



expert, it is only in relation to Mr. Mohorovic that this Court will consider Ms. White's opinions. Third, Amazon's attacks on Ms. White's credibility due to her employment with the Consumer Product Safety Commission ("CPSC") are incorrect, unsupported by the facts or the law, and not a sound basis for disqualification. Finally, Amazon's assertion of improprieties in the presentation of Ms. White's Rebuttal Expert Report is wholly baseless and conclusively refuted in Ms. White's attached Affidavit. Exhibit A.

**I. AMAZON MISCHARACTERIZES THE PURPOSE AND CONTENT OF MS. WHITE'S REBUTTAL EXPERT REPORT AND TESTIMONY**

Amazon claims that Complaint Counsel offered Sharon R. White as an expert to provide an opinion on the "the narrow issue of required corrective action remedies." *See Mot. to Exclude*, at 1. According to Amazon, because Ms. White "lacks familiarity with the central rules, manuals, and practices applicable to CPSC recalls," *id.*, her report and proposed testimony are inadmissible. However, this characterization of her testimony is both inaccurate and ignores that Ms. White's a rebuttal expert, and that she has extensive expertise and factual bases upon which to base her testimony.

**A. Contrary to Amazon's Mischaracterization of her Testimony, Ms. White is a Rebuttal Expert with Extensive Expertise in [REDACTED]**

Complaint Counsel designated Ms. White solely as a rebuttal expert to respond to Amazon's affirmative expert, Joseph P. Mohorovic. Ms. White is not an affirmative expert being put forward on the issues of "recalls and recall effectiveness." *Mot. to Exclude*, at 5-6. Instead, Ms. White's Rebuttal Expert Report and any testimony she would offer would rebut the opinions of Amazon's proffered expert. As Ms. White makes clear in her Report, [REDACTED]

[REDACTED] 2 [REDACTED]

[REDACTED]. Exhibit A, (Exhibit 3, Rebuttal Expert Report of Sharon R. White (June 30, 2022), at 3-4).

Ms. White [REDACTED]

[REDACTED] *Id.* at Appendix 1. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. B (Ex. 1, at 15:2-20). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 15:21-16:7.

Ms. White uses her expertise and knowledge to rebut the following suspect opinions offered in Mr. Mohorovic's Expert Report:

1. [REDACTED]

Mr. Mohorovic opines that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. B (Exhibit 2, Expert Report by Joseph P. Mohorovic (May 9, 2022), at 6-8, 11-15).

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2 [REDACTED]

Exhibit B, Declaration of John Eustice (Exhibit 1, S. White Dep. Tr. (August 9, 2022), at 67:12-69:1).

[REDACTED]

[REDACTED]

[REDACTED] 3 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 11-15.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Ex. A (Ex. 3, at 5-16). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>3</sup> [REDACTED] *see* Ex. B (Exhibit 3, J. Mohorovic Dep. Tr. (July 20, 2022), at 21:1-22:4).

*Id.* at 28:9-12.

*Id.* at 48:5-49:4.

*Id.* at 49:6-10.

at 57:19-58:7, 59:22-

60:20.

As noted above, expert testimony is not necessary to decide the issue of what remedies are necessary in this matter. *See supra* footnote 1. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See supra* footnote 3.

2. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. B (Ex. 2, at 8-25).

[REDACTED]

[REDACTED] *Id.* at 8. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See supra*

footnote 3. [REDACTED]

[REDACTED] *Id.* at 21

[REDACTED] 8-25. [REDACTED]

[REDACTED]

[REDACTED] Ex. B (Ex. 3, at 52:10-19).<sup>4</sup>

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<sup>4</sup> [REDACTED]

[REDACTED]

[REDACTED] Ex. A (Ex. 3, at 10-17). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 15-16. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *see, e.g.*, Ex. A (Ex. 3, at 10-17 [REDACTED], [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 16-17.

3. [REDACTED]

[REDACTED]

[REDACTED] Ex. B (Ex. 2, at 25-26).

[REDACTED]

[REDACTED] *Id.* at footnotes 79, 81, 82. [REDACTED]

[REDACTED]

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[REDACTED] Ex. B (Ex. 2, at 10). In fact, public notification is still necessary, particularly for secondary purchasers or gift recipients. *See* <https://www.cpsc.gov/Business--Manufacturing/Recall-Guidance/Recall-Notification-Types>.

