "Mr. Doucet's proposed testimony on the reliability of different catalytic converter test methods is relevant to various penalty factors," specifically, "that Respondents were not willful or negligent because the test methods used by their Chinese suppliers differed from methods employed by Complainant." Mot. at 5. This argument is a *non sequitur*, because the validity of test methods used by Respondents' Chinese suppliers is not in genuine dispute. Expert testimony from Mr. Doucet can have no bearing on the factual question of whether or not Respondents relied on tests performed by their suppliers, or the question of whether such reliance was reasonable.

Respondents also refer to the concepts of egregiousness and impossibility of compliance, but make no effort to illumine how Mr. Doucet's opinion testimony about test methodologies is relevant to these penalty issues. Complainant posits that Mr. Doucet's testimony relates solely to questions of liability that have been answered by this Tribunal. *See* Order on Partial Accelerated Decision and Related Motions, at 31–32 (May 3, 2017). Mr. Doucet should be excluded from the penalty hearing.

IV. The Testimony of Clark Gao and/or Joseph L. Gatsworth is Not Relevant to the Determination of Penalty

A. Testimony to Refute the Declaration of Dr. John Warren

In their First Motion to Supplement the Prehearing Exchange, Respondents state that Mr. Gao or Dr. Gatsworth "may be qualified as an expert on statistical analyses of the results of

precious metal analyses conducted on catalytic converters taken from Respondents' vehicles, and whether the catalytic converters analyzed may be representative of catalytic converters in vehicles across respective engine families relevant to this matter," and will be retained to testify if "the Presiding Officer permits testimony on the issue of whether Respondents are liable for 109,964 violations based on the testing of thirty-five vehicles spread over ten engine families." Respondents' First Mot. to Supp. the Prehearing Exchange, at 3–4 (June 16, 2017). In their Response, Respondents claim they "never had the opportunity to exclude Mr. Warren's testimony," and "the testimony of Mr. Gao or Mr. Gatsworth may be necessary to refute Mr. Warren's declaration." Resp. at 6. Respondents further state they "intend to admit the testimony . . . as an offer of proof." *Id.* (citing Fed. R. Evid. 103(a)(2)).

The issue of liability has been resolved and is closed. The Presiding Officer has found that Respondents are liable for the 109,964 violations identified in the Amended Complaint, and subsequently affirmed that "all questions of liability have been answered." Order on Respondents' Motion for Continuance of the Hearing, at 2 (June 27, 2017); Order on Partial Accelerated Decision and Related Motions, at 31–32 (May 3, 2017); *see* Hearing Notice and Order, at 1 (May 9, 2017) (remaining issues in controversy are those related to penalty); Order on Respondents' Motion for Reconsideration or Interlocutory Appeal, at 11–13 (June 15, 2017) ("[T]his Tribunal has again considered the merits of Respondents' arguments and still finds them lacking."); Order on Respondents' Motion to Take Depositions, at 2, 4, 6 (July 7, 2017) (excluding questions on issues of liability from the scope of permissible questions). Testimony from Mr. Gao or Dr. Gatsworth introduced for the purpose of refuting the declaration of Dr. John Warren that Complainant submitted with its "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," filed January 3, 2017, is clearly inadmissible for any purpose at the penalty hearing in this matter.

Addressing specific aspects of Respondents' argument, Respondents continue to falsely claim they "never had the opportunity to exclude Mr. Warren's testimony." Resp. at 6. As documented in Complainant's Response to Respondents' Motion for Continuance of the Hearing, filed June 26, 2017, Respondents had abundant opportunity to challenge Dr. Warren's declaration or develop their own evidence to refute its content before the Presiding Officer ruled on liability, but did neither. Resp. to Respondents' Mot. for Continuance, at 7–11 (June 26, 2017). And, when the Presiding Officer addressed this issue in her Order on Respondents' Motion for Reconsideration or Interlocutory Appeal, she observed that "Respondents never objected to the Agency's motion to supplement the record with Mr. Warren's declaration, and by failing to do so they 'waive[d] any objection to the granting of the motion.'" Order on Respondents' Mot. for Reconsideration or Interlocutory Appeal at 11 (quoting 40 C.F.R. § 22.16(b)).

