UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

IN THE MATTER OF	CPSC Docket No. 22-1
LEACHCO, INC.	HON. MICHAEL G. YOUNG PRESIDING OFFICER

LEACHCO, INC.'S OPPOSITION TO THE COMMISSION'S MOTION TO AMPLIFY DIRECT EXPERT TESTIMONY

The Court should deny the Commission's eve-of-trial request to expand the direct testimony of its proffered experts Celestine Kish and Erin Mannen. As the Commission concedes, under its rules, the direct testimony of an expert witness "shall be in writing" and "shall constitute the [witness's] testimony," 16 C.F.R. 1025.44(b), and the Commission has submitted the written reports of its proffered experts. The Commission's belated request for a second bite at the apple is therefore improper, and it would prejudice Leachco, which cannot properly prepare for cross-examination based on new and unknown testimony.

The Commission's request amounts to a classic bait-and-switch: Throughout this case, the Commission opposed any modifications to its expert-witness rules. For example, during scheduling discussions last fall, Leachco sought to include expert-witness depositions. The Commission's counsel refused, "as there is no provision for deposing expert witnesses under the [Commission's] Rules of Practice." *See* Ex. A, Sept. 12, 2022 B. Ruff Email. Similarly, because the Commission has the burden of proof, Leachco proposed that the Commission serve its expert materials first so that Leachco could prepare a rebuttal report. Again, the Commission refused to consider

any alteration from its rules: "[W]e cannot agree …. [T]he Rules of Practice do not contemplate Complaint Counsel's expert materials being produced before Respondent's." *See* Ex. A, Sept. 13, 2022 B. Ruff Email.

The Commission again demanded strict adherence to its expert-witness rules even when Leachco proposed to conduct a *fact* deposition of Ms. Kish. During a hearing on that matter, the Commission's counsel stated that it wanted to prevent Leachco from delving into expert-related topics because of "the restrictions on expert discovery under the [Commission's] rules." *See* Ex. B, Mar. 10, 2023 Tr. 6:20–21.

At the same hearing, the Court too noted the Commission's rules on expert witnesses. In response to a question from the Court about expert depositions, Leachco's counsel noted that the rules generally don't provide for expert depositions but asked if the Court would allow them. Ex. B, Mar. 10, 2023 Tr. 30:7–19. *See* 16 C.F.R. 1025.31(c)(4)(i)(B) (permitting Presiding Officer to "order further discovery" of experts "upon a showing of substantial cause"). The Court explained the extraordinarily high showing that would be needed: [redacted] *See id*. 30:20–31:5.

Accordingly, from the very beginning of the case, the Commission repeatedly and consistently demanded strict adherence to its expert-witness rules and refused to consider any changes. It should not be allowed to change these rules now.

Nor is there good cause to. The Commission claims that expert "amplification" would be relevant, helpful, and not prejudicial. CPSC Mtn. 2, 3. But relevance and helpfulness are baseline expert-testimony requirements. *See* Fed. R. Evid. 702; Leachco's *Daubert* Mtn at 3–4. They do not form the basis of a "good cause" exception to rules that have applied to both parties throughout the litigation.

And the Commission's proposed "amplification" would obviously prejudice Leachco. Because of the Commission's rules, Leachco has prepared to cross-examine Dr. Mannen and Ms. Kish based on their written testimony. 16 C.F.R. 1025.31(c), 1025.44(b). Leachco has not prepared—and *cannot prepare*—for brand-new expert testimony from these witnesses.

Further, the Commission's sudden reliance (Mtn. at 3) on federal cases discussing federal rules is misplaced. Of course, the procedure would be different in federal court. There, parties prepare for expert trial testimony based on rules that (1) preclude the admission of written reports as hearsay and (2) provide for expert depositions. But, again, Complaint Counsel decided to rely solely on its experts' written submissions and refused to consider expert depositions because "the rules for expert discovery in this proceeding are different than those in the Federal Rules." Ex. A, Sept. 12, 2022 B. Ruff Email.

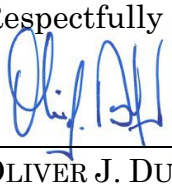
Finally, because the Commission should not be permitted to add direct expert testimony at the hearing, the Court should also preclude the Commission from using proposed "demonstrative" exhibits created by Dr. Mannen, apparently for the requested additional direct testimony. *See* CPSC Exhibit List, CCX-44–CCX-56.

