UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

IN THE MATTER OF	CPSC Docket No. 22-1
LEACHCO, INC.	HON. MICHAEL G. YOUNG PRESIDING OFFICER

LEACHCO, INC.'S RESPONSE IN OPPOSITION TO THE COMMISSION'S MOTION *IN LIMINE* TO ADMIT IN-DEPTH INVESTIGATION REPORTS

This Court should deny the Commission's Motion *in Limine* to admit its in-depth investigation reports (IDIs). The Commission rightly concedes the IDIs are hearsay, but its claim (Mtn. at 3)—that "case law clearly acknowledges the admissibility of these documents under the public records exception to the hearsay rule"—is simply false.

Case law says the exact opposite: CPSC IDIs are "clearly hearsay" and "not admissible." *Campos v. MTD Prods., Inc.*, No. 2:07-CV-00029, 2009 WL 2252257, at *7 (M.D. Tenn. July 24, 2009); *see* Section I below (discussing case law). The Commission doesn't mention any of these cases, which *uniformly* hold that its IDIs are inadmissible hearsay not subject to any exception.

Therefore, the Court should exclude the IDIs (JX-6 through JX-12B) from the hearing.

BACKGROUND

According to the Commission (Mtn. at 1–2), IDIs are based on "source" documents—*e.g.*, consumer communications or news reports—which are themselves classic hearsay. IDIs in their "final form" contain (hearsay) interview summaries and

copies of various (hearsay) documents, such as police or fire reports, medical records, and photos/descriptions. *Id.* at 2. *See, e.g.*, *Lauderdale v. Wells Fargo Home Mortg.*, 552 F. App'x 566 (6th Cir. 2014) ("Statements made by victims in a police report are hearsay and are not admissible at trial to prove the truth of the matter asserted.").

And the IDIs contain multiple levels of hearsay. As just one example, the Alabama Daycare IDI (JX-6), contains a copy of a police report, which includes (inconsistent) witness statements—along with a summary by a CPSC investigator. Here, therefore, the Commission asks the Court to admit into evidence—

a purported witness statement →

that was given to a police officer →

which was included in a police report →

that was attached to an IDI by the CPSC →

and then summarized by a CPSC investigator.

See JX-6 at CPSC0000115. At pages 2–3 of its Motion, the Commission describes other (but by no means all) hearsay documents in the IDIs that it contends should be admitted.[1]

ARGUMENT

An out-of-court statement offered to prove the truth of the matter asserted is inadmissible hearsay. Fed. R. Evid. 801(c), 802. These rules govern here. *See* 16 C.F.R. 1025.43(a) (The Federal Rules of Evidence "shall apply to all proceedings held pursuant to these Rules.").

[1] For purposes of the parties' Joint Exhibit List, Leachco stipulated that the IDIs are authentic. Leachco did not stipulate to admissibility.

Hearsay is excluded because it is inherently unreliable. *United States v. Lozado*, 776 F.3d 1119, 1121 (10th Cir. 2015) ("Hearsay is generally inadmissible as evidence because it is considered unreliable."). The Commission's IDIs and its Motion here confirm the common sense behind the hearsay rule. The Alabama Daycare IDI, for example, [redacted] *See* JX-6 at CPSC0000041. Similarly, although the Commission claims (Mtn. at 3) that the IDIs involve three deaths that occurred "on" a Podster, the Bedsharing IDI, [redacted] *See* JX-8 at CPSC0000142. The unreliability is obvious.

And because hearsay is inherently unreliable, the proponent offering hearsay must establish an exception for its admission. *United States v. Chavez*, 951 F.3d 349, 358 (6th Cir. 2020). Further, because the IDIs include multiple levels of hearsay, the Commission must identify an exception for *each* level. *See Crawford v. ITW Food Equip. Grp., LLC*, 977 F.3d 1331, 1348 (11th Cir. 2020) ("If a statement contains multiple levels of hearsay, each level must satisfy an exception to the hearsay rule.").

The Commission fails to meet its burden. Instead, the Commission asserts that the entire IDIs fall within the public-records-exception to the hearsay rule. But courts have uniformly held that the Commission's IDIs do not meet any hearsay exception.

I. THE COMMISSION'S IDIS ARE INADMISSIBLE HEARSAY

A. Courts uniformly hold that IDIs are inadmissible hearsay

The Commission erroneously claims that "case law clearly acknowledges the admissibility of these documents under the public records exception to the hearsay rule." Mtn. at 3. The Commission cites zero cases in which IDIs were admitted, and

Leachco has found none. In fact, *every case* to consider the issue holds that IDIs and similar documents are *inadmissible hearsay*.

In *Knotts v. Black & Decker, Inc.*, the court excluded CPSC IDIs because they contained hearsay "statements by someone not an employee of the CPSC as to an incident." 204 F. Supp. 2d 1029, 1041 (N.D. Ohio 2002). That was true even though the investigators had "spoken with the individuals involved or with others who witnessed or are familiar with the incidents." *Id.* "[O]bservations recorded by the CPSC are not admissible for the truth of the matter asserted." *Id*. The court was clear: IDIs contained multiple levels of hearsay and were inadmissible.