Respondents' claim appears to be based in part on language from the Order on Partial Accelerated Decision and Related Motions, which they quote out of context in their Response. In the order that both granted Complainant's motions to supplement and granted Complainant's motion for partial accelerated decision, the Presiding Officer wrote: "Respondents will still have

the ability at or prior to hearing to object to specific exhibits on admissibility grounds." Resp. at 6 (quoting Order on Partial Accelerated Decision and Related Motions, at 3). Though the quoted language refers to the opportunity to object to the introduction of evidence, Respondents seize on this language to argue that they should now be able to introduce new evidence to challenge the declaration of Dr. Warren. Respondents interpretation of the Presiding Officer's order is absurd, and ignores the context in which it was issued.

Respondents neglect to mention that the motions to supplement then pending before the Tribunal sought to supplement Complainant's Prehearing Exchange with information that was relevant to the determination of a penalty in this matter, in addition to information that pertained to liability. *See* Order on Partial Accelerated Decision and Related Motions, at 2–3 (describing documents added by motions to supplement). In granting Complainant's motions to supplement, the Presiding Officer actually stated:

> Notably, Respondents have not made any request in all of this time to test through additional discovery the expert witnesses they complain about. Moreover, as Respondents admit, many of the supplementary documents are already in their possession and are not new to them. . . . Respondents will still have the ability at or prior to hearing to object to specific exhibits on admissibility grounds. *And to the extent the supplementary exhibits are relied on to grant the Agency accelerated decision, it is notable that Respondents had an equal opportunity to submit their own supplementary evidence to place the Agency's submission in dispute, if such evidence exists.*

*Id.*at 3 (emphasis added). The exhibits to which the Respondents may still object are those that pertain to penalty, not liability.

Regarding information that pertained to liability, Respondents had ample opportunity to present rebuttal evidence, but neglected to do so and instead mounted a defense based on legal argument. *See* Resp. to Respondents' Mot. for Continuance, at 7–11 (June 26, 2017) (describing motion practice pertaining to partial accelerated decision). Consequently, there were no genuine disputes of fact with regard to liability, and the Presiding Officer issued her ruling granting Complainant partial accelerated decision. Respondents now would interpret the order to allow them, months later, to introduce new evidence in an attempt to create a dispute of fact to defeat accelerated decision. This would have the absurd result of making the order self-defeating, rendering the Presiding Officer's 30-page analysis of liability, and subsequent Order on Respondents' Motion for Reconsideration or Interlocutory Appeal, mere advisory opinions. The Order on Partial Accelerated Decision and Related Motions does not provide a basis for introducing the testimony of Mr. Gao or Dr. Gatsworth.

In addition to offering Mr. Gao or Dr. Gatsworth's testimony to refute Dr. Warren's declaration directly, Respondents indicate in the alternative that they intend to introduce the

testimony as an offer of proof under Federal Rule of Evidence 103(a)(2). Respondents' attempt to make an offer of proof is untimely and unnecessary. Under the Federal Rules of Evidence, a party may preserve an objection to a ruling that excludes evidence by "informing the court of [the evidence's] substance by an offer of proof, unless the substance was apparent from the context." Fed. Rule of Evid. 103(a)(2). Here, the appropriate time to mount a challenge by introducing expert testimony to dispute Dr. Warren's declaration was several months ago, during the extensive motion practice accompanying the parties' cross-motions for accelerated decision and prior to the ruling on those motions. The substance of Mr. Gao's or Dr. Gatsworth's testimony is apparent, because Respondents clearly state that the testimony will address the issue of liability, specifically, the content of the declaration of Dr. Warren. With liability established, Mr. Gao's or Dr. Gatsworth's testimony is irrelevant to the remaining issue of penalty. An offer of proof is not required.