* * *

This Court repeatedly reminded the parties that the hearing is not a game of surprise. The Commission should not be allowed to insist upon strict adherence to its expert-witness rules during discovery only to change those rules at the last minute. Such a change would prejudice Leachco—which has prepared for trial according to the Commission's rules and its consistent expert-witness representations. The Court should deny the Commission's Motion to Amplify Direct Expert Testimony.

DATED: July 24, 2023.

Respectfully submitted,



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Counsel for Respondent Leachco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2023, I served, by electronic mail, the foregoing was served upon all parties and participants of record:

Honorable Michael G. Young
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Brett Ruff, Trial Attorney
Rosalee Thomas, Trial Attorney
Caitlin O'Donnell, Trial Attorney
Michael Rogal, Trial Attorney
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Oliver J. Dunford
Counsel for Respondent Leachco, Inc.

Exhibit A

From:	Ruff, Brett
To:	Oliver J. Dunford; Ippolito, Leah; Thomas, Rosalee; Rogal, Michael; ODonnell, Caitlin
Cc:	Bettina J. Strauss (bjstrauss@bclplaw.com); John F. Kerkhoff; Frank Garrison; James P. Emanuel Jr. (james.emanuel@bclplaw.com)
Subject:	RE: In re: Leachco, CPSC Docket No. 22-1
Date:	Tuesday, September 13, 2022 1:38:00 PM
Attachments:	image001.png

Oliver,

We received your letter this afternoon about Leachco's discovery concerns. We are not going to have an opportunity to fully evaluate your concerns before tomorrow morning's call, so let's postpone the call until Thursday. We remain available to speak between 9:30 a.m. and noon on Thursday.

With respect to your proposed schedule, we cannot agree to a schedule that contemplates Complaint Counsel's expert materials being due a month before Leachco's. We think a simultaneous exchange of expert materials is appropriate, and the Rules of Practice do not contemplate Complaint Counsel's expert materials being produced before Respondent's.

Brett Ruff
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

From: Oliver J. Dunford <ODunford@pacificlegal.org>
Sent: Tuesday, September 13, 2022 12:50 PM
To: Ruff, Brett <BRuff@cpsc.gov>; Ippolito, Leah <LIppolito@cpsc.gov>; Thomas, Rosalee <RBThomas@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; ODonnell, Caitlin <CODonnell@cpsc.gov>
Cc: Bettina J. Strauss (bjstrauss@bclplaw.com) <bjstrauss@bclplaw.com>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>; James P. Emanuel Jr. (james.emanuel@bclplaw.com) <james.emanuel@bclplaw.com>
Subject: RE: In re: Leachco, CPSC Docket No. 22-1

Please see attached.

Oliver J. Dunford | Senior Attorney
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4440 PGA Blvd., Suite 307 | Palm Beach Gardens, FL 33410
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PACIFIC LEGAL FOUNDATION
Defending Liberty and Justice for All.

From: Oliver J. Dunford

Sent: Monday, September 12, 2022 5:24 PM
To: Ruff, Brett <BRuff@cpsc.gov>; Ippolito, Leah <LIppolito@cpsc.gov>; Thomas, Rosalee <RBThomas@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; ODonnell, Caitlin <CODonnell@cpsc.gov>
Cc: Bettina J. Strauss (bjstrauss@bclplaw.com) <bjstrauss@bclplaw.com>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>; James P. Emanuel Jr. (james.emanuel@bclplaw.com) <james.emanuel@bclplaw.com>
Subject: RE: In re: Leachco, CPSC Docket No. 22-1

Brett,

Yes, please send the call-in number to everyone here.

In light of the Commission's expert-discovery rules, we believe that it's appropriate for Complaint Counsel to complete expert discovery before Leachco. Complaint Counsel, of course, has the burden of establishing the Commission's allegations, to which Leachco must respond. Accordingly, we propose the following:

Event	Previous Deadlines	New Deadlines
Responses to First Set of Requests for Production of Documents and First Set of Interrogatories, including revised privilege log(s)	May 13, 2022	October 3, 2022
Last day to serve any written discovery requests	December 2, 2022	February 2, 2023
Fact Discovery closes (pending motions to compel)	January 20, 2023	March 20, 2023
Complaint Counsel Responses to Expert Interrogatories under 16 C.F.R. § 1025.31(c)(4)(i)(A) and Expert Witness Direct Testimony under 16 C.F.R. § 1025.44(b)		April 21, 2023
Leachco, Inc. Responses to Expert Interrogatories under 16 C.F.R. § 1025.31(c)(4)(i)(A) and Expert Witness Direct Testimony under 16 C.F.R. § 1025.44(b)		May 19, 2023
Discovery Deadline (pending motions to compel)		May 19, 2023
Motions for Summary Decision	February 3, 2023	June 16, 2023
Responses to Motion for Summary Decision	March 17, 2023	July 7, 2023

Prehearing Briefs	April 14, 2023	July 21, 2023
Witness and Exhibit Lists, Stipulations, and Prehearing Briefs, including Motions in Limine	May 1, 2023	July 28, 2023
Hearing (estimate two weeks)	June 5, 2023	August 7, 2023
Post-hearing briefs (16 C.F.R. § 1025.46)	50 days after hearing	50 days after hearing
Replies to post-hearing briefs (16 C.F.R. § 1025.46)	15 days after briefs	15 days after briefs

Thank you,
Oliver

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PACIFIC LEGAL FOUNDATION
Defending Liberty and Justice for All.

From: Ruff, Brett <BRuff@cpsc.gov>
Sent: Monday, September 12, 2022 3:55 PM
To: Oliver J. Dunford <ODunford@pacificlegal.org>; Ippolito, Leah <LIppolito@cpsc.gov>; Thomas, Rosalee <RBThomas@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; ODonnell, Caitlin <CODonnell@cpsc.gov>
Cc: Bettina J. Strauss (bjstrauss@bclplaw.com) <bjstrauss@bclplaw.com>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>; James P. Emanuel Jr. (james.emanuel@bclplaw.com) <james.emanuel@bclplaw.com>
Subject: RE: In re: Leachco, CPSC Docket No. 22-1

Oliver,

11:00 a.m. Eastern on Wednesday will work well. We will circulate a call-in number. Should it be sent to everyone on this email chain?

Your revision with respect to the "Related Prehearing Motions" and "Motions in Limine" redundancy looks good.

We are amenable to making the expert witness testimony due after the close of fact discovery, but we would want to clarify what is due on April 21 because the rules for expert discovery in this proceeding are different than those in the Federal Rules. Instead of "Expert Witness Disclosure & Written Report"—neither of which is required under the Rules of Practice, we

request that the April 21 date be revised to state: "Responses to Expert Interrogatories under 16 C.F.R. § 1025.31(c)(4)(i)(A) and Expert Witness Direct Testimony under 16 C.F.R. § 1025.44(b)". April 21 also could be the close of discovery, as there is no provision for deposing expert witnesses under the Rules of Practice.

Thank you,

Brett Ruff
Trial Attorney
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From: Oliver J. Dunford <ODunford@pacificlegal.org>
Sent: Monday, September 12, 2022 2:40 PM
To: Ruff, Brett <BRuff@cpsc.gov>; Ippolito, Leah <LIppolito@cpsc.gov>; Thomas, Rosalee <RBThomas@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; ODonnell, Caitlin <CODonnell@cpsc.gov>
Cc: Bettina J. Strauss (bjstrauss@bclplaw.com) <bjstrauss@bclplaw.com>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>; James P. Emanuel Jr. (james.emanuel@bclplaw.com) <james.emanuel@bclplaw.com>
Subject: RE: In re: Leachco, CPSC Docket No. 22-1

Brett,

First, let's plan to talk at 11:00 Eastern on Wednesday. Would you please confirm?

Further, with respect to your comments, we agree that it makes sense to complete expert discovery before the deadline for Motions for Summary Decisions. But the March 20, 2023 deadline would not allow sufficient time to complete all discovery. Instead, we propose to move other dates back, as set forth below. Note that this proposal maintains the August 7 hearing date from the previous proposal. I've also addressed the redundancy of "Related Prehearing Motions" and "Motions in Limine."