[REDACTED] Ex. B (Ex. 3, at 299:3-300:17). [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 300:18-301:7. [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 305:9-20.

[REDACTED]

[REDACTED]

[REDACTED] Ex. A (Ex. 3, at 19-21). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 21.

4. [REDACTED]

[REDACTED]

[REDACTED] Ex. B (Ex. 2, at 15-18). [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 16-18 (footnotes 41 through 45). [REDACTED]

[REDACTED] *See supra* footnote 3. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. B (Ex. 2, at 16). This is not expert opinion.

[REDACTED]

[REDACTED]

[REDACTED] Ex. A (Ex. 3, at 17-19).

[REDACTED]

[REDACTED]

*Id.* at 18. [REDACTED]

[REDACTED] *Id.* at 18-19. [REDACTED]

[REDACTED]

[REDACTED]

**B. Ms. White is Not Being Offered to Provide an Affirmative Opinion on CPSC Rules, Manuals, or Policies**

Amazon claims that fundamental to “any expert opinion about ‘required corrective action remedies’ is an understanding of the Commission’s rules, policies and guidance governing those corrective action remedies.” Mot. to Exclude, at 7. However, Ms. White is not being offered as an expert on CPSC rules, manuals, or policies, which, as set out in Complaint Counsel’s Motion for Summary Decision, speak plainly for themselves. [REDACTED]

[REDACTED]

[REDACTED] *See* Ex. A

(Ex. 3, at 3). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Complaint Counsel is not offering Ms. White, or any expert, on the issue of CPSC rules, manuals, or policies, as no expert is needed to explicate those plain language statements. *See* Ex.



B (Ex. 1, at 129:10-130:4 ( [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] ). Accordingly, Amazon’s protestations that Ms.  
White does not know about policies on “correction rates” or the [REDACTED]  
[REDACTED] are beside the point. Mot. to Exclude, at 8.  
Amazon does not even attempt to tie these sources to any particular opinion put forth by Ms.  
White.

**C. Ms. White’s Opinions Do Not Rely on Her Knowledge of CPSC’s Past Recall Actions**

Amazon also takes issue with Ms. White’s assertion [REDACTED]  
[REDACTED]  
[REDACTED] Mot. to Exclude, at 13-15. [REDACTED]  
[REDACTED]  
[REDACTED] See Ex. B (Ex. 1, at 397:21-398:16). [REDACTED]  
[REDACTED]  
[REDACTED] *Id.* at 398:18-399:4.

Ms. White did not, as Amazon claims, concoct comparisons between Amazon’s  
notifications to consumers and Commission-approved recalls in her Report. Mot. to Exclude, at  
13. [REDACTED]

[REDACTED]  
[REDACTED]

Ex. A (Ex. 3, at 10-13).

## II. AMAZON’S MOTION TO EXCLUDE IS PREMATURE AND IMPRECISE

Amazon’s Motion is premature and procedurally improper given that Ms. White presents purely rebuttal opinions and will only be considered to the extent this Court considers the opinions of Mr. Mohorovic.

Courts have consistently held that motions to exclude expert testimony are premature when they seek to challenge opinions that are merely anticipated rather than actually proffered as evidence.<sup>5</sup> Here, Amazon’s challenge to Ms. White’s testimony is entirely speculative, because the CPSC has not relied on any of Ms. White’s opinions in this proceeding to date.<sup>6</sup> Nor could it have, since it is not appropriate for a party to cite to its rebuttal expert to establish its case-in-chief. *Alsadi v. Intel Corp.*, 2019 WL 4849482, at \*12 (D. Ariz. Sept. 30, 2019) (collecting cases).<sup>7</sup> Because Complaint Counsel has not relied on any of Ms. White’s opinions at issue, Amazon’s Motion fails to identify any specific opinions that it seeks to exclude.

