FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950
FAX: 202-434-9949

August 2, 2023

In the Matter of

LEACHCO, INC., CPSC Docket No. 22-1

Respondent.

ORDER DEFERING DECISION ON COMPLAINT COUNSEL'S MOTION IN LIMINE AND MEMORANDUM IN SUPPORT TO ADMIT IN-DEPTH INVESTIGATION REPORTS

Complaint Counsel moved to admit three In-Depth Investigation reports ("IDI") and accompanying medical examiner's reports, labeled JX-6–JX-12B, under the public records exception to hearsay. *See* Compl. Counsel's Mot. in Lim. & Memo. in Supp. to Admit In-Depth Investigation Rep., at 1, 4–5 (July 14, 2023). Respondent opposes the motion, asserting the IDIs do not meet the requirements for such an exception, and it requests the exhibits be excluded. *See* Leachco, Inc.'s Resp. in Opp'n to the Comm'n's Mot. in Lim. to Admit In-Depth Investigation Reps., at 1 (July 24, 2023).

The proffered exhibits are as follows:

- JX-6 – Epidemiological Investigation Report, Task No. 160519CCC2600
- JX-7 – Same (Unredacted)
- JX-8 – Epidemiological Investigation Report, Task No. 200917CCC3888
- JX-9 – Same (Unredacted)
- JX-10 – Epidemiological Investigation Report, Task No. 220916HCC1454
- JX-11 – Same (Unredacted)
- JX-12A – Report of Investigation, Virginia Dep't of Health, Office of the Chief Medical Examiner re: Task No. 220916HCC1454
- JX-12B – Same (Unredacted)

For the following reasons, this Court DEFERS ruling on Complaint Counsel's motion.

A public record, as an exception to hearsay, is "[a] record or statement of a public office if: (A) it sets out: (i) the office's activities; (ii) a matter observed while under a legal duty to report, but not including in a criminal case, a matter observed by law-enforcement personnel; or (iii) in a civil case . . . factual findings from a legally authorized investigation." Fed. R. Evid. 803(8)(A) (2023).

An opponent to such a claimed exception must "show that the source of information or other circumstances indicate a lack of trustworthiness." *Id.* 803(8)(B); *see Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir.1984) (quoting *Kehm v. Proctor & Gamble*, 724 F.2d 613, 618 (8th Cir. 1983)) ("'Admissibility in the first instance' is assumed because of the reliability of the public agencies usually conducting the investigation, and 'their lack of any motive for conducting the studies other than to inform the public fairly and adequately.'").

I. Virginia Department of Health Investigation Reports Are Public Records, but to the Extent They Contain Inadmissible Matters, They Must Be Redacted.

Medical examiner's reports have consistently been held as admissible under this exception. *See United States v. Rosa*, 11 F.3d 315, 333 (2d Cir. 1993) ("[M]edical examiners' reported observations are admissible under Rule 803(8)(B)."); *see also United States v. Feliz*, 467 F.3d 227, 237 (2d Cir. 2006) (noting that such reports are routine and do not constitute the "observations of police officers"); *Manocchio v. Moran*, 919 F.2d 770, 776 (1st Cir. 1990); *DeLatorre v. Minn. Life*, No. 04 CV 3591, 2005 WL 2338809, at *5 (N.D. Ill. Sept. 16, 2005).

Such reports, however, have been ordered redacted where they possess inadmissible matters. *See Manocchio*, 919 F.2d at 777 ("To the extent the report, in addition to medical observations, incorporates inadmissible matters based on police reports, these can be redacted.").

Respondent did not specifically challenge the proffered medical examiner reports, only asserting the *IDIs*—i.e., JX-6–11—are inadmissible hearsay uniformly held to fall outside the public records exception. *See* Opp'n at 3, 5. As the report was part of the examiner's activities, observed under its legal duties, and constituted factual findings of an authorized investigation, it is a public record. Further, Respondent has not challenged the report's trustworthiness, and its admissibility is based on the conduct of a regular investigation with no purported improper motive for conducting that investigation.

The report does, however, contain circumstances reported by third parties and third-party notes regarding placement on a pillow. *See* JX-12B, at 2, 5, 7, 14–16. To the extent JX-12A and 12B are admissible as public records, such references, or the third-party notes themselves, must be redacted.

II. IDIs Are Summaries of Third-Party Reports Not Entitled to a Hearsay Exception.

A. Hearsay evidence is admissible at this Court's discretion, but it does not carry significant weight.

Commission Rules do not directly address the admissibility of hearsay evidence. This Court may admit hearsay evidence at its discretion. *See* 16 C.F.R. § 1025.43(a) ("[T]he Federal Rules of Evidence may be relaxed by the Presiding Officer if the ends of justice will be better served by doing so.").[1]

[1] Complaint Counsel noted in another motion that "administrative litigations 'are not bound by the specific [*Daubert*] evidentiary strictures." Compl. Counsel's Opp'n to Leachco's Mot. in Lim. & Daubert Mot., at 5 (July 24, 2023) (quoting *Consolidation Coal Co. v. Dir., OWCP*, 294

Respondent demonstrated a high bar for what justifies the "ends of justice." Opp'n at 9 n.3 (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Chia v. Cambra*, 360 F.3d 997, 1003 (9th Cir. 2004). There are, however, examples in civil cases where courts have found that the ends of justice allow admission of evidence where something as serious as due process rights was not contemplated. *See*, *e.g.*, *United States ex rel. Fisher v. Ocwen Loan Servicing, LLC*, No. 4:12-cv-543, 2015 WL 3942900, at *3 (E.D. Tex. June 26, 2015) (acknowledging and "ends of justice" provision in a statute regarding the confidentiality of certain communications); *Cudd Pumping Servs., Inc. v. Coastal Chem. Co.*, No. 11-cv-1913, 2014 WL 198155, at *1 (W.D. La. Jan. 15, 2014) ("[T]he Court finds that the ends of justice tip in favor of allowing Plaintiff to attempt to prove its [new damage model] case . . . .").

