

**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

**LEACHCO, INC.'S MOTION TO STRIKE
KONICA McMULLEN FROM THE COMMISSION'S WITNESS LIST**

Respondent Leachco, Inc. moves this Court to strike from the Commission's witness list Konica McMullen. The Commission has known of Ms. McMullen for at least seven years but failed to identify her during discovery—even though Leachco's Interrogatory No. 2 (served March 14, 2022) asked the Commission to “[i]dentify any Person who was a witness to or has knowledge of the facts, circumstances and events that are related to the relief requested in the Complaint, or who otherwise has knowledge relevant to the issues in this case....” *See* Ex. 1.

The Commission has no justification for failing to disclose Ms. McMullen, and allowing her to testify would severely prejudice Leachco. The Commission's dilatory tactics contradict this Court's admonition from just last week—reiterating that parties may not introduce evidence at the hearing that was not disclosed during discovery. *See also* 16 C.F.R. 1025.37 (authorizing Court to impose sanctions for discovery violations). The Commission flouted basic discovery principles and this Court's warnings. Ms. McMullen must be stricken from the witness list, and the Court should order the Commission to reimburse the costs of preparing this Motion.

BACKGROUND

The Commission filed its Complaint in February 2022, based [REDACTED]

[REDACTED] The Commission [REDACTED]

[REDACTED] Yet the Commission failed to disclose Ms. McMullen in response to Leachco's interrogatories.

Leachco first served Interrogatories to the Commission on March 14, 2022. Interrogatory No. 2 asked the Commission to “[i]dentify any Person who was a witness to or has knowledge of the facts, circumstances and events that are related to the relief requested in the Complaint, or who otherwise has knowledge relevant to the issues in this case.” Ex. 1. The Commission's initial responses were served May 13, 2022 and, in response to Leachco's Interrogatory No. 2, the Commission identified 13 individuals—but not Ms. McMullen. *See* Ex. 3. The Commission served its first supplemental responses on October 3, 2022 but did not supplement its response to Interrogatory No. 2. *See* Ex. 4. Nearly five months later (February 24, 2023), the Commission served its Second Supplemental Responses and, in response to Interrogatory No. 2, the Commission identified six new individuals—but, again, not Ms. McMullen. *See* Ex. 5.

Fact discovery closed on **March 20, 2023**. *See* Dkt. 35 (Order on Prehearing Schedule). The Commission supplemented its interrogatory responses a third time on April 28, 2023, without supplementing Interrogatory No. 2. *See* Ex. 6. Finally, on **May 11, 2023**—more than seven years after becoming aware of Ms. McMullen, 15

months after this case was filed, seven weeks after fact discovery closed, and two weeks after expert discovery closed—the Commission served its Fourth Supplemental Responses to Leachco’s Interrogatories and belatedly identified Ms. McMullen in response to Leachco’s Interrogatory No. 2. *See* Ex. 7. Obviously, because fact discovery had long since closed, Leachco never deposed Ms. McMullen to discover what knowledge she had relating to the Commission’s claim.

This Court held several discovery conferences over the course of this case. During the February 24, 2023 hearing, the Court instructed the parties that information withheld from discovery would not be admitted at the hearing:



Ex. 8, Feb. 24, 2023, Hearing Tr., 33:14–34:5. Last week, during the final prehearing conference on July 11, 2023, the Court again reminded the parties that sandbagging would not be permitted.

Nonetheless, three days later—July 14—the Commission submitted a witness list that included Ms. McMullen, whom the Commission intends to call in its case-in-chief, even though the Commission failed to disclose her during discovery. Ex. 9.

ARGUMENT

The Commission’s brazen discovery violations should not be tolerated, and Ms. McMullen should not be permitted to testify. The Commission’s Rules of Practice and the Federal Rules of Civil Procedure both authorize courts to impose sanctions for

discovery violations. *See* 16 C.F.R. 1025.37(c) (authorizing Presiding Officer “take such action as is just, including but not limited to the following: . . . Order that the party withholding discovery not introduce into evidence or otherwise rely, in support of any claim or defense, upon the documents or other evidence withheld”); Fed. R. Civ. P. 37(c)(1) (“If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.”).

