

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 IN LIMINE AND MEMORANDUM
IN SUPPORT TO ADMIT IN-DEPTH INVESTIGATION REPORTS**

At a recent meet and confer between the parties concerning various pre-trial issues, Respondent Leachco Inc. indicated to Complaint Counsel that it would not agree to the admissibility of the In-Depth Investigations concerning incidents involving the Podster that have been produced in this litigation. As a result, Complaint Counsel files this motion *in limine* to request that this Court rule these In-Depth Investigations and an accompanying medical examiner’s report, identified as JX-6 through JX-12B on the parties’ Joint Exhibit List, be admissible at the hearing in this proceeding.

CPSC In-Depth Investigation Reports

In furtherance of the mission of the U.S. Consumer Product Safety Commission (“CPSC”), CPSC Field staff conduct in-depth investigations of incidents, commonly referred to as “IDIs.” An IDI is conducted on a specific incident involving a consumer product within CPSC’s jurisdiction. CPSC Field staff are located throughout the United States and are assigned IDIs based on their geographic location and the location of the specific incident under investigation. Every IDI the CPSC conducts is based on a source document, which may come

from a variety of reporting sources, including consumers, news media, medical examiners (“MECAP reports”), trade associations, and other sources that report incidents to the Commission.

IDs, in their final form, contain factual summaries of investigations into events surrounding consumer product-related injuries or incidents. IDs typically contain a narrative summarizing any victim/witness interviews and a list of exhibits, which may include any relevant police or fire reports, medical records (including MECAP reports where applicable), photos/description of the consumer product involved in the incident, and the scene/area where the incident occurred. Each ID generally only provides factual information about the details of the incident sequence, human behavior surrounding the incident, and the consumer product involvement in the specific incident investigated.¹

The three Podster IDs, and an accompanying MECAP report, at issue here are attached to the Declaration of Frederick C. Millett filed concurrently with this memorandum. Redacted and unredacted versions of these documents are also included in the parties’ Joint Exhibit List as JX-6 through JX-12B. Each Podster ID investigates a specific fatal incident involving a Podster. CPSC Field staff investigated each of the Podster incidents, which occurred in Alabama, Texas, and Virginia. Each of these three IDs are in line with CPSC Field staff procedures, containing a written narrative report and list of exhibits. Each narrative report contains factual information about the incident based on witness interviews conducted by CPSC Field staff.

Specifically, the Alabama ID (JX-6 and JX-7) contains, among other things, an incident narrative, information and photos from the Alabama daycare licensing agency, a medical examiner’s/coroner’s report, a police report (containing medical records), and a fire

¹ See, e.g., United States Consumer Product Safety Commission, Guide to Public Information, available at: <https://www.cpsc.gov/Newsroom/FOIA/Guide-to-Public-Information>.

department/EMS report. Similarly, the Texas IDI (JX-8 and JX-9) contains, among other things, an incident narrative, a medical examiner's report, a police report (including scene photographs), and a fire department/EMS report. Finally, the Virginia IDI is accompanied by a MECAP report (JX-10, JX-11, JX-12A, and JX-12B) and also contains, among other things, an incident narrative, a police report (including scene photographs), and a fire department/EMS report.

Discussion

Pursuant to the Commission's Rules of Practice for Adjudicatory Proceedings, "all relevant and reliable evidence is admissible" unless the Presiding Officer determines that "its probative value is substantially outweighed by unfair prejudice or confusion of the issues," or certain other factors apply. 16 C.F.R. § 1025.43(c). The IDIs and related documents involving the Podster are relevant, as they involve three deaths that occurred on the very product that is at issue in this proceeding.

The Commission's Rules also note that "the Federal Rules of Evidence shall apply to all proceedings held pursuant to these Rules," but the Federal Rules of Evidence ("FRE") "may be relaxed by the Presiding Officer if the ends of justice will be better served by so doing." 16 C.F.R. § 1025.43(a).² Leachco may argue that these documents should not be admitted into evidence because they contain hearsay, and thus may not be reliable. However, even without any relaxation of the FRE, case law clearly acknowledges the admissibility of these documents under the public records exception to the hearsay rule.

