SBP Set

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EDWARD BENNETT WILLIAMS (1920-1988)
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February 6, 2002

By Hand Delivery

RECEIVED
CPSC
OFFICE OF COMPLIANCE
2002 FEB -6 PM 2:17

Office of the Secretary
Consumer Product Safety Commission
4330 East-West Highway, Rm. 502
Bethesda, MD 20814

Re: CPSC Docket No.: 02-1
In the matter of Chemetron Corp., et al.

Dear Sir/Madam:

Enclosed for filing please find an original and four (4) copies of the following documents in the above-referenced matter:

1. Respondents' Second Set of Interrogatories; and

2. Respondents' First Requests for Admissions.

Please return one file-stamped copy of each document to the messenger for return to me. These documents are being served this date on all parties and participants of record in this proceeding.

Respectfully,

H.K. Hubbard

Heidi K. Hubbard

Enclosures

cc (w/encl.): Michael J. Gidding, Esq.
Seth B. Popkin, Esq.
Anthony Murawski, Esq.
Alan H. Schoem, Esq.
Eric L. Stone, Esq.
Michael A. Brown, Esq.
Ralph A. Weber, Esq.

SBP

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
	)	
Chemetron Corporation,	)	
f/k/a Chemetron Investments, Inc.	)	
	)	
and	)	
	)	
Chemetron Investments, Inc.,	)	CPSC Docket No.: 02-1
f/k/a Chemetron Corporation	)	
	)	
and	)	
	)	
Sunbeam Corporation	)	
	)	
and	)	
	)	
Sprinkler Corporation of Milwaukee, Inc.,	)	
f/k/a Star Sprinkler Corporation, f/k/a	)	
Grunau Sprinkler Manufacturing Company, Inc.	)	
	)	
and	)	
	)	
Grucon Corporation	)	
	)	

RESPONDENTS' SECOND SET OF INTERROGATORIES

Respondents Chemetron Corporation ("Chemetron"), Chemetron Investments, Inc. ("Chemetron Investments"), and Sunbeam Corporation ("Sunbeam"), through undersigned counsel, hereby propound the following interrogatories to the Complainant pursuant to 16 C.F.R. § 1025.32. Complainant is required to respond to each interrogatory, separately and fully in writing under oath, within thirty (30) days of the service of these interrogatories.

Complainant's responses should be sent to the offices of Williams & Connolly

LLP, 725 Twelfth St., N.W., Washington, D.C. 20005.

For the purposes of these interrogatories, the following definitions and instructions apply:

INSTRUCTIONS

A. In answering these interrogatories, furnish all information available to you, including any such information in the possession, custody, or control of your employees, directors, commissioners, officers, agents, or attorneys.

B. If in answering these interrogatories you encounter any ambiguity in construing the interrogatory, set forth the matter deemed ambiguous and the construction selected or used by you in answering the interrogatory.

C. If, pursuant to Section 1025.32 (d) of the CPSC Rules, 16 C.F.R. § 1025.32 (d), you elect to specify and produce business records in answer to any interrogatory, then in accordance with that Rule, provide your specification in sufficient detail to permit Respondents to locate and identify, as readily as possible, the records from which the answer may be ascertained.

D. In the event that information sought in any interrogatory is withheld on the basis of privilege or any other objection, then as to such information allegedly subject to such asserted privilege or objection, state the privilege, and describe generally the information withheld, including: (a) the person(s) to and from whom the information was sent, (b) all persons who have received a copy of the information, (c) the type of information (memo, letter, oral communication, etc.), and (d) the general subject matter of the information.

E. These interrogatories are to be deemed continuing in nature, requiring you to promptly supply, by way of supplemental response, any additional responsive information that may become known to you or anyone acting on your behalf after your answers have been prepared or served.

DEFINITIONS

A. "You," "your," "Complainant" and/or the "CPSC" refers to the Consumer Product Safety Commission, including the Office of Compliance of the CPSC, and any employees or agents of the CPSC.

B. The "Complaint" means the Complaint filed in this action on October 9, 2001, and any amendments thereto.

C. "Respondents" refers to Chemetron Corporation, Chemetron Investments, Inc., and Sunbeam Corporation.

D. "Chemetron" refers to Chemetron Corporation.

E. "Chemetron Investments" refers to Chemetron Investments, Inc.

F. "Sunbeam" refers to Sunbeam Corporation.

G. "Person" or "persons" means all individuals and entities, including natural persons, representative persons, public or private corporations, companies, unincorporated associations, partnerships, organizations, government entities, groups or agencies, plus any divisions, departments, or units thereof.

H. "Star ME-1 fire sprinklers" or "Star ME-1's" means the Star ME-1 fire sprinklers at issue in the Complaint.

I. "Document" or "documents" is an all inclusive term and means any tangible thing upon which any expression, communication, or representation has

been recorded by any means, and shall include without limitation, written, printed, typed, recorded, or graphic matter, whether produced or reproduced or stored on paper, cards, tapes, film, electronic facsimile, computer storage devices or any other devices or media, including, but not limited to papers; books; letters; photographs; objects; tangible things; correspondence; telegrams; cables; telex messages; memoranda; notes; notations; records; work papers; transcripts; minutes; reports and recordings of telephone or other conversations, or of interviews, or of conferences, or of other meetings; affidavits; statements; opinions; proposals; reports; studies; analyses; audits; test results; charts; evaluations; contracts; agreements; journals; statistical records; ledgers; books of account; bookkeeping entries; financial statements; tax returns; vouchers; checks; check stubs; invoices; receipts; desk calendars; appointment books; diaries; lists; tabulations; summaries; sound recordings; computer printouts; data processing input and output; microfilms; all records kept by electronic, photographic, or mechanical means; and things similar to any of the foregoing, however denominated. When a document is requested or referred to, the request or reference shall include, but is not limited to, the original and each and every copy and draft thereof having writings, notations, corrections, or markings unique to such copy or draft.

J. "Identify" or "identification," when used in reference to a natural person, means to provide the following information:

1. his or her full name;

2. his or her business affiliation(s), position(s), title(s), and job description(s) during the period delineated in the interrogatory (and the dates during which each affiliation, position, title and

job description applied to him or her);

3. his or her present or last known business address (and the date of that last knowledge); and

4. his or her present or last known residence address (and the date of that last knowledge).

K. "Identify" or "identification," when used in reference to a corporation or other entity which is not a natural person, means to:

1. state the full name of such organization or entity;

2. state the form or nature of such organization (e.g., whether it is a corporation, partnership, etc. under the definition of "person" above);

3. state the address of the principal office or place of business of such organization or entity; and

4. in the event that such organization or entity has no active principal office or place of business, state the full name of a person who can provide information about the corporation or entity and its activities, and that person's current or last known business or personal residential address.

INTERROGATORIES

INTERROGATORY NO. 106: Identify the total number of years that you contend a "dry" type fire sprinkler should function before it needs to be replaced with a new fire sprinkler.

INTERROGATORY NO. 107: Describe in detail the general maintenance requirements for Star ME-1 fire sprinklers.

INTERROGATORY NO. 108: State how frequently you contend a "dry" type fire sprinkler must be serviced and/or tested after being installed in order to properly function during a fire.

INTERROGATORY NO. 109: Identify the standard water pressure, in psi, present in most commercial buildings. (b) (5) [redacted]

INTERROGATORY NO. 110: Identify the standard water pressure, in psi, present in most residential structures.

INTERROGATORY NO. 111: Do you contend that the CPSC may reject a remedy elected by a manufacturer, distributor, or retailer under 15 U.S.C. § 2064(d)? If so,

(a) describe in detail the circumstances under which the CPSC may reject a remedy elected by a manufacturer, distributor, or retailer under 15 U.S.C. § 2064(d);

(b) identify each instance within the past ten years in which the CPSC has rejected a remedy elected by a manufacturer, distributor, or retailer under 15 U.S.C. § 2064(d); and for each such instance:

(1) identify the product involved;

(2) identify the manufacturer, distributor, or retailer involved; and

(3) describe in detail the reasons behind the CPSC's decision to reject the remedy elected by the manufacturer, distributor, or retailer.

INTERROGATORY NO. 112: Has the CPSC ever permitted a manufacturer, distributor, or retailer to elect a remedy listed under 15 U.S.C. § 2064(d)? If so:

(a) identify each instance within the past ten years in which the CPSC has permitted a manufacturer, distributor, or retailer to elect a remedy listed under 15 U.S.C. § 2064(d);

(b) identify the manufacturer, distributor, or retailer involved; and

(c) describe in detail the circumstances under which the CPSC permitted the manufacturer, distributor, or retailer to elect a remedy listed under 15 U.S.C. § 2064(d).

INTERROGATORY NO. 113: Describe in detail the "similarities in design and defects between the Central Omega sprinklers and other sprinklers, including dry sprinklers and the Star ME-1," as stated in your response to Respondents' First Set of Interrogatories, Interrogatory No. 5.

INTERROGATORY NO. 114: Describe in detail the Central Omega Sprinkler.

INTERROGATORY NO. 115: Describe in detail the factual basis for your belief that the silent recall of Star ME-1's by Mealane Corporation in 1990 resulted from information that Star ME-1's may not operate properly under fire conditions, as

stated in your response to Respondents' First Set of Interrogatories, Interrogatory No. 5.

INTERROGATORY NO. 116: Describe in detail the factual basis for your understanding that sales of Star ME-1's by Chemetron occurred from in or about 1976 to in or about 1982, as stated in your response to Respondents' First Set of Interrogatories, Interrogatory No. 20.

INTERROGATORY NO. 117: Describe in detail the factual basis for your contention that although Star ME-1's were largely distributed to contractors and others for installation in buildings, "it is conceivable that some [Star ME-1's] were sold directly to consumers who served as their own contractors or who retained contractors to perform the installation," as stated in your response to Respondents' First Set of Interrogatories, Interrogatory Nos. 27-29 and 33.

INTERROGATORY NO. 118: Identify the total number of failure mode analyses conducted by or on behalf of the CPSC on Star ME-1's. (b) (5)

(b) (5)

INTERROGATORY NO. 119: Identify the total number of failure mode analyses reviewed by the CPSC staff on Star ME-1's. (b) (5)

INTERROGATORY NO. 120: Identify the total number of product design analyses conducted by or on behalf of the CPSC on Star ME-1's. (b) (5)

INTERROGATORY NO. 121: Identify the total number of product design analyses reviewed by the CPSC staff on Star ME-1's. (b) (5)

INTERROGATORY NO. 122: Identify the total number of pressure tests conducted by or on behalf of the CPSC on Star ME-1's.

INTERROGATORY NO. 123: Identify the total number of pressure tests reviewed by the CPSC staff on Star ME-1's.

(b) (5)

INTERROGATORY NO. 124: Describe in detail the factual basis for your estimate that Chemetron Corporation manufactured 200,000 Star ME-1's between 1977 through 1982.

INTERROGATORY NO. 125: Describe in detail the characteristics of a "consumer product" as that term is used by the CPSC.

INTERROGATORY NO. 126: Describe in detail the process by which Star ME-1's tested by or on behalf of the CPSC were removed from the buildings in which they were installed.

(b) (5)

(b) (5)

INTERROGATORY NO. 127: Describe in detail the factual basis for your belief that the Star ME-1's installed at Raley's supermarket were manufactured by Chemetron.

INTERROGATORY NO. 128: Describe in detail the factual basis for your belief that a Star ME-1 fire sprinkler that does not activate at or below 7 psi when tested has "failed," as stated in your response to Respondent First Set of Interrogatories, Interrogatory No. 64.

INTERROGATORY NO. 129: Do you contend that 7 psi is the standard water pressure present in most commercial buildings? If so, describe in detail the factual basis for your contention.

INTERROGATORY NO. 130: Do you contend that 7 psi is the standard water pressure present in most residential households? If so, describe in detail the factual basis for your contention.

INTERROGATORY NO. 131: Do you contend that a Star ME-1 fire sprinkler that does not activate at a water pressure of 7 psi when tested cannot activate properly in a fire? If so, describe in detail the factual basis for your contention.

INTERROGATORY NO. 132: Were any of the Star ME-1's tested by or on (b) (5) behalf of you altered by paint on the nozzle or sprinkler head? If so, fully explain how this factor was taken into account when testing the sprinkler heads and determining their failure rates.

INTERROGATORY NO. 133: Did you or those testing the Star ME-1's on your behalf, consider the prior maintenance history of the Star ME-1's tested? If so, describe in detail how the prior maintenance history of the Star ME-1's was considered when conducting the testing. If not, describe in detail why you did not consider the prior maintenance history of the Star ME-1's when conducting the testing.

INTERROGATORY NO. 134: Do you contend that the failure of a Star ME-1 fire sprinkler to operate at a water pressure of 7 psi constitutes a substantial product hazard? If so, describe in detail the factual basis for your contention.

INTERROGATORY NO. 135: Do you contend that if a Star ME-1 fire sprinkler operates at a 7 psi water pressure level when tested it does not contain a defect? If so, describe in detail the factual basis for your contention. If not, describe in detail why you do not make such a contention.

INTERROGATORY NO. 136: Describe in detail all tools used by you or by your agents, contractors, employees, or other third parties about whom you have knowledge, when removing for testing Star ME-1's that had been previously installed in buildings.

INTERROGATORY NO. 137: Did you or your agents, contractors or employees damage any Star ME-1's when removing them from buildings for testing? If so, were these Star ME-1's tested?

INTERROGATORY NO. 138: Describe in detail the chain of custody for each Star ME-1 fire sprinkler removed from a building for testing. Your response should include, without limitation, the following:

(a) an identification of all persons who participated in the removal of the Star ME-1 fire sprinkler;

(b) an identification of all locations where the Star ME-1 fire sprinkler has been stored or placed since removal, including whether the location was a secure location;

(c) an identification of all persons who were involved in the storage of the Star ME-1 fire sprinkler;

(d) an identification of all persons who had access to the Star ME-1 fire sprinkler;

(e) an identification of the current location of the Star ME-1 fire sprinkler; and

(f) an identification of all persons who currently have access to the Star ME-1 fire sprinkler.

INTERROGATORY NO. 139: Identify the consultants, manufacturers and third parties referenced in your response to Respondents First Set of Interrogatories, Interrogatory No. 53.

INTERROGATORY NO. 140: Identify the total number of Star ME-1's that you contend have been installed in nursing homes.

INTERROGATORY NO. 141: Identify the total number of Star ME-1's that you contend have been installed in health care facilities.

INTERROGATORY NO. 142: Identify the total number of Star ME-1's that you contend have been installed in day care centers.

INTERROGATORY NO. 143: Identify the total number of Star ME-1's that you contend have been installed in schools (as that term is used in 15 U.S.C. § 2052).

INTERROGATORY NO. 144: Identify the total number of Star ME-1's that you contend have been installed in residences or households (as those terms are used in 15 U.S.C. § 2052).

INTERROGATORY NO. 145: Identify the total number of consumers (as that term is understood by you) who are currently exposed to Star ME-1's.

INTERROGATORY NO. 146: Of the 180 Star ME-1's tested by or on behalf of the CPSC, identify the total number that were manufactured by Chemetron.

(b) (5)

INTERROGATORY NO. 147: Describe in detail the factual basis for your belief that if testing of Star ME-1's had not stopped at the pressures of 40 and 15 psi, the sprinklers tested would have failed to operate at pressures even higher than 40 psi, as stated in your response to Respondents' First Set of Interrogatories, Interrogatory No. 64.

INTERROGATORY NO. 148: Describe in detail the factual basis for your belief that the quantity and pressure levels of failures of Star ME-1's will likely increase, as stated in your response to Respondents' First Set of Interrogatories, Interrogatory No. 64.

INTERROGATORY NO. 149: Describe in detail the "interference and fit problems with the components" of Star ME-1's, as stated in your response to Respondents' First Set of Interrogatories, Interrogatory No. 64.

INTERROGATORY NO. 150: Describe in detail the "minimal engineering changes to the Star ME-1" identified by CPSC staff, as stated in your response to Respondents' First Set of Interrogatories, Interrogatory No. 64.

INTERROGATORY NO. 151: Describe in detail the factual basis for your belief that none of the engineering changes referenced in Interrogatory No. 147 eliminated the defect of the Star ME-1 fire sprinkler, as stated in your response to Respondents' First Set of Interrogatories, Interrogatory No. 64.

INTERROGATORY NO. 152: Describe in detail the factual basis for your belief that the longer a Star ME-1 fire sprinkler has been in use, the greater likelihood it will fail, as stated in your response to Respondents' First Set of Interrogatories, Interrogatory No. 64.

INTERROGATORY NO. 153: Describe in detail each and every way that you contend that the Star ME-1 fire sprinkler is inadequately designed and/or manufactured.

INTERROGATORY NO. 154: Describe in detail the "defect" in the Star ME-1 fire sprinkler that you contend renders it a substantial product hazard.

INTERROGATORY NO. 155: Describe in detail any differences in design and manufacturing between the Star ME-1 fire sprinkler and any dry sprinklers that are currently sold in the United States that you contend do not contain the alleged defect of the Star ME-1 fire sprinklers.

INTERROGATORY NO. 156: Identify the total number of fires that have occurred in locations where Star ME-1's were installed. (b) (5) [redacted]

INTERROGATORY NO. 157: Identify the total number of failures of Star ME-1's to activate in a fire (b) (5) [redacted]

INTERROGATORY NO. 158: For each fire in which a Star ME-1 fire sprinkler failed to activate describe in detail the investigation conducted. Your response should include, without limitation, the following:

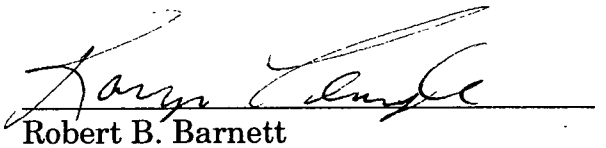
(a) a description of all steps taken to investigate the fire and the cause of the failure of the Star ME-1 fire sprinkler to activate;

(b) an identification of all persons who participated in the investigation; and

(c) a description of any findings or conclusions rendered as a result of the investigation.

INTERROGATORY NO. 159: For each manufacturer of Star ME-1's, describe in detail any warranties offered by that manufacturer on Star ME-1's.

Respectfully submitted,



Barbara Wrubel
Bert L. Wolff
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

Robert B. Barnett
Heidi K. Hubbard
Karyn A. Temple (admitted only in NY;
supervision by the above attorneys,
members of the DC Bar)
WILLIAMS & CONNOLLY LLP
725 - 12th St., N.W.
Washington, DC 20005
(202) 434-5000

Attorneys for Chemetron Corporation, Chemetron Investments, Inc., and Sunbeam Corporation

Dated: February 6, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of the foregoing Respondents' Second Set of Interrogatories upon all parties and participants of record in these proceedings on this 6th day of February, 2002, by hand-delivery on:

Michael J. Gidding, Esq.
Seth B. Popkin, Esq.
Anthony Murawski, Esq.
Alan H. Schoem, Esq.
Eric L. Stone, Esq.
Office of Compliance
Consumer Product Safety Commission
4330 East-West Highway, Rm. 613
Bethesda, MD 20814

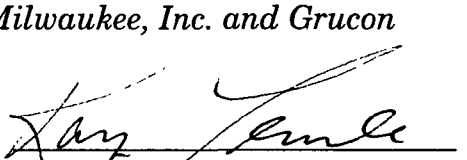
Counsel for Complainant, Consumer Product Safety Commission

Michael A. Brown, Esq.
Brown & Freeston, P.C.
3201 New Mexico Ave., NW
Suite 242
Washington, DC 20016-2756

with copy by U.S. mail, postage pre-paid to:

Ralph A. Weber, Esq.
Reinhart, Boerner, Van Deuren,
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1000 North Water St.
P.O. Box 514000
Milwaukee, WI 53203-3400

Counsel for Sprinkler Corporation of Milwaukee, Inc. and Grucon Corporation



Karyn A. Temple

(b) (5)

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
Chemetron Corporation, f/k/a Chemetron Investments, Inc.	
and	
Chemetron Investments, Inc., f/k/a Chemetron Corporation	CPSC Docket No.: 02-1
and	
Sunbeam Corporation	
and	
Sprinkler Corporation of Milwaukee, Inc., f/k/a Star Sprinkler Corporation, f/k/a Grunau Sprinkler Manufacturing Company, Inc.	
and	
Grucon Corporation	

RESPONDENTS' FIRST REQUESTS FOR ADMISSIONS

Respondents Chemetron Corporation ("Chemetron"), Chemetron Investments, Inc. ("Chemetron Investments"), and Sunbeam Corporation ("Sunbeam"), through undersigned counsel, hereby propound the following requests for admissions to the Complainant pursuant to 16 C.F.R. § 1025.34. Complainant is required to respond to each request, separately and fully in writing under oath, within thirty (30) days of the service of these requests.

Complainant's responses should be sent to the offices of Williams & Connolly

LLP, 725 Twelfth St., N.W., Washington, D.C. 20005.

For the purposes of these requests for admissions, the following definitions and instructions apply:

INSTRUCTIONS

A. If your response to any of the following requests is anything other than an unqualified admission, you shall specify the portion that is true, and qualify or deny only the portion of the matter set forth in the request for admission that you refuse to admit. If you claim that you cannot specifically admit or deny the matter set forth in the request for admission, you shall set forth in detail the reasons why you cannot truthfully admit or deny the matter set forth in the request for admission. Only if you cannot admit or deny a request for admission after conducting a reasonable inquiry of all information known to or reasonably obtainable by you, may you claim a lack of information or knowledge as to any matter set forth in a request for admission.

B. If you object to any request for admission, you must state with particularity your objection in writing and the basis for your objection. The belief that the matter to which an admission has been requested presents a genuine issue for hearing is not, on that ground alone, basis for objection.

C. You shall serve your responses to these requests for admissions upon the undersigned attorneys within thirty (30) days of the service of these requests unless otherwise ordered by the Court.

D. These requests for admissions are to be deemed continuing in nature to the full extent authorized by 16 C.F.R. § 1025.31(f).

DEFINITIONS

A. "You," "your," "Complainant" and/or the "CPSC" refers to the Consumer Product Safety Commission, including the Office of Compliance of the CPSC, and any employees or agents of the CPSC.

B. The "Complaint" means the Complaint filed in this action on October 9, 2001, and any amendments thereto.

C. "Respondents" refers to Chemetron Corporation, Chemetron Investments, Inc., and Sunbeam Corporation.

D. "Chemetron" refers to Chemetron Corporation.

E. "Chemetron Investments" refers to Chemetron Investments, Inc.

F. "Sunbeam" refers to Sunbeam Corporation.

G. "Person" or "persons" means all individuals and entities, including natural persons, representative persons, public or private corporations, companies, unincorporated associations, partnerships, organizations, government entities, groups or agencies, plus any divisions, departments, or units thereof.

H. "Star ME-1 fire sprinklers" or "Star ME-1's" means the Star ME-1 fire sprinklers at issue in the Complaint.

REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1: Admit that each of the documents produced in response to Respondents' First Request for Production of Documents and Things and Respondents' First Set of Interrogatories are true and correct copies of the originals.

REQUEST FOR ADMISSION NO. 2: Admit that each of the documents produced in response to Respondents' First Request for Production of Documents and Things and Respondents' First Set of Interrogatories are documents kept in the regular course of business.

REQUEST FOR ADMISSION NO. 3: Admit that during its investigation of the Star ME-1, the CPSC staff had difficulty locating buildings where Star ME-1's were installed.

REQUEST FOR ADMISSION NO. 4: Admit that you are aware of no fires where Star ME-1's allegedly manufactured by Chemetron failed to activate.

REQUEST FOR ADMISSION NO. 5: Admit that you are aware of no fires where Star ME-1's allegedly manufactured by Sunbeam failed to activate.

REQUEST FOR ADMISSION NO. 6: Admit that you are aware of no fires where Star ME-1's allegedly manufactured by Chemetron Investments failed to activate.

REQUEST FOR ADMISSION NO. 7: Admit that you are aware of only two fires where Star ME-1's failed to activate.

REQUEST FOR ADMISSION NO. 8: Admit that you are aware of no injuries resulting from a fire in which a Star ME-1 failed to activate.

REQUEST FOR ADMISSION NO. 9: Admit that you are aware of no deaths resulting from a fire in which a Star ME-1 failed to activate.

REQUEST FOR ADMISSION NO. 10: Admit that Sunbeam has never sold Star ME-1's.

REQUEST FOR ADMISSION NO. 11: Admit that Sunbeam has never manufactured Star ME-1's.

REQUEST FOR ADMISSION NO. 12: Admit that Sunbeam has never distributed (as that term is used in the Complaint) Star ME-1's.

REQUEST FOR ADMISSION NO. 13: Admit that the current Chemetron Corporation has never sold Star ME-1's.

REQUEST FOR ADMISSION NO. 14: Admit that the current Chemetron Corporation has never manufactured Star ME-1's.

REQUEST FOR ADMISSION NO. 15: Admit that the current Chemetron Corporation has never distributed (as that term is used in the Complaint) Star ME-1's.

REQUEST FOR ADMISSION NO. 16: Admit that Star ME-1's are not distributed for sale in households, residences, or schools (as those terms are used in 15 U.S.C. § 2052).

REQUEST FOR ADMISSION NO. 17: Admit that Star ME-1's are not sold to consumers directly.

REQUEST FOR ADMISSION NO. 18: Admit that Star ME-1's are not installed by consumers themselves.

REQUEST FOR ADMISSION NO. 19: Admit that Star ME-1's are not serviced by consumers themselves.

REQUEST FOR ADMISSION NO. 20: Admit that you have located no Star ME-1's that have been installed in a household or residence (as those terms are used in 15 U.S.C. § 2052).

REQUEST FOR ADMISSION NO. 21: Admit that you have located no Star ME-1's that have been installed in a school (as that term is used in 15 U.S.C. § 2052).

REQUEST FOR ADMISSION NO. 22: Admit that you have located no Star ME-1's that have been installed in day care centers.

REQUEST FOR ADMISSION NO. 23: Admit that you have located no Star ME-1's allegedly manufactured by Chemetron that have been installed in schools (as that term is used in 15 U.S.C. § 2052).

REQUEST FOR ADMISSION NO. 24: Admit that you have located no Star ME-1's allegedly manufactured by Chemetron that have been installed in a household or residence (as those terms are used in 15 U.S.C. § 2052).

REQUEST FOR ADMISSION NO. 25: Admit that you have located no Star ME-1's allegedly manufactured by Chemetron that have been installed in health care facilities.

REQUEST FOR ADMISSION NO. 26: Admit that you have located no Star ME-1's allegedly manufactured by Chemetron that have been installed in day care centers.

REQUEST FOR ADMISSION NO. 27: Admit that you have located no Star ME-1's allegedly manufactured by Chemetron that have been installed in nursing homes.