Here, the Commission’s failure to identify Ms. McMullen in response to Leachco’s Interrogatory No. 2 was anything but justified and far from harmless. The Commission should have disclosed her in its initial response to Leachco’s Interrogatory No. 2. By failing to do so during discovery, the Commission hid from Leachco its plan to call Ms. McMullen in its case-in-chief and denied Leachco its right to fully prepare for trial.

Ms. McMullen should be stricken from the Commission’s witness list, and the Commission should be sanctioned for the cost of preparing this Motion.

I. The Commission has no justification for not disclosing Ms. McMullen during discovery

The Commission has no valid excuse for failing to identify Ms. McMullen in its initial response to Leachco’s Interrogatory No. 2. The Commission [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Indeed, by identifying her—but only *after* discovery closed—the Commission confirms that she is a person “who was a witness to or has knowledge of the facts, circumstances and events that are related to the relief requested in the Complaint, or who otherwise has knowledge relevant to the issues in this case....” Ex. 1, Leachco’s ROG No. 2.

Accordingly, the Commission has known all along that it should have disclosed Ms. McMullen’s name in response to Leachco’s Interrogatory No. 2. And “[b]ecause [the Commission] did not disclose that [Ms. McMullen] had discoverable information” during discovery, her “testimony is precluded by Rule 37(c)(1).” *Commonwealth Cap. Corp. v. City of Tempe*, No. 2:09–cv–00274 JWS, 2011 WL 1325140, at *2 (D. Ariz. Apr. 7, 2011); *see also Lil’ Man in the Boat, Inc. v. City and Cty. of San Francisco*, No. 17-cv-00904-JST, 2019 WL 8263440, at *4 (N.D. Cal. Nov. 26, 2019) (excluding witness testimony where “[d]efendants were deprived of the opportunity to take [the witness’s] deposition before the close of discovery and were forced to confront his testimony for the first time on summary judgment”).

II. Failure to disclose has prejudiced and will prejudice Leachco

The Commission’s trial-by-ambush approach undermines the purpose of discovery and causes Leachco severe prejudice.

Consistent with this Court’s repeated admonitions here, courts across the country routinely exclude late-identified witnesses. *Ollier v. Sweetwater Union High School Dist.*, 768 F.3d 843, 862 (9th Cir. 2014) (upholding district court order excluding 30 witnesses identified after fact discovery closed and ten months before trial); *E.E.O.C. v. Caterpillar, Inc.*, 2004 WL 2092003, at *8 (N.D. Ill. Sept. 14, 2004); *Dey*

v. Coughlin, No. 19-00318-CV-W-ODS, 2020 WL 4003967, at *2 (W.D. Mo. July 15, 2020) (granting motion to “exclude the testimony of any witness not identified in discovery”); *Fletcher v. U-Haul Co. of Ariz.*, No. 2:07-cv-1193 JWS, 2008 WL 11338790 (D. Ariz. Sept. 19, 2008) (precluding witness from testifying when witness was not timely disclosed in discovery); *Brinkley v. Santiago*, No. 11 C 6282, 2013 WL 12309671, at *6 (N.D. Ill. July 11, 2013) (“Witnesses who have not been disclosed in discovery may not testify in a party’s case-in-chief and no mention of them may be made to the jury.”).

Prejudice to Leachco is obvious. It did not depose Ms. McMullen, seek documents from her, or otherwise prepare to address Ms. McMullen’s expected testimony (or decide whether to call Ms. McMullen for its own case). “Prejudice generally occurs when late disclosure deprives the opposing party of a meaningful opportunity to perform discovery and depositions related to the documents or witnesses in question.” *Bowe v. Pub. Storage*, 106 F. Supp. 3d 1252, 1260 (S.D. Fla. 2015) (citation omitted); *see also Pete’s Towing Co. v. City of Tampa*, 378 F. App’x. 917, 920 (11th Cir. 2010) (upholding exclusion of testimony where plaintiffs filed late); *Padgett v. Kmart Corp.*, 2016 WL 6802482, at *5 (S.D. Ga. Nov. 15, 2016) (excluding late testimony by affidavit where “Defendants had no opportunity to depose [the witness] before moving for summary judgment because Plaintiffs did not disclose Hasty’s parking lot crime testimony until approximately five weeks later.”); *Medina v. Multaler, Inc.*, 547 F. Supp. 2d 1099, 1106 (C.D. Cal. 2007) (“Medina’s failure to disclose Hannaway as a likely