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<sup>5</sup> See *Murphy v. Big Canoe Prop. Owner’s Ass’n, Inc.*, 2007 WL 5957922, at \*1 (N.D. Ga. Dec. 6, 2007) (“The court notes that Plaintiff has not yet sought to introduce testimony or evidence from Dr. Silverthorne in any of her filings with the court. The court finds, therefore, that Defendant’s motion is premature.”); see also *Robinson v. Linde Lift Truck*, 2003 WL 25686836, at \*1 (M.D. Fla. June 12, 2003) (“The exclusion of evidence under the Federal Rules of Evidence typically occurs at trial, so that pertinent determinations occur in the context of the actual (rather than anticipated) proceedings.”) (citation omitted).

<sup>6</sup> See *Krise v. SEI/Aaron’s, Inc.*, 2017 WL 3608189, at \*5 (N.D. Ga. Aug. 22, 2017) (denying defendants’ motion to exclude expert testimony as premature where plaintiffs “do not rely on [the expert’s] opinions in their response to the Defendant’s Motion for Summary Judgment” and “state that they have not decided whether they will use the [expert’s] testimony at trial”).

<sup>7</sup> It is well-established under Fed. R. Civ. P. 26 (a)(2)(C)(ii) that experts being offered solely as rebuttal witnesses may not be relied upon for a parties’ case-in-chief. See *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 759 (8th Cir. 2006) (upholding district court’s decision that rebuttal expert was confined to rebuttal, and disallowing his testimony in support of case-in-chief); see also *Berlyn, Inc. v. The Gazette Newspapers, Inc.*, 73 F. App’x 576, 580–81 (4th Cir. 2003) (upholding district court’s decision not to consider rebuttal evidence as part of case-in-chief at summary judgment).

Amazon's efforts to impeach the credibility of Ms. White's report, *see infra* Section III, are similarly premature because "[m]atters of bias are usually most appropriately handled on cross examination at trial and are for the [factfinder] to weigh in deciding what weight, if any, to give the expert's testimony." *Rushing v. Yeargain*, 2022 WL 2663851, at \*8 (M.D. La. July 11, 2022). Accordingly, Amazon's motion to exclude is not ripe for decision.

### **III. AMAZON'S ARGUMENT THAT MS. WHITE'S EMPLOYMENT WITH THE CPSC IS DISQUALIFYING FAILS AS A MATTER OF LAW AND FACT**

Contrary to Amazon's arguments, nothing about Ms. White's employment with the CPSC impacts the reliability of her opinion. In fact, courts have been clear that "the mere fact that an expert works for an employer similar to one of the defendants, or works in the same field . . . would disqualify many experts who are in a unique, if not the best position to assist a [the factfinder] in understanding unfamiliar scientific, technical, or specialized knowledge." *See also Brawhaw ex rel Hays v. Marine Health Care, Inc.* 2008 WL 2004707, at \*5 (N.D. Miss. May 8, 2008) ("All expert witnesses are hired and paid. . . . [T]he court's primary duty in its gate-keeping function is to determine whether the witness is qualified and whether his opinions are relevant and reliable, not whether the witness has a personal bias.").

Amazon can offer no legal support for its suggestion that employees are barred from acting as experts on behalf of their employers. Indeed, Amazon fails to cite to a single case where bias or impartiality was a basis for exclusion of an expert rather than a matter of credibility at trial. Instead, Amazon significantly mischaracterizes a number of cases that are

completely inapposite.<sup>8</sup> Several of these cited cases do not relate to exclusion of expert testimony at all.<sup>9</sup>

#### IV. AMAZON’S ASSERTION OF IMPROPRIETIES IN THE FORMULATION OF MS. WHITE’S REBUTTAL OPINIONS IS BASELESS

Amazon’s assertion of improprieties in the formulation of Ms. White’s rebuttal expert opinions is baseless and conclusively refuted in the attached Affidavit of Sharon White. Ex. A.

[REDACTED]

[REDACTED] Ex. B (Ex. 1, at 30:13-15). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 23:21-24:3 [REDACTED]

[REDACTED]; *id.* at 29:18-19 [REDACTED]

[REDACTED]; *id.* at 89: 20-21 [REDACTED]

[REDACTED]). Ms. White continues to affirm that the report, in its entirety, accurately contains her research and her findings and is a true and correct expression of her expert opinion. Ex. A ¶¶ 10-14.