REQUEST FOR ADMISSION NO. 28: Admit that you have located no Star ME-1's allegedly manufactured by Chemetron Investments that have been installed in schools (as that term is used in 15 U.S.C. § 2052).

REQUEST FOR ADMISSION NO. 29: Admit that you have located no Star ME-1's allegedly manufactured by Chemetron Investments that have been installed in a household or residence (as those terms are used in 15 U.S.C. § 2052).

REQUEST FOR ADMISSION NO. 30: Admit that you have located no Star ME-1's allegedly manufactured by Chemetron Investments that have been installed in health care facilities.

REQUEST FOR ADMISSION NO. 31: Admit that you have located no Star ME-1's manufactured by Chemetron Investments that have been installed in day care centers.

REQUEST FOR ADMISSION NO. 32: Admit that you have located no Star ME-1's allegedly manufactured by Chemetron Investments that have been installed in nursing homes.

REQUEST FOR ADMISSION NO. 33: Admit that the sprinkler system in the Prairie View nursing home fire in Warsaw, Indiana did not activate because the room temperature where the fire occurred was not high enough to trigger the sprinkler system.

REQUEST FOR ADMISSION NO. 34: Admit that the Star ME-1 fire sprinkler is a "dry" type fire sprinkler designed primarily for use in parking garages, warehouses, and other areas where the piping system is subject to freezing.

REQUEST FOR ADMISSION NO. 35: Admit that a Star ME-1 fire sprinkler may activate in a fire even though it does not activate at a water pressure of 7 psi when tested.

REQUEST FOR ADMISSION NO. 36: Admit that a Star ME-1 fire sprinkler does not have to activate at a water pressure of 7 psi in order to activate properly in a fire.

REQUEST FOR ADMISSION NO. 37: Admit that the standard water pressure available in the majority of residences (as that term is used in 15 U.S.C. § 2052) in the United States is above 7 psi.

REQUEST FOR ADMISSION NO. 38: Admit that the standard water pressure available in the majority of commercial buildings in the United States is above 7 psi.

REQUEST FOR ADMISSION NO. 39: Admit that Chemetron did not manufacture Star ME-1's after 1982.

REQUEST FOR ADMISSION NO. 40: Admit that Chemetron Investments did not manufacture Star ME-1's after 1982.

REQUEST FOR ADMISSION NO. 41: Admit that, according to NFPA-25, the functional life of a "dry" type fire sprinkler is 10 years.

REQUEST FOR ADMISSION NO. 42: Admit that "dry" type fire sprinklers account for less than three percent of all installed fire sprinklers in the United States.

REQUEST FOR ADMISSION NO. 43: Admit that the type of sprinkler system used in most residential structures is the wet pipe system.

REQUEST FOR ADMISSION NO. 44: Admit that Star ME-1's are typically installed in areas where the temperature may fall below freezing.

REQUEST FOR ADMISSION NO. 45: Admit that a manufacturer, distributor, or retailer has the power to elect a remedy of choice pursuant to 15 U.S.C. § 2064(d).

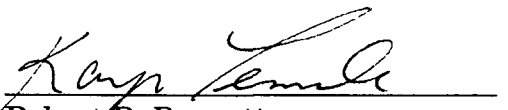
REQUEST FOR ADMISSION NO. 46: Admit that the CPSC has never prevented a manufacturer, distributor, or retailer from electing a remedy of choice pursuant to 15 U.S.C. § 2064(d).

REQUEST FOR ADMISSION NO. 47: Admit that the total number of Star ME-1's allegedly manufactured by Chemetron between 1977 and 1982 is no more than 200,000.

REQUEST FOR ADMISSION NO. 48: Admit that Star ME-1's are not consumer products within the meaning of 15 U.S.C. § 2052.

REQUEST FOR ADMISSION NO. 49: Admit that the CPSC did not conduct its own investigation of the fires in which Star ME-1's allegedly failed to activate.

Respectfully submitted,



Barbara Wrubel
Bert L. Wolff
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000

Robert B. Barnett
Heidi K. Hubbard
Karyn A. Temple (admitted only in NY;
supervision by the above attorneys,
members of the DC Bar)
WILLIAMS & CONNOLLY LLP
725 - 12th St., N.W.
Washington, DC 20005
(202) 434-5000

Attorneys for Chemetron Corporation, Chemetron Investments, Inc., and Sunbeam Corporation

Dated: February 6, 2002

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of the foregoing Respondents' First Requests for Admissions upon all parties and participants of record in these proceedings on this 6th day of February, 2002, by hand-delivery on:

Michael J. Gidding, Esq.
Seth B. Popkin, Esq.
Anthony Murawski, Esq.
Alan H. Schoem, Esq.
Eric L. Stone, Esq.
Office of Compliance
Consumer Product Safety Commission
4330 East-West Highway, Rm. 613
Bethesda, MD 20814

Counsel for Complainant, Consumer Product Safety Commission

Michael A. Brown, Esq.
Brown & Freeston, P.C.
3201 New Mexico Ave., N.W.
Suite 242
Washington, DC 20016-2756

with copy by U.S. mail, postage pre-paid to:

Ralph A. Weber, Esq.
Reinhart, Boerner, Van Deuren,
Norris & Rieselbach, S.C.
1000 North Water St.
P.O. Box 514000
Milwaukee, WI 53203-3400

Counsel for Sprinkler Corporation of Milwaukee, Inc. and Grucon Corporation

Karyn A. Temple

SBP a

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HEIDI K. HUBBARD
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hhubbard@wc.com

EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

February 11, 2002

By Hand Delivery

Office of the Secretary
Consumer Product Safety Commission
4330 East-West Highway, Rm. 502
Bethesda, MD 20814

RECEIVED
CPSC
OFFICE OF COMPLIANCE
2002 FEB 11 PM 3:43

Re: CPSC Docket No.: 02-1
In the matter of Chemetron Corp., et al.

Dear Sir/Madam:

Enclosed for filing please find an original and four (4) copies of the following document in the above-referenced matter:

1. Respondents' Motion to Compel.

Please return one file-stamped copy of this document to the messenger for return to me. This document is being served this date on all parties and participants of record in this proceeding.

Respectfully,

H.K. Hubbard

Heidi K. Hubbard

Enclosures

cc (w/encl.): Michael J. Gidding, Esq.
Seth B. Popkin, Esq.
Anthony Murawski, Esq.
Alan H. Schoem, Esq.
Eric L. Stone, Esq.
Michael A. Brown, Esq.
Ralph A. Weber, Esq.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
	)	
Chemetron Corporation,	)	
f/k/a Chemetron Investments, Inc.	)	
	)	
and	)	
	)	
Chemetron Investments, Inc.,	)	CPSC Docket No.: 02-1
f/k/a Chemetron Corporation	)	
	)	
and	)	
	)	
Sunbeam Corporation	)	
	)	
and	)	
	)	
Sprinkler Corporation of Milwaukee, Inc.,	)	
f/k/a Star Sprinkler Corporation, f/k/a	)	
Grunau Sprinkler Manufacturing Company, Inc.	)	
	)	
and	)	
	)	
Grucon Corporation	)	
	)	

MOTION TO COMPEL

Pursuant to 16 C.F.R. § 1025.36, Respondents Chemetron Corporation ("Chemetron"), Chemetron Investments, Inc. ("Chemetron Investments"), and Sunbeam Corporation ("Sunbeam") (collectively herein, "Respondents"), through undersigned counsel, hereby move to compel full and complete responses to their First Set of Interrogatories and First Request for Production of Documents and Things to Complainant. Respondents are attempting to resolve these discovery issues with Complainant and have written to Complaint Counsel (see letter

attached as Exhibit A) in an effort to reach resolution without the need for a ruling by the Court. Complaint Counsel has responded that Complainant anticipates filing supplemental responses. Because the parties have not yet reached a final resolution, however, Respondents are filing this motion in order to comply with the time requirements of 16 C.F.R. § 1025.36. The reasons for this motion are set forth more fully below:

1. At this time, Respondents are moving to compel full and complete responses to interrogatories and document requests that have not been answered at all or for which incomplete or evasive answers have been supplied solely to preserve their rights under 16 C.F.R. § 1025.36, which requires a party to file motions to compel within twenty days of the other party's failure to respond to discovery.

2. On November 20, 2001, Respondents propounded their First Set of Interrogatories and First Request for Production of Documents and Things to Complainant in this matter.

3. After a mutually agreed upon one month extension of time in which to respond, on January 22, 2002, Complainant served Chemetron, Chemetron Investments and Sunbeam with its responses.

4. Complainant's interrogatory responses, however, failed to fully and completely respond to each interrogatory. For example, Complainant failed to provide any answer to Interrogatories Nos. 39 and 42-48. Complainant provided incomplete and/or evasive answers to Interrogatories Nos. 15, 26 and 64. Additionally, Complainant's responses failed to comply with 16 C.F.R. § 1025.32(d),

when producing documents in lieu of written responses, by failing to identify, by Bates Number or document title, the specific documents from which the answers to interrogatories could be ascertained. Moreover, a number of Complainant's responses were evasive in that, for example, Complainant referred generally to its previous interrogatory answers, without specifying those interrogatories by number.

5. Complainant also failed to answer Document Requests Nos. 46 and 91. Moreover, although Complainant objected to a number of interrogatories and document requests on the grounds of alleged privileges, Complainant has failed to provide either a privilege log or any description of the withheld documents. For that reason, Respondents cannot properly assess Complainant's privilege claims.

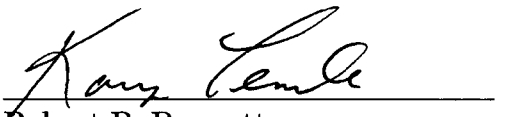
6. On February 1, 2002, in an effort to resolve some of these issues amicably, Respondents wrote to Complaint Counsel. See letter attached as exhibit A. Complaint Counsel has responded that Complainant anticipates filing supplemental responses. The parties, however, have not yet reached a final resolution of the issues raised in that letter. If, as Respondents hope, they are able to reach a resolution of these issues with Complainant, they will so notify the Court.

CONCLUSION

Respondents Chemetron, Chemetron Investments, and Sunbeam respectfully request that this Court order Complainant to supplement its responses to Respondents' First Set of Interrogatories by providing complete responses, including to Interrogatories Nos. 15, 26, 39, 42-48, and 64, and including by identifying (by Bates Number or document title) the specific documents from which any answers

may be ascertained when producing documents in lieu of written responses, and including by indicating by interrogatory number any interrogatories which respond to subsequent answers. Respondents further request that this Court order Complainant to supplement its responses to Respondents' First Request for Production of Documents and Things by providing complete responses, including by providing answers to Document Requests Nos. 46 and 91 and by providing a privilege log or other general description of all documents and/or information withheld by Complainant on the basis of purported privilege claims.

Respectfully submitted,



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Bert L. Wolff
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MEAGHER & FLOM LLP
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New York, NY 10036
(212) 735-3000

Robert B. Barnett
Heidi K. Hubbard
Karyn A. Temple (admitted only in NY;
supervision by the above attorneys,
members of the DC Bar)
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Washington, DC 20005
(202) 434-5000

Attorneys for Chemetron Corporation, Chemetron Investments, Inc., and Sunbeam Corporation

Dated: February 11, 2002

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
	)	
Chemetron Corporation,	)	
f/k/a Chemetron Investments, Inc.	)	
	)	
and	)	
	)	
Chemetron Investments, Inc.,	)	CPSC Docket No.: 02-1
f/k/a Chemetron Corporation	)	
	)	
and	)	
	)	
Sunbeam Corporation	)	
	)	
and	)	
	)	
Sprinkler Corporation of Milwaukee, Inc.,	)	
f/k/a Star Sprinkler Corporation, f/k/a	)	
Grunau Sprinkler Manufacturing Company, Inc.	)	
	)	
and	)	
	)	
Grucon Corporation	)	
	)	

ORDER

Upon consideration of the motion, the opposition, and any arguments of counsel, and there being good cause shown to grant the motion, it is this ___ day of _____, 2002, hereby ORDERED that Respondents' Motion to Compel is GRANTED; it is further ORDERED that Complainant shall provide complete responses to Respondents' First Set of Interrogatories and First Request for Production of Documents and Things within seven days of the date of this Order.

_____
Presiding Officer

LAW OFFICES
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EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

February 1, 2002

By Facsimile & Federal Express

Seth B. Popkin, Esq.
Consumer Product Safety Commission
4330 East-West Highway, Rm. 613
Bethesda, MD 20814

Re: CPSC Docket No.: 02-1
In the matter of Chemetron Corp., et al.

Dear Seth:

Upon initial review of Complaint Counsel's responses to the interrogatories and document requests of Sunbeam and the Chemetron entities, we have a number of concerns about the adequacy of your responses. The purpose of this letter is to raise those concerns with you now in the hope of obtaining complete responses without the need to seek further recourse.

First, when referencing documents in lieu of written responses, you failed to comply with either our Instruction C or 16 C.F.R. § 1025.32(d). On several occasions your responses referred generally to "documents to be produced," but failed to specify the particular documents from which the answers to those interrogatories could be ascertained. Therefore, in those instances where your interrogatory responses refer to documents to be produced, we request that you supplement your responses by identifying, by Bates Number or title of the document, the specific document(s) from which answers to the interrogatories may be ascertained. Specifically, we request that you supplement your responses to Interrogatory Nos. 1, 3, 6-8, 11, 15-16, 40(a), 49, 56-57, 59-62, 85-88, and 90 with that information.

Second, in response to several interrogatories, you referenced your previous interrogatory answers without specifying those answers by interrogatory number. On each of those occasions, we request that you specify the interrogatory answer, by number, that you contend responds in full or in part to any subsequent interrogatory, so that we may determine whether the subsequent interrogatory has been fully and completely answered.

Third, you have failed to provide a privilege log or other description of the documents that you have withheld on privilege grounds. We request that you specifically identify all of the responsive documents that you have withheld on the basis of applicable privileges, so that the validity of your privilege claims may be assessed.

Fourth, we have the following comments concerning specific interrogatory responses:

1. Respondents' First Set of Interrogatories, Interrogatory No. 15(c): Your response failed to answer subpart (c) of Interrogatory No. 15, which requested that you identify the level of hazard assigned to the Star ME-1. We request that you supplement your response with that information.

2. Respondents' First Set of Interrogatories, Interrogatory No. 26: We requested that you define consumer as used by the CPSC. As you are aware, that term is not defined in the CPSA or applicable CPSC regulations. Accordingly, your response referring generally to statutes and regulations is insufficient. We ask that you supplement your response.

3. Respondents' First Set of Interrogatories, Interrogatory No. 39: We requested that you describe any circumstances in which you believe fire sprinklers would not constitute a "consumer" product. Your objections to that interrogatory are not well taken, as we are entitled to explore the bases for the allegations of the Complaint. We therefore request that you answer this interrogatory in full.

4. Respondents' First Set of Interrogatories, Interrogatory Nos. 42-48. You failed to answer these interrogatories on the grounds, in part, that the interrogatories were allegedly vague and/or confusing. Please advise us of the basis for the confusion; we would be happy to discuss these interrogatories with you in order to clarify any ambiguities, so that you can provide a full and complete response.

5. Respondents' First Set of Interrogatories, Interrogatory No. 64: We requested that you describe the inadequate design and/or manufacturing of the Star ME-1. In response, while you described generally the conditions resulting from the alleged inadequate design and or manufacturing of the Star ME-1, you did not specify the inadequate design and/or manufacturing that you contend is present in Star ME-1 fire sprinklers as requested by that interrogatory. We request that you supplement your response with that information.

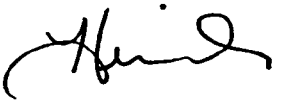
Fifth, we would like to arrange a time to inspect the sprinklers that you have indicated will be produced in response to our requests. We will be contacting you within the next several weeks to arrange that inspection.

Finally, your interrogatory responses, although signed, were not signed under oath as required by 16 C.F.R. § 1025.32(b). We ask that you provide the appropriate certification of your interrogatory responses as required by that section.

In an effort to resolve these issues amicably without the need for a Motion to Compel, we request that you supplement your responses no later than February 9, 2002. The foregoing is without prejudice to our right to raise additional concerns in the future.

On a separate issue, we are hereby identifying one additional document that is responsive to your Interrogatory Nos. 40-41 and 50. Document No. 001541-001545, in addition to the documents already listed in those responses, has also been produced to you in response to our agreement in those responses to provide documents relating to fire sprinklers generally.

Sincerely,



Heidi K. Hubbard

cc: Michael Gidding, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of the foregoing Motion to Compel upon all parties and participants of record in these proceedings on this 11th day of February, 2002, by hand-delivery on:

Michael J. Gidding, Esq.
Seth B. Popkin, Esq.
Alan H. Schoem, Esq.
Anthony Murawski, Esq.
Eric L. Stone, Esq.
Office of Compliance
Consumer Product Safety Commission
4330 East-West Highway, Rm. 613
Bethesda, MD 20814

Counsel for Complainant, Consumer Product Safety Commission

Michael A. Brown, Esq.
Brown & Freeston, P.C.
3201 New Mexico Ave., N.W.
Suite 242
Washington, DC 20016-2756

with copy by U.S. mail, postage pre-paid to:

Ralph A. Weber, Esq.
Reinhart, Boerner, Van Deuren,
Norris & Rieselbach, S.C.
1000 North Water St.
P.O. Box 514000
Milwaukee, WI 53203-3400

Counsel for Sprinkler Corporation of Milwaukee, Inc. and Grucon Corporation

Karyn A. Temple

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of

CHEMETRON CORPORATION,
f/k/a Chemetron Investments, Inc.

and

CPSC Docket No.: 02-1

CHEMETRON INVESTMENTS, INC.,
f/k/a Chemetron Corporation

and

SUNBEAM CORPORATION

and

SPRINKLER CORPORATION OF
MILWAUKEE, INC., f/k/a Star
Sprinkler Corporation, f/k/a Grunau
Sprinkler Manufacturing Company, Inc.

and

GRUCON CORPORATION,

SPRINKLER CORPORATION OF MILWAUKEE, INC.'S RESPONSE TO THE CPSC'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS

Defendant Sprinkler Corporation of Milwaukee, Inc. ("SCM"), by its attorneys, Reinhart Boerner Van Deuren s.c. and Ralph A. Weber and Kurt D. Dykstra and Brown & Freeston, P.C. by Michael A. Brown and Margaret Freeston

submit the following responses and objection to the CPSC's First Set of Request for Production of Documents and Things.

GENERAL RESPONSES AND OBJECTIONS

1. SCM objects to this discovery insofar as it seeks documents or things protected by the attorney-client privilege, the work product doctrine or other applicable privileges or doctrines. SCM intends to assert those privileges with respect to any document or thing to which they apply and should its responses or production inadvertently include any such documents or things, it reserves the right to seek the return of the document or things, and the inadvertent production shall not be construed as waiver with respect to any document or thing.

2. The disclosure of any document or thing, or failure currently to object to any request for production, does not constitute a waiver of right to object with respect to the disclosure of other documents or things or future requests for documents or things.

3. The phrase "documents it has located" means responsive documents that have been collected by SCM as a result of a good faith search of its files and records that it reasonably believes might contain responsive documents or things. This statement should not be construed as representation that any such documents or things exist, but merely as a statement that if such documents or things exist, they will be produced.

4. SCM objects to all instructions and definitions to the extent that they seek to impose obligations beyond those required the Federal Rules of Civil Procedure and/or local rules of this court.

5. Discovery is ongoing. SCM reserves the right to supplement its responses to this discovery as information and documents become available.

6. SCM is not presently, nor has it been since the sale of its assets (including the operational name, Star Sprinkler Corporation) to Grinnell Corporation in 1996 an active corporation. SCM manufactures no products; it conducts no business of any sort. SCM has no employees. The vast majority of its records were transferred to Grinnell with the 1996 sale. As a result, without personnel or records, its answers to this discovery are necessarily limited.

Subject to the foregoing general statements and objections, SCM responds to the CPSC's discovery as follows:

REQUESTS

REQUEST NO. 1: All documents identified in response to the Interrogatories.

RESPONSE: SCM objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. SCM further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, SCM refers the CPSC to the correspondence and documents exchanged from June 1999 until the commencement of this litigation; a copy of these documents are included with SCM's responses to the CPSC's discovery. Also, SCM will produce additional documents that are responsive to this request as they are located, bate stamped, and copied.

REQUEST NO. 2: All documents relating to your answers to the Interrogatories, in support of your answers thereto, and/or used or relied upon in preparing your answers thereto.

RESPONSE: *See* SCM's Objections and Response to Request No. 1.

REQUEST NO. 3: All documents in support of and/or upon which you base the Answer, including each of the Answer's admissions, denials, and affirmative or other defenses (numbered or otherwise).

RESPONSE: *See* SCM's Objections and Response to Request No. 1.

REQUEST NO. 4: All documents refuting or tending to refute the allegations of the Complaint.

RESPONSE: *See* SCM's Objections and Response to Request No. 1.

REQUEST NO. 5: All documents supporting or tending to support the allegations of the Complaint.

RESPONSE: *See* SCM's Objections and Response to Request No. 1.

REQUEST NO. 6: All of your written document retention policies in effect at any time(s) since the date of your incorporation.

RESPONSE: After the 1996 sale of its assets (including its operational name, Star Sprinkler Corporation) to Grinnell Corporation, SCM has not been an active corporation. It makes no products. It has no employees. It has very limited records, as most were transferred to Grinnell as part of the 1996 sale. However, SCM has no knowledge of any written document retention policies.

REQUEST NO. 7: All of your written policies in effect at any time(s) since the date of your incorporation relating to retention of your products or samples of your products.

RESPONSE: *See* SCM's Objections and Response to Request No. 6.

REQUEST NO. 8: All documents relating to each communication, whether in person, by telephone, or by some other means, whether in a discussion, meeting, or other setting, relating to the subject matter of this litigation, the Complaint, the Answer, the documents requested herein, and/or the Star ME-1, between, among, by, or with any persons, including, but not limited to, the following: the Respondents; the Respondents' employees, former employees, agents, and/or representatives; and/or sprinkler installers, contractors, customers, and/or users.

RESPONSE: SCM objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. SCM further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, SCM refers the CPSC to the correspondence and documents exchanged from June 1999 until the commencement of this litigation; a copy of these documents are included with SCM's responses to the CPSC's discovery. Also, SCM will produce additional documents that are responsive to this request as they are located.

REQUEST NO. 9: All correspondence relating to the Star ME-1 other than correspondence to or from Complaint Counsel dated on or after October 9, 2001.

RESPONSE: SCM objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. SCM further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, SCM refers the CPSC to the correspondence and documents exchanged from June 1999 until the commencement of this litigation; a copy of these documents are included with SCM's responses to the CPSC's discovery. Also, SCM will produce additional documents that are responsive to this request as they are located.

REQUEST NO. 10: All documents you obtained from the U.S. Consumer Product Safety Commission or its staff relating to the Star ME-1, other than those obtained from Complaint Counsel on or after October 9, 2001.

RESPONSE: SCM refers the CPSC to the correspondence and documents exchanged from June 1999 until the commencement of this litigation; a copy of these documents are included with SCM's responses to the CPSC's discovery.

REQUEST NO. 11: All witness statements relating to the subject matter of this litigation, the Complaint, and the Answer.

RESPONSE: SCM objects to this request as it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, SCM answers that it has not obtained any witness statements.

REQUEST NO. 12: All documents describing and/or evidencing the operations, purposes, and uses of the Star ME-1.

RESPONSE: SCM objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Subject to and without waiving the above objections, SCM answers as follows. SCM is not now, and has not been since the 1996 sale of its assets to Grinnell, an active corporation. It has no assets or employees. It manufactures no products. It has very limited records, as most were transferred to Grinnell as part of the 1996 sale. As a result, SCM's necessarily limited answers to this interrogatory are contained in the correspondence (with enclosures) that it supplied to the CPSC from June 1999 until the commencement of this litigation as well as in any additional responsive documents SCM has located and may locate during the course of this litigation. Aside from information obtained from these sources, SCM does not have additional knowledge that is responsive to this interrogatory.

REQUEST NO. 13: All documents relating to the quantities of Star ME-1's manufactured.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 14: All documents relating to manufacture of the Star ME-1, including, but not limited to, its design, development, and/or engineering.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 15: All complete engineering drawing packages, engineering drawings, requests for changes, and change notices relating to the Star ME-1.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 16: All documents relating to the materials used in the Star ME-1 and to the procedures and specifications for the manufacture of the Star ME-1, including, but not limited to, all documents relating to the following:

(a) The Star ME-1's design, materials, and component parts, including, but not limited to, the acquisition of and specifications for each

component part, substance, chemical, lubricant, and/or other material used in the Star ME-1, the purposes for which they were used, the manner and amounts in which they were used, and any changes in any of the foregoing;

(b) All tools, machinery, and equipment used in the Star ME-1 manufacture process, the purposes for which they were used, and any changes in any of the foregoing; and

(c) All changes in procedures and specifications for the manufacture of the Star ME-1.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 17: All documents evidencing the manufacturer and supplier of each component part, substance, chemical, lubricant, "O" ring, and/or other material used in the Star ME-1.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 18: All documents evidencing the composition and/or material of the "O" rings contained in the Star ME-1, including all changes in same.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 19: All documents relating to submission of the Star ME-1 for approval, listing, and/or certification by laboratories or institutions including, but not limited to, UL and FM. These documents shall include, but not be limited to, the following: documents relating to all tests, examinations, evaluations, and analyses conducted with respect to the submission; each communication relating to the submission; all results of and responses to the submission; and all documents relating to whether or not approval, listing, and/or certification of any Star ME-1 or component part thereof was ever withdrawn, discontinued, cancelled, or the like, and whether or not any person ever objected to the sale and/or distribution of any Star ME-1.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 20: All documents evidencing the persons who distributed and/or participated in the distribution of the Star ME-1, the persons to whom the Star ME-1 was distributed, the dates of Star ME-1 distribution, and the Star ME-1 quantities distributed.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 21: All documents relating to the installation of the Star ME-1, including, but not limited to, the persons who installed and/or participated in the installation of the Star ME-1, the persons for whom the Star ME-1 was installed, the buildings in which the Star ME-1 was installed, the building types in which Star ME-1's have ever been installed, the dates of Star ME-1 installation, and the Star ME-1 quantities installed.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 22: All documents relating to the actions, steps, and/or procedures, including, but not limited to, quality control and quality assurance, any persons took before, during, and/or after the manufacture of each Star ME-1, to ensure that each Star ME-1 was manufactured in accordance with specifications, was properly manufactured, and would fully and properly operate and activate.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 23: All documents relating to tests, examinations, and/or analyses of Star ME-1's and/or any component parts thereof, including, but not limited to, test, examination, and/or analysis procedures, protocols, and results.

RESPONSE: *See* SCM's Objections and Response to Request No. 9 and 12.