witness before defendants' summary judgment motion was filed prejudiced defendants by depriving them of an opportunity to depose him.”).

The Commission may argue that Leachco also knew of Ms. McMullen and thus suffers no prejudice. Not so. As the Commission itself recognized here, depositions are “a key part of a party’s preparation for trial.” Dkt. 53, Mem. in Supp. of CPSC’s Mot. to Compel Depositions at 4 (quoting *Adams v. Sharfstein*, No. 11- 45 cv-3755-CCB, 2012 WL 2992172, at *2 (D. Md. July 19, 2012)). The Commission emphasized that “[d]epositions permit parties ‘to discover facts about the case, meet the adverse witnesses and assess their character and credibility, freeze the witnesses’ testimony, establish a foundation for subsequent impeachment, neutralize potentially harmful witnesses, and perpetuate testimony.” *Id.* at 5 (quoting *Adams*, 2012 WL 2992172, at *2).¹ The Commission seeks a different rule for itself.

Further, as the Commission previously argued—and as this Court agreed—the Commission’s claim here is not identical to a common law tort claim. Therefore, the *McMullen* lawsuit dealt with different legal questions. And Leachco’s Interrogatory No. 2 asked for the identify of any person “who was a witness to or has knowledge of the facts, circumstances and events that are *related to the relief requested in the Complaint*, or who otherwise has knowledge *relevant to the issues in this case....*” Ex. 1, Leachco’s ROG No. 2 (emphasis added). Because the Commission failed to disclose Ms. McMullen, Leachco did not depose her about circumstances, events, and knowledge relevant to the Commission’s case.

¹ The Commission withdrew this motion after the parties reached an agreement. See Dkt. 55, Order Granting Stipulation and Joint Mot. to Set Schedule for Depositions of Leachco Employees.

The Commission will also argue that Leachco itself did not identify its witnesses until July 14, 2023. That's true but *irrelevant*, since the Commission—unlike Leachco—did not serve an interrogatory asking Leachco to identify all persons with potentially relevant information. Instead, the Commission asked Leachco only to identify witnesses it intended to call at the hearing—and Leachco identified its witnesses according to the Court's Order on Prehearing Schedule (Dkt. 35). Nor did Leachco identify any surprise witnesses. All individuals identified on Leachco's witness list were (except the expert witnesses) deposed during fact discovery.

Leachco's Interrogatory No. 2 asked for information beyond a mere witness list, since parties routinely exchange witness lists shortly before trial. Instead, Leachco asked for *all individuals known to the Commission with relevant information*. That basic interrogatory—like initial disclosures in federal court—allows parties to strategize regarding whom to depose, seek documents from, or *later* add to a witness list. By asking the Commission to identify all individuals with information *relevant to the Commission's claim*, Leachco sought to determine, among the untold number of people Leachco may be aware of, who should be deposed in preparation for the hearing.

Thus, whether Leachco knew of Ms. McMullen generally is irrelevant to the CPSC's plan to call Ms. McMullen in its case-in-chief here. The Commission was required to comply with discovery obligations so that Leachco could prepare for the hearing *in this case*. The Commission's disclosures and non-disclosures informed Leachco's discovery strategy; allowing the Commission to submit untimely disclosures necessarily prejudices Leachco's ability to prepare for a trial that will begin less

than a month after learning of the Commission's plan to have Ms. McMullen testify. The Commission's failure to ask Leachco to identify all individuals with relevant information does not excuse the Commission's failure to fully and timely respond to Leachco's Interrogatory No. 2.