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<sup>8</sup> See *Lippe v. Bairnco Corp.*, 288 B.R. 678, 688 (S.D.N.Y. 2003), *aff’d*, 99 F. App’x 274 (2d Cir. 2004) (granting a motion to exclude a proposed expert who had originally been “engaged as ‘counsel’ by plaintiffs” and “acted as an attorney in the case,” including formulating and developing legal theories and suggesting areas for cross examination); *Miesen v. Hawley Troxell Ennis & Hawley LLP*, 1:10-cv-00404-DCN (D. Idaho May 12, 2021), at \*6 (granting a motion to exclude a lawyer as a proposed expert after he filed several opinions on substantive legal issues, including an opposition to defendants’ motion to modify a discovery order).

<sup>9</sup> See *Haynes v. Shoney’s, Inc.*, 1991 WL 354933, at \*5 (N.D. Fla. Sept. 27, 1991) (denying a motion to compel personnel documents and salary information for fifteen fact witnesses); *Morrow v. Greensouth Equip., Inc.*, 2010 WL 5094304, at \*2 (N.D. Fla. Dec. 7, 2010) (denying a motion to compel salary information for an expert witness where “any bias Mr. Ney may have because he serves as an employee and expert can be explored adequately . . . on cross-examination without the need to know [his] annual salary.”).

[REDACTED]

[REDACTED] See Mot. to Exclude, at 9 n.34. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. A ¶ 5 (Ex. 2).

[REDACTED]

[REDACTED] Ex. B (Ex. 1 at 117:8-15). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. A

¶¶ 3, 5. Amazon’s attempt to spin a misstatement about one source in three footnotes into broad allegations that additions were made to Ms. White’s Rebuttal Expert Report “without her knowledge or approval” and that Ms. White “might not have [been] afforded . . . the opportunity to review the final draft before it was signed” is unfounded. Mot. to Exclude at 1, 9. These allegations are false, and the attached Affidavit of Ms. White makes clear that these allegations are baseless. See Ex. A ¶¶ 6-8.

Contrary to Amazon’s insinuation otherwise, Ms. White also properly reviewed all of the materials that were provided to Amazon counsel on August 8<sup>th</sup> in response to Amazon’s Notice of Deposition of Sharon White. See Ex. A ¶ 9. Amazon’s misleading attempt to argue that Ms. White failed to review all of the materials produced on August 8<sup>th</sup> ignores the fundamental distinction that two productions were made that day. Only one production set—transmitted with the subject line “Amazon Deposition of Sharon White”—related to Ms. White’s Expert Rebuttal Report and deposition. See Ex. B ¶ 6 (Ex. 4). This production set reproduced 25 documents that

had been previously produced to Amazon on June 30, 2022, as part of Ms. White’s Rebuttal Expert Report production—as well as the Protective Order signed by Ms. White in this matter and an email chain confirming Ms. White’s receipt of the Protective Order. *Id.* As affirmed in Ms. White’s Affidavit, these were all materials that Ms. White had reviewed in the course of preparing her Rebuttal Expert Report. Ex. A ¶ 9. [REDACTED]

[REDACTED]

[REDACTED] See Ex. B (Ex. 1, at 138:21-143:1, 176:7-184:1, 186:8-200:15, 313:14-319:2, 319:4-332:2, 349:21-358:19).

A second production set of approximately 1,300 pages was sent to Amazon counsel later in the evening on August 8th, and that production set exclusively contained materials that were not related to Ms. White’s Rebuttal Expert Report. Ex. B ¶ 7 (Ex. 5). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. B (Ex. 1, at 396:6-11). [REDACTED]

[REDACTED] *Id.* at 26:4-27:7. [REDACTED]

[REDACTED] *Id.* at 27:6-7. Amazon can therefore in no way undermine Ms. White’s opinions based on her testimony that she properly did not review a production set of materials that is not related to her Expert Rebuttal Report, while she properly did review the documents that do relate to her Expert Rebuttal Report.

**V. CONCLUSION**

For the reasons stated above, Respondent Amazon.com, Inc.'s Motion to Exclude the Rebuttal Expert Report and Testimony of Ms. Sharon R. White should be denied.

Respectfully submitted,

*John C. Eustice*

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October 3, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

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