REQUEST NO. 24: All documents relating to any of the following conditions being present, observed, and/or alleged in any Star ME-1's or any components

parts thereof: corrosion; accumulation of deposits; adhesion, binding, bonding, and/or sticking of the "O" ring to other sprinkler component parts; swelling of the "O" ring; lubricant deficiencies or problems; leakage and/or evidence of leakage; and/or component part interference or fit problems.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 25: All documents relating to actual, potential, or alleged effects on the operation, activation, and/or other performance of Star ME-1's of any of the following conditions being present in any Star ME-1's or any component parts thereof: corrosion; accumulation of deposits; adhesion, binding, bonding, and/or sticking of the "O" ring to other sprinkler component parts; swelling of the "O" ring; lubricant deficiencies or problems; leakage and/or evidence of leakage; and/or component part interference or fit problems.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 26: All documents relating to the operation and proper operation of Star ME-1's.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 27:

All documents relating to the role of, and requirements for, water pressure in the operation and activation of the Star ME-1.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 28: All documents relating to actual, alleged, reported, or otherwise communicated problems, flaws, defects, defective conditions, and/or deficiencies in or associated with any Star ME-1's and/or any component parts thereof, including, but not limited to, performance or activation, and/or with any substance, chemical, lubricant, "O" ring, and/or other material used in manufacturing Star ME-1's.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 29: All documents relating to actual, alleged, reported, or otherwise communicated failures and/or partial failures of Star ME-1's and/or any component parts thereof to operate, activate, perform, and/or otherwise function (including, but not limited to, discharge water) in fires. Your response should include, but not be limited to, the following resulting from or relating to the fire (including in attempting to escape from or extinguish the fire):

(a) All documents relating to injuries or alleged injuries;
(b) All documents relating to deaths or alleged deaths;
(c) All documents relating to damaged, destroyed, or lost property, and allegedly damaged, destroyed, or lost property;
(d) All police, fire, medical, emergency service, or other reports;
(e) All documents relating to tests, examinations, and/or analyses of any Star ME-1 or component part thereof that failed and/or partially failed, and/or any other Star ME-1 from the same site; and
(f) All documents relating to the reasons the Star ME-1 failed and/or partially failed.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 30: All documents relating to actual, alleged, reported, or otherwise communicated failures and/or partial failures of Star ME-1's, and/or any component parts thereof, to operate, activate, perform, and/or otherwise function (including, but not limited to, discharge water) in tests, and/or to operate, activate, perform, and/or otherwise function (including, but not limited to, discharge water) in tests in accordance with applicable industry and/or other standards, codes, requirements, and/or rules. Your response should include, but not be limited to, all documents relating to these tests.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 31: All documents relating to actual, alleged, reported, or otherwise communicated failures of Star ME-1's to activate at a pressure of 7 psig or below in tests or otherwise after melting of the thermal sensing element, and/or any failures of Star ME-1's to activate at a pressure of 7 psig or below in tests within 5 seconds of melting of the thermal sensing element. Your response should

include, but not be limited to, all documents relating to these tests, failures, or other circumstances.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 32: All documents relating to the performance record and/or history of the Star ME-1, including, but not limited to, positive and negative information, praise and criticism, passing and failing test results, and successes and failures in service.

RESPONSE: *See* SCM's Objections and Response to Request No. 9 and 12.

REQUEST NO. 33: All documents relating to all Star ME-1's that properly operated and activated in a fire.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 34: All documents relating to the delisting (by UL, FM, and/or any other person), recall, discontinuance, and/or taking off the market of any Star ME-1's and/or any Star ME-1 component parts, and all documents relating to any warning, advisory, safety, or similar notice to persons relating to any Star ME-1's and/or any Star ME-1 component parts.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 35: All documents relating to the return, and/or requested return, to you and/or any manufacturer, supplier, distributor, installer, and/or other person, of any Star ME-1's and/or any Star ME-1 component parts.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 36: All documents relating to the replacement of Star ME-1's that had been installed in buildings or other places with new Star ME-1's or other sprinklers.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 37: All documents evidencing the current costs, and/or estimates of the current costs, of replacing a Star ME-1 or a group of Star ME-1's, including, but not limited to, the costs of the replacement product, the labor, any other associated costs, all variables, factors, and considerations related to determining the costs or estimates, and all bases for all estimates.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 38: All documents relating to all verbal and/or written claims of which you are aware relating to the Star ME-1, including, but not limited to, the persons making the claim, the status of the claim (including whether or not it has been settled or otherwise resolved), and the settlement or resolution terms and amounts.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 39: Personnel or other documents sufficient to identify and evidence each of your employees from the date of your incorporation through the present and the dates during which you employed each employee. (This request does not seek *all* documents relating to your employees, but merely documents adequate to evidence and confirm the information sought.)

RESPONSE: SCM objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. SCM further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, SCM will produce documents that are responsive to this Request.

REQUEST NO. 40: Documents sufficient to identify and evidence each of your officers from the date of your incorporation through the present and the dates during which each officer was in each office. (This request does not seek *all* documents relating to your officers, but merely documents adequate to evidence and confirm the information sought.)

RESPONSE: SCM objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. SCM further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, SCM will produce documents that are responsive to this Request.

REQUEST NO. 41: Documents sufficient to identify and evidence each of your directors from the date of your incorporation through the present and the dates during which each director held his/her directorship. (This request does not seek *all* documents relating to your directors, but merely documents adequate to evidence and confirm the information sought.)

RESPONSE: SCM objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. SCM further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, SCM will produce documents that are responsive to this Request.

REQUEST NO. 42: Documents sufficient to identify and evidence each of your stockholders and/or other owners from the date of your incorporation through the present, the percentage of stock owned by each person identified, and the dates during which each person owned said stock. (This request does not seek *all* documents relating to your stockholders and/or other owners, but merely documents adequate to evidence and confirm the information sought.)

RESPONSE: SCM objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. SCM further objects to this

request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, SCM will produce documents that are responsive to this Request.

REQUEST NO. 43: Documents sufficient to identify and evidence each of your employees, agents, representatives, and/or consultants who has held a supervisory, managerial, and/or executive position or role in the following areas of your company from the date of your incorporation through the present:

(a) Sales;
(b) Marketing;
(c) Product design and/or development;
(d) Engineering and/or technical services;
(e) Customer service/customer relations;
(f) Public and/or governmental relations;
(g) Product manufacturing and/or production;
(h) Product distribution;
(i) Corporate mergers, acquisitions, and/or transactions;
(j) Quality assurance/control; and
(k) Any divisions or areas responsible for, or with work relating to, Star ME-1's and/or any component parts thereof.

(This request does not seek *all* documents relating to these employees, agents, representatives, and/or consultants, but merely documents adequate to evidence and confirm the information sought.)

RESPONSE: SCM objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. SCM further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, SCM will produce documents that are responsive to this Request. Further answering, SCM refers the CPSC to its response to Request No. 39.

REQUEST NO. 44: All documents relating to the sale of Star ME-1's, including, but not limited to, purchase orders, shipping documents, invoices, billing statements, and sales receipts.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 45: All of your insurance policies, including, but not limited to, general liability and product liability policies, as well as all policies evidencing and/or describing insurance coverage that is and/or may be applicable or related to recalls, repairs, and/or refunds relating to your products, and/or to other corrective actions relating to your products, including, but not limited to, potential corrective action for the Star ME-1.

RESPONSE: SCM objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Subject to and without waiving the above objections, SCM answers as follows. SCM is not now, and has not been since the 1996 sale of its assets to Grinnell, an active corporation. It has no assets or employees. It manufactures no products. It has very limited records, as they were transferred to Grinnell as part of the 1996 sale. Based on its information and belief, SCM does not have insurance policies related to recalls, repairs, and/or refunds of ME-1 or any other sprinklers.

REQUEST NO. 46: From the date of your incorporation through the present, all documents evidencing your profits, losses, gross income, net income, gross sales, net sales, net assets, net worth, total assets, and total liabilities, including, but not limited to, your federal and state tax returns, financial statements, and accountant's reports.

RESPONSE: SCM objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. SCM further objects to this request to the extent it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, SCM will provide documents it has located that are responsive to this request from the years 1990 to the present.

REQUEST NO. 47: All documents comprising, for each of the last three (3) years, your budgets, revenue projections, cash flow projections, and profitability projections.

RESPONSE: SCM objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Subject to and without waiving the above objections, SCM answers as follows. SCM is not now, and has not been since the 1996 sale of its assets to Grinnell, an active corporation. It has no assets or employees. It manufactures no products. As a result, SCM has no documents responsive to this request.

REQUEST NO. 48: All photographs and other pictures of the Star ME-1.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 49: All product catalogues, brochures, marketing materials, sales materials, and similar documents listing, describing, or otherwise referencing or showing the Star ME-1.

RESPONSE: *See* SCM's Objections and Response to Request No. 12.

REQUEST NO. 50: Three (3) never-installed Star ME-1's of each manufacture model year.

RESPONSE: As SCM has not been an active corporation after 1996, it does not have any ME-1 sprinklers in its possession.

REQUEST NO. 51: Three (3) samples of each Star ME-1 component part, including, but not limited to, each substance, chemical, lubricant, "O" ring, and/or other material used in manufacturing Star ME-1's.

RESPONSE: As SCM has not been an active corporation after 1996, it does not have any ME-1 sprinklers in its possession.

REQUEST NO. 52: All Star ME-1's tested, analyzed, examined, torn down, and/or cut apart.

RESPONSE: As SCM has not been an active corporation after 1996, it does not have any ME-1 sprinklers in its possession.

AS TO ANSWERS

Jeffrey Hintze, being duly sworn, deposes and says that he verifies the foregoing Sprinkler Corporation of Milwaukee, Inc.'s ("SCM") Responses to the CPSC's First Request for Production of Documents for and on behalf of SCM, and is duly authorized so to do; that certain of the matters stated therein are not within the personal knowledge of deponent; that the facts therein have been assembled by authorized employees and counsel of SCM; that the responses set forth therein, subject to inadvertent and undiscovered errors, are based upon and therefore necessarily limited by the records and information still in existence, presently recollected, and thus far discovered in the course of preparation of those responses; and consequently SCM reserves the right to make any changes in the responses if it appears at any time that omissions or errors have been made therein or that more accurate information is available; and that subject to the limitations set forth herein, the said responses are true to the best of his knowledge, information and belief.

Jeffrey Hintze

This instrument was acknowledged before me on this 25 th day of January, 2002 by Jeffrey Hintze.

[Seal]

Christine Owens
Notary Public, State of Wisconsin
My commission 2/8/04

AS TO OBJECTIONS

Dated this 25th day of January, 2002.

Reinhart Boerner Van Deuren s.c.
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414-298-1000

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Ralph A. Weber
WI State Bar ID No. 1001563
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WI State Bar ID No. 1025415

BY _____
Attorneys for Sprinkler Corporation of Milwaukee, Inc.

Michael A. Brown
Margaret Freeston
Brown & Freeston, P.C.
Suite 242
3201 New Mexico Avenue, NW
Washington, DC 20016-2756

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of the foregoing Sprinkler Corporation of Milwaukee, Inc's Response to the CPSC's First Set of Requests for Production of Documents and Things on this 25th day of January, 2002, by hand-delivery on:

Seth B. Popkin, Esquire
Alan H. Schoem, Esquire
Eric L. Stone, Esquire
Office of Compliance
Consumer Product Safety Commission
4330 East-West Highway
Room 613
Bethesda, Maryland 20814

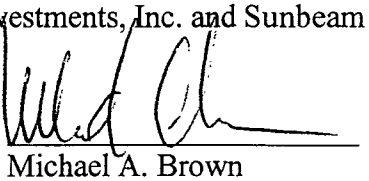
Counsel for Complainant, Consumer Product Safety Commission

Robert B. Barnett, Esquire
Heidi K. Hubbard, Esquire
Williams & Connolly LLP
725 12th Street, N.W.
Washington, D.C. 20005

With a copy via U.S. mail, postage pre-paid to:

Barbara Wrubel, Esquire
Bert L. Wolff, Esquire
Skadden, Arps, Slate, Meager & Flom LLP
Four Times Square
New York, New York 10036

Counsel for Chemetron Corporation, Chemetron Investments, Inc. and Sunbeam Corporation



Michael A. Brown

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of

CHEMETRON CORPORATION,
f/k/a Chemetron Investments, Inc.

and

CPSC Docket No.: 02-1

CHEMETRON INVESTMENTS, INC.,
f/k/a Chemetron Corporation

and

SUNBEAM CORPORATION

and

SPRINKLER CORPORATION OF
MILWAUKEE, INC., f/k/a Star
Sprinkler Corporation, f/k/a Grunau
Sprinkler Manufacturing Company, Inc.

and

GRUCON CORPORATION

**GRUCON CORPORATION'S ANSWERS
TO THE CPSC'S
FIRST SET OF INTERROGATORIES**

Grucon Corporation ("Grucon"), by its attorneys, Reinhart Boerner

Van Deuren s.c. and Ralph A. Weber and Kurt D. Dykstra and Brown & Freeston,

P.C. by Michael A. Brown and Margaret Freeston answers to the Consumer Product Safety Commission's ("CPSC") discovery as follows:

GENERAL RESPONSES AND OBJECTIONS

1. Grucon objects to this discovery insofar as it seeks documents or things protected by the attorney-client privilege, the work product doctrine or other applicable privileges or doctrines. Grucon intends to assert those privileges with respect to any document or thing to which they apply and should its responses or production inadvertently include any such documents or things, it reserves the right to seek the return of the document or things, and the inadvertent production shall not be construed as waiver with respect to any document or thing.

2. The disclosure of any document or thing, or failure currently to object to any request for production, does not constitute a waiver of right to object with respect to the disclosure of other documents or things or future requests for documents or things.

3. The phrase "documents it has located" means responsive documents that have been collected by Grucon as a result of a good faith search of its files and records that it reasonably believes might contain responsive documents or things. This statement should not be construed as representation that any such documents or things exist, but merely as a statement that if such documents or things exist, they will be produced.

4. Grucon objects to all instructions and definitions to the extent that they seek to impose obligations beyond those required the Federal Rules of Civil Procedure and/or local rules of this court.

5. Discovery is ongoing. Grucon reserves the right to supplement its responses to this discovery as information and documents become available.

6. Grucon is a parent holding corporation of various other companies, including Sprinkler Corporation of Milwaukee, Inc. ("SCM"). It does not presently—and has never in its history—designed, manufactured, or distributed any consumer products generally or ME-1 sprinklers specifically. As a result, Grucon objects to the direction of this discovery toward it. Additionally, Grucon, as a holding corporation, lacks information to answer much of this discovery in detail.

Subject to the foregoing general statements and objections, Grucon responds to the CPSC's discovery as follows:

INTERROGATORIES

INTERROGATORY NO. 1: Identify all documents that support your answers to these Interrogatories, your responses to the Requests for Production, and/or upon which you rely and/or relied in responding to these Interrogatories and the Requests for Production.

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this interrogatory to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon refers the CPSC to Grucon's response to Document Request No. 1.

INTERROGATORY NO. 2: State all facts in support of and upon which you base the Answer, including each of the Answer's admissions, denials, and affirmative or other defenses (numbered or otherwise).

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this interrogatory to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon refers the CPSC to the correspondence, telephone conversations, and documents it produced to the CPSC from June 1999 until the commencement of this litigation as well as documents produced in this litigation. Based on that information, the CPSC should understand Grucon's admissions, denials, and defenses.

INTERROGATORY NO. 3: Identify all documents in support of and upon which you base the Answer, including each of the Answer's admissions, denials, and affirmative or other defenses (numbered or otherwise).

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further

objects to this interrogatory to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon refers the CPSC to the correspondence, telephone conversations, and documents it produced to the CPSC from June 1999 until the commencement of this litigation as well as document produced in this litigation. Based on that information, the CPSC should understand Grucon's admissions, denials, and defenses.

INTERROGATORY NO. 4: Identify each person who you believe possesses any knowledge of the facts relating to the subject matter of this litigation, the Star ME-1, the Complaint, and/or the Answer, and describe with specificity the knowledge of each such person concerning the subject matter of this litigation, the Star ME-1, the Complaint, and/or the Answer.

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. The Star ME-1 sprinkler was manufactured by many different companies over a period of many years. Grucon further objects to this interrogatory to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon answers this Interrogatory as follows:

William Stone:

Mr. Stone is a long-time employee. When the CPSC contacted Grucon asking for information about the ME-1 sprinklers, Mr. Stone gathered information and documents at the request of Mr. Gary Grunau. Mr. Stone also responded to the CPSC's requests for information.

Paul Grunau:

Mr. Paul Grunau has an understanding of the corporate structure of the Grucon Companies, including the parent holding company, Grucon, as well as Sprinkler Corporation of Milwaukee, Inc.

Gary Grunau:

Mr. Gary Grunau has an understanding of the corporate structure of the Grucon Companies, including the parent holding company, Grucon, as well as Sprinkler Corporation of Milwaukee, Inc. Mr. Grunau also has a general understanding of the Star ME-1 sprinkler, its uses, and its manufacture and design.

Jeff Hintze:

Mr. Hintze has an understanding of the corporate structure of the Grucon Companies, including the parent holding company, Grucon, as well as Sprinkler Corporation of Milwaukee, Inc.

Milt Kuyers
John Fenske
Jim Smyrl

These individuals were employed at Star Sprinkler Corporation when it was owned by Grucon. Grucon believes that they have knowledge of the ME-1 sprinkler.

INTERROGATORY NO. 5: Identify all persons who assisted in the preparation of, and/or who provided information or documents used in the preparation of, the responses to these Interrogatories and the responses to the Requests for Production.

ANSWER: Grucon objects to this Interrogatory on the grounds that the manner in which it and its counsel assembles information pertaining to pending litigation is protected by the work product doctrine. This is a corporate response prepared by various persons with the assistance of counsel. Subject to and without waiving the above objection, Grucon answers that William Stone and Jeff Hintze were primarily responsible for preparing Grucon's answers to the CPSC's discovery.

INTERROGATORY NO. 6: Identify all persons who participated or assisted in producing the documents produced in response to these Interrogatories and the Requests for Production.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 5.

INTERROGATORY NO. 7: Since the date of your incorporation, have you had written document retention policies? If the response to this question is in the affirmative for any part or all of the time period referenced, state the period(s) of time you had such policies.

ANSWER: Grucon does not have any written document retention policies. It generally follows the Internal Revenue Service ("IRS") and other agency guidelines.

INTERROGATORY NO. 8: Since the date of your incorporation, have you had unwritten document retention policies? If the response to this question is in the affirmative for any part or all of the time period referenced, describe in detail all of your unwritten document retention policies in effect since the date of your incorporation, and state the period of time each policy was in effect.

ANSWER: Grucon generally follows the Internal Revenue Service ("IRS") and other agency guidelines.

INTERROGATORY NO. 9: Since the date of your incorporation, have you had written policies relating to retention of your products or samples of your products? If the response to this question is in the affirmative for any part or all of the time period referenced, state the period(s) of time you had such policies.

ANSWER: Grucon, as a parent holding corporation, is not in the business of the manufacture of products and has no products or samples to retain. Thus, it has no written policies relating to the retention of products or samples thereof.

INTERROGATORY NO. 10: Since the date of your incorporation, have you had unwritten policies relating to retention of your products or samples of your products? If the response to this question is in the affirmative for any part or all of the time period referenced, describe in detail all such policies, state the period of time each policy was in effect.

ANSWER: Grucon, as a parent holding corporation, is not in the business of the manufacture of products and thus has no products or samples to retain.

INTERROGATORY NO. 11: Identify each person whom you expect to call as an expert witness at the trial or hearing of this matter, and for each such expert witness, state or provide the following information:

(a) The subject matter on which the expert is expected to testify;

(b) The substance of the facts and opinions to which the expert is expected to testify; and

(c) A summary of the grounds for each opinion.

ANSWER: Grucon objects to this interrogatory as it is premature. The complaint in this matter was only recently filed. Grucon will identify its experts in accordance with the deadlines of any scheduling order established by the administrative law judge in this matter.

INTERROGATORY NO. 12: Identify each person whom you expect to call as a witness at the trial or hearing of this matter (other than those already identified in response to the immediately preceding interrogatory), and for each such witness, state or provide the following information:

(a) The subject matter on which the witness is expected to testify; and

(b) The substance of the facts to which the witness is expected to testify.

ANSWER: Grucon objects to this interrogatory as it is premature. The complaint in this matter was only recently filed. Grucon will identify its witnesses in accordance with the deadlines of any scheduling order established by the administrative law judge in this matter. Further answering, Grucon does expect to call certain company witnesses—which could include the individuals identified in response to Interrogatory No. 4—to provide testimony about the company and its relationship with Sprinkler Corporation of Milwaukee, Inc.

INTERROGATORY NO. 13: Identify each communication, whether in person, by telephone, or by some other means, whether in a discussion, meeting, or other setting, relating to the subject matter of this litigation, the Complaint, the Answer, and/or the Star ME-1, between, among, by, or with any persons, including, but not limited to, the following: the Respondents; the Respondents' employees, former employees, agents, and/or representatives; and/or sprinkler installers, contractors, customers, and/or users. As part of your answer, identify all communications you and/or other persons made and/or received relating to the following:

(a) Problems, flaws, defects, defective conditions, and/or deficiencies in or associated with any Star ME-1's and/or any component parts

thereof, including, but not limited to, any substance, chemical, lubricant, "O" ring, and/or other material used in manufacturing Star ME-1's; and

(b) Failures and/or partial failures of Star ME-1's and/or any component parts thereof to operate, activate, perform, and/or otherwise function (including, but not limited to, discharge water) in fires and/or tests.

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this interrogatory to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon refers the CPSC to its response to Document Request No. 8.

INTERROGATORY NO. 14: Identify all persons from whom you have obtained witness statements relating to the subject matter of this litigation, the Complaint, and the Answer, and all persons who have custody or possession of each such statement, as well as the date of each such statement and whether each such statement was written or oral.

ANSWER: Grucon objects to this interrogatory as it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon answers that it has not obtained any witness statements.

INTERROGATORY NO. 15: Identify and describe in detail all operations, purposes, and uses of the Star ME-1.

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Subject to and without waiving the above objections, Grucon answers as follows. Grucon, as a parent holding company that has not ever been engaged in the manufacture, sale, or distribution of sprinklers, lacks detailed information to fully answer this interrogatory.

INTERROGATORY NO. 16: Identify each person who manufactured the Star ME-1 and the place(s) at which each such person manufactured the Star ME-1. State the dates each such person manufactured the Star ME-1.

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Subject to and without waiving the above objections, Grucon answers as follows. Grucon, as a parent holding company that has not ever been engaged in the manufacture, sale, or distribution of sprinklers, lacks detailed information to fully answer this interrogatory. In general, Grucon knows that Sprinkler Corporation of Milwaukee, Inc. (then known as Star Sprinkler Corporation) manufactured the ME-1 sprinkler from approximately 1983 until it sold its name and assets to Grinnell in 1996. In addition, in 1983 Grunau Sprinkler Manufacturing Co., Inc. purchased certain assets from Chemetron Fire Systems, Inc. related to sprinkler manufacturing devices including the ME-1.

INTERROGATORY NO. 17: Identify all persons who participated in, had responsibility for, and/or had knowledge of any of the following relating to the Star ME-1, and for each such person, state their position and title at the time of their participation or responsibility and describe in detail the nature of their participation, activities, responsibilities, and/or knowledge:

(a) Design and/or development;
(b) Engineering;
(c) Manufacture;
(d) Testing; and
(e) UL and/or FM approval process and/or listing process.

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Subject to and without waiving the above objections, Grucon answers as follows. Grucon, as a parent holding company that has not ever been engaged in the manufacture, sale, or distribution of sprinklers, lacks detailed information to fully answer this interrogatory. In general, during the period of time in which Grucon owned Star Sprinkler Company:

(a), (d) – (e) John Simmons
deceased

(b) – (c) John Fenske

(b) (6)

INTERROGATORY NO. 18: Identify and describe in detail the Star ME-1, all materials used therein, and all procedures and specifications for the manufacture of the Star ME-1, including, but not limited to, the following:

(a) Its design, materials, and component parts, including, but not limited to, the specifications for each component part, substance, chemical, lubricant, and/or other material used in the Star ME-1, the purposes for which they were used, the manner and amounts in which they were used, and any changes in any of the foregoing;

(b) All tools, machinery, and equipment used in the Star ME-1 manufacture process, the purposes for which they were used, and any changes in any of the foregoing; and

(c) All changes in procedures and specifications for the manufacture of the Star ME-1.

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Subject to and without waiving the above objections, Grucon answers as follows. Grucon, as a parent holding company that has never been engaged in the manufacture, sale, or distribution of sprinklers, lacks detailed information to answer this interrogatory. Grucon's necessarily limited answers to this interrogatory are contained in the correspondence (with enclosures) that were supplied to the CPSC from June 1999 until the commencement of this litigation. Aside from the information contained within that correspondence as well as the information contained within the accompanying documents, Grucon does not have additional knowledge that is responsive to this interrogatory.

INTERROGATORY NO. 19: For each change identified in your response to the immediately preceding interrogatory:

(a) State the date of the change;

(b) State all reasons for the change;

(c) Identify all persons who participated in bringing about the change, and explain each person's role in same;

(d) Identify all persons who implemented the change; and

(e) State whether or not any tests were performed on the Star ME-1's before and/or after the change occurred. If so:
   (i) Describe all such tests and provide a detailed protocol;
   (ii) Identify the persons and entities who participated in setting up and/or conducting the tests;
   (iii) Describe and explain the results of the tests, including all observations and conclusions; and
   (iv) Identify all persons who participated in evaluating the test results.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 20: Identify the manufacturer and supplier of each component part, substance, chemical, lubricant, and/or other material used in the Star ME-1.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 21: State the composition and/or material of the "O" rings contained in the Star ME-1, including all changes in same, and identify the manufacturer and supplier of each of the "O" rings contained in the Star ME-1.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 22: Identify all industry and/or other standards, codes, requirements, and/or rules according to which the Star ME-1 was manufactured, including, but not limited to, UL and FM.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 23: Identify all industry and/or other standards, codes, requirements, and/or rules applicable to the Star ME-1, including, but not limited to, UL and FM.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 24: Were the Star ME-1's submitted for approval, listing, and/or certification by laboratories or institutions including, but not limited to, UL and FM? If so, for each submission for approval, listing, and/or certification:

(a) Identify the Star ME-1;

(b) Identify the laboratory, institution, and/or other person to whom the Star ME-1 was submitted;

(c) State the date of each submission;

(d) Describe all steps taken to obtain approval, listing, and/or certification;

(e) Identify all persons who made the submission, all persons involved in each step, and all persons having knowledge of the submission and the steps associated therewith;

(f) Identify and describe all tests, examinations, evaluations, and analyses conducted with respect to the submission, and include in your answer the following:

  (i) The identity of each person having knowledge of same;

  (ii) The identity of each person setting up, conducting, evaluating, and/or witnessing same; and

  (iii) A detailed description and explanation of the results of same, including all findings, observations, and conclusions;

(g) Identify each communication relating to the submission;

(h) State the final result of and final response to the submission, and the date of the final result and/or response, including, but not limited to, whether or not the submission was approved, granted, denied, rejected, refused, and/or postponed. If the submission was denied, rejected, refused, and/or postponed, state all reasons for such action; and

  (i) State whether or not approval, listing, and/or certification of any Star ME-1 or component part thereof was ever withdrawn, discontinued, cancelled, or the like, and whether or not any person ever objected to the sale and/or distribution of any Star ME-1. If so, identify the Star ME-1 or component part, state the date of and all reasons for such action, identify each person with knowledge of such action, and identify each communication relating to such action.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 25: Identify each person who distributed and/or participated in the distribution of the Star ME-1, and state the dates each such person distributed and/or participated in the distribution of the Star ME-1. For each such person, identify each person to whom the Star ME-1 was distributed, the dates on which the Star ME-1 was distributed to that person, the quantity of Star ME-1's distributed to each person, and the terms on which the Star ME-1 was distributed to each person (including, but not limited to, sale prices).

