

UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION

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

**COMPLAINT COUNSEL’S OFFER OF PROOF  
REGARDING THE DECLARATION OF KONICA MCMULLEN**

Pursuant to 16 C.F.R. § 1025.43(f), this Court’s Order Granting Leachco, Inc.’s Motion to Strike Konica McMullen from the Commission’s Witness List, July 28, 2023, Dkt. No. 125, at 4 (“July 28, 2023 Order”), and the Court’s Order Reaffirming Decision to Grant Leachco, Inc.’s Motion to Strike Konica McMullen from the Commission’s Witness List, August 2, 2023, Dkt. No. 131 (“August 2, 2023 Order”), Complaint Counsel respectfully submits this Offer of Proof and accompanying Declaration of Konica McMullen (Exhibit 1). The declaration includes the relevant testimony Ms. McMullen was expected to give at the hearing in this matter.

Pursuant to the Commission’s Rules of Practice that govern this proceeding:

When an objection to proffered testimony or documentary evidence is sustained, the sponsoring party may make a specific offer, either in writing or orally, of what the party expects to prove by the testimony or the document. . . . Written offers of proof or of rebuttal, adequately marked for identification, shall accompany the record and be available for consideration by any reviewing authority.

16 C.F.R. § 1025.43(f).

As outlined in Complaint Counsel’s Offer of Proof Regarding the Exclusion of Konica McMullen, July 31, 2023, Dkt. No. 126 (“July 31, 2023 Offer of Proof”), Ms. McMullen’s

expected testimony would have been relevant to the issues in this proceeding and how the Podster poses a Substantial Product Hazard. *See* July 31, 2023 Offer of Proof at 2. Thus, Complaint Counsel is providing Ms. McMullen’s expected testimony in the form of a signed declaration.

Complaint Counsel files this Offer of Proof that “shall accompany the record and be available for consideration by any reviewing authority.” 16 C.F.R. § 1025.43(f). Accordingly, Complaint Counsel requests that this filing and the accompanying exhibit be marked for identification as CCX-58 in this proceeding.

Dated this 3rd day of August, 2023

Respectfully submitted,

*/s/ Rosalee Thomas*

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Complaint Counsel for  
U.S. Consumer Product Safety Commission

**CERTIFICATE OF SERVICE**

I hereby certify that on August 3, 2023, I served Complaint Counsel's Offer of Proof Regarding the Declaration of Konica McMullen and accompanying exhibit on all parties and participants of record in these proceedings as follows:

*By email to the Secretary:*

Alberta E. Mills  
Secretary  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814  
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*By email to the Presiding Officer:*

Judge Michael G. Young  
Presiding Officer and Administrative Law Judge  
Federal Mine Safety and Health Review Commission  
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*/s/ Rosalee Thomas*

\_\_\_\_\_  
Rosalee Thomas  
Complaint Counsel for  
U.S. Consumer Product Safety Commission

# Exhibit 1

UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION

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In the Matter of )	
)	
LEACHCO, INC. )	CPSC DOCKET NO. 22-1
)	
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_____ )	

**DECLARATION OF KONICA MCMULLEN**

I, Konica McMullen, declare that the following is true and correct based on my personal knowledge:

1. I am over the age of 18, and I am competent to make this declaration.
2. On December 22, 2015, my son, [REDACTED] died after being placed in a Podster manufactured by Leachco, Inc. My son was four months old at the time of his death. .
3. In December 2010, I received my Bachelor of Science in Nursing from the University of North Alabama. In December 2021, I received a Doctor in Nursing Practice degree in Family Practice. I currently work as a Certified Registered Nurse Practitioner at Complete Health Simon Williamson in Birmingham, Alabama. As a practicing nurse for over 22 years and a mother, safety and healthy practices have been my top priority.
4. I often consulted with [REDACTED]'s physician regarding infant safety and conducted my own research to ensure [REDACTED] was safe in my care. Prior to [REDACTED]'s incident, I knew and was told that plush products pose a suffocation risk to infants.
5. My son [REDACTED] was a happy and healthy infant at the time of his death. He reached all of his developmental milestones. On a flat surface, [REDACTED] was able to roll from a prone (face-

down) to supine (face-up) position and roll from a supine to prone position. [REDACTED] was also able to sit up and hold and support his torso. In fact, I worked with [REDACTED] to strength his core muscles and ensure that he could move from a prone position to a supine position on a flat surface so that he could self-rescue in the event that he found himself in a compromised, face-down position.

6. [REDACTED] experienced some minor health issues during his brief life. [REDACTED] had reflux and was administered Zantac on a daily basis. In or around October 2015, [REDACTED] was exposed to a Respiratory Syncytial Virus (RSV) at his daycare, La Petite Academy. He developed bronchiolitis. We sought medical attention, and he was prescribed a home nebulizer and medication. At one point after his illness, my son's breathing appeared labored. My son's physician reassured me that [REDACTED]'s breathing was normal. Besides an occasional cough, [REDACTED] made a full recovery from this illness. [REDACTED] did not show symptoms of any respiratory issues, or other medical issues, in the days leading up the December 16, 2015 incident.

7. It is my understanding that, on December 16, 2015, [REDACTED] was placed in, and later found face down and unresponsive in a Podster. The daycare called me to report that [REDACTED] was found unresponsive.

8. [REDACTED] was transported by the paramedics to the children's hospital in Birmingham, Alabama. He was hospitalized for approximately six days. After the incident, [REDACTED] was declared brain dead after his voluntary breathing ceased. In this compromised state, [REDACTED] developed an infection at the hospital.

9. On December 22, 2015, [REDACTED] was taken off life support and passed away.

10. Before my son's death, I was not aware of the Podster. At La Petite Academy, on or around November 2015, I observed an infant sleeping on a plush product, which I later discovered was a Podster.

11. Before my son's death, I did not know that the daycare employees were placing [REDACTED] on the Podster for sleep. I did not give, and would not have given, La Petite permission to use the Podster for [REDACTED].

12. On December 18, 2015, I brought a wrongful death lawsuit against Leachco, Inc., La Petite Academy, Inc., and others for [REDACTED]'s injuries and untimely death. That lawsuit settled before trial.

13. After [REDACTED]'s death, I found online complaints on Amazon.com of other infants being found in potentially dangerous positions on the Podster. I also found online images of infants sleeping on the Podster by conducting Google searches. With so many consumers using the Podster for sleep, it appeared to me that the Podster was a sleep positioner.

Executed on August 2, 2023 in Bessemer, Alabama 35022  
Date

Konica McMullen

Konica McMullen