If Respondents are allowed to provide an offer of proof, in this administrative action offers of proof are governed by Consolidated Rule 22.23(b), 40 C.F.R. § 22.23(b), rather than Federal Rule of Evidence 103(a)(2). Consolidated Rule 22.23(b) provides that a party who unsuccessfully attempts to introduce information into evidence may make an offer of proof, and that an "offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the information excluded." If the Presiding Officer allows Respondents to make an offer of proof for the testimony of Mr. Gao or Dr. Gatsworth, Complainant requests that the offer be submitted in advance of the hearing and limited to the form described by Consolidated Rule 22.23(b).

B. Testimony Regarding Emissions Tests

In their Response, Respondents state for the first time that, in addition to providing testimony about "statistical analyses of the results of precious metal analyses conducted on catalytic converters taken from Respondents' vehicles,"[3] Mr. Gao or Dr. Gatsworth may also testify about emissions testing performed on vehicles identified in Counts 1 and 2 of the Amended Complaint. Resp. at 6–7. Specifically, they may testify as to whether the testing supports characterizing the violations in those counts as "major" under the Clean Air Act Mobile Source Civil Penalty Policy ("Penalty Policy"). *Id.* Respondents misstate the facts regarding vehicle emissions tests and, more importantly, misinterpret the role the emissions tests play in assigning egregiousness under the Penalty Policy.

Respondents claim that of the vehicles identified in Count 1, two vehicles were tested for emissions at California Environmental Engineering, LLC ("CEE") and passed, while one vehicle was tested twice at Lotus Engineering, Inc. ("Lotus") where it failed, and then tested at Tovatt Engineering ("Tovatt") where the results differed from those at Lotus. Resp. at 6–7. The evidence paints a more complicated picture.

[3] Respondents' First Mot. to Supp. the Prehearing Exchange, at 3–4 (June 16, 2017).

Three vehicles identified in Count 1 were subjected to low-hour testing at CEE, with mileage accumulation of approximately 2,500 km, and all passed. *See* CX106; CX112; CX116; RX001. One of those vehicles, with a vehicle identification number ("VIN") ending in 0882, had mileage accumulated at CEE to the end of its useful life, approximately 6,000 km. After the full-useful life mileage accumulation, Respondents tested the vehicle again at CEE, and claim it passed. *See* RX001 at 6–7. The vehicle was then sent to Lotus, where it failed an emissions test conducted on August 21, 2014. CX136; RX001 at 9–10. Respondents sent their representative, David Garibyan, to Lotus to observe a second test conducted on September 16, 2014, which the vehicle again failed. CX136; RX001 at 12, 15–18. The vehicle was returned to Respondents, who tested it at least two additional times at two different labs. The vehicle failed an emissions test conducted by CEE on September 26, 2014, and failed another emissions test conducted by Tovatt Engineering on October 1, 2014.[4] RX001 at 21–22; RX009; RX010. A fourth vehicle identified in Count 1, with a VIN ending in 5584, had approximately 6,000 km accumulated at CEE, where Respondents claim it passed an emissions test on January 19, 2015. RX001 at 27–28. That vehicle was sent to Lotus, where it failed an emissions test on February 4, 2015. RX001 at 29; CX138.

All told, four vehicles identified in Count 1 were subject to emissions testing. Two passed low-hour emissions testing at CEE, and were not re-tested. One passed low-hour emissions testing and allegedly passed a full useful life test at CEE, but then failed subsequent full useful life tests at Lotus, CEE, and Tovatt. One allegedly passed a full useful life test at CEE, but then failed a full useful life test at Lotus.

For the vehicles identified in Count 2, three were subjected to low-hour emissions testing at CEE. Two passed, and one failed. CX100; CX104; CX108.

