

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

In the Matter of Amazon.com, Inc.,

Respondent

CPSC Docket No. 21-2

Hon. Carol Fox Foelak
Presiding Officer

**REPLY IN FURTHER SUPPORT OF THE MOTION TO EXCLUDE THE
TESTIMONY OF THE CPSC'S REBUTTAL EXPERT WITNESS**

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ARGUMENT

Amazon submits this reply in further support of its motion *in limine* to exclude the rebuttal expert report and testimony of Consumer Product Safety Commission employee Ms. Sharon R. White.

The only live issues in this case turn on an assessment of recall effectiveness: whether Amazon's actions over a year ago to inform every customer that purchased the Subject Products that those products may pose a safety risk, to encourage them to "immediately" destroy the products, and to refund them for their purchases were sufficient under the Consumer Product Safety Act, or whether additional corrective action as prescribed by the Commission is required. The Commission proffers Ms. White as expert on that specific question.

An expert witness must have "superior knowledge, skill, experience, or education" in the area she expects to testify.¹ "Superior knowledge" and "skill" both ultimately derive from either "education" or "experience," both of which Ms. White lacks. Ms. White's unfamiliarity with basic CPSC recall practices and guidelines demonstrates her lack of education in this specific area. Her concession that she has participated in just 4 recalls over nearly four decades of CPSC employment demonstrates her lack of relevant experience.

I. Ms. White Lacks the Expertise to Testify as an Expert on Recall-Related Questions.

Complaint Counsel has previously acknowledged that just one issue remains in this proceeding: "the narrow issue of required corrective action remedies."² Complaint

¹ *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir. 1990).

² CPSC Opp. to Mot. to Compel at 1.

Counsel’s recent motion for summary decision confirms this focus, dedicating over thirty pages to arguing that additional action by Amazon is warranted to address the hazards presented by the Subject Products.³ Ms. White’s report acknowledges she will address, *inter alia*, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ms. White, however, conceded in deposition that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In other words, the Commission seeks to call an expert to testify about, *e.g.*, whether Amazon’s corrective action with respect to the Subject Products was *effective* even though that witness admitted that [REDACTED]

[REDACTED]

Complaint Counsel seeks to avoid this result by re-characterizing Ms. White as an expert on [REDACTED] The question raised by Amazon’s motion is *not*

³ See CPSC Mot. for Summ. Decision, 21-53.

⁴ See Mizerak Declaration, Ex. 9, Sharon R. White, Rebuttal Expert Report (hereinafter the “White Report”), at 6-8.

⁵ See Mizerak Declaration, Ex. 4, White Dep. (hereinafter “White Dep.”) 122:17-18 ; 271:9-17

[REDACTED]

⁶ White Dep. 122:17-18 (emphasis added).

⁷ See CPSC Opp. to Mot. to Exclude at 8.

whether Ms. White is or is not an Engineering Psychologist. The questions raised by Amazon’s motion are (a) whether Ms. White intends to testify about recalls and recall effectiveness (her report demonstrates she does), and (b) whether she has the experience or expertise to do so (her testimony demonstrates that she does *not*).

A. Ms. White Lacks Experience Handling Recalls.

Complaint Counsel does not dispute that Ms. White categorically refused to answer Amazon’s questions comparing the language Amazon used in its safety notices to similar language approved by the Commission in other recalls.⁸ She could not respond to these questions because, as she testified in her deposition, Ms. White has only participated in 4 of the approximately 10,500 recalls administered by the Commission since Ms. White began her tenure as an Engineering Psychologist at the CPSC.⁹ Ordinarily, such limited experience might go to the weight and not the admissibility of a proffered expert’s testimony; here, Ms. White’s testimony itself demonstrates a lack of experience that affirmatively precludes her from testifying at all. Ms. White steadfastly refused to answer any questions about any recalls in which she did not personally participate.¹⁰ Apparently, the only corrective action that she did not participate in that she *can* discuss are those at issue here.

⁸ Amazon Mot. to Exclude at 13-15.

⁹ The Commission administers “more than 300 recalls of products” annually. González Declaration, Ex. 94, Heiden Associates & XL Associates, “Recall Effectiveness Research: A Review and Summary of the Literature on Consumer Motivation and Behavior” (July 2003) at 1. Ms. White began her tenure as an Engineering Psychologist for the CPSC in 1987. *See* White Dep. 60:13-16.