Finally, the Commission's gamesmanship forced Leachco's counsel to spend time away from trial preparation to prepare this Motion. The Commission's underhanded tactics cannot be tolerated.

* * *

In sum, as this Court repeatedly reminded counsel, the parties should "try cases on the merits, not by surprise, and not by ambush." *Ollier*, 768 F.3d at 862. That requires prompt disclosure of witnesses so that "a party can conduct discovery of what those witnesses would say on relevant issues, which in turn informs the party's judgment about which witnesses it may want to call at trial, either to controvert testimony or to put it in context." *Id.* The Commission's "late disclosure of witnesses throws a wrench into the machinery of trial." *Id.* at 863. Because "the discovery cutoff has passed," Leachco "cannot conduct discovery without a court order permitting extension," which prejudices Leachco, threatens the trial date, and undermines the entire process. *Id.*

* * *

CONCLUSION

The Court should strike Ms. McMullen from the Commission's witness list and issue an order prohibiting the Commission from calling Ms. McMullen as a witness in this case.

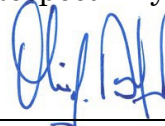
Leachco respectfully asks the Court to address this Motion as soon as possible, as the resolution will affect Leachco's trial preparation—which has already been prejudiced by having to take time to draft this Motion in response to the Commission's egregious tactics.

Finally, before filing this Motion, Leachco asked the Commission to withdraw Ms. McMullen as a witness. The Commission refused. *See* Ex. 10. Therefore, the Court should also issue a sanction and compel the Commission to pay for the costs incurred in preparing this Motion.

DATED: July 17, 2023.

JOHN F. KERKHOFF
Ohio Bar No. 0097134
FRANK D. GARRISON
Indiana Bar No. 34024-49
JESSICA THOMPSON
Pacific Legal Foundation
3100 Clarendon Boulevard, Suite 1000
Arlington, VA 22201
Telephone: 202.888.6881
Fax: 916.419.7747
JKerkhoff@pacifical.org
FGarrison@pacifical.org
JLThompson@pacifical.org

Respectfully submitted,



OLIVER J. DUNFORD
Florida Bar No. 1017791
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Telephone: 916.503.9060
Fax: 916.419.7747
ODunford@pacifical.org

Counsel for Respondent Leachco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2023, I served, by electronic mail, the foregoing was served upon all parties and participants of record:

<p>Honorable Michael G. Young Federal Mine Safety and Health Review Commission Office of the Chief Administrative Law Judge 1331 Pennsylvania Ave., N.W., Suite 520N Washington, D.C. 20004-1710 myoung@fmshrc.gov cjannace@fmshrc.gov whodnett@fmshrc.gov</p>	<p>Mary B. Murphy Director, Div. of Enforcement & Litigation U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 mmurphy@cpsc.gov</p> <p>Robert Kaye Assistant Executive Director Office of Compliance and Field Operations U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 rkaye@cpsc.gov</p> <p>Leah Ippolito, Supervisory Attorney Brett Ruff, Trial Attorney Rosalee Thomas, Trial Attorney Caitlin O'Donnell, Trial Attorney Michael Rogal, Trial Attorney Frederick C. Millett, Trial Attorney Gregory M. Reyes, Supervisory Attorney Complaint Counsel Office of Compliance and Field Operations U.S. Consumer Product Safety Comm'n Bethesda, MD 20814 lippolito@cpsc.gov bruff@cpsc.gov rbthomas@cpsc.gov codonnell@cpsc.gov mrogal@cpsc.gov fmillett@cpsc.gov greyes@cpsc.gov</p>
<p>Alberta Mills Secretary of the U.S. Consumer Product Safety Commission U.S. Consumer Product Safety Commission 4330 East West Highway Bethesda, MD 20814 amills@cpsc.gov</p>	

Oliver J. Dunford
Counsel for Respondent Leachco, Inc.

LEACHCO, INC.
MOTION TO STRIKE KONICA MCMULLEN
FROM THE COMMISSION'S WITNESS LIST

Exhibit 1

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

In the Matter of
LEACHCO, INC.