In *C.O. v. Coleman Co., Inc.*, the court excluded IDIs because they "merely reproduce second- or third-hand knowledge of previous events." No. C06-1779 TSZ, 2008 WL 820066, at *2 n.6 (W.D. Wash. Mar. 25, 2008). Like here, the in-depth investigation reports in *Coleman* "relied upon the various law enforcement and coroner or medical examiner reports." *Id.* These reports "differ substantially in nature from the laboratory test reports, statistical studies, and investigative reports that have been admitted in other cases . . .." *Id.*

In *Campos*, the court excluded CPSC reports that were "'factual reports' of specific incidents" because the "documents are not merely statistics but contain witness or eyewitness statements by someone not an employee of the CPSC as to an incident, creating a double hearsay problem, where the material within the CPSC document is inadmissible because it relies on out-of-court witness statements." 2009 WL 2252257, at *7 (cleaned up). As the court made clear, "fact-specific witness statements that

describe the manner, type, and location of injury"—even if within a CPSC report—are "clearly hearsay" and "not admissible." *Id.*; *see also Landis v. Jarden Corp.*, 5 F. Supp. 3d 808, 816 (S.D. W.Va. 2014) (excluding CPSC "epidemiologic report" (the title of an IDI) because "the out-of-court statements reproduced therein raise double hearsay concerns").

In *McKinnon v. Skil Corp.*, the First Circuit held that CPSC incident reports were "untrustworthy because they contain double hearsay in many instances, the CPSC investigator at one level, and the accident victim interviewee at yet another level removed." 638 F.2d 270, 278 (1st Cir. 1981). Those reports, as here, included unchallenged witness observations about the incidents at issue. Also, as here, "[m]ost of the data contained in the reports is simply a paraphrasing of versions of accidents given by victims themselves who surely cannot be regarded as disinterested observers." *Id.*; *cf. also John McShain Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 635–36 (3d Cir. 1977) (excluding NTSB reports that included pilot statements, witness statements, and investigator reports).

No court has held that IDIs may be admitted for the truth of the matters asserted therein, and every case that has considered the issue has excluded IDIs.

B. Courts uniformly hold that IDIs fall outside the public-records exception to hearsay rule

The Commission claims that its IDIs are public records under Fed. R. Evid. 803(8) because they include "factual" and "investigatory" information. *See* Mtn. at 4–6. But as noted above, IDIs "differ substantially in nature from the laboratory test

reports, statistical studies, and investigative reports that have been admitted in other cases…." *Coleman Co.*, 2008 WL 820066, at *2 n.6.

Indeed, the IDIs "rely upon, and merely reproduce, second- or third-hand knowledge of previous events" based on, *e.g.*, fire department reports, autopsy reports, or witness statements given to police. *Coleman Co.*, 2008 WL 820066, at *2 n.6. And merely recounting witness statements does not create an "investigation's" "factual findings" within Fed. R. Evid. 803(8). *United States v. Ortiz*, 125 F.3d 630, 632 (8th Cir. 1997); *see also Jenks v. N.H. Motor Speedway*, No. 09-cv-205–JD, 2012 WL 274348, at *3 n.2 (D.N.H. Jan 31, 2012) (explaining that statistical reports—which are public records under Rule 803(8)—are "both qualitatively and quantitatively different" from IDIs and similar documents such as accident reports).

As the Fourth Circuit emphasized, "[i]t is beyond peradventure that the authors of the Rule [803] did not intend it to apply in this situation. The raw interview transcripts that [the party] desire[s] to introduce here cannot be considered 'factual findings,' since they are not findings resulting from any type of evaluative process whatsoever." *United States v. D'Anjou*, 16 F.3d 604, 610 (4th Cir. 1994).

In short, Rule 803's public-records exception does not apply to the IDIs simply because the Commission collated police reports, medical reports, and other documents. Rather, courts hold that mere collections of documents like police reports are "clearly hearsay" and "not admissible." *Campos*, 2009 WL 2252257, at *7.

The cases cited by the Commission say nothing to the contrary; indeed, they do not consider IDIs at all. In *Beech Aircraft Co. v. Rainey*, the Supreme Court held

only that the admissible portions of investigatory reports are not inadmissible "merely because they state a conclusion or opinion." 488 U.S. 153, 170 (1988). The Court did not address the issue here—whether the reports contained admissible "factual findings" from "investigative observations, laboratory results, or statistical analysis." *Coleman Co.*, 2008 WL 820066, at *2 n.6. The Commission's reliance (Mtn. at 6–7) on *Ellis v. int'l Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984) and *Bradford Tr. Co. of Bos. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 805 F.2d 49, 54 (2d Cir. 1986), is also misplaced. These cases merely restate the language of Fed. R. Evid. 803(8), explaining that *after* a court finds that documents fall under 803(8), *then* the opposing party may show untrustworthiness to exclude them. Neither case held that IDIs are admissible under Rule 803(8).[2]

In sum, the IDIs are hearsay. They contain multiple layers of hearsay—witness statements, medical reports, police reports, and letters from third parties—that the CPSC merely collected and summarized. The Commission doesn't even attempt to establish an exception for each level of hearsay. And most importantly, the Commission overlooks—or ignores—ample case law holding that IDIs and similar reports are not admissible. The IDIs must be excluded.