¹⁰ *See, e.g.,* White Dep. 256:1-4

[REDACTED]; White Dep. 281:3-6

See also White Dep. 245:10-18; 245:19-246:2; 246:20-247:5; 247:6-11; 248:6-8; 250:1-

Confronted with examples of Commission-approved recall notices materially similar to notices the Commission now contends are inadequate, Ms. White could not explain why the Commission approved some indirect notices but challenged Amazon's direct notices. Complaint Counsel offers the excuse that Ms. White did not have [REDACTED] those other recalls before her.¹¹ That argument does not withstand scrutiny. [REDACTED]

[REDACTED] For each of those other recalls, the recall notice itself contained precisely that information, something an expert on recalls would have known.¹³ And of course, those notices were in front of her.¹⁴

Ms. White failed to articulate any rational difference between Amazon's notices and other notices approved by the Commission because there are none. Ms. White is *not* applying *any* expert methodology; she is offering the bare conclusion that Amazon's

15; 253:21-254:9; 255:16-256:4; 256:19-257:7; 257:8-14; 257:15-258:3; 258:4-14; 258:15-259:2; 259:17-260:1; 260:7-14; 261:10-19; 262:15-18; 266:4-12; 266:13-267:6; 267:7-15; 267:16-22; 268:1-12; 268:19-22; 269:18-270:2; 277:7-15; 277:16-278:7; 278:13-17; 279:14-20; 279:21-280:4; 280:17-281:2; 283:17-284:7; 285:15-22; 286:1-6; 286:7-11; 287:17-288:4; 288:8-18; 288:19-289:10; 290:19-291:11; 293:18-294:6; 296:5-17; 297:2-10; 298:17-299:7; 302:22-303:11; 308:6-14.

¹¹ See CPSC Opp. to Mot. to Exclude at 9.

¹² White Dep. 268:5-269:12.

¹³ See, e.g., White Dep. 252:18-253:13; Magcale Declaration, Ex. 1, White Dep. Ex. 21 (CPSC Recall No. 22-022 (November 23, 2021)) (describing hazard posed by dumbbells and citing 4 incidents related to the described hazard); White Dep. 243:19-244:15; Magcale Declaration, Ex. 2, White Dep. Ex. 20 (CPSC Recall No. 17-102 (March 2, 2017)) (describing hazard posed by off-highway vehicles and citing 17 incidents related to the described hazard).

¹⁴ See, e.g., Magcale Declaration, Exs. 1-2, White Dep. Exs. 21-22.

notice is problematic because *she says so* (or has been told to say so). But such opinions violate Rule 702.¹⁵

B. Ms. White Lacks the Superior Knowledge Necessary to Testify as an Expert.

Ms. White’s belated recognition of key CPSC documents and concepts, almost two months after her deposition, lacks credibility. In deposition, Ms. White was shown portions of the Commission’s guidelines about information that its staff contend should be included in recall notices—a question about which the Commission and Amazon disagree, and on which Ms. White opines in her report. She admitted that [REDACTED]

[REDACTED]

In a new affidavit, Ms. White tells the Court that [REDACTED]

[REDACTED]

[REDACTED] The documents Ms. White could not recognize go to the heart of her proffered testimony, just as surely as the U.S. Constitution goes to the heart

¹⁵ See *Holman Enterprises v. Fid. and Guar. Ins. Co.*, 563 F. Supp. 2d 467, 472 (D.N.J. 2008) (noting the “well-settled principle that an expert’s bare conclusions are not admissible under the fit requirement of Rule 702 of the Federal Rules of Evidence.”) (internal citations omitted). See also *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 144 (1997) (“[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.”); *Wells v. Antero Resources Corp.*, 497 F. Supp. 3d 96, 99 (N.D.W. Va. 2020) (“Expert opinions that are ‘bare conclusion[s] without reliable support’ must be excluded.”).

¹⁶ See Amazon Mot. to Exclude at 8-10.

¹⁷ *Id.*

¹⁸ CPSC Opp. to Mot. to Exclude at 13 (second alteration in original) (quoting Affidavit of Sharon White ¶¶ 3, 5).

of every lawyer’s practice, though very few work with it daily. And just as no lawyer would assert that she did not recognize the First Amendment because it was set in Times New Roman rather than Garamond, no expert on recall-related questions would be unable to recognize the CPSC’s *own* recall guidelines.

In any case, Ms. White’s testimony makes clear that the issue was lack of knowledge, not font choice. For instance, Ms. White’s report discusses the adequacy of the subject lines used in Amazon’s direct notices to purchasers of the Subject Products.¹⁹ Yet in deposition, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ms. White’s report likewise discussed [REDACTED]

[REDACTED] but when asked about the CPSC rules on this issue, [REDACTED]

[REDACTED] Ms. White’s lack of expertise and experience demonstrates that she lacks the “superior knowledge, skill, experience, or education” fundamental to serving as an expert witness.

C. The Commission’s Criticism of Amazon’s Expert Is Irrelevant and Wrong.

Attempting to distract this Court from Ms. White’s lack of experience and expertise, Complaint Counsel attacks the qualifications of Amazon’s expert, former

¹⁹ White Report at 5.

²⁰ White Dep 223:6-224:8.

²¹ White Report at 6.

²² White Dep. 237:21-240:11.

CPSC Commissioner Joseph P. Mohorovic. Those arguments are both immaterial and, in any case, incorrect. It is well-established that “the proponent of expert testimony”—Complaint Counsel—“bears the burden of proving its admissibility.”²³ Complaints about the opposing party’s expert do not carry that basic *Daubert* burden.