CPSC DOCKET NO. 22-1

Respondent.

**RESPONDENT'S FIRST SET OF INTERROGATORIES TO
CONSUMER PRODUCT SAFETY COMMISSION**

Pursuant to 16 C.F.R. § 1025.32, Respondent Leachco, Inc. ("Leachco") hereby requests that the Consumer Product Safety Commission ("CPSC") answer each of the following interrogatories under oath and in writing within 30 days of service hereof.

DEFINITIONS AND INSTRUCTIONS

A. In the following interrogatories:

1. "You," or "your," shall mean the CPSC, and includes the staff and, where applicable, the Commissioners.
2. "Document" shall mean the original and all non-identical copies of all written, printed, typed, graphic, and photographic matter of any kind or nature, and all mechanical or electronic audio and/or visual recordings or transcripts thereof, however produced or reproduced, and all entries in a computer or electronic database (including Twitter and any other form of social media) of any kind, including but not limited to: correspondence, telexes, telegrams, telephone messages, statements, voice mail, electronic mail, and all other computer files or data, claim forms, incident reports, intake forms or histories, summaries or records of telephone conversations, memoranda, records, summaries or records of personal conversations or

E. Pursuant to 16 C.F.R. § 1025.31, Complaint Counsel are under a continuing duty to supplement its responses to these discovery requests without further request from Respondents. Where Complaint Counsel have responded to a discovery request with a response that was complete when made, Complaint Counsel is under a duty to supplement that response to include information later obtained.

INTERROGATORIES

INTERROGATORY NO. 1. Identify each Person with knowledge of your efforts to respond to these Interrogatories and Requests for Production of Documents. For each Person identified, indicate the time period of his or her involvement and describe the Person's responsibility, role and contribution.

RESPONSE:

INTERROGATORY NO. 2. Identify any Person who was a witness to or has knowledge of the facts, circumstances and events that are related to the relief requested in the Complaint, or who otherwise has knowledge relevant to the issues in this case and identify any Documents concerning, involving or in any way related to your response.

RESPONSE:

INTERROGATORY NO. 3. Describe in complete detail each defect in the design, manufacture, or materials of the Podster or any of its, that you contend support the relief requested in the Complaint, including without limitation in your description, the exact nature of the defect, the

RESPONSE:

Dated: March 14, 2022

CROWELL & MORING LLP

By: /s/ Cheryl A. Falvey
Cheryl A. Falvey
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
Telephone: (202) 624-2675
Facsimile: (202) 628-5116
CFalvey@crowell.com

**BRYAN CAVE LEIGHTON PAISNER
LLP**

Bettina J. Strauss, Esq.
211 North Broadway, Suite 3600
St. Louis, MO 63102-2750
Telephone: (314) 259-2000
Facsimile: (314) 259-2020
bjstrauss@bcplaw.com

Attorneys for Leachco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2022, a true and correct copy of Respondent's First Set of Interrogatories was served by e-mail and first class U.S. Mail, postage prepaid, on the following:

Alberta Mills
Secretary of the U.S. Consumer Product Safety Commission
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
amills@cpsc.gov

Mary B. Murphy, Director, Division of Enforcement and Litigation
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
mmurpy@cpsc.gov

Robert Kaye
Assistant Executive Director
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
rkaye@cpsc.gov

Leah Ippolito, Supervisory Attorney
Brett Ruff, Trial Attorney
Rosalee Thomas, Trial Attorney
Caitlin O'Donnell, Trial Attorney
Complaint Counsel
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7809
Lippolito@cpsc.gov
BRuff@cpsc.gov
RBThomas@cpsc.gov
CODonnell@cpsc.gov