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 26: By manufacturer, state the total quantity of Star ME-1's manufactured in each year in which they were manufactured, and state the total quantity of Star ME-1's manufactured in all years combined. If you cannot state exact quantities, please so state and give your best estimates.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 27: By manufacturer, state the total quantity of Star ME-1's distributed in each year in which they were distributed, and state the total quantity of Star ME-1's distributed in all years combined. If you cannot state exact quantities, please so state and give your best estimates.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 28: Identify each person who installed and/or participated in the installation of the Star ME-1, and state the dates each such person installed and/or participated in the installation of the Star ME-1.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 29: State the total quantity of Star ME-1's installed in each year in which they were distributed, and state the total quantity of Star ME-1's installed in all years combined. If you cannot state exact quantities, please so state and give your best estimates.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 30: Identify, and state the building type of (including, but not limited to, the building types listed in interrogatory 31), all buildings in which Star ME-1's have ever been installed, state the quantity ever installed in each such building, and state the quantity presently installed in each such building.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 31: State the quantity of Star ME-1's ever installed in each of the following types of buildings:

(a) Private homes;
(b) Apartment buildings;
(c) Public and private schools, including, but not limited to, universities, colleges, dormitories, and residential halls;
(d) Nursing homes;
(e) Hospitals and other healthcare facilities;
(f) Detention facilities, including, but not limited to, prisons and jails;
(g) Homeless shelters;
(h) Facilities used for recreation, including, but not limited to, health clubs, gymnasiums, sports arenas, public pools, country clubs, and museums;
(i) Hotels and motels; and
(j) Day care centers.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 32: State the quantity of Star ME-1's currently in your possession, custody, or control, and of those, state the quantity that have been removed from service, the quantity that have never been put in service, and the manufacture year of each one.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18. Further answering, Grucon does not have any ME-1s in its possession, custody, or control.

INTERROGATORY NO. 33: Identify and describe all actions, steps, and/or procedures, including, but not limited to, quality control and quality assurance, you and/or any other persons took before, during, and/or after the manufacture of each Star ME-1, to ensure that each Star ME-1 was manufactured in accordance with specifications, was properly manufactured, and would fully and properly operate and activate.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 34: Identify all persons with knowledge of and/or responsibility for all actions, steps, and/or procedures identified and described in response to the immediately preceding interrogatory.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 35: Identify all tests, examinations, and/or analyses of Star ME-1's and/or any component parts thereof, and for each Star ME-1 tested, examined, and/or analyzed:

(a) Identify the Star ME-1;
(b) Describe each test, examination, and/or analysis, state the date of each, and provide a detailed protocol for each;
(c) Identify the persons who participated in setting up and/or conducting the tests, examinations, and/or analyses;
(d) Describe and explain the results of the tests, including all observations and conclusions; and
(e) Identify all persons who participated in evaluating the test results.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18. Further answering, Grucon also is aware of purported testing, the results of which were provided to Grucon by the CPSC prior to the commencement of this litigation.

INTERROGATORY NO. 36: State whether you or any other persons:

(a) observed that;

(b) alleged, reported, or otherwise communicated to you that they observed that; or

(c) tested, examined, and/or analyzed to determine if:
any of the following conditions was present in any Star ME-1's or any component parts thereof: corrosion; accumulation of deposits; adhesion, binding, bonding, and/or sticking of the "O" ring to other sprinkler component parts; swelling of the "O" ring; lubricant deficiencies or problems; leakage and/or evidence of leakage; and/or component part interference or fit problems. If so, for each such Star ME-1 or component part thereof:

(i) Identify the Star ME-1 and/or component part;
(ii) Describe the circumstances of the conditions;
(iii) Describe each observation, test, examination, and/or analysis, state the date of each, and provide a detailed protocol for each;
(iv) Identify all persons who made the observations and/or communicated this information to you, and state the dates of all such observations and/or communications;
(v) Identify all persons who participated in setting up and/or conducting the tests, examinations, and/or analyses;
(vi) Describe and explain the results of the tests, examinations, and/or analyses, including all observations and conclusions relating to the extent to which any of the referenced conditions was present and the criteria by which it was determined whether the referenced conditions were present;
(vii) State all reasons any of the referenced conditions was present;
(viii) Identify all persons who participated in evaluating the results of the tests, examinations, and/or analyses; and
(ix) Identify all communications relating to the observations, tests, examinations, and/or analyses.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 37: State the effects each of the following conditions may have upon the operation, activation, and/or other performance of a Star ME-1, and state all facts, reasons, and bases for the effects you state:

(a) Corrosion;
(b) Accumulation of deposits;
(c) Adhesion, binding, bonding, and/or sticking of the "O" ring to other sprinkler component parts;
(d) Swelling of the "O" ring;

(e) Lubricant deficiencies or problems;
(f) Leakage; and
(g) Component part interference or fit problems.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 38: Explain in detail the role of, and requirements for, water pressure in the operation and activation of the Star ME-1.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 39: In each of the Star ME-1's manufactured and installed, after the thermal sensing element or fusible link melts from fire or heat, does each Star ME-1 require water pressure to enable its component parts to properly move and open the sprinkler (to then enable water to properly discharge)? For each Star ME-1 requiring such water pressure:

(a) State the minimum water pressure required (in psig) and the reasons that pressure is required;
(b) State how the water pressure causes the Star ME-1's component parts to properly move and open the sprinkler; and
(c) State all reasons the Star ME-1's component parts will not properly move and open the sprinkler without that pressure.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 40: Do you have knowledge of, and/or has any person alleged, reported, or otherwise communicated to you, any problems, flaws, defects, defective conditions, and/or deficiencies in or associated with any Star ME-1's and/or any component parts thereof, including, but not limited to, performance or activation, and/or with any substance, chemical, lubricant, "O" ring, and/or other material used in manufacturing Star ME-1's? If so, for each such alleged, reported, or communicated problem, flaw, defect, defective condition, and efficiency:

(a) Identify the Star ME-1 or component part;
(b) Describe it in detail and state the date;
(c) Identify all persons having knowledge of it;
(d) State the date on which you acquired knowledge of it;

(e) State how, and identify from whom, you acquired knowledge of it, and identify all communications relating to it; and

(f) Identify and describe all actions you and/or any other persons took relating to it, including, but not limited to, the dates of all actions and the identity of all persons who took the actions.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 41: Do you have knowledge of, and/or has any person alleged, reported, or otherwise communicated to you, any failures and/or partial failures of Star ME-1's and/or any component parts thereof to operate, activate, perform, and/or otherwise function (including, but not limited to, discharge water) in fires? If so, for each such alleged, reported, or communicated failure and/or partial failure:

(a) Identify the Star ME-1 or component part;

(b) Describe it in detail, state the time and date, and state the cause and nature of the fire;

(c) Identify the building and/or place at which it occurred;

(d) State the sprinkler system pressure (in psig) at the site of it;

(e) Identify all persons witnessing and/or having knowledge of it;

(f) State the date on which you acquired knowledge of it;

(g) State how, and identify from whom, you acquired knowledge of it, and identify all communications relating to it;

(h) Identify and describe all actions you and/or any other persons took relating to it, including, but not limited to, the dates of all actions and the identity of all persons who took the actions;

(i) State whether any persons sustained or allegedly sustained injury as a result of or relating to the fire (including in attempting to escape from or extinguish the fire). If so, for each such person:

  (i) Identify the person;

  (ii) Describe each injury, and state how, where, and when the injury occurred; and

  (iii) Identify each claim related to it, including the identity of each person against whom the claim was made, describe the claim, and state the result;

(j) State whether any persons died or allegedly died as a result of or relating to the fire (including in attempting to escape from or extinguish the fire). If so, for each such person:

  (i) Identify the person;

  (ii) Describe the death, and state how, where, and when the death occurred; and

(iii) Identify each claim related to it, including the identity of each person against whom the claim was made, describe the claim, and state the result;

(k) State whether any property was damaged, destroyed, or lost, or allegedly damaged, destroyed, or lost, as a result of or relating to the fire (including in attempting to escape from or extinguish the fire). If so:

(i) Identify the property and the persons owning the property;

(ii) Describe the damage, destruction, or loss, and state the value of the affected property;

(iii) State how, where, and when the damage, destruction, or loss occurred; and

(iv) Identify each claim related to it, including the identity of each person against whom the claim was made, describe the claim, and state the result;

(l) State whether any police, fire, medical, emergency service, or other report was prepared related to the fire. If so, for each such report:

(i) Identify the report, including its date;

(ii) State the type of report;

(iii) Identify the municipality, organization, and/or other persons by whom the report was prepared;

(iv) State whether photographs and other documents, or statements, were obtained in connection with and/or made part of the report; and

(v) State whether you have a copy of the report in your possession, custody, or control;

(m) State whether any persons tested, examined, and/or analyzed any Star ME-1 or component part thereof that failed and/or partially failed in a fire, and/or any other Star ME-1 from the same site. If so, for each Star ME-1 or component part thereof tested, examined, and/or analyzed:

(i) Identify the Star ME-1 or component part;

(ii) Describe each test, examination, and/or analysis, state the date of each, and provide a detailed protocol for each;

(iii) Identify the persons who participated in setting up and/or conducting the tests, examinations, and/or analyses;

(iv) Describe and explain the results of the tests, including all observations and conclusions;

(v) Identify all persons who participated in evaluating the test results; and

(vi) Identify all communications related to it;

(n) State whether any persons tested, examined, and/or analyzed the Star ME-1 or any component part thereof to determine if any one or more

of the following conditions was present: corrosion; accumulation of deposits; adhesion, binding, bonding, and/or sticking of the "O" ring to other sprinkler component parts; swelling of the "O" ring; lubricant deficiencies or problems; and/or component part interference or fit problems. If so, for each Star ME-1 or component part thereof so tested, examined, and/or analyzed:

(i) Identify the Star ME-1 and/or component part;

(ii) Describe each test, examination, and/or analysis, state the date of each, and provide a detailed protocol for each;

(iii) Identify the persons who participated in setting up and/or conducting the tests, examinations, and/or analyses;

(iv) Describe and explain the results of the tests, examinations, and/or analyses, including all observations and conclusions relating to the extent to which any of the referenced conditions were present and the bases and criteria by which it was determined whether the referenced conditions were present;

(v) Identify all persons who participated in evaluating the results of the tests, examinations, and/or analyses; and

(vi) Identify all communications related to it;

(o) State all reasons the Star ME-1 failed and/or partially failed in the fire.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 42: Do you have knowledge of, and/or has any person alleged, reported, or otherwise communicated to you, any failures and/or partial failures of Star ME-1's, and/or any component parts thereof, to operate, activate, perform, and/or otherwise function (including, but not limited to, discharge water) in tests, and/or to operate, activate, perform, and/or otherwise function (including, but not limited to, discharge water) in tests in accordance with applicable industry and/or other standards, codes, requirements, and/or rules? If so, for each such alleged, reported, or communicated failure and/or partial failure:

(a) Identify the Star ME-1 and/or component part;

(b) Describe it in detail and state the date;

(c) Identify and describe all tests in which it occurred, identify all persons witnessing and/or having knowledge of it and performing the tests, and state all results, observations, and evaluations from the tests;

(d) State the date on which you acquired knowledge of it;

(e) State how, and identify from whom, you acquired knowledge of it, and identify all communications relating to it; and

(f) Identify and describe all actions you and/or any other persons took relating to it, including, but not limited to, the dates of all actions and the identity of all persons who took the actions; and

(g) State whether any persons tested, examined, and/or analyzed the Star ME-1 or any component part thereof to determine if any one or more of the following conditions was present: corrosion; accumulation of deposits; adhesion, binding, bonding, and/or sticking of the "O" ring to other sprinkler component parts; swelling of the "O" ring; lubricant deficiencies or problems; and/or component part interference or fit problems. If so, for each Star ME-1 or component part thereof so tested, examined, and/or analyzed:

(i) Identify the Star ME-1 and/or component part;

(ii) Describe each test, examination, and/or analysis, state the date of each, and provide a detailed protocol for each;

(iii) Identify the persons who participated in setting up and/or conducting the tests, examinations, and/or analyses;

(iv) Describe and explain the results of the tests, examinations, and/or analyses, including all observations and conclusions relating to the extent to which any of the referenced conditions were present and the bases and criteria by which it was determined whether the referenced conditions were present;

(v) Identify all persons who participated in evaluating the results of the tests, examinations, and/or analyses; and

(vi) Identify all communications related to it.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 43: Do you have knowledge of, and/or has any person alleged, reported, or otherwise communicated to you, any failures of Star ME-1's to activate at a pressure of 7 psig or below in tests or otherwise after melting of the thermal sensing element, and/or any failures of Star ME-1's to activate at a pressure of 7 psig or below in tests within 5 seconds of melting of the thermal sensing element? If so, for each such alleged, reported, or communicated failure:

(a) Identify the Star ME-1 and/or component part;

(b) Describe it in detail and state the date;

(c) Identify and describe all tests or other circumstances in which it occurred, including the test protocol, identify all persons witnessing and/or having knowledge of it and performing the tests, and state all

results, observations, and evaluations from the tests or circumstances;

(d) State the date on which you acquired knowledge of it;

(e) State how, and identify from whom, you acquired knowledge of it, and identify all communications relating to it; and

(f) Identify and describe all actions you and/or any other persons took relating to it, including, but not limited to, the dates of all actions and the identity of all persons who took the actions;

(g) State the pressure, if any, at which the Star ME-1 activated, or if it failed altogether to activate, state the highest pressure to which it was subjected;

(h) State whether any persons tested, examined, and/or analyzed the Star ME-1 or any component part thereof to determine if any one or more of the following conditions was present: corrosion; accumulation of deposits; adhesion, binding, bonding, and/or sticking of the "O" ring to other sprinkler component parts; swelling of the "O" ring; lubricant deficiencies or problems; and/or component part interference or fit problems. If so, for each Star ME-1 or component part thereof so tested, examined, and/or analyzed:

(i) Identify the Star ME-1 and/or component part;

(ii) Describe each test, examination, and/or analysis, state the date of each, and provide a detailed protocol for each;

(iii) Identify the persons who participated in setting up and/or conducting the tests, examinations, and/or analyses;

(iv) Describe and explain the results of the tests, examinations, and/or analyses, including all observations and conclusions relating to the extent to which any of the referenced conditions were present and the bases and criteria by which it was determined whether the referenced conditions were present;

(v) Identify all persons who participated in evaluating the results of the tests, examinations, and/or analyses;

(vi) Identify all communications related to it; and

(vii) State all reasons for the presence of the referenced conditions.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 44: Describe in detail the performance record and history of the Star ME-1, including, but not limited to, as applicable, positive and negative information, praise and criticism, passing and failing test results, and successes and failures in service.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 45: Identify all Star ME-1's that properly operated and activated in a fire, including, but not limited to, the date and circumstances of the fire. Identify all persons having knowledge of this information.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 46: State whether or not any Star ME-1's and/or any Star ME-1 component parts were delisted (by UL, FM, and/or, any other person), recalled, discontinued, taken off the market, and/or the subject of a warning, advisory, safety, or similar notice to consumers, distributors, installers, governmental authorities, or other persons. If so, for each such action:

(a) Identify the Star ME-1, state the quantity sought to be recalled, discontinued, taken off the market, and/or subject to notice, and the quantity actually recalled, discontinued, taken off the market, and/or subject to notice;
(b) Describe the action in detail, state the date, and state all reasons for the action;
(c) Identify and describe the circumstances leading to the action;
(d) Identify all persons having knowledge of the action;
(e) State the date on which you acquired knowledge of the action;
(f) State how, and identify from whom, you acquired knowledge of the action, and identify all communications relating to it; and
(g) Identify and describe all actions you and/or any other persons took relating to it, including, but not limited to, the dates of all actions and the identity of all persons who took the actions.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 47: State whether or not any Star ME-1's and/or any Star ME-1 component parts were returned, and/or were asked to be returned, to you and/or any manufacturer, supplier, distributor, installer, and/or other person. If so, for each such action:

(a) Identify the Star ME-1, state the quantity asked to be returned, and state the quantity actually returned;

(b) Describe the action in detail, state the date, and state all reasons for the action;
(c) Identify and describe the circumstances leading to the action;
(d) Identify all persons having knowledge of the action;
(e) State the date on which you acquired knowledge of the action;
(f) State how, and identify from whom, you acquired knowledge of the action, and identify all communications relating to it; and
(g) Identify and describe all actions you and/or any other persons took relating to it, including, but not limited to, the dates of all actions and the identity of all persons who took the actions.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 48: Have you and/or any other persons replaced Star ME-1's that had been installed in buildings or other places with new Star ME-1's or other sprinklers? If so, state the total number of Star ME-1's replaced, according to manufacturer and model year, and for each Star ME-1 replaced:

(a) Identify it and state the date it was replaced;
(b) Identify the building and/or place at which it had been installed;
(c) State the make, model, and year of the replacement sprinkler;
(d) Identify all persons to whom you provided the replacement sprinkler;
(e) State all reasons you and/or any other persons replaced it;
(f) Describe its condition at the time of replacement;
(g) State all costs of replacing it, including, and separately specifying, the costs of the replacement product, the labor, and any other associated costs;
(h) Identify all persons who paid the replacement costs;
(i) Identify all communications related to it; and
(j) State whether any persons tested, examined, and/or analyzed it, and/or any other Star ME-1 from the same site. If so, for each Star ME-1 and/or component part tested, examined, and/or analyzed:
    (i) Identify the Star ME-1 or component part;
    (ii) Describe each test, examination, and/or analysis, state the date of each, and provide a detailed protocol for each;
    (iii) Identify the persons who participated in setting up and/or conducting the tests, examinations, and/or analyses;
    (iv) Describe and explain the results of the tests, examinations, and/or analyses, including all observations and conclusions;
    (v) Identify all persons who participated in evaluating the results of the tests, examinations, and/or analyses; and

(vi) Identify all communications related to it.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 49: State all current costs of replacing a Star ME-1 and/or a group of Star ME-1's, including, and separately specifying, the costs of the replacement product, the labor, and any other associated costs. To the extent these costs may vary depending upon facts and circumstances (including, but not limited to, the building or site of replacement or the quantity being replaced), so state, identify all variables, factors, and considerations related to determining the costs, and explain fully. If you cannot give exact costs, give your best estimates (identified as such) and explain the basis for the estimates.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 50: Identify and describe all verbal and/or written claims of which you are aware relating to the Star ME-1. For each such claim, identify the Star ME-1, state the date on and manner in which you first became aware of same, identify all persons making the claim, and state the status of same, including whether or not it has been settled or otherwise resolved, and if settled or resolved, the settlement or resolution terms and amounts.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory No. 18.

INTERROGATORY NO. 51: From the date of your incorporation through the present, identify each of your employees and state the dates during which you employed each employee.

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Subject to and without waiving the above objections, Grucon answers as follows. Grucon is a parent holding company that has never been engaged in the manufacture, sale, or distribution of sprinklers. Nevertheless, despite the objectionable nature of the CPSC's request, Grucon answers this interrogatory (please note that all dates are approximate):

Gary Grunau
(address known to the CPSC)
Employed 1980 – Present

Barbara Casey
(b) (6)
Employed 1988 – Present

Charles Wallace
Address Unknown
Employed 1991 – 1994

Mark Nennig
Address Unknown
Employed 1992 – 1994

Vince Digaudio
Address Unknown
Employed 1980 – 1993

Tom Anderson
(b) (6)
Employed 1984 – 1991

INTERROGATORY NO. 52: From the date of your incorporation through the present, identify each of your officers and state the dates during which each officer held each officer position.

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Subject to and without waiving the above objections, Grucon answers as follows. Grucon is a parent holding company that has never been engaged in the manufacture, sale, or distribution of sprinklers. Nevertheless, despite the objectionable nature of the CPSC's request, Grucon answers this interrogatory (please note that all dates are approximate):

Gary Grunau
(address known to CPSC)
President
1980-Present

Robert Schmitt
(b) (6)
Vice President
1994-Present

Paul W. Grunau
(b) (6)
Vice President
1994-Present

Jeff Hintze
(b) (6)
Secretary & Treasurer
1994-Present

Charles Wallace
Address Unknown
Secretary & Treasurer
1991-1994

Milt Kuyers
(b) (6)
Vice President
1993

Tom Anderson
(b) (6)
Secretary & Treasurer
1984-1991

Dave Klein
Address Unknown
Asst. Secretary & Treasurer
1980-1984

Hugh Dennison
Address Unknown
Secretary and Asst. Treasurer
1980-1984

John Olson
Address Unknown
Vice President & Secretary
1984-1985

Vince Digaudio
Address Unknown
Asst. Secretary
1988-1993

Jim Henry
(b) (6)
Asst. Secretary
1991-1994

INTERROGATORY NO. 53: From the date of your incorporation through the present, identify each of your directors and state the dates during which each director held such position.

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Subject to and without waiving the above objections, Grucon answers as follows. Grucon is a parent holding company that has never been engaged in the manufacture, sale, or distribution of sprinklers. Nevertheless, despite the objectionable nature of the CPSC's request, Grucon answers this interrogatory (please note that all dates are approximate):

Paul W. Grunau
1999-Present

Gary Grunau
1980-1999

Gretchen Henry
(b) (6)
1983-1999

Susan Dragisic
(b) (6)
1983-1999

Milt Kuyers
1998-1999

Tom Bolger
(b) (6)
1998-1999

Paul E. Grunau
deceased
1980-1992

Lenore Grunau
deceased
1980-1985

Daniel Maddigan
Address Unknown
1980-1983

Richard Harrington
Address Unknown
1980-1984

Walter Davis
deceased
1980-1999

Linda Grunau
(b) (6)
1985-1992

INTERROGATORY NO. 54: From the date of your incorporation through the present, identify all of your stockholders and/or other owners, state the percentage of stock owned by each person identified, and state the dates during which each person owned said stock.

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Subject to and without waiving the above objections, Grucon answers as follows. Grucon is a parent holding company that has never been engaged in the manufacture, sale, or distribution of sprinklers. Nevertheless, despite the objectionable nature of the CPSC's request, Grucon answers this interrogatory (please note that all dates and percentages are approximate):

Paul Grunau
100%
1999-Present

Gary Grunau
28% *
1980-1999

Susan Dragisic
24% *
1980-1999

Gretchen Henry
24% *
1980-1999

Various trusts for the benefit of the children of (b) (6)
(b) (6)
24% *
1988-1999

Paul E. Grunau
Deceased
Prior to his death, Mr. Grunau owned various percentages of the stock and over time gifted various classes of stock to the other stockholders.
1980-1991

* The percentages of ownership fluctuated over time because, prior to his death, Mr. Paul E. Grunau gifted various classes of stock to the other stock holders.

INTERROGATORY NO. 55: From the date of your incorporation through the present, identify each of your employees, agents, representatives, and/or consultants who has held a supervisory, managerial, and/or executive position or role in the following areas of your company:

(a) Sales;
(b) Marketing;
(c) Product design and/or development;
(d) Engineering and/or technical services;
(e) Customer service/customer relations;
(f) Public and/or governmental relations;
(g) Product manufacturing and/or production;
(h) Product distribution;
(i) Corporate mergers, acquisitions, and/or transactions;
(j) Quality assurance/control; and
(k) Any divisions or areas responsible for, or with work relating to, Star ME-1's and/or any component parts thereof.

ANSWER: *See* Grucon's Objections and Answer to Interrogatory Nos. 51 and 52.

INTERROGATORY NO. 56: Identify and describe your insurance coverage that is and/or may be applicable or related to recalls, repairs, and/or refunds relating to your products, and/or to other corrective actions relating to your products, including, but not limited to, potential corrective action for the Star ME-1. Identify all insurance policies relating to the foregoing.

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably

calculated to lead to the discovery of relevant information. Subject to and without waiving the above objections, Grucon answers that it is not engaged in the design, manufacture, or distribution of the Star ME-1 or any other sprinkler. As a result, based on its information and belief, Grucon does not have any insurance coverage responsive to this interrogatory.

INTERROGATORY NO. 57: For each of the last three (3) years, state your gross income, your net income, your gross sales, and your net sales.

ANSWER: Grucon objects to this interrogatory as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Subject to and without waiving the above objections, Grucon answers that it is not engaged in the design, manufacture, or distribution of the Star ME-1 or any other sprinkler. Further answering, Grucon refers the CPSC to Grucon's response to Document Request Nos. 46 and 47.

INTERROGATORY NO. 58: For each of the documents produced in response to these Interrogatories and the Requests for Production, state whether or not it is a true and accurate copy of the original.

ANSWER: Grucon answers that the documents referred to in these interrogatories and produced in response to the CPSC's Requests for Production are believed to be true and accurate copies of the originals.

AS TO ANSWERS

Jeffrey Hintze, being duly sworn, deposes and says that he verifies the foregoing Grucon Corporation's Answers to the CPSC's First Set of Interrogatories for and on behalf of Grucon, and is duly authorized so to do; that certain of the matters stated therein are not within the personal knowledge of deponent; that the facts therein have been assembled by authorized employees and counsel of Grucon; that the responses set forth therein, subject to inadvertent and undiscovered errors, are based upon and therefore necessarily limited by the records and information still in existence, presently recollected, and thus far discovered in the course of preparation of those responses, and consequently Grucon reserves the right to make any changes in the responses if it appears at any time that omissions or errors have been made therein or that more accurate information is available; and that subject to the limitations set forth herein, the said responses are true to the best of his knowledge, information and belief.

Jeffrey Hintze

This instrument was acknowledged before me on this 25th day of January, 2002 by Jeffrey Hintze.