In any case, Mr. Mohorovic is fully qualified on issues of recall effectiveness and consumer notification. His service as a Senate-confirmed Commissioner of the CPSC affords him with years of experience on setting and evaluating CPSC policies on recall effectiveness and consumer communications.²⁴ Unlike Ms. White, Mr. Mohorovic was intimately familiar with CPSC policies and was able to compare past CPSC-approved recall language with the language used by Amazon in its direct notice.²⁵ And, unlike Ms. White, Mr. Mohorovic did not disclaim knowledge of key recall effectiveness concepts nor did he refuse to answer questions due to a lack of knowledge during his deposition. His time as Commissioner, of course, builds on his time working as staff at the Agency.²⁶

²³ See *Berk v. St. Vincent's Hosp. and Med. Ctr.*, 380 F. Supp. 2d 334, 349 (S.D.N.Y. 2005). See also Fed. R. Evid. 702 Advisory Committee Notes (2000) (“Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met...”).

²⁴ See Mizerak Declaration, Ex. 2, Joseph P. Mohorovic, Expert Report (hereinafter the “Mohorovic Report”), 4.

²⁵ See, e.g., Magcale Declaration, Ex. 3, Mohorovic Dep. (hereinafter “Mohorovic Dep.”) 24:13-25:4 [REDACTED]; Mohorovic Dep. 72:9-73:4 [REDACTED]; Mohorovic Dep. 201:10-14 [REDACTED]; Mohorovic Dep. 287:4-288:12 [REDACTED].

²⁶ See Mohorovic Report at 4.

Nor did Mr. Mohorovic's experience end when he left the Commission in 2017, as Complaint Counsel asserts.²⁷ Since leaving the Commission, he has continued to work in the product safety field and has been qualified as an expert on product safety issues multiple times. He remains in close contact with members of the agency, is sought out and commonly speaks as an expert on CPSC developments, and regularly serves on panels with current Commissioners.²⁸ Mr. Mohorovic's significant experience in recall effectiveness while outside the CPSC gives him a balanced perspective, unlike the insular background of Ms. White.

II. Resolving Amazon's Motion at Summary Judgment Makes Good Sense.

Lacking substantive responses, Complaint Counsel finally argues that Amazon's motion is premature.²⁹

But “[a] trial court has discretion to conduct the reliability and helpfulness analysis that *Daubert* and Rule 702 require in the context of a summary judgment motion, and to exclude expert testimony found wanting from its consideration in ruling on the motion.”³⁰ The Court's ability to do so is not a “time-of-trial phenomenon.”³¹ Where, as here, “defects are obvious on the face” of an expert's testimony, exclusion is

²⁷ CPSC Opp. to Mot. to Exclude at 5.

²⁸ See Mohorovic Report, Appendix 1 [REDACTED]

²⁹ CPSC Opp. to Mot. to Exclude at 10.

³⁰ *Crowley v. Perdue*, 318 F. Supp. 3d 277, 291–92 (D.D.C. 2018) (quoting Jack B. Weinstein & Margaret A. Berger, WEINSTEIN'S FEDERAL EVIDENCE, § 702.05[4] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2013)).

³¹ *Cortes-Irizarry v. Corporacion Insular De Seguros*, 111 F.3d 184, 188 (1st Cir. 1997).

appropriate, regardless of the stage at which the challenge arises.³² For this reason, courts grant motions to exclude expert witness testimony before or at the same time as motions for summary judgment.³³

Both Amazon and the Commission have moved for summary decision and, presumably, Complaint Counsel will rely on Ms. White’s expected testimony to oppose Amazon’s motion and to further support its own. Absent an affirmative representation that Complaint Counsel will not invoke Ms. White’s opinions in those filings—instead of merely saying that they have “not yet” done so—a ruling at this time makes good sense. It will allow the Court and the parties to focus their time and attention to relevant, reliable, and admissible evidence in this proceeding.

CONCLUSION

For the reasons discussed above, those set forth in Amazon’s opening brief and the entire record in this matter, Ms. White’s testimony should be excluded.

³² *Id.*

³³ See, e.g., *Chapman v. Procter & Gamble Distribg., LLC*, 766 F.3d 1296, 1312 (11th Cir. 2014) (upholding district court’s grant of summary judgment after successful *Daubert* challenge). *Oddi v. Ford Motor Co.*, 234 F.3d 136, 159 (3d Cir. 2000) (upholding district court’s grant of summary judgment based on expert witness’ failure to “survive *Daubert* scrutiny”); *Graves v. Mazda Motor Corp.*, 675 F. Supp. 2d 1082, 1105 (W.D. Okla. 2009), *aff’d*, 405 Fed. Appx. 296 (10th Cir. 2010) (unpublished) (granting defendant’s motion to exclude proposed expert testimony and motion for summary judgment).

Dated: October 21, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 21, 2022, a true and correct copy of the foregoing document was, pursuant to the Order Following Prehearing Conference entered by the Presiding Officer on October 19, 2021:

- filed by email with the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills at amills@cpsc.gov, with a copy to the Presiding Officer at alj@sec.gov and to all counsel of record; and
- served to Complaint Counsel by email at jeustice@cpsc.gov, lwolf@cpsc.gov, and sanand@cpsc.gov.

/s/ Sarah L. Wilson
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