Statistical analysis of these results might be relevant to the penalty determination if the Penalty Policy required Complainant to prove by a preponderance of evidence that the vehicles will exceed emissions before characterizing the violations as "major," but it does no such thing. Under the Penalty Policy, violations are "major" if excess emissions are likely to occur, and are "moderate" if emissions "are likely to be similar to emissions from certified vehicles or engines." Penalty Policy at 13. The Penalty Policy identifies examples of the types of violations that would typically be "major," including those involving "engines with missing or defective catalytic converters" or other emission control devices, violations where "test data of the uncertified engines shows the engines to exceed emissions standards," or violations where "there is no information about the emissions from" the vehicles or engines. *Id.* "Normally, if there is uncertainty about the proper egregiousness classification, a violation should be classified as Major." *Id.* The question for the penalty hearing is therefore not whether the evidence proves that all vehicles identified in the Amended Complaint will exceed emissions standards, but is instead whether it is reasonable to classify violations as "major" under the Penalty Policy in the face of

[4] Respondents appear to claim that the vehicle passed another test at CEE conducted on October 6, 2014, after they adjusted the vehicle's idle speed, but Respondents have not placed those test results into the record. *See* RX001 at 23.

the evidence presented. Expert testimony from a statistician will not provide probative evidence that will help resolve this issue.

For the foregoing reasons, Mr. Gao's and Dr. Gatsworth's testimony will not be admissible for any reason at the penalty hearing, and they should be excluded from testifying. If the Presiding Officer does allow one or both witnesses to testify, Complainant requests that the Presiding Officer order that their testimony should be limited to questions pertaining to emissions tests in this matter, and that testimony regarding catalytic converter testing or the declaration of Dr. Warren is not relevant or admissible at the hearing.

V. The Testimony of the Primary Author of the Penalty Policy, Granta Nakayama, and Jacqueline Robles Werner are Not Relevant to the Determination of Penalty

Respondents again invoke the matter of *John A. Biewer Co. of Ohio, Inc.*, EPA Docket No. RCRA-05-2008-007, EPA ALJ LEXIS 19 (ALJ, Dec. 23, 2009), as support for their argument that they must have the opportunity to cross examine the authors of the Penalty Policy to determine whether Complainant has appropriately applied the Penalty Policy in this case. Resp. at 8. However, in the Order on Respondents' Motion for Issuance of Subpoenas ("Subpoena Order") issued on July 18, 2017, this Tribunal explained that "Respondents misconstrue *Biewer*," which only "articulated a respondents' right to cross examine the Agency employee who applied the Penalty Policy . . . ." Subpoena Order at 4. Here, Complainant's witness Ms. Amelie Isin applied the Penalty Policy to calculate the proposed penalty, and Respondents will have an opportunity to question her at the penalty hearing.

The Tribunal further noted that "Respondents have failed to demonstrate the materiality and relevancy of the evidence to be adduced from" Mr. Nakayama, Ms. Werner, or the primary author, because "there is no allegation of ambiguity in the Penalty Policy that would justify . . . looking beyond the document itself for interpretation." *Id.*at 3. Respondents have not yet corrected that failure, nor can they. Interpretation of the Penalty Policy's language is a legal matter entrusted to the Presiding Officer. Mr. Nakayama's non-expert testimony about the development of the Penalty Policy would not be material or probative, and would likely be privileged.[5] *See id.* at 4. Ms. Werner's testimony about the development of the Penalty Policy would be similarly irrelevant, and likely privileged, and to the extent Ms. Werner supervises Ms. Isin, any additional information about the penalty calculation could only be duplicative of Ms. Isin's testimony. *Id.*

The testimony of the Penalty Policy's primary author, Mr. Nakayama, and Ms. Werner are not admissible at the penalty hearing for any purpose, and should be excluded.

[5] Respondents have not indicated that they intend to retain Mr. Nakayama as an expert. Complainant will address Mr. Nakayama's anticipated expert testimony in separate filings when and if Respondents retain Mr. Nakayama and amend their prehearing exchange to include him as an expert.

Conclusion

For the reasons stated above, Complainant requests that this Tribunal issue an order excluding the foregoing documents and witnesses from this matter.

Respectfully Submitted,

7/27/17
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CERTIFICATE OF SERVICE

I certify that the foregoing Reply in Support of Motion *In Limine* To Exclude Evidence and Testimony ("Reply") 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 an electronic copy of this Motion 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.

7/27/2017
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