/s/ Cheryl A. Falvey _____
Cheryl A. Falvey

LEACHCO, INC.
MOTION TO STRIKE KONICA MCMULLEN
FROM THE COMMISSION'S WITNESS LIST

Exhibit 2

Submitted for *in camera* review

LEACHCO, INC.
MOTION TO STRIKE KONICA MCMULLEN
FROM THE COMMISSION'S WITNESS LIST

Exhibit 3

Submitted for *in camera* review

LEACHCO, INC.
MOTION TO STRIKE KONICA MCMULLEN
FROM THE COMMISSION'S WITNESS LIST

Exhibit 4

Submitted for *in camera* review

LEACHCO, INC.
MOTION TO STRIKE KONICA MCMULLEN
FROM THE COMMISSION'S WITNESS LIST

Exhibit 5

Submitted for *in camera* review

LEACHCO, INC.
MOTION TO STRIKE KONICA MCMULLEN
FROM THE COMMISSION'S WITNESS LIST

Exhibit 6

Submitted for *in camera* review

LEACHCO, INC.
MOTION TO STRIKE KONICA MCMULLEN
FROM THE COMMISSION'S WITNESS LIST

Exhibit 7

Submitted for *in camera* review

LEACHCO, INC.
MOTION TO STRIKE KONICA MCMULLEN
FROM THE COMMISSION'S WITNESS LIST

Exhibit 8

Submitted for *in camera* review

LEACHCO, INC.
MOTION TO STRIKE KONICA MCMULLEN
FROM THE COMMISSION'S WITNESS LIST

Exhibit 9

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 WITNESS LIST

In accordance with 16 C.F.R. § 1025.21(a)(11), Appendix I to Part 1025, and the Order on Prehearing Schedule dated September 14, 2022 [Dkt. 35], Complaint Counsel hereby serves its Witness List in the above-captioned action:

A. Complaint Counsel will present the following persons as witnesses in this matter:

1. Konica McMullen. As a parent of one of the infants who died while using the Podster, Ms. McMullen is expected to testify, among other things, about the victim, the victim’s physical condition at the time of his death, and the victim’s death in the Podster.
2. Erin Mannen (Expert Witness). Dr. Mannen submitted her written direct expert testimony on April 28, 2023. In that testimony, Dr. Mannen described her qualifications and experience, relevant prior work, biomechanical testing and methodology with respect to the Leachco Podster, assessment of the fatal incidents involving a Podster, and her expert opinion regarding the hazards posed by the Podster from a biomechanical perspective. Dr. Mannen is expected to amplify that testimony at trial, and Complaint Counsel has moved the Presiding Officer to permit

Dr. Mannen to do so. Complaint Counsel anticipates that amplification will include, among other things, the use of demonstratives—specifically, video clips and samples of the Podster—to illustrate and contextualize her written direct testimony. Dr. Mannen will be available at the hearing for cross-examination regarding her expert testimony by counsel for Leachco and redirect by Complaint Counsel.

3. Celestine Kish (Expert Witness). Ms. Kish submitted her written direct expert testimony on April 28, 2023 and a corrected version of that testimony on May 2, 2023. In that testimony, Ms. Kish described her qualifications and experience, relevant prior work, assessment of the fatal incidents involving a Podster, and her human factors evaluation and expert opinion regarding the Podster, including the foreseeable manners in which the Podster will be used and that its warnings are insufficient to mitigate the danger it poses. Ms. Kish is expected to amplify that testimony at trial, and Complaint Counsel has moved the Presiding Officer to permit Ms. Kish to do so. Complaint Counsel anticipates that amplification will include, among other things, the use of demonstratives—specifically, samples of the Podster and its packaging—to illustrate and contextualize her written direct testimony. Ms. Kish will be available at the hearing for cross-examination regarding her expert testimony by counsel for Leachco and redirect by Complaint Counsel.
4. Umakanth Katwa (Expert Witness). Dr. Katwa submitted his written direct expert testimony on April 28, 2023. In that testimony, Dr. Katwa described his qualifications and experience, methodology for evaluating the hazards posed by the Podster from a medical perspective, analysis of the Podster and the fatal incidents involving a Podster, and his expert opinion of the dangers posed by the Podster from a medical

perspective. Dr. Katwa will be available at the hearing for cross-examination regarding his expert testimony by counsel for Leachco and redirect by Complaint Counsel.