[Seal]

(Christine Owens)
Notary Public, State of Wisconsin
My commission 2/8/04

AS TO OBJECTIONS

Dated this 25th day of January, 2002.

Reinhart Boerner Van Deuren s.c.
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Ralph A. Weber
WI State Bar ID No. 1001563
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WI State Bar ID No. 1025415

BY: _____
Attorneys for Glucon Corporation

Michael A. Brown
Margaret Freeston
Brown & Freeston, P.C.
Suite 242
3201 New Mexico Avenue, NW
Washington, DC 20016-2756

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of the foregoing Grucon Corporation's Answers to the CPSC's First Set of Interrogatories on this 25th day of January, 2002, by hand-delivery on:

Seth B. Popkin, Esquire
Alan H. Schoem, Esquire
Eric L. Stone; Esquire
Office of Compliance
Consumer Product Safety Commission
4330 East-West Highway
Room 613
Bethesda, Maryland 20814

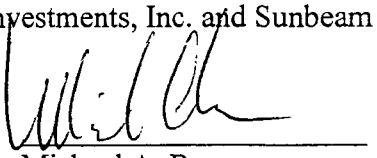
Counsel for Complainant, Consumer Product Safety Commission

Robert B. Barnett, Esquire
Heidi K. Hubbard, Esquire
Williams & Connolly LLP
725 12th Street, N.W.
Washington, D.C. 20005

With a copy via U.S. mail, postage pre-paid to:

Barbara Wrubel, Esquire
Bert L. Wolff, Esquire
Skadden, Arps, Slate, Meager & Flom LLP
Four Times Square
New York, New York 10036

Counsel for Chemetron Corporation, Chemetron Investments, Inc. and Sunbeam Corporation



Michael A. Brown

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of

CHEMETRON CORPORATION,
f/k/a Chemetron Investments, Inc.

and

CPSC Docket No.: 02-1

CHEMETRON INVESTMENTS, INC.,
f/k/a Chemetron Corporation

and

SUNBEAM CORPORATION

and

SPRINKLER CORPORATION OF
MILWAUKEE, INC., f/k/a Star
Sprinkler Corporation, f/k/a Grunau
Sprinkler Manufacturing Company, Inc.

and

GRUCON CORPORATION,

**GRUCON CORPORATION'S
RESPONSE TO THE CPSC'S FIRST
SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS AND THINGS**

Grucon Corporation ("Grucon"), by its attorneys, Reinhart Boerner

Van Deuren s.c. and Ralph A. Weber and Kurt D. Dykstra and Brown & Freeston,

P.C. by Michael A. Brown and Margaret Freeston respond to the Consumer Product Safety Commission's ("CPSC") discovery as follows:

GENERAL RESPONSES AND OBJECTIONS

1. Grucon objects to this discovery insofar as it seeks documents or things protected by the attorney-client privilege, the work product doctrine or other applicable privileges or doctrines. Grucon intends to assert those privileges with respect to any document or thing to which they apply and should its responses or production inadvertently include any such documents or things, it reserves the right to seek the return of the document or things, and the inadvertent production shall not be construed as waiver with respect to any document or thing.

2. The disclosure of any document or thing, or failure currently to object to any request for production, does not constitute a waiver of right to object with respect to the disclosure of other documents or things or future requests for documents or things.

3. The phrase "documents it has located" means responsive documents that have been collected by Grucon as a result of a good faith search of its files and records that it reasonably believes might contain responsive documents or things. This statement should not be construed as representation that any such documents or things exist, but merely as a statement that if such documents or things exist, they will be produced.

4. Grucon objects to all instructions and definitions to the extent that they seek to impose obligations beyond those required the Federal Rules of Civil Procedure and/or local rules of this court.

5. Discovery is ongoing. Grucon reserves the right to supplement its responses to this discovery as information and documents become available.

6. Grucon is a parent holding corporation of various other companies, including Sprinkler Corporation of Milwaukee, Inc. ("SCM"). It does not presently—and has never in its history—designed, manufactured, or distributed any consumer products generally or ME-1 sprinklers specifically. As a result, Grucon objects to the direction of this discovery toward it. Additionally, Grucon, as a holding corporation, lacks information to answer much of this discovery in detail.

Subject to the foregoing general statements and objections, Grucon responds to the CPSC's discovery as follows:

REQUESTS

REQUEST NO. 1: All documents identified in response to the Interrogatories.

RESPONSE: Grucon objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon will produce documents that are responsive to this Request and refers the CPSC to the correspondence and documents produced to it from June 1999 to the commencement of this litigation.

REQUEST NO. 2: All documents relating to your answers to the Interrogatories, in support of your answers thereto, and/or used or relied upon in preparing your answers thereto.

RESPONSE: *See* Grucon's Objections and Response to Request No.1.

REQUEST NO. 3: All documents in support of and/or upon which you base the Answer, including each of the Answer's admissions, denials, and affirmative or other defenses (numbered or otherwise).

RESPONSE: *See* Grucon's Objections and Response to Request No.1.

REQUEST NO. 4: All documents refuting or tending to refute the allegations of the Complaint.

RESPONSE: *See* Grucon's Objections and Response to Request No.1.

REQUEST NO. 5: All documents supporting or tending to support the allegations of the Complaint.

RESPONSE: *See* Grucon's Objections and Response to Request No.1.

REQUEST NO. 6: All of your written document retention policies in effect at any time(s) since the date of your incorporation.

RESPONSE: Grucon objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Subject to and without waiving these objections, Grucon responds that it does not have any written document retention policies and generally follows the IRS and other agency guidelines.

REQUEST NO. 7: All of your written policies in effect at any time(s) since the date of your incorporation relating to retention of your products or samples of your products.

RESPONSE: Grucon objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Subject to and without waiving these objections, Grucon responds that it never has been involved in the design, manufacture, or distribution of the ME-1 of any other sprinkler. As a result, it has no retention policies responsive to this request.

REQUEST NO. 8: All documents relating to each communication, whether in person, by telephone, or by some other means, whether in a discussion, meeting, or other setting, relating to the subject matter of this litigation, the Complaint, the Answer, the documents requested herein, and/or the Star ME-1, between, among, by, or with any persons, including, but not limited to, the following: the Respondents; the Respondents' employees, former employees, agents, and/or representatives; and/or sprinkler installers, contractors, customers, and/or users.

RESPONSE: Grucon objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon will produce documents that are responsive to

this request and refers the CPSC to the correspondence and documents produced to it from June 1999 to the commencement of this litigation.

REQUEST NO. 9: All correspondence relating to the Star ME-1 other than correspondence to or from Complaint Counsel dated on or after October 9, 2001.

RESPONSE: Grucon objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon will produce documents that are responsive to this request and refers the CPSC to the correspondence and documents produced to it from June 1999 to the commencement of this litigation.

REQUEST NO. 10: All documents you obtained from the U.S. Consumer Product Safety Commission or its staff relating to the Star ME-1, other than those obtained from Complaint Counsel on or after October 9, 2001.

RESPONSE: *See* Grucon's objections and response to Request No. 9.

REQUEST NO. 11: All witness statements relating to the subject matter of this litigation, the Complaint, and the Answer.

RESPONSE: Grucon objects to this request as it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon answers that it has not obtained any witness statements.

REQUEST NO. 12: All documents describing and/or evidencing the operations, purposes, and uses of the Star ME-1.

RESPONSE: Grucon objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this

request to the extent it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon answers as follows. Grucon, as a parent holding company that has never been engaged in the manufacture, sale, or distribution of sprinklers, lacks detailed information to fully answer this request. It has produced documents responsive to this request in correspondence from June 1999 to the commencement of this litigation and refers the CPSC to those documents.

REQUEST NO. 13: All documents relating to the quantities of Star ME-1's manufactured.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 14: All documents relating to manufacture of the Star ME-1, including, but not limited to, its design, development, and/or engineering.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 15: All complete engineering drawing packages, engineering drawings, requests for changes, and change notices relating to the Star ME-1.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 16: All documents relating to the materials used in the Star ME-1 and to the procedures and specifications for the manufacture of the Star ME-1, including, but not limited to, all documents relating to the following:

(a) The Star ME-1's design, materials, and component parts, including, but not limited to, the acquisition of and specifications for each component part, substance, chemical, lubricant, and/or other material used in the Star ME-1, the purposes for which they were used, the manner and amounts in which they were used, and any changes in any of the foregoing;

(b) All tools, machinery, and equipment used in the Star ME-1 manufacture process, the purposes for which they were used, and any changes in any of the foregoing; and

(c) All changes in procedures and specifications for the manufacture of the Star ME-1.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 17: All documents evidencing the manufacturer and supplier of each component part, substance, chemical, lubricant, "O" ring, and/or other material used in the Star ME-1.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 18: All documents evidencing the composition and/or material of the "O" rings contained in the Star ME-1, including all changes in same.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 19: All documents relating to submission of the Star ME-1 for approval, listing, and/or certification by laboratories or institutions including, but not limited to, UL and FM. These documents shall include, but not be limited to, the following: documents relating to all tests, examinations, evaluations, and analyses conducted with respect to the submission; each communication relating to the submission; all results of and responses to the submission; and all documents relating to whether or not approval, listing, and/or certification of any Star ME-1 or component part thereof was ever withdrawn, discontinued, cancelled, or the like, and whether or not any person ever objected to the sale and/or distribution of any Star ME-1.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 20: All documents evidencing the persons who distributed and/or participated in the distribution of the Star ME-1, the persons to whom the

Star ME-1 was distributed, the dates of Star ME-1 distribution, and the Star ME-1 quantities distributed.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 21: All documents relating to the installation of the Star ME-1, including, but not limited to, the persons who installed and/or participated in the installation of the Star ME-1, the persons for whom the Star ME-1 was installed, the buildings in which the Star ME-1 was installed, the building types in which Star ME-1's have ever been installed, the dates of Star ME-1 installation, and the Star ME-1 quantities installed.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 22: All documents relating to the actions, steps, and/or procedures, including, but not limited to, quality control and quality assurance, any persons took before, during, and/or after the manufacture of each Star ME-1, to ensure that each Star ME-1 was manufactured in accordance with specifications, was properly manufactured, and would fully and properly operate and activate.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 23: All documents relating to tests, examinations, and/or analyses of Star ME-1's and/or any component parts thereof, including, but not limited to, test, examination, and/or analysis procedures, protocols, and results.

RESPONSE: *See* Grucon's Objections and Response to Requests Nos. 9 and 12.

REQUEST NO. 24: All documents relating to any of the following conditions being present, observed, and/or alleged in any Star ME-1's or any components parts thereof: corrosion; accumulation of deposits; adhesion, binding, bonding, and/or sticking of the "O" ring to other sprinkler component parts; swelling of the

"O" ring; lubricant deficiencies or problems; leakage and/or evidence of leakage; and/or component part interference or fit problems.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 25: All documents relating to actual, potential, or alleged effects on the operation, activation, and/or other performance of Star ME-1's of any of the following conditions being present in any Star ME-1's or any component parts thereof: corrosion; accumulation of deposits; adhesion, binding, bonding, and/or sticking of the "O" ring to other sprinkler component parts; swelling of the "O" ring; lubricant deficiencies or problems; leakage and/or evidence of leakage; and/or component part interference or fit problems.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 26: All documents relating to the operation and proper operation of Star ME-1's.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 27: All documents relating to the role of, and requirements for, water pressure in the operation and activation of the Star ME-1.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 28: All documents relating to actual, alleged, reported, or otherwise communicated problems, flaws, defects, defective conditions, and/or deficiencies in or associated with any Star ME-1's and/or any component parts thereof, including, but not limited to, performance or activation, and/or with any substance, chemical, lubricant, "O" ring, and/or other material used in manufacturing Star ME-1's.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 29: All documents relating to actual, alleged, reported, or otherwise communicated failures and/or partial failures of Star ME-1's and/or any component parts thereof to operate, activate, perform, and/or otherwise function (including, but not limited to, discharge water) in fires. Your response should include, but not be limited to, the following resulting from or relating to the fire (including in attempting to escape from or extinguish the fire):

(a) All documents relating to injuries or alleged injuries;
(b) All documents relating to deaths or alleged deaths;
(c) All documents relating to damaged, destroyed, or lost property, and allegedly damaged, destroyed, or lost property;
(d) All police, fire, medical, emergency service, or other reports;
(e) All documents relating to tests, examinations, and/or analyses of any Star ME-1 or component part thereof that failed and/or partially failed, and/or any other Star ME-1 from the same site; and
(f) All documents relating to the reasons the Star ME-1 failed and/or partially failed.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 30: All documents relating to actual, alleged, reported, or otherwise communicated failures and/or partial failures of Star ME-1's, and/or any component parts thereof, to operate, activate, perform, and/or otherwise function (including, but not limited to, discharge water) in tests, and/or to operate, activate, perform, and/or otherwise function (including, but not limited to, discharge water) in tests in accordance with applicable industry and/or other standards, codes, requirements, and/or rules. Your response should include, but not be limited to, all documents relating to these tests.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 31: All documents relating to actual, alleged, reported, or otherwise communicated failures of Star ME-1's to activate at a pressure of 7 psig or below in tests or otherwise after melting of the thermal sensing element, and/or any failures of Star ME-1's to activate at a pressure of 7 psig or below in tests within 5 seconds of melting of the thermal sensing element. Your response should include, but not be limited to, all documents relating to these tests, failures, or other circumstances.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 32: All documents relating to the performance record and/or history of the Star ME-1, including, but not limited to, positive and negative information, praise and criticism, passing and failing test results, and successes and failures in service.

RESPONSE: *See* Grucon's Objections and Responses to Requests Nos. 9 and 12.

REQUEST NO. 33: All documents relating to all Star ME-1's that properly operated and activated in a fire.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 34: All documents relating to the delisting (by UL, FM, and/or any other person), recall, discontinuance, and/or taking off the market of any Star ME-1's and/or any Star ME-1 component parts, and all documents relating to any warning, advisory, safety, or similar notice to persons relating to any Star ME-1's and/or any Star ME-1 component parts.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 35: All documents relating to the return, and/or requested return, to you and/or any manufacturer, supplier, distributor, installer, and/or other person, of any Star ME-1's and/or any Star ME-1 component parts.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 36: All documents relating to the replacement of Star ME-1's that had been installed in buildings or other places with new Star ME-1's or other sprinklers.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 37: All documents evidencing the current costs, and/or estimates of the current costs, of replacing a Star ME-1 or a group of Star ME-1's, including, but not limited to, the costs of the replacement product, the labor, any other associated costs, all variables, factors, and considerations related to determining the costs or estimates, and all bases for all estimates.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 38: All documents relating to all verbal and/or written claims of which you are aware relating to the Star ME-1, including, but not limited to, the persons making the claim, the status of the claim (including whether or not it has been settled or otherwise resolved), and the settlement or resolution terms and amounts.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 39: Personnel or other documents sufficient to identify and evidence each of your employees from the date of your incorporation through the present and the dates during which you employed each employee. (This request does not seek *all* documents relating to your employees, but merely documents adequate to evidence and confirm the information sought.)

RESPONSE: Grucon objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon will produce documents that are responsive to this Request.

REQUEST NO. 40: Documents sufficient to identify and evidence each of your officers from the date of your incorporation through the present and the dates during which each officer was in each office. (This request does not seek *all*

documents relating to your officers, but merely documents adequate to evidence and confirm the information sought.)

RESPONSE: Grucon objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon will produce documents that are responsive to this Request.

REQUEST NO. 41: Documents sufficient to identify and evidence each of your directors from the date of your incorporation through the present and the dates during which each director held his/her directorship. (This request does not seek *all* documents relating to your directors, but merely documents adequate to evidence and confirm the information sought.)

RESPONSE: Grucon objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon will produce documents that are responsive to this Request.

REQUEST NO. 42: Documents sufficient to identify and evidence each of your stockholders and/or other owners from the date of your incorporation through the present, the percentage of stock owned by each person identified, and the dates during which each person owned said stock. (This request does not seek *all* documents relating to your stockholders and/or other owners, but merely documents adequate to evidence and confirm the information sought.)

RESPONSE: Grucon objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon will produce documents that are responsive to this Request.

REQUEST NO. 43: Documents sufficient to identify and evidence each of your employees, agents, representatives, and/or consultants who has held a supervisory, managerial, and/or executive position or role in the following areas of your company from the date of your incorporation through the present:

(a) Sales;
(b) Marketing;
(c) Product design and/or development;
(d) Engineering and/or technical services;
(e) Customer service/customer relations;
(f) Public and/or governmental relations;
(g) Product manufacturing and/or production;
(h) Product distribution;
(i) Corporate mergers, acquisitions, and/or transactions;
(j) Quality assurance/control; and
(k) Any divisions or areas responsible for, or with work relating to, Star ME-1's and/or any component parts thereof.

(This request does not seek *all* documents relating to these employees, agents, representatives, and/or consultants, but merely documents adequate to evidence and confirm the information sought.)

RESPONSE: Grucon objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this request to the extent that it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon will produce documents it has located that are responsive to this Request. Further answering, Grucon refers the CPSC to the response to Request No. 39.

REQUEST NO. 44: All documents relating to the sale of Star ME-1's, including, but not limited to, purchase orders, shipping documents, invoices, billing statements, and sales receipts.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 45: All of your insurance policies, including, but not limited to, general liability and product liability policies, as well as all policies evidencing and/or describing insurance coverage that is and/or may be applicable or related to recalls, repairs, and/or refunds relating to your products, and/or to other corrective actions relating to your products, including, but not limited to, potential corrective action for the Star ME-1.

RESPONSE: Grucon objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this request to the extent it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon answers as follows. Grucon is a parent holding company that has never been engaged in the manufacture, sale, or distribution of sprinklers or any other product. Based on its information and belief, Grucon does not have insurance policies related to recalls, repairs, and/or refunds of ME-1 or any other sprinklers.

REQUEST NO. 46: From the date of your incorporation through the present, all documents evidencing your profits, losses, gross income, net income, gross sales, net sales, net assets, net worth, total assets, and total liabilities, including, but not limited to, your federal and state tax returns, financial statements, and accountant's reports.

RESPONSE: Grucon objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this request to the extent it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon will provide documents it has located that are responsive to this request from the years 1990 to the present.

REQUEST NO. 47: All documents comprising, for each of the last three (3) years, your budgets, revenue projections, cash flow projections, and profitability projections.

RESPONSE: Grucon objects to this request as it is overly broad, unduly burdensome, and seeks information not relevant or reasonably calculated to lead to the discovery of relevant information. Grucon further objects to this

request to the extent it seeks information protected by the attorney-client and/or work product privileges. Subject to and without waiving the above objections, Grucon will provide documents it has located that are responsive to this request. Further answering, Grucon refers the CPSC to the response to Request No. 46.

REQUEST NO. 48: All photographs and other pictures of the Star ME-1.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 49: All product catalogues, brochures, marketing materials, sales materials, and similar documents listing, describing, or otherwise referencing or showing the Star ME-1.

RESPONSE: *See* Grucon's Objections and Response to Request No. 12.

REQUEST NO. 50: Three (3) never-installed Star ME-1's of each manufacture model year.

RESPONSE: Because it does not design, manufacture, or distribute the ME-1 or any other sprinkler, Grucon does not have any ME-1 sprinklers—new or otherwise—in its possession.

REQUEST NO. 51: Three (3) samples of each Star ME-1 component part, including, but not limited to, each substance, chemical, lubricant, "O" ring, and/or other material used in manufacturing Star ME-1's.

RESPONSE: Because it does not design, manufacture, or distribute the ME-1 or any other sprinkler, Grucon does not have any component parts of the ME-1 sprinklers in its possession.

REQUEST NO. 52: All Star ME-1's tested, analyzed, examined, torn down, and/or cut apart.

RESPONSE: Because it does not design, manufacture, or distribute the ME-1 or any other sprinkler, Grucon does not have any ME-1 sprinklers in its possession.

AS TO ANSWERS

Jeffrey Hintze, being duly sworn, deposes and says that he verifies the foregoing Grucon Corporation's Responses to the CPSC's First Request for Production of Documents for and on behalf of Grucon, and is duly authorized so to do; that certain of the matters stated therein are not within the personal knowledge of deponent; that the facts therein have been assembled by authorized employees and counsel of Grucon; that the responses set forth therein, subject to inadvertent and undiscovered errors, are based upon and therefore necessarily limited by the records and information still in existence, presently recollected, and thus far discovered in the course of preparation of those responses; and consequently Grucon reserves the right to make any changes in the responses if it appears at any time that omissions or errors have been made therein or that more accurate information is available; and that subject to the limitations set forth herein, the said responses are true to the best of his knowledge, information and belief.

Jeffrey Hintze

This instrument was acknowledged before me on this 25 th day of January, 2002 by Jeffrey Hintze.

[Seal]

(Christine Owens)
Notary Public, State of Wisconsin
My commission 2/8/04

AS TO OBJECTIONS

Dated this 25th day of January, 2002.

Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 2100
Milwaukee, WI 53202
414-298-1000

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P.O. Box 2965
Milwaukee, WI 53201-2965

Ralph A. Weber
WI State Bar ID No. 1001563
Kurt D. Dykstra
WI State Bar ID No. 1025415

BY _____
Attorneys for Gracon Corporation

Michael A. Brown
Margaret Freeston
Brown & Freeston, P.C.
Suite 242
3201 New Mexico Avenue, NW
Washington, DC 20016-2756

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of the foregoing Grucon Corporation's Response to the CPSC's First Set of Requests for Production of Documents and Things on this 25th day of January, 2002, by hand-delivery on:

Seth B. Popkin, Esquire
Alan H. Schoem, Esquire
Eric L. Stone, Esquire
Office of Compliance
Consumer Product Safety Commission
4330 East-West Highway
Room 613
Bethesda, Maryland 20814

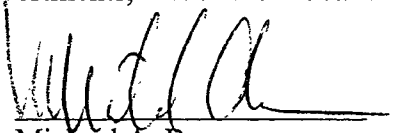
Counsel for Complainant, Consumer Product Safety Commission

Robert B. Barnett, Esquire
Heidi K. Hubbard, Esquire
Williams & Connolly LLP
725 12th Street, N.W.
Washington, D.C. 20005

With a copy via U.S. mail, postage pre-paid to:

Barbara Wrubel, Esquire
Bert L. Wolff, Esquire
Skadden, Arps, Slate, Meager & Flom LLP
Four Times Square
New York, New York 10036

Counsel for Chemetron Corporation, Chemetron Investments, Inc. and Sunbeam Corporation

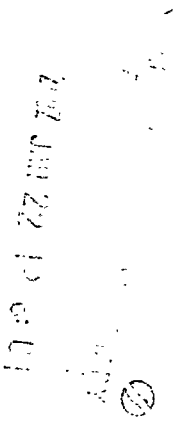


Michael A. Brown

SBP

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
CHEMETRON CORPORATION, f/k/a Chemetron Investments, Inc.	CPSC Docket No.: 02-1
and	
CHEMETRON INVESTMENTS, INC., f/k/a Chemetron Corporation	
and	
SUNBEAM CORPORATION	
and	
SPRINKLER CORPORATION OF MILWAUKEE, INC., f/k/a Star Sprinkler Corporation, f/k/a Grunau Sprinkler Manufacturing Company, Inc.	
and	
GRUCON CORPORATION	



COMPLAINT COUNSEL'S ANSWERS TO RESPONDENTS' (CHEMETRON CORPORATION, CHEMETRON INVESTMENTS, INC., AND SUNBEAM CORPORATION) FIRST SET OF INTERROGATORIES

Pursuant to 16 C.F.R. § 1025.32, Complaint Counsel responds as follows to Respondents' (Chemetron Corporation, Chemetron Investments, Inc., and Sunbeam Corporation) First Set of Interrogatories.

Where current Commission employees are identified in the answers, the present business address of each such employee is as follows, unless otherwise stated: U.S. Consumer Product

Safety Commission, 4330 East West Highway, Bethesda, MD 20814. Where former Commission employees are identified in the answers, the answers include their last known business address or residence address to the extent available to Complaint Counsel.

GENERAL OBJECTIONS

First General Objection

Complaint Counsel objects to these interrogatories and to Respondents' definition of "you," "your," "Complainant," and the "CPSC," as follows: a) to the extent the definition refers to the Consumer Product Safety Commission itself ("Commission"), as distinguished from the Commission staff which brought this action; and b) to the extent these requests seek documents or things from or relating to the Commission itself. The Commission itself is not a party to this action. Complaint Counsel's responses to these requests are on behalf of, and reflect documents and things in the possession, custody, or control of, the Commission staff which brought this action, including Complaint Counsel.

Second General Objection

Complaint Counsel objects to these interrogatories to the extent they seek information or documents prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. To make it possible for Complaint Counsel to disclose such confidential information or documents where applicable, and to facilitate such disclosure, Complaint Counsel is preparing motions regarding the confidentiality requests. Complaint Counsel will provide such information or produce such documents if not restricted by other objections, but only in accordance with the following procedures, or procedures analogous to these as ordered by the Presiding Officer, to the extent applicable: 1) upon its receipt of permission from the applicable and affected third parties; 2) after all of the Respondents have executed a satisfactory

confidentiality stipulation; and/or 3) after the Presiding Officer has entered an order that adequately protects the third parties or other persons who requested confidentiality. Complaint Counsel responds to the interrogatories to the extent not restricted by the confidentiality requests and will supplement as necessary after lifting of the confidentiality restrictions.

Third General Objection

Complaint Counsel objects to these interrogatories to the extent they seek information or documents protected by the law enforcement investigatory privilege, attorney-client privilege, deliberative process privilege, the work product doctrine, or any other applicable privilege or protection. While Complaint Counsel will undertake to withhold information or documents protected by applicable privileges or doctrines, any inadvertent disclosure of such information or production of such documents shall not be deemed a waiver of any applicable privilege, doctrine, or protection.

Fourth General Objection

Complaint Counsel objects to these interrogatories to the extent they exceed the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

INTERROGATORIES AND ANSWERS

Interrogatory No. 1: State the reasons for the CPSC's authorization of, and decision to initiate, the instant adjudicative proceeding against the Respondents.

Objections: This interrogatory is vague, particularly in light of Respondents' definition of "CPSC" and the usage of that term in this interrogatory. Given its context, Complaint Counsel interprets "CPSC" here as including the Commission itself, as only the Commission itself authorized this proceeding. This interrogatory calls for speculation on the part of Complaint Counsel regarding the reasoning of, decisionmaking of, and deliberative processes of the Commissioners. Under agency procedure and regulations, Complaint Counsel is prohibited

from communicating with the Commissioners, their staffs, and other designated persons, regarding the information this interrogatory seeks. See also 16 C.F.R. § 1025.68. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: The Commission authorizes the issuance of administrative complaints where it concludes the staff has demonstrated a reason to believe the product in question contains a defect that creates a substantial product hazard. See the Complaint. For the basis for the staff's recommendation to issue the Complaint, see the answers herein and/or the documents that will be produced, as applicable. See also the Consumer Product Safety Act, 15 U.S.C. §§ 2051 - 2084, and the regulations related thereto in Title 16 of the Code of Federal Regulations.