The Commission's Rules do not address hearsay directly. *See generally* 16 C.F.R. §

² *See also Conley v. N.L.R.B.*, 520 F.3d 629, 640 (6th Cir. 2008) ("[A]dministrative law judges are 'not obliged to strictly adhere to the Federal Rules of Evidence.'" (*citing 3750 Orange Place Ltd. P'ship v. N.L.R.B.*, 333 F.3d 646, 666 (6th Cir. 2003))); Wright & Miller, 32 Fed. Prac. & Proc. Judicial Review § 8237 (2d ed.) (May 2023 update) ("Generalizing, administrative tribunals take a much less strict approach to admissibility than federal trial courts. The obvious policy rationale for this relatively relaxed approach is that administrative tribunals need not, unlike federal courts, protect lay juries from evidence that they are purportedly likely to misunderstand.").

1025.43. The FRE define hearsay as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of a matter asserted in the statement.” Fed. R. Evid. 801(c). FRE 802 deems hearsay inadmissible unless an exception to the hearsay rule applies.

FRE 803 provides exceptions to the rule against hearsay. The exceptions in FRE 803 apply regardless of whether the declarant is available as a witness. One of these enumerated exceptions is the “public records” exception: “A record or statement of a public office” that “sets out . . . factual findings from a legally authorized investigation” as long as “the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.” Fed. R. Evid. 803(8)(A)(iii)-(B). This exception to the hearsay rule is based on the assumption that public officials will perform their duties properly and the unlikelihood that they will remember details independently of the record. Advisory Committee’s Note to Rule 803 of the Federal Rules of Evidence; *see also Bradford Tr. Co. of Bos. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 805 F.2d 49, 54 (2d Cir. 1986) (“This rule is premised on the assumption that public officials perform their duties properly without motive or interest other than to submit accurate and fair reports.”).

Pursuant to the Consumer Product Safety Act, “[t]he Commission shall . . . conduct such continuing studies and investigations of deaths, injuries, diseases, other health impairments, and economic losses resulting from accidents involving consumer products as it deems necessary.” 15 U.S.C. § 2054(a)(2). The Commission may also “conduct research, studies, and investigations on the safety of consumer products.” 15 U.S.C. § 2054(b)(1). Therefore, Commission IDIs consist of factual findings that are the result of legally-authorized investigations, and qualify for an exception to the hearsay rule under FRE 803(8)(A)(iii). As noted above, each Podster IDI in

this matter contains narratives and is accompanied by official reports documenting factual information about the incident. On this basis alone, the documents are admissible in this matter.

However, if this Court deems that IDIs are in part evaluative rather than purely factual, they still qualify for the public records exception. The Supreme Court has acknowledged that FRE 803(8)(A)(iii) “excepts investigatory reports from the hearsay rule.” *Beech Aircraft Co. v. Rainey*, 488 U.S. 153, 160 (1988). In *Rainey*, the issue was whether the “opinion” section of a government investigation report was excepted from the hearsay rule to the same extent as a factual section. A Navy Lieutenant Commander prepared an investigative report examining the causes of a military plane crash. The report contained sections titled “finding of fact,” “opinion,” and “recommendation,” and also contained 60 attachments. *Id.* at 157. The factual findings were based in part on “information gained from eyewitnesses.” *Id.* at 157 n.2. The Supreme Court held that “factually based conclusions or opinions are not on that account excluded from the scope of Rule 803(8)[(A)(iii)],”³ *id.* at 162, and that both the factual section and opinion section qualified for the hearsay exception. The Court stated:

the language of the Rule does not state that “factual findings” are admissible, but that “*reports . . . setting forth . . . factual findings*” (emphasis added) are admissible. On this reading, the language of the Rule does not create a distinction between “fact” and “opinion” contained in such reports.

Id. at 164. *Rainey* further observed that “the distinction between statements of fact and opinion is, at best, one of degree.” *Id.* at 168.