5. Jamie Leach. As Leachco, Inc's Vice President and Chief of Product Development, Ms. Leach is expected to testify as to all matters related to the Answer of Respondent Leachco, Inc. ("Leachco") in this matter; Leachco's responses to Complaint Counsel's discovery requests in this matter, including the responses to Interrogatories that Ms. Leach verified; Leachco's structure and operations; her background, and the Leachco Podster, including its design, development, use, sale, testing, fatal incidents involving the Podster and communications Leachco has had internally or with third parties about the Podster.

B. Complaint Counsel may present the following persons as witnesses in this matter:

1. Christopher Nguyen. Mr. Nguyen is a Program Specialist in the Small Business Ombudsman Office at CPSC. He formerly was a Compliance Officer with the Office of Compliance and Field Operations at CPSC. Mr. Nguyen may testify about communications Leachco made to CPSC in connection with CPSC's investigation of the Leachco Podster, as well as other documentary evidence received and obtained during the course of that investigation, if Leachco continues to contest the admissibility of certain exhibits.
2. John Walker. Mr. Walker is a Product Safety Investigator at CPSC. Mr. Walker may testify concerning the CPSC investigation regarding the Podster, including the CPSC in-depth investigation report bearing Task Number 160519CCC2600, which relates to the fatal incident involving a Podster in Alabama, if Leachco continues to contest the

admissibility of that exhibit, or if the Court does not grant Complaint Counsel's motion in limine to admit it.

3. Christopher Palmer. Mr. Palmer is a Product Safety Investigator at CPSC. Mr. Palmer may testify concerning the CPSC investigation regarding the Podster, including the CPSC in-depth investigation report bearing Task Number 200917CCC3888, which relates to the fatal incident involving a Podster in Texas, if Leachco continues to contest the admissibility of that exhibit, or if the Court does not grant Complaint Counsel's motion in limine to admit it.
4. Elizabeth Phillips. Ms. Phillips is a Product Safety Investigator at CPSC. Ms. Phillips may testify concerning the CPSC investigation regarding the Podster, including the CPSC in-depth investigation report bearing Task Number 220916HCC1454 and the associated MECAPS report, which relate to the fatal incident involving a Podster in Virginia, if Leachco continues to contest the admissibility of that exhibit, or if the Court does not grant Complaint Counsel's motion in limine to admit it.

Dated this 14th day of July, 2023

Respectfully submitted,

/s/ Brett Ruff

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) 504-7809

Complaint Counsel for
U.S. Consumer Product Safety Commission

LEACHCO, INC.
MOTION TO STRIKE KONICA MCMULLEN
FROM THE COMMISSION'S WITNESS LIST

Exhibit 10

From: [Rogal, Michael](#)
To: [Oliver J. Dunford](#); [John F. Kerkhoff](#); [Frank Garrison](#)
Cc: [Ruff, Brett](#); [Reyes, Gregory](#)
Subject: RE: In re Leachco, Inc. -- CPSC Docket No. 22-1 -- Prehearing Filings
Date: Monday, July 17, 2023 11:32:29 AM
Attachments: [image002.png](#)
[image003.png](#)

Counsel – we are not withdrawing Ms. McMullen from Complaint Counsel’s witness list. First, as you note, Complaint Counsel identified Ms. McMullen in our Fourth Supplemental Responses to Leachco’s First Set of Interrogatories served on May 11, 2023 (JX-48 at 9) pursuant to 16 C.F.R. § 1025.31(f). Since that date (more than two months) you have not once communicated with Complaint Counsel about that supplemental response, or taken any action to depose Ms. McMullen if that is what you wanted to do.

More fundamentally, Ms. McMullen is not under Complaint Counsel’s control. She is a third-party witness. You were always able to seek a subpoena under the Rules of Practice for Adjudicative Proceedings for her testimony. You did not do so and now cannot complain about your own failure to conduct discovery. Moreover, you were aware of Ms. McMullen for years prior to the filing of this action – Leachco was sued by her and Leachco deposed Ms. McMullen in her lawsuit. Her testimony will relate to one of the three fatal incidents in this case and you cannot seriously be claiming surprise that she might be a witness.