Interrogatory No. 2: Identify by name, address, title and job description all persons employed and/or retained by the CPSC who in any way participated in the CPSC's decision to initiate the instant adjudicative proceeding against the Respondents. For each person identified, describe his or her role in the decision.

Objections: This interrogatory is vague, particularly in light of Respondents' definition of "CPSC" and the usage of that term in this interrogatory. Given its context, however, Complaint Counsel interprets "CPSC" here as including the Commission itself, as only the Commission itself can make, and made, the decision to initiate this proceeding. This interrogatory is also vague because as used therein the term "participated" is unclear. Under agency procedure and regulations, Complaint Counsel is prohibited from communicating with the Commissioners, their staffs, and other designated persons, regarding information this interrogatory seeks. See also 16 C.F.R. § 1025.68. This interrogatory seeks information

protected by the attorney-client privilege, deliberative process privilege, and work product doctrine.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: The Commission's three Commissioners made the decision to initiate the instant adjudicative proceeding: Chairman Ann Brown, Commissioner Thomas H. Moore, and Commissioner Mary Sheila Gall. Ann Brown's term as Chairman concluded on November 1, 2001. The Commissioners have knowledge of who participated in the decisionmaking, and Complaint Counsel understands the Commissioners' decisions to have been made in consultation with and on the advice of their staffs and the Office of the General Counsel.

The following Commission employees were the primary participants in formulating the staff's recommendation to the Commission to issue the Complaint: Alan H. Schoem, Assistant Executive Director, Office of Compliance (directs and manages the Office of Compliance, including the Compliance Officers, attorneys, and support staff); Eric L. Stone, Director, Legal Division, Office of Compliance (directs and manages the Legal Division of the Office of Compliance, including the attorneys and support staff; represents the Commission staff in Office of Compliance legal matters); and Seth B. Popkin, Trial Attorney, Office of Compliance (represents the Commission staff in Office of Compliance legal matters).

Interrogatory No. 3: Identify all communications and documents (including internal memoranda and correspondence) relating to the CPSC's decision to initiate the instant adjudicative proceeding against the Respondents.

Objections: This interrogatory is vague in several respects, including, but not limited to, Respondents' definition of "CPSC" and the usage of that term in this interrogatory. Given its context, however, Complaint Counsel interprets "CPSC" here as including the Commission

itself, as only the Commission itself can make, and made, the decision to initiate this proceeding. Under agency procedure and regulations, Complaint Counsel is prohibited from communicating with the Commissioners, their staffs, and other designated persons, regarding information this interrogatory seeks. See also 16 C.F.R. § 1025.68. As Complaint Counsel interprets this interrogatory, it is overbroad and unduly burdensome, and it seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. As Complaint Counsel interprets this request, it seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this request, Complaint Counsel answers as follows: For the basis for the staff's recommendation to issue the Complaint, see the answers herein and/or the documents that will be produced, as applicable. See also the Consumer Product Safety Act, 15 U.S.C. §§ 2051 - 2084, and the regulations related thereto in Title 16 of the Code of Federal Regulations.

Interrogatory No. 4: Identify by name, address, title, and job description all persons employed and/or retained by the CPSC who in any way participated in the CPSC's investigation of Star ME-1 fire sprinklers. For each person identified, describe his or her role in the investigation.

Objections: This interrogatory is vague because the term "participated" is unclear and the interrogatory does not specify a time period. This interrogatory seeks information protected by the law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: The Commission employees listed below performed work as part of the CPSC's investigation of the Star ME-1 up to the date of the filing of the Complaint. As a general matter, this list does not include Commission employees or other consultants who are not expected to be called, or as to whom Complaint Counsel has not yet determined whether they are expected to be called, as expert witnesses at the hearing. The list does include, however, certain Commission employees who directly participated in developing and/or providing documents or things relied upon or employed by the United States Naval Academy ("USNA") (such persons are specifically noted below as being in this category). Complaint Counsel will identify each person whom it expects to call as an expert witness at hearing in accordance with the rules of practice and will supplement accordingly.

(a) Alan H. Schoem, Assistant Executive Director, Office of Compliance. His job duties include directing and managing the Office of Compliance, including the Compliance Officers, Trial Attorneys, and support staff. Mr. Schoem's role in the investigation included reviewing the investigation with staff, recommending action, and making the decision for the Office of Compliance to recommend to the Commission that it issue the Complaint.

(b) Eric L. Stone, Director, Legal Division, Office of Compliance. His job duties include directing and managing the Legal Division of the Office of Compliance, including the attorneys and support staff. Mr. Stone's role in the investigation has included supervising the investigation's Trial Attorneys, reviewing the investigation with staff, participating in meetings concerning the substance of the

case, reviewing materials concerning the case and recommending action, and otherwise serving as counsel to the Commission staff.

(c) Marc J. Schoem, Director, Recalls and Compliance Division, Office of Compliance. His job duties include directing and managing the Recalls and Compliance Division of the Office of Compliance, including the Associate Directors, Compliance Officers, and support staff. Mr. Schoem's role in the investigation included correspondence, reviewing the investigation with staff, and approving the preliminary staff determination assessing the defect, risk, and hazard posed by the Star ME-1.

(d) Carlos L. Perez, Associate Director, Fire and Electrical Products, Recalls and Compliance Division, Office of Compliance. His job duties include directing and managing the Fire and Electrical Products team within the Office of Compliance, including the Compliance Officers and support staff. Mr. Perez's role in the investigation included supervising the Compliance Officers on the investigation and reviewing the investigation with staff.

(e) Eric H. Singer, Trial Attorney, Office of Compliance; current business address is Keller and Heckman, 1001 G Street, NW, Suite 500 West, Washington, DC 20001. His job duties included representing the Commission staff in Office of Compliance legal matters. Mr. Singer's role in the investigation covered approximately the following dates: November 1998 to February 2000. His role included serving as counsel in the investigation, including drafting correspondence and subpoenas, reviewing documents and information obtained, working with Commission employees or other consultants regarding the product

and product analysis, and conducting legal analysis. He also served as counsel in relation to the 1999 recall of the Star ME-1 manufactured 1975 through 1976.

(f) Amy J. Brown, Compliance Officer, Office of Compliance; current residence address is (b) (6) Her Compliance Officer job duties included the following: investigating potentially defective products to determine if they present a substantial product hazard or violate Commission standards or regulations; coordinating technical analysis of products; recommending appropriate courses of action to address hazards associated with defective products through a corrective action plan; and organizing, coordinating, and communicating with Commission staff personnel. Ms. Brown's role in the investigation covered the following dates: November 1998 to April 2000. Ms. Brown's role included performing the responsibilities of a Compliance Officer, including investigating, drafting correspondence, working with investigators, reviewing documents and information obtained, working with Commission employees or other consultants regarding the product and product analysis, obtaining product samples, and evaluating defect, risk, and hazard factors. She also performed work in relation to the 1999 recall of the Star ME-1 manufactured 1975 through 1976.

(g) Seth B. Popkin, Trial Attorney, Office of Compliance. His job duties include representing the Commission staff in Office of Compliance legal matters. Mr. Popkin's role in the investigation covered August 1999 to the date of the Complaint filing (as well as serving as lead Complaint Counsel through the present). His role included serving as counsel leading and conducting the

investigation, including drafting correspondence and subpoenas, reviewing documents and information obtained, working with Commission employees or other consultants regarding the product and product analysis, determining and analyzing responsible parties, and conducting legal analysis. Mr. Popkin was one of the staff persons who approved the preliminary staff determination assessing the defect, risk, and hazard posed by the Star ME-1, prepared the briefing memorandum and package recommending to the Commission that the Complaint be issued, and participated in conferences related thereto.

(h) Shawn M. Cerruti, Compliance Officer, Office of Compliance. Her Compliance Officer job duties include the following: investigating potentially defective products to determine if they present a substantial product hazard or violate Commission standards or regulations; coordinating technical analysis of products; recommending appropriate courses of action to address hazards associated with defective products through a corrective action plan; and organizing, coordinating, and communicating with Commission staff personnel. Ms. Cerruti's role in the investigation covered the following dates: April 2000 to the date of the filing of the Complaint. On an occasional basis after the filing of the Complaint and through the present, Ms. Cerruti assists Complaint Counsel in relation to her work on the investigation. Ms. Cerruti's role in the investigation was to assist the attorney leading the investigation (Mr. Popkin). Her primary responsibilities in the investigation included drafting correspondence, serving as CPSC Project Officer in an Interagency Agreement between the CPSC and the USNA for testing and examination of fire sprinklers, communicating with USNA personnel

concerning Star ME-1 testing and samples, organizing and compiling data, working with Commission engineers, and reviewing documents and information obtained. Ms. Cerruti was involved in the preliminary staff determination assessing the defect, risk, and hazard posed by the Star ME-1. Ms. Cerruti was the Compliance Officer for, and participated in the negotiation and implementation of, the corrective action plan for the 2001 recall of the Star ME-1 manufactured from 1996 through 1998.

(i) Thelma E. Tucker, Compliance Investigator, (b) (6) (b) (6) . Her job duties include currently serving as a Compliance Officer and product safety investigator, doing inspections, investigations, and sample collections, evaluating samples and notifying firms of evaluation results, writing correspondence, and negotiating with firms. Her role in the investigation was as an investigator and included assisting in obtaining Star ME-1's from specific sites, shipping them to the Office of Compliance, and completing applicable documentation regarding such tasks.

(j) Douglas Kinloch, Compliance Officer, Office of Compliance. Mr. Kinloch is no longer employed at the Commission. His Compliance Officer job duties include the following: investigating potentially defective products to determine if they present a substantial product hazard or violate Commission standards or regulations; coordinating technical analysis of products; recommending appropriate courses of action to address hazards associated with defective products through a corrective action plan; and organizing, coordinating, and communicating with Commission staff personnel. Mr. Kinloch's role in the

investigation covered the following dates: February 1991 to in or about June 1991. See the answer to Interrogatory 5 for additional information concerning the investigation in 1991.

(k) Dr. Angela L. Moran, Associate Professor and Materials Lab Director, Mechanical Engineering Department, United States Naval Academy, 590 Holloway Road, 3rd Floor, Rickover Hall, Annapolis, MD 21402. Her role in the investigation included serving as USNA Project Officer in Interagency Agreements between the CPSC and the USNA for testing and examination of fire sprinklers. See Interagency Agreements being produced.

(l) Stephen J. Crutchley, Laboratory Technician, Mechanical Engineering Department, United States Naval Academy, 590 Holloway Road, 3rd Floor, Rickover Hall, Annapolis, MD 21402. His role in the investigation included performing work under Interagency Agreements between the CPSC and the USNA for testing and examination of fire sprinklers. See Interagency Agreements being produced.

(m) Anthony F. Antenucci, Laboratory Technician, Mechanical Engineering Department, United States Naval Academy, 590 Holloway Road, 3rd Floor, Rickover Hall, Annapolis, MD 21402. His role in the investigation included performing work under Interagency Agreements between the CPSC and the USNA for testing and examination of fire sprinklers. See Interagency Agreements being produced.

(n) Nicholas V. Marchica, Acting Deputy Executive Director, Office of the Executive Director, (formerly Directorate for Engineering Sciences with titles: Acting

Associate Director for Engineering; and Director, Mechanical Engineering Division). Mr. Marchica participated in the Directorate for Engineering Sciences's development of the Sprinkler Operational Pressure Test Procedures that the USNA employed in the sprinkler pressure testing. See Interagency Agreements being produced. Mr. Marchica supervised Rikki Khanna and Caroleene Paul in their design and construction of the sprinkler operational pressure testing assembly USNA used in its pressure testing.

(o) Rikki Khanna, Fire Protection Engineer, Directorate for Engineering Sciences. Mr. Khanna was a principal participant in the Directorate for Engineering Sciences's development of the Sprinkler Operational Pressure Test Procedures that the USNA employed in the sprinkler pressure testing. See Interagency Agreements being produced. Mr. Khanna was also a principal participant in the design and construction of the sprinkler operational pressure testing assembly USNA used in its pressure testing. He also participated in providing the USNA with the data acquisition software and hardware relating to and used in the testing.

(p) Caroleene Paul, Mechanical Engineer, Directorate for Engineering Sciences. Ms. Paul was a principal participant in the Directorate for Engineering Sciences's development of the Sprinkler Operational Pressure Test Procedures that the USNA employed in the sprinkler pressure testing. See Interagency Agreements being produced. Ms. Paul was also a principal participant in the design and construction of the sprinkler operational pressure testing assembly USNA used in its pressure testing. She participated in providing the USNA with the data acquisition software and hardware relating to and used in the testing.

(q) Mark Kumagai, Director, State and Local Programs, Directorate for Field Operations (formerly Mechanical Engineer, Directorate for Engineering Sciences). Mr. Kumagai reviewed and/or commented on the Directorate for Engineering Sciences's development of the Sprinkler Operational Pressure Test Procedures that the USNA employed in the sprinkler pressure testing. Mr. Kumagai also observed a demonstration of the pressure testing and the pressure testing assembly at the USNA.

(r) Patricia L. Hackett, General Engineer, Directorate for Engineering Sciences. Ms. Hackett served as CPSC Project Officer with respect to a July 1999 Interagency Agreement between the CPSC and the USNA for testing and examination of fire sprinklers. See Interagency Agreements being produced.

The documents that will be produced may reflect additional persons responsive to this request.

Interrogatory No. 5: Describe the circumstances surrounding, and the reasons giving rise to, the CPSC's decision to investigate Star ME-1 fire sprinklers. Your response should include, without limitation, the following:

(a) the date that the CPSC decided to investigate Star ME-1 fire sprinklers;

(b) the identity of all persons at the CPSC involved in the decision to investigate Star ME-1 fire sprinklers; and

(c) the identity of all information (including, but not limited to, any complaints) available to or otherwise relied upon by the CPSC in deciding to initiate an investigation of Star ME-1 fire sprinklers.

Objections: This interrogatory is vague in part because of the term "circumstances surrounding." This term is undefined and unclear. This interrogatory seeks information

protected by the law enforcement investigatory privilege, deliberative process privilege, and work product doctrine.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows:

(a) The Commission staff initiated its first investigation of the Star ME-1 in February 1991. The Commission staff initiated another investigation of the Star ME-1 in or about November 1998.

(b) Eric L. Stone, Eric H. Singer, and Alan H. Schoem.

(c) The Commission staff initiated the 1991 investigation upon obtaining information from an Oregon Fire Marshal newsletter in January 1991. According to the information, Star Sprinkler Corporation had advised the fire marshal that Star brand sprinklers manufactured from 1959 to 1981, including Star ME-1's manufactured from 1975 to 1981, may not operate properly under fire conditions. See the documents that will be produced. The Commission staff initiated its 1998 investigation of the Star ME-1, which led to the filing of the Complaint in these proceedings, after receiving information that there were similarities in design and defects between the Central Omega sprinklers and other sprinklers, including dry sprinklers and the Star ME-1. The staff also learned of a "silent" recall initiated in 1990 of the Star ME-1 manufactured from 1975 through 1976, and of its predecessor models, by Mealane Corporation. The staff did not learn of that initial recall until long after the manufacturer was conducting it. Complaint Counsel believes that the basis for that recall was information that the sprinklers may not operate properly under fire conditions. Star Sprinkler Corporation noted

in public notices that a corrosion problem caused malfunction. It noted that close tolerances of the nozzle and the piston assembly, as well as the fact that they are of similar uncoated metals, could cause corrosion in the sprinkler and prevent the piston from exiting the nozzle through the conductor tube. Star Sprinkler Corporation stated that these conditions would prevent water from reaching the now open sprinkler. Star Sprinkler Corporation stated that it also believed that the combination of seasonal heating and cooling cycles and moisture in the sprinkler piping over time may result in corrosion in the sprinkler. See the documents that will be produced. The staff learned that these sprinklers had been installed in nursing homes, and the staff learned of a report of one of these pre-1977 Star sprinklers not functioning in a 1991 bedroom fire in an Indiana nursing home. This information led the staff to conclude that the Star ME-1's manufactured after 1976 may pose a hazard and that the staff should investigate.

Interrogatory No. 6: Describe in detail any investigation by the CPSC relating to complaints and/or reports of personal injury, death, property damage, non-activation, or any other problems allegedly associated with Star ME-1 fire sprinklers. Your response should include, without limitation, the following:

(a) the identity by name, address, title, and job description of any and all persons employed and/or retained by the CPSC who participated in the investigation;

(b) the identity by name and address of any persons making complaints or reports with whom the CPSC communicated in connection with the investigation;

(c) the identity by name and address of any persons who complained of or reported an incident regarding Star ME-1 fire sprinklers;

(d) the identification of any questionnaires or other surveys used by the CPSC in conducting the investigation; and

(e) the identification of any and all data, reports, survey results, or other information revealing the results of the investigations.

Objections: This interrogatory is vague in part because the terms "non-activation" and "participated" are undefined and unclear. This interrogatory seeks information protected by the law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this request, Complaint Counsel answers as follows: See the documents that will be produced. See answer to Interrogatory 5. Specifically regarding subpart (e), see the documents produced relating to reports of Star ME-1 test results conducted by the USNA, Underwriters Laboratories ("UL"), Factory Mutual Research Corporation ("FM"), and Grinnell Corporation.

Interrogatory No. 7: Identify and describe any and all incidents known to the CPSC in which any person has reported a fire in connection with Star ME-1 fire sprinklers. For each such incident, state the following:

(a) the name and address of the reporting person;

(b) the location of the fire;

(c) the date of the incident involving the fire;

(d) a description of all property damage, if any, allegedly caused by or associated with the fire;

(e) a description of all personal injuries, if any, allegedly sustained as a result of or associated with the fire; and

(f) the manufacturer and the distributor of the Star ME-1 fire sprinklers involved.

Objections: This interrogatory is vague because of the phrase "fire in connection with Star ME-1 fire sprinklers." Complaint Counsel interprets this phrase as referring to a fire in the

presence of Star ME-1's, or a fire in a room in which Star ME-1's were present. This interrogatory seeks information protected by the law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this request, Complaint Counsel answers as follows: See the documents that will be produced, including those regarding a 1993 fire in a Troy, MO nursing home, and those regarding a report of a pre-1977 Star sprinkler not functioning in a 1991 bedroom fire in an Indiana nursing home. No one reported injuries, but the staff learned that the nursing home residents had to be evacuated.

Interrogatory No. 8: To the extent not already identified in response to Interrogatory Nos. 6-7, identify and describe any and all incidents known to the CPSC in which any person has reported any form of property damage or personal injury in connection with Star ME-1 fire sprinklers. For each such incident, state the following:

(a) the name and address of the reporting person;

(b) the location of the fire;

(c) the date of the incident involving the fire;

(d) a description of all property damage, if any, allegedly caused by or associated with the fire;

(e) a description of any and all personal injuries, if any, allegedly sustained as a result of or associated with the fire; and

(f) the manufacturer and the distributor of the Star ME-1 fire sprinklers involved.

Answer: See the objections and answers to Interrogatories 6 and 7.

Interrogatory No. 9: Identify all former and/or current employees of Respondents with whom Complainant has had any contact regarding Star ME-1 fire sprinklers. For each such person, include the following:

(a) the person's name;

(b) the person's last known home and business addresses;

(c) the person's last known telephone number;

(d) the person's last known position with Respondents;

(e) the date of any such contacts;

(f) the nature of any such contacts (e.g., letter, telephone conversation, in-person interview);

(g) a detailed description of the subject matter of such contact; and

(h) the identity of all persons participating in or present during such contacts.

Answer: On July 26, 2000, Seth Popkin had a telephone conference call that included the following Sunbeam Corporation personnel: Ken Bell, Senior Vice President; Mark Clements, Director of Product Litigation and Compliance; and Heather Van Dever, Legal Assistant. David Baker, counsel for Sunbeam Corporation, also participated in the call. A Commission staff law clerk was also present for the call. Complaint Counsel does not have address and telephone information for these Sunbeam Corporation personnel. The subject matter of the conference call related to Chemetron Corporation, Chemetron Investments, Inc., and Sunbeam Corporation, and the discussion included the following: corporate, contractual, and transactional histories and matters; assets and liabilities information; bankrupty matters; and liabilities of these corporations and others regarding the Star ME-1.

Interrogatory No. 10: For each and every contact described in response to Interrogatory No. 9, identify each and every document that describes, evidences, refers, or relates to such contacts, including without limitation any notes of such contacts, documents shown during the course of such contacts, lists of questions or answers given, or any reports of such contacts.

Objections: This interrogatory is overbroad. This interrogatory seeks information and documents protected by the law enforcement investigatory privilege, deliberative process privilege, attorney-client privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Response: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: See the documents, including correspondence between the Commission staff and the Respondents' counsel, that will be produced after confidentiality requests have been waived or adequately addressed.

Interrogatory No. 11: Identify each and every person whom Complainant knows and/or believes to have knowledge or information concerning or related to the subject matter of the Complaint or other discoverable information. For each such person, include the following:

(a) the person's name;

(b) the person's last known home and business addresses;

(c) the person's last known telephone number;

(d) the person's employer, or business, or government affiliation;

(e) whether the Complainant has contacted such person; and

(f) the specific subject matter of the person's knowledge.

Objections: This interrogatory is vague in that the phrase "other discoverable information" is unspecific, undefined, and unclear. That phrase also appears to call for a legal conclusion. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this request, Complaint Counsel answers as follows: For persons Complaint Counsel believes to have knowledge or information related to the subject matter of the Complaint, see the documents that will be produced and the persons named therein, including their addresses, telephone numbers, employers, affiliations, and the subject matter of their knowledge. See also the persons identified in the answers to these interrogatories, including the answers to Interrogatories 2 and 4.

Interrogatory No. 12: Explain in detail the CPSC's policy with respect to document retention. Include in your description how the policy pertains to investigative materials, sample and tested products, and testing reports.

Answer: See documents that will be produced titled "General Records Schedules" (1998), "Retaining and Managing Records and Information" with accompanying July 31, 2000 email, and guidance memorandum from Alan H. Schoem.

Interrogatory No. 13: Describe in detail how the document retention policy described in response to Interrogatory No. 12 was applied to documents and things relating to Star ME-1 fire sprinklers.

Answer: Complaint Counsel believes the Commission staff followed the policy.

Interrogatory No. 14: To the extent that information in any way relating or referring to Star ME-1 fire sprinklers has been discarded, lost or otherwise destroyed by the CPSC, identify the information, the reasons for its loss or destruction, and the date of its loss or destruction.

Answer: Complaint Counsel has been unable to locate a videotape, previously provided to the Commission staff, of Star ME-1 testing performed by a sprinkler installer. At present, the videotape, the provider of same, and the information in same, is prohibited from

disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel believes that if the videotape is not located with Commission staff, the provider is likely to have another copy.

Interrogatory No. 15: Describe the CPSC's preliminary determination of the alleged risks associated with Star ME-1 fire sprinklers. Your response should include, without limitation, the following:

(a) the date the CPSC Staff issued its preliminary determination of the alleged risks associated with Star ME-1 fire sprinklers;

(b) the identity of all persons involved in the Staff's preliminary determination;

(c) the level of hazard assigned to Star ME-1 fire sprinklers in accordance with the applicable provisions of the CPSC Recall Handbook; and

(d) an identification of all data, studies, reports, and/or testing upon which the CPSC relied in making its preliminary determination.

Objections: This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts. Subpart (b) is vague because the phrase "persons involved in" is undefined and unclear.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this request, Complaint Counsel answers as follows: The Commission staff made its preliminary determination on May 2, 2001. Seth Popkin drafted the preliminary determination. Marc Schoem, Shawn Cerruti, and Seth Popkin signed and approved the preliminary determination. These persons were together, along with

Eric Stone, at the time the preliminary determination was made. Regarding subpart (d), see other answers herein and the documents that will be produced.

Interrogatory No. 16: Describe in detail any and all measures taken by the CPSC to determine the severity of the risk allegedly associated with Star ME-1 fire sprinklers, including, without limitation:

(a) a description of how the CPSC measures the severity of the risk allegedly associated with Star ME-1 fire sprinklers;

(b) a statement of whether the measurement employed by the CPSC incorporates, considers, or is in any way adjusted to reflect the number of products in use and the frequency of the use of Star ME-1 fire sprinklers;

(c) a description of all efforts taken by the CPSC to measure the severity of the risk or probability of injury allegedly associated with Star ME-1 fire sprinklers; and

(d) an identification of all data, studies, and reports that quantify or otherwise provide an assessment of the risk or probability of injury allegedly associated with Star ME-1 fire sprinklers.

Objections: This interrogatory seeks information protected by the law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts. Complaint Counsel objects to this interrogatory to the extent it calls for a legal conclusion.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Subparts (a) through (d) interrelate and overlap with each other and with the main part of this interrogatory; for that reason, the responses to all of the subparts are contained in the answer that follows. See also the documents that will be produced.

The Commission staff's investigation has included, in part, efforts to determine the severity of the risk posed by the Star ME-1. As part of its investigation, the staff conducted

extensive analysis of the Star ME-1. This analysis included testing, failure mode analysis, product design analysis, product history and performance, and statements and other information provided by the Star ME-1 manufacturers. See other answers herein and/or documents that will be produced for further information on this part of the staff's investigation.

The staff reached determinations regarding the severity of the risk by applying applicable law to the facts acquired in the investigation. Under 15 U.S.C. § 2064(a)(2), which defines the term "substantial product hazard," severity of the risk is one factor that may be considered in determining if a product defect creates a substantial risk of injury to the public. The staff evaluated the facts in light of the applicable Commission regulations. See, e.g., 16 C.F.R. § 1115.12(g)(1)(iii). A risk is severe if the injury which might occur is serious and/or if the injury is likely to occur. In considering the likelihood of any injury the staff will consider the number of injuries reported to have occurred, the intended or reasonably foreseeable use or misuse of the product, and the population group exposed to the product (e.g., children, elderly, handicapped). 16 C.F.R. § 1115.12(g)(1)(iii).

The Star ME-1 is a life safety device. Star ME-1's are likely to fail to operate as intended in a fire, with concommitant failure to suppress and/or extinguish fire as intended. Such failures create a likelihood fire will grow and spread, exposing consumers to the risk of serious injury and death resulting from, among other factors, fire, smoke, and toxic fumes.