Event	Previous Deadlines	New Deadlines
Responses to First Set of Requests for Production of Documents and First Set of Interrogatories, including revised privilege log(s)	May 13, 2022	October 3, 2022
Last day to serve any written discovery requests	December 2, 2022	February 2, 2023
Fact Discovery closes		

(pending motions to compel)	January 20, 2023	March 20, 2023
Expert Witness Disclosure & Written Report		April 21, 2023
Discovery Deadline (pending motions to compel)		May 19, 2023
Motions for Summary Decision	February 3, 2023	June 16, 2023
Responses to Motion for Summary Decision	March 17, 2023	July 7, 2023
Prehearing Briefs	April 14, 2023	July 21, 2023
Witness and Exhibit Lists, Stipulations, and all Prehearing Motions, including Motions in Limine	May 1, 2023	July 28, 2023
Hearing (estimate two weeks)	June 5, 2023	August 7, 2023
Post-hearing briefs (16 C.F.R. § 1025.46)	50 days after hearing	50 days after hearing
Replies to post-hearing briefs (16 C.F.R. § 1025.46)	15 days after briefs	15 days after briefs

We look forward to your thoughts.

Thank you,
Oliver

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From: Ruff, Brett <BRuff@cpsc.gov>
Sent: Friday, September 9, 2022 11:05 AM
To: Oliver J. Dunford <ODunford@pacificlegal.org>; Ippolito, Leah <LIppolito@cpsc.gov>; Thomas, Rosalee <RBThomas@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; ODonnell, Caitlin

<CODonnell@cpsc.gov>
Cc: Bettina J. Strauss (bjstrauss@bclplaw.com) <bjstrauss@bclplaw.com>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>
Subject: RE: In re: Leachco, CPSC Docket No. 22-1

Oliver,

The two documents you sent generally look fine to us. We have three suggested revisions:

- The current and proposed schedules have line items for "Prehearing Briefs, **Related Prehearing Motions** and written expert testimony" and "Witness and Exhibit Lists, Stipulations and **Motions in Limine**". "Related Prehearing Motions" and "Motions in Limine" strike us as duplicative. We propose deleting "Related Prehearing Motions".

- We think it may be useful to both sides if we exchange written expert testimony prior to the deadline for Motions for Summary Decision. We propose moving "written expert discovery" from June 2023 to March 20, 2023, which also is the close of discovery.

- We see there is a gap in the signature block for Michael's title. He is a Trial Attorney.

With respect to a call next week, we could speak between 9:30 a.m. and noon Eastern on Wednesday or Thursday. Please let us know which time would work well for you during those periods.

Also, to confirm, we do not intend to move forward with the depositions of Leachco's employees on the September dates listed in their deposition notices. We can discuss depositions during our call next week.

Thank you,

Brett Ruff
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From: Ruff, Brett
Sent: Thursday, September 8, 2022 3:59 PM
To: Oliver J. Dunford <ODunford@pacificlegal.org>; Ippolito, Leah <LIppolito@cpsc.gov>; Thomas, Rosalee <RBThomas@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; ODonnell, Caitlin <CODonnell@cpsc.gov>
Cc: Bettina J. Strauss (bjstrauss@bclplaw.com) <bjstrauss@bclplaw.com>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>
Subject: RE: In re: Leachco, CPSC Docket No. 22-1

Oliver,

Thank you for preparing these documents. We still are checking on people's availability under the continued schedule, but we expect to be able to get back to you about these drafts tomorrow. We may have some minor suggested changes. We also will send some dates and times for a meet-and-confer call.

Thanks again,

Brett Ruff
Trial Attorney
U.S. Consumer Product Safety Commission
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From: Oliver J. Dunford <ODunford@pacificlegal.org>
Sent: Thursday, September 8, 2022 2:25 PM
To: Ippolito, Leah <LIppolito@cpsc.gov>; Ruff, Brett <BRuff@cpsc.gov>; Thomas, Rosalee <RBThomas@cpsc.gov>; odonnell@cpsc.gov; Rogal, Michael <MRogal@cpsc.gov>
Cc: Bettina J. Strauss (bjstrauss@bclplaw.com) <bjstrauss@bclplaw.com>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>
Subject: In re: Leachco, CPSC Docket No. 22-1

Counsel,

Two things. First, we've prepared drafts of a Joint Proposed Revised Prehearing Schedule and Proposed Order. Would you please let us know if we may file these?

Second, in light of the October 3, 2022 deadline for responding to initial discovery requests, we'd like to have a meet-and-confer call early next week. Would you please give us some dates and times when you're available for a call?

Thank you,
Oliver

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PACIFIC LEGAL FOUNDATION
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LEACHCO, INC.
OPPOSITION TO MOTION TO AMPLIFY

Exhibit B

Submitted for *in camera* review.