Finally, the witness list was filed on July 14, 2023 per the Court’s September 16, 2023 scheduling order which you agreed to, *see* Dkt. No. 13 at 7 (“[t]he Parties expect to submit the names of anticipated witnesses and exhibits in the timeframes ordered by the Presiding Officer”), and the Court imposed. It is completely without merit to say that disclosing a witness per the Court’s schedule is improper or untimely. Indeed, your interrogatory responses took this same approach. None of your witnesses on your July 14, 2023 witness list other than Ms. Shibata were disclosed by you in discovery. Your Second Supplemental Response to Interrogatory No. 6 served on April 28, 2023 (JX-44 at 1-2) only specifically disclosed Ms. Shibata and did not disclose anyone else on your witness list. Your response stated in part: “Leachco responds that it will identify all fact witnesses that it intends to call at the Hearing by July 14, 2023 when witness lists are due.” JX-44 at 2. That is exactly how Complaint Counsel responded to the interrogatory.

Your request is wholly without merit. It ignores basic tenets of discovery, the Court’s schedule, your own knowledge of the witness at issue and your own deposition of her, your own conduct and our discovery responses. Any motion filed would also be out of time and contrary to the prehearing schedule. If you file a motion and waste our valuable time, we will be requesting sanctions be imposed against you.

Michael J. Rogal

Trial Attorney

U.S. Consumer Product Safety Commission

Division of Enforcement and Litigation | Office of Compliance and Field Operations

4330 East West Highway | Bethesda, MD 20814

Office: (301) 504-7528 | **Cell:** (240) 743-7330 | mrogal@cpsc.gov | www.cpsc.gov



From: Oliver J. Dunford <ODunford@pacificlegal.org>
Sent: Monday, July 17, 2023 9:37 AM
To: Ruff, Brett <BRuff@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>
Cc: John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>
Subject: RE: In re Leachco, Inc. -- CPSC Docket No. 22-1 -- Prehearing Filings

Counsel,

We ask that you withdraw Ms. McMullen from your witness list. As you know, Leachco asked the Commission to “[i]dentify any Person who was a witness to or has knowledge of the facts, circumstances and events that are related to the relief requested in the Complaint, or who otherwise has knowledge relevant to the issues in this case...” Leachco ROG No. 2. You did not identify Ms. McMullen during fact discovery. As a result, it’s improper to attempt to call her as a witness at the hearing. That you belatedly identified her—seven weeks after the close of fact discovery, in your Fourth Supplemental Responses to Leachco’s First Set of Interrogatories—confirms that she should have been named in your initial responses. And, of course, you’ve known of Ms. McMullen for at least seven years, when the Commission began investigating the alleged McMullen incident. There is no justification for failing to identify her.

Further, Leachco will be prejudiced if she is allowed to testify. As you argued, and as Judge Young agreed, the Commission’s claim here is not a common law tort claim. Therefore, if Ms. McMullen was to be a witness at the hearing, we were entitled to depose her about “the facts, circumstances and events that are *related to the relief requested in the Complaint*, or [her] knowledge *relevant to the issues in this case....*” Leachco ROG No. 2 (emphasis added). Therefore, the Commission can’t excuse its failure to timely identify Ms. McMullen on the ground that Leachco was also aware of her. As Judge Young has repeatedly told the parties, trial is not a game of surprise.

Please let us know by **Noon today** whether you will withdraw Ms. McMullen as a witness in this case. If not, we will file a Motion with Judge Young and request sanctions for the costs of preparing the Motion. We believe that a prompt resolution is needed, if for no other reason, than that Ms. McMullen should not make unnecessary travel arrangements. The resolution will also affect how Leachco

prepares for trial—prejudiced as it already is by having to take time away from trial preparation to respond to the Commission’s improper action.

Thank you,

Oliver J. Dunford | Senior Attorney

Pacific Legal Foundation

4440 PGA Blvd., Suite 307 | Palm Beach Gardens, FL 33410

916.503.9060 (Direct) | 216.702.7027 (Cell)



**PACIFIC LEGAL
FOUNDATION**

Defending Liberty and Justice for All.