Star ME-1's are present in a variety of buildings in which many people are found. Star ME-1's are installed in such buildings as day care centers, nursing homes, and health care facilities, including in residential hallways and rooms. Installation in these sites increases the likelihood of injury since the population groups in such buildings include children, and elderly

and handicapped persons, groups specifically cited in the regulation, as well as sick or injured persons. Such persons may be particularly vulnerable and/or limited in mobility.

The staff evaluated the intended or reasonably foreseeable use of the product, including consumers' dependence or reliance on sprinklers for protection from injury and death in a fire, and building design factors. Under 15 U.S.C. § 2064(a)(2), which defines the term "substantial product hazard," the number of defective products distributed in commerce is one factor that may be considered in determining if a product defect creates a substantial risk of injury to the public.

Interrogatory No. 17: Do you contend that Chemetron has ever manufactured Star ME-1 fire sprinklers? If so:

(a) identify the date and location of any such manufacturing by Chemetron;

(b) identify the precise kind of Star ME-1 fire sprinkler allegedly manufactured by Chemetron, including the model number and a description of the product;

(c) state the total number of Star ME-1 fire sprinklers that you contend were manufactured by Chemetron;

(d) identify each and every document that describes, evidences, refers, or relates in any way to such manufacturing;

(e) identify each and every person whom Complainant knows and/or believes to have knowledge of any such manufacturing; and

(f) describe in detail the substance of each such person's knowledge and/or information.

Objections: Subparts (d), (e), and (f) to this interrogatory seek information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. Subparts (d), (e), and (f) to this interrogatory are overbroad and unduly burdensome. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel

objects to subparts (d), (e), and (f) to the extent they exceed the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Yes.

(a) Chemetron manufactured the Star ME-1 from in or about 1976 to in or about 1982. See documents that will be produced, including UL Fire Protection Equipment Directories 1977 through 1984, listing addresses in Cornwell Heights, PA, 19020, and Monee, IL 60449.

(b) Star ME-1. See UL Fire Protection Equipment Directories 1977 through 1984 that will be produced.

(c) Complaint Counsel does not know the total number of Star ME-1's Chemetron manufactured, but it estimates that Chemetron manufactured 200,000.

(d) UL Fire Protection Equipment Directories 1977 through 1984 that will be produced; correspondence and enclosures between Commission staff counsel and Respondents' counsel; Answer and Defenses of Chemetron Corporation in this proceeding; Answer and Defenses of Chemetron Investments, Inc. in this proceeding; Complaint for Declaratory Judgment, *Sunbeam Corp. v. US Consumer Product Safety Commission*, D.D.C. 1:01CV02273; (Sunbeam Corporation's) Motion and Statement of Points and Authorities Requesting Status Conference, *Sunbeam Corp. v. US Consumer Product Safety Commission*, D.D.C. 1:01CV02273; and other documents that will be produced.

(e) Complaint Counsel believes the persons listed in the answer to Interrogatory 4 have such knowledge through the staff's investigation. Complaint Counsel also

believes the following have such knowledge: Chemetron Corporation personnel; Chemetron Investments personnel; Sunbeam personnel; and UL personnel.

(f) Complaint Counsel believes that from the staff's investigation, the persons listed in the answer to Interrogatory 4 have knowledge that Chemetron Corporation manufactured the Star ME-1 from in or about 1976 to in or about 1982. Complaint Counsel believes UL personnel have knowledge of the information contained in the UL directories and of engineering and design information. Chemetron Corporation, Chemetron Investments, and Sunbeam Corporation personnel have knowledge, at a minimum, of the information contained in the referenced pleadings.

Interrogatory No. 18: Do you contend that Chemetron Investments has ever manufactured Star ME-1 fire sprinklers? If so:

(a) identify the date and location of any such manufacturing by Chemetron Investments;

(b) identify the precise kind of Star ME-1 fire sprinkler allegedly manufactured by Chemetron Investments, including the product and a description of the product;

(c) state the total number of Star ME-1 fire sprinklers that you contend were manufactured by Chemetron Investments;

(d) identify each and every document that describes, evidences, refers, or relates in any way to such manufacturing;

(e) identify each and every person whom Complainant knows and/or believes to have knowledge of any such manufacturing; and

(f) describe in detail the substance of each such person's knowledge and/or information.

Objections: Subparts (d), (e), and (f) to this interrogatory seek information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process

privilege, and work product doctrine. Subparts (d), (e), and (f) to this interrogatory are overbroad and unduly burdensome. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to subparts (d), (e), and (f) to the extent they exceed the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Yes, inasmuch as Chemetron Investments is formerly and also known as "Chemetron Corporation", and Chemetron Corporation is formerly and also known as "Chemetron Investments, Inc." Accordingly, see the answer to Interrogatory 17, including all subparts.

Interrogatory No. 19: Do you contend that Sunbeam has ever manufactured Star ME-1 fire sprinklers? If so:

(a) identify the date and location of any such manufacturing by Sunbeam;

(b) identify the precise kind of Star ME-1 fire sprinkler allegedly manufactured by Sunbeam, including the model number and a description of the product;

(c) state the total number of Star ME-1 fire sprinklers that you contend were manufactured by Sunbeam;

(d) identify each and every document that describes, evidences, refers, or relates in any way to such manufacturing;

(e) identify each and every person whom Complainant knows and/or believes to have knowledge of any such manufacturing; and

(f) describe in detail the substance of each such person's knowledge and/or information.

Answer: At this time, Complaint Counsel makes no such contention. Complaint Counsel contends, as stated in the Complaint, that each of the Respondents was and/or is a

"manufacturer" and/or a "distributor" as those terms are defined in section 3(a)(4) and (5) of the CPSA, 15 U.S.C. § 2052(a)(4) and (5).

Interrogatory No. 20: Do you contend that Chemetron has ever sold Star ME-1 fire sprinklers? If so:

(a) identify the date of each and every such sale by Chemetron, the purchaser who purchased the sprinklers from Chemetron, the number of sprinklers purchased by that purchaser, and the precise kind of Star ME-1 fire sprinkler (including the model number and a description of the sprinkler) that was purchased;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such sales;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such sales; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Yes.

(a) Complaint Counsel does not have such specific sales information, but understands the sales to have occurred from in or about 1976 to in or about 1982.

(b) UL Fire Protection Equipment Directories 1977 through 1984 that will be produced; correspondence and enclosures between Commission staff counsel and

Respondents' counsel; Answer and Defenses of Chemetron Corporation in this proceeding; Answer and Defenses of Chemetron Investments, Inc. in this proceeding; Complaint for Declaratory Judgment, *Sunbeam Corp. v. US Consumer Product Safety Commission*, D.D.C. 1:01CV02273; (Sunbeam Corporation's) Motion and Statement of Points and Authorities Requesting Status Conference, *Sunbeam Corp. v. US Consumer Product Safety Commission*, D.D.C. 1:01CV02273; and other documents that will be produced.

(c) Complaint Counsel believes the persons listed in the answer to Interrogatory 4 have such knowledge through the staff's investigation. Complaint Counsel also believes the following have such knowledge: Chemetron Corporation personnel; Chemetron Investments personnel; Sunbeam personnel; and UL personnel.

(d) Complaint Counsel believes that from the staff's investigation, the persons listed in the answer to Interrogatory 4 have knowledge that Chemetron Corporation manufactured and sold the Star ME-1 from in or about 1976 to in or about 1982. Complaint Counsel believes UL personnel have knowledge of the information contained in the UL directories and of engineering and design information. Chemetron Corporation, Chemetron Investments, and Sunbeam Corporation personnel have knowledge, at a minimum, of the information contained in the referenced pleadings.

Interrogatory No. 21: Do you contend that Chemetron Investments has ever sold Star ME-1 fire sprinklers? If so:

(a) identify the date of each and every such sale by Chemetron Investments, the purchaser who purchased the sprinklers from Chemetron Investments, the number of sprinklers purchased by that purchaser, and the precise kind of Star ME-1 fire

sprinkler (including the model number and a description of the sprinkler) that was purchased;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such sales;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such sales; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Yes, inasmuch as Chemetron Investments is formerly and also known as "Chemetron Corporation", and Chemetron Corporation is formerly and also known as "Chemetron Investments, Inc." Accordingly, see the answer to Interrogatory 20, including all subparts.

Interrogatory No. 22: Do you contend that Sunbeam has ever sold Star ME-1 fire sprinklers? If so:

(a) identify the date of each and every such sale by Sunbeam, the purchaser who purchased the sprinklers from Sunbeam, the number of sprinklers purchased by that purchaser, and the precise kind of Star ME-1 fire sprinkler (including the model number and a description of the sprinkler) that was purchased;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such sales;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such sales; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Answer: At this time, Complaint Counsel makes no such contention.

Interrogatory No. 23: Do you contend that Chemetron has ever marketed Star ME-1 fire sprinklers? If so:

(a) identify and describe any such marketing;

(b) identify each and every person or entity known to have been a recipient of such marketing;

(c) identify each and every document that describes, evidences, refers, or relates in any way to such marketing;

(d) identify each and every person whom Complainant knows and/or believes to have knowledge of any such marketing; and

(e) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague because the term "marketed" is not defined or clear. Complaint Counsel interprets the term in accordance with its dictionary definition, i.e., to offer for sale or to sell. As interpreted, this interrogatory is essentially duplicative of Interrogatory 20. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Yes. See answer to Interrogatory 20.

Interrogatory No. 24: Do you contend that Chemetron Investments has ever marketed Star ME-1 fire sprinklers? If so:

(a) identify and describe any such marketing;

(b) identify each and every person or entity known to have been a recipient of such marketing;

(c) identify each and every document that describes, evidences, refers, or relates in any way to such marketing;

(d) identify each and every person whom Complainant knows and/or believes to have knowledge of any such marketing; and

(e) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague because the term "marketed" is not defined or clear. Complaint Counsel interprets the term in accordance with its dictionary definition, i.e., to offer for sale or to sell. As interpreted, this interrogatory is essentially duplicative of Interrogatory 21. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Yes. See answer to Interrogatory 21.

Interrogatory No. 25: Do you contend that Sunbeam has ever marketed Star ME-1 fire sprinklers? If so:

(a) identify and describe any such marketing;

(b) identify each and every person or entity known to have been a recipient of such marketing;

(c) identify each and every document that describes, evidences, refers, or relates in any way to such marketing;

(d) identify each and every person whom Complainant knows and/or believes to have knowledge of any such marketing; and

(e) describe in detail the substance of each such person's knowledge and/or information.

Answer: At this time, Complaint Counsel makes no such contention.

Interrogatory No. 26: Fully define "consumer" as used by the CPSC for purposes of administering the Consumer Product Safety Act, 15 U.S.C. § 2064.

Objections: This interrogatory calls for a legal conclusion. This interrogatory seeks information protected by the work product doctrine.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: See the Consumer Product Safety Act, 15 U.S.C. §§ 2051 - 2084, the regulations related thereto in Title 16 of the Code of Federal Regulations, and related case law, legal decisions, and opinions.

Interrogatory No. 27: Do you contend that Star ME-1 fire sprinklers have ever been sold by Chemetron directly to consumers? If so:

(a) identify by date and purchaser any such sales and describe the precise type of Star ME-1 fire sprinkler allegedly sold by Chemetron;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such sales;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such sales; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: The Complaint makes no such contention, and, at this time, Complaint Counsel does not make any such contention. Although Complaint Counsel understands that the Star ME-1's were largely distributed to contractors and others for installation in buildings, it is conceivable that some were sold directly to consumers who served as their own contractors or who retained contractors to perform the installation.

Interrogatory No. 28: Do you contend that Star ME-1 fire sprinklers have ever been sold by Chemetron Investments directly to consumers? If so:

(a) identify by date and purchaser any such sales and describe the precise type of Star ME-1 fire sprinkler allegedly sold by Chemetron Investments;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such sales;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such sales; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: The Complaint makes no such contention, and, at this

time, Complaint Counsel does not make any such contention. Although Complaint Counsel understands that the Star ME-1's were largely distributed to contractors and others for installation in buildings, it is conceivable that some were sold directly to consumers who served as their own contractors or who retained contractors to perform the installation.

Interrogatory No. 29: Do you contend that Star ME-1 fire sprinklers have ever been sold by Sunbeam directly to consumers? If so:

(a) identify by date and purchaser any such sales and describe the precise type of Star ME-1 fire sprinkler allegedly sold by Sunbeam;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such sales;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such sales; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: The Complaint makes no such contention, and, at this time, Complaint Counsel does not make any such contention. Although Complaint Counsel understands that the Star ME-1's were largely distributed to contractors and others for installation in buildings, it is conceivable that some were sold directly to consumers who served as their own contractors or who retained contractors to perform the installation.

Interrogatory No. 30: Do you contend that Star ME-1 fire sprinklers have ever been marketed by Chemetron directly to consumers? If so:

(a) identify by date and purchaser any such marketing and describe the precise type of Star ME-1 fire sprinkler allegedly marketed by Chemetron;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such marketing;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such marketing; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague because the term "marketed" is not defined or clear. Complaint Counsel interprets the term in accordance with its dictionary definition, i.e., to offer for sale or to sell. As interpreted, this interrogatory is essentially duplicative of Interrogatory 27. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: See answer to Interrogatory 27.

Interrogatory No. 31: Do you contend that Star ME-1 fire sprinklers have ever been marketed by Chemetron Investments directly to consumers? If so:

(a) identify by date and purchaser any such marketing and describe the precise type of Star ME-1 fire sprinkler allegedly marketed by Chemetron Investments;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such marketing;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such marketing; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague because the term "marketed" is not defined or clear. Complaint Counsel interprets the term in accordance with its dictionary definition, i.e., to offer for sale or to sell. As interpreted, this interrogatory is essentially duplicative of

Interrogatory 28. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: See answer to Interrogatory 28.

Interrogatory No. 32: Do you contend that Star ME-1 fire sprinklers have ever been marketed by Sunbeam directly to consumers? If so:

(a) identify by date and purchaser any such marketing and describe the precise type of Star ME-1 fire sprinkler allegedly marketed by Sunbeam;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such marketing;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such marketing; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague because the term "marketed" is not defined or clear. Complaint Counsel interprets the term in accordance with its dictionary definition, i.e., to offer for sale or to sell. As interpreted, this interrogatory is essentially duplicative of Interrogatory 29. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: See answer to Interrogatory 29.

Interrogatory No. 33: Do you contend that Star ME-1 fire sprinklers were installed by consumers themselves (as opposed to professional contractors)? If so:

(a) identify by date, location, and installer each such installation, and state whether the installer had any prior training or experience with respect to installing fire sprinklers;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such installation;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such installation; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague in part because the term "professional contractors" is undefined and unclear. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: The Complaint makes no such contention, and, at this time, Complaint Counsel does not make any such contention. Although Complaint Counsel understands that the Star ME-1's were largely distributed to contractors and others for installation in buildings, it is conceivable that some were sold directly to consumers who served as their own contractors or who retained contractors to perform the installation.

Interrogatory No. 34: Do you contend that Star ME-1 fire sprinklers were serviced by consumers themselves (as opposed to professional contractors)? If so:

(a) identify by date and location, each such service, and state whether the consumer had any prior training or experience with respect to servicing fire sprinklers;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such servicing;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such servicing; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague in part because the term "professional contractors" is undefined and unclear. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: The Complaint makes no such contention, and, at this time, Complaint Counsel does not make any such contention.

Interrogatory No. 35: Do you contend that Star ME-1 fire sprinklers were repaired by consumers themselves (as opposed to professional contractors)? If so:

(a) identify by date and location, each such repair and state whether the consumer had any prior training or experience with respect to repairing fire sprinklers;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such repairs;

(c) identify each and every person whom Complainant knows ad/or believes to have knowledge of any such repairs; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague in part because the term "professional contractors" is undefined and unclear. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: The Complaint makes no such contention, and, at this time, Complaint Counsel does not make any such contention.

Interrogatory No. 36: Do you contend that Star ME-1 fire sprinklers installed in buildings used only as storage facilities constitute "consumer products" pursuant to 15 U.S.C. § 2052(a)(1)? If so:

(a) set forth in detail the facts and law that you contend support this assertion;

(b) identify each and every document that describes, evidences, refers, or relates in any way to this assertion;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of this assertion; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague because the term "storage facilities" is undefined and unclear. This interrogatory is also vague because the term "this assertion" is unclear. This interrogatory calls for a legal conclusion. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence. This interrogatory seeks information protected by the work product doctrine.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this interrogatory, Complaint Counsel answers as follows: Yes. If the product is a consumer product, it does not lose its character as such merely because of where it is located in a particular instance. See the Complaint and the documents that will be produced. As stated in the Complaint, the Star ME-1 is a consumer product. See the Consumer Product Safety Act, 15 U.S.C. §§ 2051 - 2084, the regulations related thereto in Title 16 of the Code of Federal Regulations, and related case law, legal decisions, and opinions.

Interrogatory No. 37: Do you contend that Star ME-1 fire sprinklers installed in buildings used only as warehouses constitute "consumer products" pursuant to 15 U.S.C. § 2052(a)(1)? If so:

(a) set forth in detail the facts and law that you contend support this assertion;

(b) identify each and every document that describes, evidences, refers, or relates in any way to this assertion;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of this assertion; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague because the term "this assertion" is unclear. This interrogatory calls for a legal conclusion. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence. This interrogatory seeks information protected by the work product doctrine.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this interrogatory, Complaint Counsel answers as follows: Yes. If the product is a consumer product, it does not lose its character as such merely because of where it is located in a particular instance. See the Complaint and the documents that will be produced. As stated in the Complaint, the Star ME-1 is a consumer product. See the Consumer Product Safety Act, 15 U.S.C. §§ 2051 - 2084, the regulations related thereto in Title 16 of the Code of Federal Regulations, and related case law, legal decisions, and opinions.

Interrogatory No. 38: State whether there are any factual circumstances under which any Star ME-1 fire sprinklers would not constitute a "consumer product" pursuant to 15 U.S.C. § 2052(a)(1). If so:

(a) identify and describe such circumstances;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such circumstances;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of such circumstances; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory calls for speculation and a legal conclusion. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence. This interrogatory seeks information protected by the work product doctrine.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: No.

Interrogatory No. 39: State whether there are any factual circumstances under which fire sprinklers of any kind would not constitute a "consumer product" pursuant to 15 U.S.C. § 2052(a)(1). If so:

(a) identify and describe such circumstances;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such circumstances;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of such circumstances; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory calls for speculation and a legal conclusion. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence. This interrogatory seeks information protected by the work product doctrine.

Interrogatory No. 40: Identify each and every location known to you in which Star ME-1 fire sprinklers manufactured by Chemetron have ever been used and/or placed. For each location:

(a) state the exact address of the location;

(b) describe the type of location (e.g., cold storage facility, warehouse, loading dock, parking garage, etc.);

(c) identify the owner of the location;

(d) identify the exact model, size, temperature rating, and installation position of the Star ME-1 fire sprinkler used and/or placed therein; and

(e) identify the manufacturer, distributor, and seller of the Star ME-1 used and/or placed therein.

Objections: This interrogatory is vague because the term "used and/or placed" is undefined and unclear. Complaint Counsel interprets that term as meaning "installed" and responds accordingly. Subpart (e) is confusing and/or redundant since the main part of the interrogatory inquires about Star ME-1's manufactured by Chemetron Corporation. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this interrogatory, Complaint Counsel answers as follows: See the documents provided prior to the Complaint filing and that will be produced, including the database titled "Test Results of Star ME-1 Manufactured after 1976" and the updated database printout relating to the USNA test results. Due to the terms of applicable confidentiality requests and the public filing of the documents being produced, the updated database printout excludes test results from UL, FM, and Grinnell Corporation. Complaint Counsel will produce further updates of the database printout that will include UL, FM, and Grinnell Corporation test results as confidentiality waivers and/or arrangements are completed.

Within these database printouts, see the sprinklers listed as having been manufactured from 1978 through 1982. The following responses relate to those sprinklers:

(a) To the extent known, see documents that will be produced.

(b) Raley's is a supermarket chain.

(c) To the extent known, see documents that will be produced.

(d) All of the sprinklers listed in the database printouts are Star ME-1's. The Commission staff has custody of the sprinklers listed in the database with sample number 00-860-6228, made by Chemetron. Complaint Counsel expects to be able to make those sprinklers available for inspection upon mutually agreeable terms, subject to possible limitations. During that inspection, Respondents should be able to learn each sprinkler's size, temperature rating, and installation position.

(e) Chemetron Corporation.

Interrogatory No. 41: Identify each size, temperature rating, finish, and installation position, in which the Star ME-1 fire sprinklers at issue in the Complaint have ever been manufactured, marketed, sold, or distributed.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory is vague because the term "marketed" is not defined or clear. Complaint Counsel interprets the term in accordance with its dictionary definition, i.e., to offer for sale or to sell. This interrogatory seeks information protected by the law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this interrogatory, Complaint Counsel answers as

follows: The sizes of Star ME-1's varies according to installation site. See documents that will be produced, including UL Fire Protection Equipment Directories and manufacturing records.

Interrogatory No. 42: Do you contend that there is a single standard of water pressure (in psi) at which previously installed fire sprinkler heads must activate when tested to be deemed by the Complainant as not presenting any substantial risk of injury to the public and/or substantial product hazard? If so:

(a) identify and describe in detail any such standard, including who developed the standard, when and how it was developed, and any state or local governments or industry groups or organizations that have adopted the standard and the date of adoption;

(b) identify each and every document that describes, evidences, refers, or relates to any such standard;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such standard; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague and confusing. This interrogatory is overbroad and unduly burdensome. This interrogatory calls for a legal conclusion. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 43: Do you contend that there is a single standard of temperature at which previously installed fire sprinkler heads must activate when tested to be deemed by the Complainant as not presenting any substantial risk of injury to the public and/or substantial product hazard? If so:

(a) identify and describe in detail any such standard, including who developed the standard, when and how it was developed, and any state or local governments or industry groups or organizations that have adopted the standard and the date of adoption;

(b) identify each and every document that describes, evidences, refers, or relates to any such standard;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such standard; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague and confusing. This interrogatory is overbroad and unduly burdensome. This interrogatory calls for a legal conclusion. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 44: Describe the percentage of previously installed fire sprinkler heads that must activate at the standards described in Interrogatory Nos. 42-43 when tested in order to be considered by the Complainant as not presenting any substantial risk of injury to the public and/or substantial product hazard;

(a) describe in detail how such a percentage was determined, including the persons and their qualifications involved in the determination;

(b) identify each and every document that describes, evidences, refers, or relates to any such percentage;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such percentage; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague and confusing. This interrogatory is overbroad and unduly burdensome. This interrogatory calls for a legal conclusion. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence. See also the objections to Requests 42 and 43.

Interrogatory No. 45: Do you contend that there is a standard of "failure" that will accurately predict whether a Star ME-1 fire sprinkler will fail to activate in a fire when used in a particular building without regard to the actual hydraulic pressure that exists in the building? If so:

(a) identify and describe in detail any such standard, including who developed the standard, how it was developed, and any state or local governments or industry groups or organizations that have adopted the standard and the date of adoption;

(b) identify each and every document that describes, evidences, refers, or relates to any such standard;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any such standard; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague and confusing. This interrogatory is overbroad and unduly burdensome.

Interrogatory No. 46: What do you contend is the average static water pressure (in psi) present in the sprinkler systems of most commercial buildings? Describe in detail the factual basis for your contention.

Objections: This interrogatory is vague and confusing. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 47: What do you contend is the average residual water pressure (in psi) at the most remote sprinkler head in the sprinkler systems of most commercial buildings, after the system has been activated? Describe in detail the factual basis for your contention.

Objections: This interrogatory is vague and confusing. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 48: Do you contend that if a particular Star ME-1 fire sprinkler does not activate at a minimum of 7 psi when tested, such Star ME-1 fire sprinkler would not activate if a fire occurred in a building where such Star ME-1 fire sprinkler was installed? If so:

(a) set forth in detail the factual basis for any such contention, including the date, time, place, and details of any tests or expert examinations supporting such contention, and the identity (by name, address, title, and qualifications) of any persons participating in such tests or examinations;

(b) identify each and every document that describes, evidences, refers, or relates in any way to this assertion;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of this assertion; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague and confusing, and it lacks facts or information sufficient to answer. This interrogatory calls for speculation. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 49: With respect to the statement in the November 30, 2000 letter (attached hereto) from Seth B. Popkin of the CPSC to David H. Baker that "we have collected pressure test results on post-1976 Star ME-1's. The tests determined whether or not sprinklers activated, and if so, the pressures at which they activated":

(a) identify the date and location of each such test;

(b) describe in detail how each such test was conducted and the results of each such test;

(c) identify by name, address, title and qualifications the person(s) conducting the tests;

(d) identify by name, address, title and qualifications the person(s) interpreting the test results;

(e) identify the location where each Star ME-1 fire sprinkler tested had been or was installed;

(f) describe the type of location where each Star ME-1 fire sprinkler tested had been or was installed (e.g., cold storage facility, warehouse, loading dock, parking garage, etc.);

(g) identify the owner of the location where each Star ME-1 fire sprinkler tested was installed;

(h) identify the manufacturer of each Star ME-1 fire sprinkler that was tested;

(i) fully describe the visual appearance and condition of each Star ME-1 fire sprinkler tested (including any abnormalities, corrosion, etc.);

(j) fully describe the complete maintenance and service history of each Star ME-1 fire sprinkler tested; and

(k) state whether the tested sprinklers were preserved and, if so, their current location and custodian.

Objections: This interrogatory is overbroad and unduly burdensome. Subpart (d) is vague because the term "interpreting" is undefined and unclear. This interrogatory seeks information protected by the law enforcement investigatory privilege and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this interrogatory, Complaint Counsel answers as follows: Complaint Counsel has limited information concerning testing conducted by testers other than the USNA.

(a) See documents that will be produced, including the database printouts and documents relating to the USNA.

(b) See documents that will be produced, including the database printouts, Sprinkler Operational Pressure Test Procedures, and documents relating to the USNA.

(c) At the USNA, Stephen J. Crutchley and Anthony F. Antenucci. These persons are Laboratory Technicians. See answer to Interrogatory 4.

(d) At the USNA, Stephen J. Crutchley and Anthony F. Antenucci. These persons are Laboratory Technicians. See answer to Interrogatory 4. Complaint Counsel and other Commission staff reviewed the test results.

(e) See documents that will be produced, including the database printouts.

(f) See documents that will be produced. Raley's is a supermarket chain.

(g) Complaint Counsel does not believe it has any information regarding ownership of the locations, except to the extent it is found in the documents that will be produced.

(h) Chemetron Corporation and/or Chemetron Investments, Inc. manufactured the sprinklers with manufacture dates of 1977 to 1982. Sprinkler Corporation of Milwaukee, Inc., f/k/a Star Sprinkler Corporation, f/k/a Grunau Sprinkler Manufacturing Company, Inc., manufactured the sprinklers with manufacture dates of 1983 to 1995.

