

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 GRANTING IN PART AND DENYING IN PART LEACHCO, INC.'S MOTION
IN LIMINE TO EXCLUDE (1) ALL POST-FACT-DISCOVERY EVIDENCE & (2)
TESTIMONY & DOCUMENTS REGARDING ALLEGED DEFECTS IN THE
PODSTER'S WARNINGS**

Respondent moved to exclude the following:

- I. All late-produced documents.
- II. Exemplars never made available for inspection.
- III. All testimony relying on such information.
- IV. All testimony concerning the Podster's allegedly defective warnings.

Leachco, Inc.'s Mot. in Lim. to Exclude (1) All Post-Fact-Disc. Evid. & (2) Test. & Docs. regarding Alleged Defects in the Podster's Warnings, at 2 (July 14, 2023). Complaint Counsel opposes the motion, asserting (1) the prehearing schedule permitted disclosures in the time they were filed, (2) Respondent is not prejudiced by the experts' use of the Podster samples, and (3) late- or unproduced non-Podster IDIs were used only for background purposes by Dr. Mannen and are otherwise irrelevant. Compl. Counsel's Opp'n to Leachco's Mot. in Lim. & *Daubert* Mot., at 1-2 (July 24, 2023).

For the following reasons, this Court GRANTS Respondent's motion with respect to testimony concerning allegedly defective warnings. It otherwise DENIES the motion.

I. Complaint Counsel Should Have Provided the Facts or Tested Materials During Fact Discovery, But Exclusion Is Too Extreme a Sanction Here Because of the Time Respondent Was Aware of the Deficiency and Failed to Act.

This Court has addressed this issue, and Complaint Counsel's late-produced documents will not be excluded to the extent that they regard the claim at issue. *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 2-5 (Aug. 2, 2023) ("*Daubert* Order") (declining to preclude late- or

unproduced evidence due to lack of surprise or prejudice and precluding evidence regarding the adequacy of the Podster's warnings).

II. Exemplars Not Produced Are Similarly Not Excluded.

For the same reasons, the challenged exemplars are not excluded. *See* Section I, *supra*.

III. Testimony Based on Facts or Materials Not Made Available or Produced After Close of Fact Discovery Is Not Excluded.

For the same reasons, testimony based on the challenged evidence will not be excluded. *See* Sections I, II, *supra*.

IV. Complaint Counsel Is Precluded from Presenting Evidence Regarding Inadequate Warnings.

Complaint Counsel did not allege a warning defect and it is precluded from presenting evidence regarding inadequate warnings based on its claimed irrelevance throughout discovery. *See Daubert* Order at 3–5; *see also* Section I, *supra*. This Court takes the opportunity to further support its decision by accepting Respondent's citation to *Masimo Corp. v. Apple, Inc.*, No. SACV2000048JVSJDEZ, 2022 WL 18285029 (C.D. Cal. Nov. 22, 2022), and *Aetna Inc. v. Mednax, Inc.*, No. 18-cv-2217, 2021 WL 949454 (E.D. Pa. Mar. 12, 2021), which this Court finds instructive.

The court in *Masimo* found the late disclosure and change inappropriate where the motions practice predicted the issue and the court issued cautionary statements. 2022 WL 18285029, at *7. This Court warned Complaint Counsel not to hide the ball and that it must have a rational basis for its action, it emphasized to Respondent that the case of defect included evaluation of reasonably foreseeable use, and Complaint Counsel consistently claimed it was not bringing a warning-defect action and claimed irrelevance of such information during discovery.

Further, the court in *Aetna* discussed bad faith regarding objections to RFPs where it planned to use such information later. 2021 WL 949454, at *6. It also noted:

If Aetna is arguing that it always knew it would announce its pursuit of hospital payments in an expert report, then Aetna's failure to timely disclose this damages theory seems willful. And if Aetna did not know until after fact discovery that it would seek such damages, Aetna's expectation that it would rely on future experts does not explain why Aetna refuted during fact discovery the damages theory it adopted shortly thereafter.

Id. at *6 n.7. This is similar to this Court's finding that discovery about warning adequacy was relevant during discovery and should have been disclosed when known that Complaint Counsel's experts would rely on such information. *See Daubert* Order at 4, 4 n.4.

V. Conclusion

Respondent's motion is **GRANTED** with respect to testimony concerning allegedly defective warnings. Such testimony will be stricken from the record and Complaint Counsel may not inquire into such information on direct examination.

Respondent's motion is **DENIED** with respect to all remaining requests.



Michael G. Young
Administrative Law Judge

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