

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
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)	
LEACHCO, INC.)	CPSC DOCKET NO. 22-1
)	
)	Hon. Michael G. Young
)	Presiding Officer
Respondent.)	
)	

**COMPLAINT COUNSEL’S MOTION FOR LEAVE TO AMPLIFY WRITTEN DIRECT
EXPERT TESTIMONY**

Pursuant to 16 C.F.R. § 1025.44(b), Complaint Counsel respectfully submits this motion for leave to amplify the written direct testimony of its experts Dr. Erin Mannen and Celestine Kish.¹ Dr. Erin Mannen, a professor and researcher in the field of mechanical and biomechanical engineering, has presented testimony about the physical design defects of the Leachco Podster. Celestine Kish, an engineering psychologist with over three decades of experience in her field, has offered testimony detailing the foreseeable uses of the Podster and how the Podster’s warnings are insufficient to mitigate the danger it poses. Both expert witnesses will testify in person at the hearing that is scheduled to begin on August 7, 2023.

Section 1025.44(b) generally provides that “the direct testimony of an expert witness shall be in writing” and that it “shall be incorporated into the record and shall constitute the direct testimony of that witness.” 16 C.F.R. § 1025.44(b). The rule also provides that “upon a

¹ Complaint Counsel met and conferred with Leachco’s counsel in an effort to resolve this request without motion practice, but the parties were unable to agree to permit amplification. Complaint Counsel does not oppose permitting Leachco to provide a modest amplification of the written direct testimony of its expert witness Ms. Shibata, should Leachco make that request.

showing of good cause, the party sponsoring the expert witness may be permitted to amplify the written direct testimony during the hearing.” Here, there is good cause for modest amplification to illustrate and elaborate on the technical written direct expert testimony. Indeed, this Court has previously noted its expectation that “the CPSC will have the opportunity to expand and amplify on its expert testimony, as will Leachco,”² a point the Court reiterated in its Order Denying Motions for Summary Decision.³

Complaint Counsel requests leave to amplify the written direct testimony of two of its three anticipated expert witnesses.⁴ First, Complaint Counsel seeks to amplify the direct testimony of Dr. Mannen. Complaint Counsel expects to conduct a limited amplified direct examination that would include some questions regarding Dr. Mannen’s background and qualifications, her experience with infants and infant products, and a demonstration of some of her work in this case, using sample Podsters and short video clips. Complaint Counsel believes this will be useful for the Court and provide a further framework and supporting visuals to amplify Dr. Mannen’s written direct testimony.

Second, Complaint Counsel seeks leave to amplify the written direct testimony of its expert Celestine Kish. Complaint Counsel anticipates a limited amplified direct examination that would include some questions on Ms. Kish’s background and qualifications, her experience with infant consumer products, and a demonstration of her work in this case, using sample Podsters, their packaging, and their warnings. Complaint Counsel suggests this too will be useful for the Court and will provide further framework and supporting visuals to amplify Ms. Kish’s written

² Prehearing Conference Transcript, June 29, 2023, at 38:21-39:4.

³ Order Denying Motions for Summary Decision, July 6, 2023, Dkt. 99, at 3 (“The issue [regarding the expert’s evaluation of the three infant deaths associated with the Podster, its design, and foreseeable use] may be amplified at hearing...”).

⁴ Complaint Counsel is not requesting amplification of Dr. Katwa’s testimony.

direct testimony.

The Commission's Rules of Practice for Adjudicative Proceedings do not define what constitutes "good cause" for purposes of permitting amplification of written direct testimony pursuant to 16 C.F.R. § 1025.44(b). Good cause generally is a "legally sufficient reason" for why a request should be granted. Cause (2), Black's Law Dictionary (11th ed. 2019). Here, there is a legally sufficient reason to permit amplification because amplification would be relevant, helpful, and not prejudicial. And that is typically all that is required to permit the introduction of demonstrative evidence for experts in federal court.

Amplification here would serve the same purpose as demonstrative evidence— "to illustrate other admitted evidence and thus render it more comprehensible to the trier of fact." *See Colgan Air, Inc. v. Raytheon Aircraft Co.*, 535 F. Supp. 2d 580, 583 (E.D. Va. 2008) (citation omitted). In federal court, demonstratives in expert testimony are generally permitted if they are relevant to testimony on the issues and help illustrate and explain the testimony to the trier of fact. *See id.* at 583-84. Courts have expressly found that videos and models of expert tests are examples of demonstratives that aid the factfinder in understanding technical testimony. *See, e.g., Jordan v. City Chicago*, No. 08 C 6902, 2012 WL 254243, at *10 (N.D. Ill. 2012) (permitting the use of mannequins as part of expert witness testimony); *Moody v. Ford Motor Co.*, No. 03-CV-0784-CVE-PJC, 2006 WL 3354472, at *1 (N.D. Okla. 2006) (permitting the use of videos as part of expert witness testimony); *Whitfield v. Riley*, NOS. 09-1877 c/w 09-8074, 2021 WL 2291138, at *2 (E.D. La. 2021) (permitting the use of a mannequin to assist in understanding technical testimony). Here, amplification of the written testimony with videos and in-person demonstrations is relevant and would serve to assist the trier of fact in understanding the previously submitted written direct testimony. There is also no risk of unfair prejudice

because there is no jury and Respondent will have the opportunity to explore the amplification on cross-examination. Thus, amplification should be permitted.

In light of the foregoing, Complaint Counsel respectfully requests that the Presiding Officer grant Complaint Counsel's motion for leave to amplify the written direct testimony of its experts Dr. Erin Mannen and Celestine Kish. As explained above, there is good cause to permit these experts to amplify their testimony at the hearing because it should be useful to illustrate and contextualize their testimony for this Court.

A proposed Order is attached hereto pursuant to 16 C.F.R. § 1025.23(b).

Dated this 14th day of July, 2023

Respectfully submitted,



Thomas J. Mendel, Trial Attorney
Gregory M. Reyes, Supervisory Attorney
Brett Ruff, Trial Attorney
Michael J. Rogal, Trial Attorney

Division of Enforcement and Litigation
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7220

Complaint Counsel for
U.S. Consumer Product Safety Commission

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**[PROPOSED] ORDER ON COMPLAINT COUNSEL’S
MOTION FOR LEAVE TO AMPLIFY WRITTEN DIRECT EXPERT TESTIMONY**

This matter, having come before the Presiding Officer on Complaint Counsel’s Motion for Leave to Amplify Written Direct Expert Testimony dated July 14, 2023, it is hereby ORDERED that Complaint Counsel’s Motion is GRANTED. It shall be further ORDERED that Complaint Counsel shall be granted leave to amplify the written direct testimony of Dr. Erin Mannen and Celestine Kish at the hearing in this matter set to begin on August 7, 2023.

Done and dated _____ 2023.

Michael G. Young
Administrative Law Judge