Similar to *Rainey*, Commission IDIs contain factual findings developed by CPSC Field staff based on interviews of eyewitnesses, official police/fire/medical reports, and, when applicable, investigation of the consumer product and scene of the incident. Notably, the Podster

³ FRE 803 was amended in 2011. Before the amendment, the current FRE 803(8)(A)(iii) was numbered FRE 803(8)(C).

IDs do not contain the field investigator's opinions about what likely caused each incident, only factual findings detailing each investigator's witness interviews and the official findings in the police, fire, and/or medical examiner reports. Thus, these IDs are even more factual-based than the admissible report in *Rainey* and there should be no reasonable dispute that these IDs are admissible at the hearing in this proceeding. Further, under the reasoning of *Rainey*, each ID in its entirety qualifies as an admissible public record under FRE's 803(A)(iii) exception to hearsay. This includes all exhibits included in each ID, which were made part of the official investigatory record.

The effect of FRE 803(8) is to make reports or records of public offices or agencies presumptively admissible. As mentioned above, FRE 803(8)(B) and *Rainey* state that the public record, although otherwise admissible, may be excluded if "the sources of information or other circumstances indicate lack of trustworthiness." *Rainey*, 488 U.S. at 167 ("[T]his trustworthiness inquiry—and not an arbitrary distinction between 'fact' and 'opinion'—was the Committee's primary safeguard against the admission of unreliable evidence."). The party challenging the admissibility of the evidence has the burden to prove untrustworthiness. See *Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 301 (4th Cir. 1984). As the court in *Ellis* noted:

Placing the burden on the opposing party makes considerable practical sense. Most government sponsored investigations employ well accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered. Rather than requiring the moving party to spend considerable time and money to ensure that the experts who conducted the study are available at trial, it is far more equitable to place that burden on the party seeking to demonstrate why a time tested and carefully considered presumption is not appropriate.

Id.; see also *Bradford*, 805 F.2d at 54 ("To exclude evidence which technically falls under 803(8)[(A)] there must be 'an affirmative showing of untrustworthiness, beyond the obvious fact that the declarant is not in court to testify.'") (quoting *Kehm v. Proctor & Gamble*, 724 F.2d 613,

618 (8th Cir. 1983)).

During the parties' meet and confer regarding this issue, Leachco did not proffer any argument why the Podster IDIs are untrustworthy. Thus, there is no indication that Leachco could meet its heavy burden to prove that the Podster IDIs—official, legally-authorized public records of CPSC Field staff investigations of the Podster incidents—are untrustworthy. And they are not. As noted above, the IDIs are compiled from Field staff's witness interviews and collection of official documents, such as police reports and medical records.

Further, admitting these documents into evidence prior to the hearing will streamline and expedite the proceedings. Specifically, Complaint Counsel will not need to call three additional witnesses for the sole purpose of admitting these documents into evidence; documents that, based on the case law cited above, are presumed to be admissible. In any event, given the flexibility for admitting evidence in the CPSC Rules of Practice—and in administrative proceedings generally—the Court can admit these IDIs and weigh the evidence accordingly, without potentially confusing or prejudicing a jury. *See* fn. 2, *supra*.

As a result, Complaint Counsel asks this Court to admit into evidence the three Podster IDIs and the accompanying MECAP report (JX-6, JX-7, JX-8, JX-9, JX-10, JX-11, JX-12A, and JX-12B) at issue in this proceeding.

Dated this 14th day of July, 2023

Respectfully submitted,

/s/ Frederick C. Millett

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**[PROPOSED] ORDER ON COMPLAINT COUNSEL’S MOTION IN LIMINE
TO ADMIT IN-DEPTH INVESTIGATION REPORTS**

This matter, having come before the Presiding Officer on Complaint Counsel’s Motion in Limine to Admit In-Depth Investigation Reports dated July 14, 2023, it is hereby ORDERED that Complaint Counsel’s Motion is GRANTED.

It shall be further ORDERED that joint exhibits JX-6, JX-7, JX-8, JX-9, JX-10, JX-11, JX-12A, and JX-12B from the Joint Exhibit List shall be admitted in evidence at the hearing in this Proceeding.

Done and dated _____ 2023.

Michael G. Young
Administrative Law Judge