

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE  
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August 2, 2023

In the Matter of

LEACHCO, INC.,

CPSC Docket No. 22-1

Respondent.

**ORDER REAFFIRMING DECISION TO GRANT LEACHCO, INC.'S MOTION TO STRIKE KONICA MCMULLEN FROM THE COMMISSION'S WITNESS LIST**

This Court granted Respondent's motion to strike Ms. Konica McMullen from Complaint Counsel's witness list, but it denied requested sanctions and allowed an offer of proof prior to hearing. *See* Order Granting Leachco, Inc.'s Mot. to Strike Konica McMullen from the Comm'n's Witness List, at 5 (July 28, 2023). Complaint Counsel responded with an offer of proof, providing examples of intended testimony it asserts relates directly to the issues in this proceeding. *See* Compl. Counsel's Offer of Proof Regarding the Exclusion of Konica McMullen, at 2–3 (July 31, 2023).<sup>1</sup>

The examples provided by Respondent have not persuaded this Court that its decision to exclude Ms. McMullen's testimony was incorrect. The proposed testimony is either irrelevant or is more appropriately brought by a more competent direct witness. Also, some of Complaint Counsel's justifications are based on Respondent assertions that this Court has already refuted. As the following are the examples Complaint Counsel chose to provide, this Court addresses them each in order.

This is not a wrongful death case, and the extent to which an individual infant may or may not have had respiratory issues that contributed to his death is irrelevant to the risk posed by the product at issue. This action is about the reasonably foreseeable misuse of the Podster, and the risk of injury created by an alleged defect. *See* Order Granting in Part & Denying in Part Resp't's Mot. to Exclude the Expert Test. Proffered by the Consumer Prod. Safety Comm'n, at 4–5 (Aug. 2, 2023) ("*Daubert* Order").

The parties have acknowledged as much in their discovery disputes regarding similar information. Respondent previously moved for sanctions regarding Complaint Counsel's

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<sup>1</sup> Complaint Counsel requested the Offer and accompanying exhibit be marked for identification as CCX-57, and it stated it will proffer a declaration regarding testimony Ms. McMullen was expected to give prior to hearing. *Id.* at 2.

responses to RFA Nos. 218–25 and 227–31. *See* Leachco’s Mot. for Sanctions & Order That Certain Reqs. for Admission Be Deemed Admitted, at 1 (June 6, 2023). Those RFAs involved the health of an infant from a different incident. *See* Leachco, Inc.’s Mem. in Supp. of Its Mot. for Sanctions & Order that RFAs be Deemed Admitted, Ex. 1 [Compl. Counsel’s Suppl. Objs. & Resps. to Resp’t’s 1st Set of Reqs. for Admission & Resp’t’s 2d Set of Reqs. for Admission (May 17, 2023)], at 184–92 (June 6, 2023).

Complaint Counsel objected to these RFAs, arguing they were misleading for suggesting Respondent had no responsibility for foreseeable misuse. Respondent also agreed to withdraw its arguments to these responses. *See* Order Dismissing As Moot Leachco, Inc.’s Mot. for Sanctions & Order That Certain Reqs. for Admission Be Deemed Admitted & Order Directing Agreed Upon Amendment to Reqs. for Admission 147 & 148, at 1 (July 21, 2023).

Any reference to an individual infant’s medical condition, including by Respondent, is objectionable. Expert testimony exists regarding the medical effects of the body position allegedly created by the Podster’s design and/or allowed by reasonably foreseeable misuse. This evaluation appears to be based on a healthy infant. Any further contribution to such risk by an exacerbating individual condition is best addressed, if necessary at all, by such experts.

Ms. McMullen’s son’s ability to rollover, sit up, or support his torso is similarly irrelevant to the present action. The proffered experts testify as to the effect of an infant properly in the supine position—if allowed to sleep or remain unsupervised in the Podster—and the consequences of rolling into or off the Podster. Complaint Counsel’s theory of the risk posed by the Podster and its foreseeable misuse is therefore not aided by testimony about this particular infant’s ability to do the things contemplated in the expert testimony. Expert testimony already relies in part on the incident reports reviewed. As Ms. McMullen was not present, she has nothing more to add with respect to direct knowledge of the incident.

Finally, Ms. McMullen’s testimony regarding her beliefs about the product as a consumer are already addressed by competent expert testimony and intended exhibits. Complaint Counsel has already proffered other, likely less prejudicial, evidence regarding marketing, reviews, publicly presented consumer use, etc. Ms. McMullen’s individual observation of misuse and her Google or Amazon searches regarding such alleged misuse are redundant, and her testimony continues to pose too great a risk of prejudice.<sup>2</sup>

This contention further relies on challenged assertions by Respondent that this Court has already dismissed. Complaint Counsel contends that Respondent wrongly claims its expert witness testimony is speculative and conclusory. Offer of Proof at 3. This Court refuted this assertion in denying summary decision. *See* Order Denying Compl. Counsel’s Mot. for Partial Summ. Decision & Denying Resp’t’s Mot. for Summ. Decision, at 5–6 (July 6, 2023). As this Court has found Complaint Counsel’s experts competent to testify, with certain caveats that do

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<sup>2</sup> This is particularly true where Ms. McMullen did not purchase or use the Podster, and nothing in the record demonstrates that she conducted the research until after the incident. *See, e.g.*, Offer of Proof, Ex. 1, at 157:16–158:18.

not affect this particular issue, *see Daubert* Order at 6–8, Ms. McMullen’s testimony is not further helpful to evaluation of this action.

Respondent’s motion to strike Konica McMullen from Complaint Counsel’s witness list and exclude her testimony remains **GRANTED**.

Complaint Counsel’s Offer of Proof and accompanying exhibit is **MARKED** as CCX-57.



Michael G. Young  
Administrative Law Judge

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