[2] Even if the IDIs were admissible—they are clearly not—the IDIs' inconsistencies and double-hearsay problems noted above render them untrustworthy. *See, e.g.*, *McKinnon*, 638 F.2d 270, 278 (holding CPSC incident reports "untrustworthy because they contain double hearsay in many instances"); *Miller v. Field*, 35 F.3d 1088, 1091–92 (6th Cir. 1994) (holding public record untrustworthy when "the preparer" of a report relies on "hearsay evidence from another individual under no duty to provide unbiased information"). If necessary, Leachco reserves the right to demonstrate additional indicia of the IDIs' untrustworthiness.

II. NO OTHER RULE OR WITNESS ON THE COMMISSION'S WITNESS LIST CAN MAKE THE IDIS ADMISSIBLE

Despite the obvious hearsay, the Commission claims (1) another rule, 16 C.F.R. 1025.43(c), renders the IDIs admissible, and (2) testimony from the CPSC investigators would cure the hearsay defect. Both arguments fail.

First, section 1025.43(c) is irrelevant. That provision mirrors the balancing test from Federal Rule of Evidence 403, which allows "relevant and *reliable*" evidence to be admitted unless "its probative value is substantially outweighed by unfair prejudice" or other factors. 16 C.F.R. 1025.43(c). But as noted above hearsay is inherently unreliable—which is precisely why it's not admissible. *See Lozado*, 776 F.3d at 1121 ("Hearsay is generally inadmissible as evidence because it is considered unreliable."); *United States v. Givens*, 786 F.3d 470, 473 (6th Cir. 2015). Because the IDIs are hearsay (not subject to any exception), they are *not reliable* and, therefore, not admissible. Section 1025.43's probative-value/prejudice balancing test never comes into play.

Second, testimony from CPSC staff does nothing to cure the IDIs' inherent hearsay. As the Commission itself explains, IDIs include "summaries of investigations," "typically contain a narrative summarizing any victim/witness interviews and a list of exhibits, which may include any relevant police or fire reports, medical records," etc. Mtn. at 2. The CPSC investigators have no personal knowledge about the incidents. *See* Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). They have merely collected and summarized other (hearsay) docu-

ments. Therefore, investigator testimony at the hearing would simply add *another layer* of hearsay. It would not fix the IDIs' inherent hearsay.

III. THE RULES OF EVIDENCE APPLY TO THESE PROCEEDINGS, AND THE COMMISSION HAS NOT SHOWN THAT THEY SHOULD BE RELAXED TO MEET THE "ENDS OF JUSTICE"

The Commission's last-ditch request to "relax[]" the rules of evidence must be rejected. Mtn. at 7. The Commission claims (*id*. at 2 n.2) that strict adherence to the Federal Rules of Evidence is not required in administrative proceedings. Although it's true agencies may choose to apply other rules, the CPSC itself chose the Federal Rules of Evidence, which "*shall* apply to all proceedings held pursuant to these Rules," unless "otherwise provided by statute or these rules." 16 C.F.R. 1025.43(a) (emphasis added). The CPSC rules do include some exceptions to the Federal Rules of Evidence—*e.g.*, allowing expert reports, which are hearsay, to be admitted as direct testimony—but the Commission can point to no statute or CPSC rule that relaxes the hearsay rule for its IDIs.

Further, the Commission fails to show that the "ends of justice" would be served by relaxing the hearsay rule here. (Mtn. at 3 (quoting 16 C.F.R. 1025.43(a))). Federal courts' consistent exclusion of IDIs confirms that admitting inherently unreliable evidence would run counter to justice.[3] And relaxing the hearsay rule for the

[3] It's worth noting that the "ends of justice" analysis comes from federal court cases that relax evidentiary standards to protect the *constitutional* rights of *defendants*. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (holding "ends of justice" required admission to ensure defendant had a constitutionally fair hearing); *Chia v. Cambra*, 360 F.3d 997, 1003 (9th Cir. 2004) (holding "ends of justice" met when a trustworthy statement "is critical to the defense" such that exclusion "may rise to the level of a due process violation"). Admission of the IDIs comes nowhere close to these situations.

convenience of one litigating party would necessarily prejudice the other party—the very opposite of a just, fair trial.

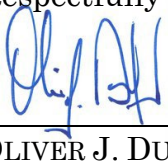
The Commission cannot evade the Federal Rules of Evidence simply because it thinks doing so would make its case easier to prove.

CONCLUSION

The IDIs must be excluded. They include hearsay on top of hearsay on top of hearsay, and the Commission cannot establish an exception for each level. The public-records exception, as courts have universally held, comes nowhere close to making the IDIs admissible. And there is no reason for this Court to take a different (and lonely) approach by admitting the IDIs. This Court should exclude such evidence and deny the Commission's Motion.

DATED: July 24, 2023.

Respectfully submitted,



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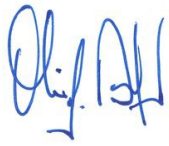

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