Hearsay evidence will not carry much weight in this proceeding, especially if there is a better mechanism for demonstrating such evidence—e.g., direct fact witness or expert testimony. As such is expected to be present at hearing, little weight will be given to such reports. As this Court finds that the reports may be admissible if a foundation is properly established, *see* Section II.B., *infra*, the requirements for an "ends of justice" consideration will be part of the admissibility analysis.

B. IDIs may be used in examination, but the reports themselves are hearsay, and a foundation has not been established for their admission into evidence.

Respondent provided multiple examples where courts have specifically excluded such CPSC reports because they were recitals of witness statements and reports rather than actual investigations by CPSC personnel. *See Knotts v. Black & Decker, Inc.*, 204 F. Supp. 2 1029, 1041 (N.D. Ohio 2002); *C.O. v. Coleman Co.*, No. C06-1779 TSZ, 2008 WL 820066, at *2 n.6 (W.D. Wash. Mar. 25, 2008).[2] This Court finds these holdings persuasive.

It is worth noting that Complaint Counsel did not cite any authority wherein IDIs were admitted. It simply cited *Beech Aircraft Co. v. Rainey* to argue that "factually based conclusions or opinions are not on that account excluded from the scope of [the exception]." 488 U.S. 153, 162 (1988); *see* Mot. at 5. The court in *Coleman Co.*, however, effectively explained that *Rainey* involved conclusions or opinions "which were based upon the *author's own factual investigation*." 2008 WL 820066, at *2 n.6 (emphasis added). That court also cited *United*

F.3d 885, 893 (7th Cir. 2002). Acknowledging that this argument was made specifically to evaluation of expert testimony, this administrative Court recognizes its discretion to permit hearsay evidence.

[2] Though related, Respondent's other cited cases are not particularly instructive. In *Campos v. MTD Products, Inc.*, the court excluded a *summary* of CPSC reports, where it might have been admissible had the underlying investigation materials been admitted. No. 2:07-CV-00029, 2009 WL 2252257, at *7 (M.D. Tenn. July 24, 2009). Further, the court in *Lauderdale v. Wells Fargo Home Mortgage*, simply emphasized that victim statements in a police report are not admissible. 552 Fed. Appx. 566, 571 (6th Cir. 2014). That is pertinent to the fact that the reports are based on hearsay, but it is not specifically relevant to the IDIs here when compared to the other cases.

States v. Midwest Fireworks Mfg. Co., wherein laboratory *tests performed by CPSC technicians* were admitted as public records. 248 F.3d 563, 566–67 (6th Cir. 2001) (emphasis added).

As noted by the courts in *Knotts* and *Coleman Co.*, the IDIs are not investigations conducted by CPSC technicians, but summaries of media, police, and fire reports, and the medical examination report. *See* Mot. at 1–2. The IDIs will therefore not be deemed admissible now. They may be used in examination of witnesses, but this Court will defer judgment on admissibility until a foundation is laid. Each will be considered on a case-by-case basis in the context of the hearing.

III. Conclusion

This Court **DEFERS** ruling on the admissibility of Joint Exhibits 6–12B.

Complaint Counsel may **REDACT** JX-12A and JX-12B for reconsideration.

The exhibits may be used during witness examination, but they will not be admitted as evidence without a proper foundation.

Michael G. Young
Administrative Law Judge

Distribution:

Brett Ruff, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, bruff@cpsc.gov

Rosalee Thomas, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, rbthomas@cpsc.gov

Caitlin O'Donnell, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, codonnell@cpsc.gov

Michael J. Rogal, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, mrogal@cpsc.gov

Gregory Reyes, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, greyes@cpsc.gov

Frank Perilla, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, FPerilla@cpsc.gov

Thomas J. Mendel, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, tmendel@cpsc.gov

Oliver J. Dunford, Pacific Legal Foundation, 4440 PGA Blvd., Suite 307, Palm Beach Gardens, FL 33410, ODunford@pacificlegal.org

John F. Kerkhoff, Pacific Legal Foundation, 3100 Clarendon Boulevard, Suite 610, Arlington, VA 22201, JKerkhoff@pacificlegal.org

Frank Garrison, Pacific Legal Foundation, 3100 Clarendon Boulevard, Suite 610, Arlington, VA 22201, FGarrison@pacificlegal.org

Jessica L. Thompson, Pacific Legal Foundation, 3100 Clarendon Boulevard, Suite 610, Arlington, VA 22201, JLThompson@pacificlegal.org

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