(i) See the documents that will be produced and the sprinklers themselves.

(j) Complaint Counsel has limited or no information responsive to this request. The documents that will be produced may contain some responsive information.

(k) The sprinklers tested by the USNA were preserved. They are in the custody of Commission staff. See the documents that will be produced. Complaint Counsel has limited or no information regarding preservation of sprinklers tested by persons other than the USNA. The documents that will be produced may contain some responsive information.

Interrogatory No. 50: With respect to the statement in the November 30, 2000 letter from Seth B. Popkin of the CPSC to David H. Baker that, "[a]ccording to certain industry standards, 7 psi is a passing pressure level," specify the industry standards referred to, including any bodies or organizations that have adopted or followed those standards and the date of adoption or acceptance within the industry.

Objections: The portion of this interrogatory from the word "including" through the ending word "industry" is vague because the terms therein are undefined and unclear. This interrogatory is overbroad. This interrogatory seeks information protected by the work product doctrine.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this interrogatory, Complaint Counsel answers as follows: The industry standards referred to in the November 30, 2000 letter are UL 199 and NFPA 13.

Interrogatory No. 51: With respect to the statement in the November 30, 2000 letter from Seth B. Popkin of the CPSC to David H. Baker that, "Underwriters Laboratories and Factory Mutual Research have more rigorous testing standards," identify the date on which the Underwriters Laboratories and Factory Mutual Research standards went into effect and/or were adopted, whether and for how long those standards have been followed by "dry" fire sprinkler manufacturers and, if so, which manufacturers.

Objections: The portion of this interrogatory from the term "went into effect" through the ending word "manufacturers" is vague because the terms therein are undefined and unclear. This interrogatory is overbroad. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this interrogatory, Complaint Counsel answers as

follows: UL and FM standards speak for themselves, and Complaint Counsel refers Respondents to UL and FM and their standards.

Interrogatory No. 52: Identify the specific industry standard you contend applies to Star ME-1 fire sprinklers. Your response should also include an identification of any bodies or organizations that have adopted or followed this standard, the date of adoption or acceptance within the industry, an identification of any manufacturers that follow this standard, and the date when such manufacturers first began to follow this standard.

Objections: This interrogatory is vague and confusing, as it fails to identify or define "the specific industry standard" inquired about in this interrogatory (numerous standards could be said to apply to Star ME-1's), and for the reasons stated in the objections to Request 50. This interrogatory is overbroad. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this interrogatory, Complaint Counsel answers as follows: The industry standards referred to in the November 30, 2000 letter are UL 199 and NFPA 13.

Interrogatory No. 53: With respect to the statement in the November 30, 2000 letter from Seth B. Popkin of the CPSC to David H. Baker that "we expect that over time the quantity and pressure levels of failures will increase":

(a) set forth in detail the factual basis for this statement;

(b) identify each and every document that describes, evidences, refers, or relates in any way to this statement;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of this statement; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows:

(a) The basis for this statement includes analyses of the Star ME-1 conducted by various persons, including consultants, manufacturers, and third parties. See the documents that will be produced, including the test results. Complaint Counsel anticipates that further basis for this statement will be provided in the context of expert testimony and documents related thereto. See the answer to Interrogatory 64.

(b) See the documents that will be produced.

(c) Complaint Counsel presumes that any person who has read the statement has knowledge of it.

(d) See response (c) above.

Interrogatory No. 54: With respect to the statement in the November 30, 2000 letter from Seth B. Popkin of the CPSC to David H. Baker that, "we conducted failure mode examinations and reviewed records of such examinations conducted by others [on Star ME-1 fire sprinklers]":

(a) identify and describe each failure mode examination conducted by the CPSC on Star ME-1 fire sprinklers, and for each such failure mode examination:

(1) identify the date and location of each such examination;

(2) describe in detail how each examination was conducted;

(3) identify by name, address, title and qualifications the person(s) involved in or conducting the examinations;

(4) identify by name, address, title and qualifications the person(s) interpreting the examination results;

(5) identify the location where each Star ME-1 fire sprinkler examined had been or was installed;

(6) describe the type of location where each Star ME-1 fire sprinkler examined had been or was installed (e.g., cold storage facility, warehouse, loading dock, parking garage, etc.);

(7) identify the owner of the location where each Star ME-1 fire sprinkler examined was installed;

(8) identify the manufacturer of each Star ME-1 fire sprinkler that was examined;

(9) fully describe the visual appearance and condition of each Star ME-1 fire sprinkler that was examined (including any abnormalities, corrosion, etc.);

(10) describe the complete maintenance and service history of each Star ME-1 fire sprinkler that was examined; and

(11) state whether the examined Star ME-1 sprinklers were preserved and, if so, their current location and custodian.

(b) identify and describe each failure mode examination conducted by a person other than CPSC on Star ME-1 fire sprinklers, and for each such failure mode examination:

(1) identify the date and location of each such examination;

(2) describe in detail how each examination was conducted;

(3) identify by name, address, title and qualifications the person(s) involved in or conducting the examinations;

(4) identify by name, address, title and qualifications the person(s) interpreting the examination results;

(5) identify the location where each Star ME-1 fire sprinkler examined had been or was installed;

(6) describe the type of location where each Star ME-1 fire sprinkler examined had been or was installed (e.g., cold storage facility, warehouse, loading dock, parking garage, etc.);

(7) identify the owner of the location where each Star ME-1 fire sprinkler examined was installed;

(8) identify the manufacturer of each Star ME-1 fire sprinkler that was examined;

(9) fully describe the visual appearance and condition of each Star ME-1 fire sprinkler that was examined (including any abnormalities, corrosion, etc.);

(10) describe the complete maintenance and service history of each Star ME-1 fire sprinkler that was examined; and

(11) state whether the examined sprinklers were preserved and, if so, their current location and custodian.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows:

(a) Inasmuch as the response to this interrogatory relates to expert analysis of the Star ME-1's, Complaint Counsel will provide the requested information to the extent not restricted by the objections and to the extent available in conjunction with

identification and disclosure of expert witnesses expected to testify at the hearing. See answer to Interrogatory 49.

(b) Inasmuch as the response to this interrogatory relates to information that is prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality, Complaint Counsel is barred from providing it at this time. Complaint Counsel will provide the requested information to the extent not restricted by these limitations and stated objections, and to the extent available, after waiver of applicable requests for confidentiality and/or the entry of a sufficient protective order, and/or in conjunction with identification and disclosure of expert witnesses expected to testify at the hearing. See answer to Interrogatory 49.

Interrogatory No. 55: With respect to the statement in the November 30, 2000 letter from Seth B. Popkin of the CPSC to David H. Baker that "we believe the failures [of Star ME-1 fire sprinklers] are likely due to several causes, including but not limited to, corrosion, accumulation of deposits, binding of the O-rings, interference and fit problems with the components, lubricant problems, and/or combination of some or all of the foregoing":

(a) set forth in detail the factual basis for this statement as to each cause listed;

(b) identify each and every document that describes, evidences, refers, or relates in any way to this statement as to each cause listed;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of this statement;

(d) describe in detail the substance of each such person's knowledge and/or information; and

(e) state any other causes that the CPSC believes may result in failures of Star ME-1 fire sprinklers not listed in this statement, and for each cause state the CPSC's factual basis for the belief that it may result in the failure of Star ME-1 fire sprinklers.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Inasmuch as the response to this interrogatory relates to expert analysis of the Star ME-1's, Complaint Counsel will provide the requested information to the extent not restricted by the objections and to the extent available in conjunction with identification and disclosure of expert witnesses expected to testify at the hearing. See the answer to Interrogatory 64. Regarding subpart (c), Complaint Counsel presumes that any person who has read the statement has knowledge of it.

Interrogatory No. 56: With respect to the allegation in Paragraph 6 of the Complaint that, "[b]y virtue of the Asset Purchase Agreement and Sunbeam's stock and assets acquisition of CC and CI, Sunbeam assumed CC's and CI's liabilities for the Star ME-1 relief sought herein":

(a) set forth in detail the factual basis for this allegation;

(b) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of this allegation; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement

investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it calls for a legal conclusion.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows:

(a) Seth Popkin's November 30, 2000 letter to David Baker describes in detail the factual basis for this allegation. See the documents that will be produced. The transactional and other documents speak for themselves. Because of the Respondents' assertions of confidentiality, Complaint Counsel cannot, at this time, respond further or identify and produce responsive documents.

(b) See answer to subpart (a).

(c) Complaint Counsel presumes that any person who has read the allegation has knowledge of it.

(d) See answer to subpart (c).

Interrogatory No. 57: With respect to the allegation in Paragraph 10 of the Complaint that "[e]ach of the Respondents was and/or is a 'manufacturer'":

(a) set forth in detail the factual basis for this allegation with respect -- separately and specifically -- to each Respondent;

(b) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of this allegation; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is in large part duplicative of Interrogatories 17 and 18. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it calls for a legal conclusion.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: With respect to Chemetron Corporation, see other answers herein, including the answer to Interrogatory 17, and the documents that will be produced. With respect to Chemetron Investments, see other answers herein, including the answer to Interrogatory 18, and the documents that will be produced. With respect to Sunbeam Corporation, see other answers herein, including the answer to Interrogatory 56, and the documents that will be produced.

Interrogatory No. 58: With respect to the allegation in Paragraph 11 of the Complaint that the Star ME-1 fire sprinklers at issue in the Complaint are "intended to suppress and/or extinguish fire":

(a) identify and describe in detail the ways in which Star ME-1 fire sprinklers are intended to suppress and/or extinguish fire;

(b) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of any (sic) this allegation; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement

investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts. Subpart (a) of this interrogatory is vague.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows:

(a) Stated generally, when exposed to sufficient heat from a fire, the sprinklers should discharge water onto a fire, and the discharge of water should then suppress and/or extinguish the fire. This answer may be supplemented in further discovery in conjunction with identification and disclosure of expert witnesses expected to testify at the hearing.

(b) See the documents that will be produced.

(c) Complaint Counsel presumes that any person who has read the allegation has knowledge of it.

(d) See answer to subpart (c).

Interrogatory No. 59: With respect to the allegation in Paragraph 10 of the Complaint that "each of the Respondents was and/or is" a "distributor":

(a) set forth in detail the factual basis for this allegation with respect -- separately and specifically -- to each Respondent;

(b) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of this allegation; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is very similar to Interrogatories 20 and 21. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it calls for a legal conclusion.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: With respect to Chemetron Corporation, see other answers herein, including the answer to Interrogatory 20, and the documents that will be produced. With respect to Chemetron Investments, see other answers herein, including the answer to Interrogatory 21, and the documents that will be produced. With respect to Sunbeam Corporation, see other answers herein, including the answer to Interrogatory 56, and the documents that will be produced.

Interrogatory No. 60: With respect to the allegation in Paragraph 12 of the Complaint that the Star ME-1 fire sprinkler is a "consumer product" that was "distributed in commerce" "as those terms are defined in ... 15 U.S.C. § 2052(a)(1), (11)":

(a) set forth in detail any and all facts and law that you contend support this allegation;

(b) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of this allegation; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory calls for a legal conclusion. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows:

(a) The Star ME-1 is an article produced and distributed for the personal use, consumption, and/or enjoyment of a consumer in or around a household or residence, in recreation, or otherwise. The Star ME-1 is used in day care centers, nursing homes, health care facilities, supermarkets, and other buildings. See other answers herein addressing consumer exposure to Star ME-1's. See documents previsously provided to the Respondents and that will be produced, including database printouts. See the Consumer Product Safety Act, 15 U.S.C. §§ 2051 - 2084, the regulations related thereto in Title 16 of the Code of Federal Regulations, and related case law, legal decisions, and opinions.

(b) See the documents that will be produced.

(c) Complaint Counsel presumes that any person who has read the allegation has knowledge of it.

(d) See answer to subpart (c).

Interrogatory No. 61: With respect to the allegation in Paragraph 12 of the Complaint that the Star ME-1 fire sprinkler is "an article produced and distributed for the personal use, consumption, and/or enjoyment of a consumer in or around a household or residence, in recreation, or otherwise":

(a) set forth in detail the factual basis for this allegation;

(b) describe in detail any and all ways in which you contend that consumers have used, consumed, and/or enjoyed Star ME-1 fire sprinklers;

(c) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(d) identify each and every person whom Complainant knows and/or believes to have knowledge of this allegation; and

(e) describe in detail the substance of each such person's knowledge and/or information.

Objections: Complaint Counsel objects to this interrogatory to the extent it calls for a legal conclusion. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows:

(a) The Star ME-1 is manufactured and distributed as a distinct article in commerce. It is used in day care centers, nursing homes, health care facilities, supermarkets, and other buildings. See documents that will be produced, including the database printouts. See the documents that will be produced.

(b) Consumers have used, consumed, and/or enjoyed Star ME-1's at all of the times and in all of the locations at which consumers have been in the presence of, and thereby exposed to the hazards associated with, installed Star ME-1's. At all such

times and in all such locations, consumers have relied, and continue to rely, upon Star ME-1's to function properly and as intended should a fire occur.

(c) See the documents that will be produced.

(d) Complaint Counsel presumes that any person who has read the allegation has knowledge of it.

(e) See answer to subpart (d).

Interrogatory No. 62: With respect to the allegation in Paragraph 12 of the Complaint that Star ME-1 fire sprinklers are "used in, among other places, day care centers, nursing homes, and health care facilities":

(a) set forth in detail the factual basis for this allegation;

(b) identify by name and address each and every day care center in which you contend that Star ME-1 sprinklers have been used, identify the manufacturer of the sprinklers used in each center, describe in detail the type of sprinklers used in each center, and identify the locations within the center where the sprinklers were used;

(c) identify by name and address each and every nursing home in which you contend that Star ME-1 sprinklers have been used, identify the manufacturer of the sprinklers used in each nursing home, describe in detail the type of sprinklers used in each nursing home, and identify the locations within the nursing home where the sprinklers were used;

(d) identify by name and address each and every health care facility in which you contend that Star ME-1 sprinklers have been used, identify the manufacturer of the sprinklers used in each health care facility, describe in detail the type of sprinklers used in each health care facility, and identify the locations within the health care facility where the sprinklers were used;

(e) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(f) identify each and every person whom Complainant knows and/or believes to have knowledge of this allegation; and

(g) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. The term "type of sprinklers" used in several subparts is vague.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Much of the information and many of the documents supporting this allegation remain the subject of requests for confidentiality. Complaint Counsel has sought waivers of confidentiality, but such waivers have not yet been provided. See procedures explained in Second General Objection.

(a) This allegation is based on facts collected during the course of the Commission staff's investigation. The staff obtained Star ME-1's from nursing homes and health care facilities, and it obtained test results and other information regarding Star ME-1's located in a day care center. See database printout provided to the Respondents prior to the filing of the Complaint and updated database printout being produced. See other documents being produced or that will be produced.

(b) Star ME-1's. See documents that will be produced, including database printouts. Chemetron Corporation and/or Chemetron Investments manufactured the Star ME-1's from 1977 through 1982. Sprinkler Corporation of Milwaukee, Inc. (under former names) manufactured the Star ME-1's from 1983 through 1995.

(c) See answer to subpart (b).

(d) See answer to subpart (b).

(e) See the documents that will be produced.

(f) Complaint Counsel presumes that any person who has read the allegation has knowledge of it.

(g) See answer to subpart (f).

Interrogatory No. 63: With respect to the allegation in Paragraph 13 of the Complaint that the Star ME-1 fire sprinkler "is intended to operate when the temperature to which it is exposed reaches a particular level":

(a) identify and fully describe the particular temperature level at which the Star ME-1 fire sprinkler is intended to operate as referred to in this allegation, and describe in detail how that level was determined;

(b) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of this allegation; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows:

(a) The particular temperature level at which a given Star ME-1 is intended to operate (temperature rating) is specified on each sprinkler.

(b) See the documents that will be produced.

(c) Complaint Counsel presumes that any person who has read the allegation has knowledge of it.

(d) See answer to subpart (c).

Interrogatory No. 64: Fully describe the alleged "inadequate design and/or manufacturing" of Star ME-1 fire sprinklers as alleged in Paragraph 14 of the Complaint and:

(a) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(b) identify each and every person whom Complainant knows and/or believes to have knowledge of this allegation; and

(c) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Inasmuch as the response to this interrogatory relates to expert analysis of the Star ME-1's, Complaint Counsel will provide the requested information to the extent not restricted by the objections and to the extent available in conjunction with identification and disclosure of expert witnesses expected to testify at the hearing. Complaint Counsel responds further as follows:

On August 4, 1999, following a staff investigation, Mealane Corporation, in cooperation with the Commission, recalled Star brand fire sprinklers including, but not limited to, the Star

ME-1 manufactured in 1975 and 1976. On its own, Mealane had previously recalled these sprinklers. This 1999 recall publicized the recall more effectively. The recall announcement noted that the sprinklers could fail in a fire, exposing people to bodily injury or death.

On July 19, 2001, Central Sprinkler Company, in cooperation with the Commission, recalled millions of fire sprinklers including, but not limited to, the Star ME-1 that Star Sprinkler, Inc. manufactured from 1996 through 1998. Central Sprinkler Company recalled these sprinklers because of concerns about performance degradation causing potential failure. Under the recall, Central Sprinkler Company will provide free replacement sprinklers and free replacement labor. With the 1999 recall and the 2001 recall, all Star ME-1's manufactured in the first two years (the earliest version) and final three years (the latest version) of its production have been recalled.

The Star ME-1 has failed to operate and discharge water as intended and required. The staff has compiled test results on 180 Star ME-1's manufactured from 1978 through 1994 (updated since the staff last provided a test results database to the Respondents, but confidentiality restrictions prevent Complaint Counsel from filing and serving an updated database printout of all but the USNA test results). Test results show that 64% of the tested Star ME-1's did not activate at or below 7 psi, and thus failed. The test results also show that 28% of the Star ME-1's tested to 40 psi did not operate below 40 psi, with some of those operating at 40 psi or above, and some failing altogether to operate at 40 psi or above. Commission staff and USNA test protocol required that the testing be stopped at a pressure of 40 psi, and in certain circumstances, at a pressure of 15 psi (to preserve the sprinklers for further analysis) (see protocol produced). The staff believes that had testing not been stopped at these pressures, many of these sprinklers would have failed to operate at pressures even higher than 40 psi. These

failure rates and pressure levels constitute substantial evidence that the Star ME-1 will likely fail to operate when needed in a fire. In addition, over time, the quantity and pressure levels of failures will likely increase.

Based on failure mode examinations and review of third-party technical reports and analyses concerning the Star ME-1, the staff contends that the Star ME-1 failures result from several causes originating with inadequate design and/or manufacturing. The conditions likely resulting from inadequate design include, but are not necessarily limited to, the following: corrosion; accumulation of deposits; binding, bonding, or sticking of the O-ring seals; lubricant problems; and/or combinations of some or all of the foregoing. Evidence of inadequate manufacturing includes interference and fit problems with the components. Though the staff identified certain minimal engineering changes to the Star ME-1 in the period of 1977 through 1995, the pressure test results, engineering analysis, and documents reviewed establish that none of the changes eliminated the defect.

In 1990 and 1991, Sprinkler Corporation of Milwaukee, Inc., then known as "Star Sprinkler Corporation," sent out notices advising that the Star ME-1 manufactured from 1975 through 1981 (made by Sprinkler Corporation of Milwaukee, Inc.'s predecessors, including, in part, Chemetron Corporation) may not operate properly under fire conditions. In 1991, SCM notified the public of failure modes of these sprinklers. These notices also stated it was imperative that fire protection agencies and officials be notified so that the potential hazard is evaluated and/or corrected.

A March 3, 2000 UL news release stated UL's concerns about dry sprinklers with O-rings, such as the Star ME-1, and urged "immediate testing or replacement of dry sprinklers incorporating an 'O-ring' water seal regardless of the year of manufacture or installation

location." In addition, a July 27, 2001 UL news release announced that under a revision to UL's applicable standard, after January 2003, O-ring water seal constructions will no longer be permitted. UL found that some O-ring sealed sprinklers can degrade over time due to corrosion or build up of minerals, salts, and other elements in water that could affect how the sprinklers activate in a fire.

The failure and likely failure of the Star ME-1, a life safety device, to operate as intended and protect consumers, as well as the inadequate design and/or manufacturing of the Star ME-1, constitutes a "defect" as that term is used in 15 U.S.C. § 2064(a)(2). The staff further contends that the longer a Star ME-1 has been in use, the greater the likelihood it will fail.

(a) See the documents that will be produced.

(b) Complaint Counsel presumes that any person who has read the allegation has knowledge of it.

(c) See answer to subpart (b).

Interrogatory No. 65: With respect to the allegation in Paragraph 14 of the Complaint that the Star ME-1 fire sprinkler "has failed and is likely to fail to operate as intended":

(a) describe in detail all of the causes and/or reasons that you contend that the Star ME-1 fire sprinkler "has failed and is likely to fail to operate as intended";

(b) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of this allegation; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Answer: See the objections and answer to Interrogatory 64.

Interrogatory No. 66: With respect to the allegation in Paragraph 15 of the Complaint that the inadequate design and/or manufacturing of Star ME-1 fire sprinklers constitute a "defect":

(a) set forth in detail the factual basis for this allegation;

(b) identify and describe in detail any such defect;

(c) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(d) identify each and every person whom Complainant knows and/or believes to have knowledge of this allegation; and

(e) describe in detail the substance of each such person's knowledge and/or information.

Objections: Complaint Counsel objects to this interrogatory to the extent that it calls for a legal conclusion. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: See the answer to Interrogatory 64.

Interrogatory No. 67: With respect to the allegation in Paragraph 16 of the Complaint that "from 1977 through 1995, Respondents manufactured and/or distributed approximately 700,000 Star ME-1's":

(a) set forth in detail the factual basis for this allegation, including the precise method and underlying data used to arrive at the total of "approximately 700,000";

(b) state the number of Star ME-1 fire sprinklers that you contend were manufactured and/or distributed by Respondent Chemetron, and describe the precise method and underlying data used to arrive at this number;

(c) state the number of Star ME-1 fire sprinklers that you contend were manufactured and/or distributed by Respondent Chemetron Investments, and describe the precise method and underlying data used to arrive at this number;

(d) state the number of Star ME-1 fire sprinklers that you contend were manufactured and/or distributed by Respondent Sunbeam, and describe the precise method and underlying data used to arrive at this number;

(e) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(f) identify each and every person whom Complaint (sic) knows and/or believes to have knowledge of this allegation; and

(g) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows:

(a) Complaint Counsel estimated 700,000 based on confidential information provided (waiver of confidentiality denied to date and will be sought in accordance with Second General Objection), and based on the 1,000,000 estimated to have been covered by the 1999 recall of the 1975 through 1976 Star ME-1's and their predecessor models.

(b) Complaint Counsel estimates 200,000. See answer to subpart (a).

(c) Inasmuch as Chemetron Investments is formerly and also known as "Chemetron Corporation," and Chemetron Corporation is formerly and also known as "Chemetron Investments, Inc.," see the answer to subpart (b).

(d) At this time, Complaint Counsel does not contend that Sunbeam Corporation manufactured and/or distributed any Star ME-1's. See also the answer to Interrogatory 56 and documents related thereto.

(e) See the documents that will be produced.

(f) Complaint Counsel presumes that any person who has read the allegation has knowledge of it.

(g) See answer to subpart (f).

Interrogatory No. 68: With respect to the allegation in Paragraph 17 of the Complaint that the "[f]ailure of the Star ME-1 to operate as intended in a fire creates a likelihood the fire will grow and spread, exposing consumers to the risk of serious injury and death":

(a) set forth in detail the factual basis for this allegation;

(b) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of this allegation; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: See the answer to Interrogatory 16 and the documents that will be produced. Complaint Counsel presumes that any person who has read the allegation has knowledge of it.

Interrogatory No. 69: With respect to the allegation in Paragraph 18 of the Complaint that an alleged defect in Star ME-1 fire sprinklers creates a "substantial risk of injury to the public":

(a) set forth in detail the factual basis for this allegation;

(b) describe the specific risk(s) of injury that you contend are presented by Star ME-1 fire sprinklers;

(c) describe the criteria or factors used by the CPSC in determining that each risk allegedly associated with Star ME-1 fire sprinklers constitutes a "substantial risk" within the meaning of 15 U.S.C. § 2064(a)(2);

(d) identify any and all data, survey information, or testing relating to the alleged risks associated with Star ME-1 fire sprinklers;

(e) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(f) identify each and every person whom Complaint knows and/or believes to have knowledge of this allegation; and

(g) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts. Complaint Counsel objects to this interrogatory to the extent it calls for a legal conclusion.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: See the other answers herein, including the answers to Interrogatories 16, 64, and 67, and the documents that will be produced. Complaint Counsel presumes that any person who has read the allegation has knowledge of it.

Interrogatory No. 70: With respect to the allegation in Paragraph 19 of the Complaint that Star ME-1 fire sprinklers constitute a "substantial product hazard":

(a) set forth in detail the factual basis for this allegation;

(b) identify each and every document that describes, evidences, refers, or relates in any way to this allegation;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of this allegation; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Answer: See the objections and answer to Interrogatory 69.

Interrogatory No. 71: State whether the failure of any Star ME-1 fire sprinkler to function has resulted in any injury or death. For each injury or death allegedly as a result of the failure of a Star ME-1 fire sprinkler to function:

(a) identify by name, address, age, and next-of-kin, the person who suffered the injury or death;

(b) describe the nature of the injury or death;

(c) identify the location of the Star ME-1 fire sprinkler which allegedly caused the injury or death;

(d) identify the type of location where the injury or death allegedly occurred (e.g., cold storage facility, warehouse, loading dock, parking garage, etc.);

(e) identify the owner of the location; and

(f) identify the manufacturer, distributor, and seller of the Star ME-1 fire sprinkler involved.

Answer: Complaint Counsel has not been informed of any such injury or death.

Interrogatory No. 72: Do you contend that the performance of Star ME-1 fire sprinklers declines or deteriorates over time? If so:

(a) identify and describe in detail any such performance decline or deterioration, including the nature and cause of any such performance decline or deterioration;

(b) identify each and every document that describes, evidences, refers, or relates in any way to such performance decline or deterioration;

(c) identify each and every person whom Complainant knows and/or believes to have knowledge of such decline or deterioration; and

(d) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague and confusing because of its lack of specificity and because the term "declines or deteriorates over time" is undefined and unclear. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's understanding of this interrogatory, Complaint Counsel answers as follows: Inasmuch as the response to this interrogatory relates to expert analysis of the Star ME-1's, Complaint Counsel will provide the requested information to the extent not restricted by the objections and to the extent available in conjunction with identification and disclosure of

expert witnesses expected to testify at the hearing. Complaint Counsel responds further as follows:

Answer: See the answers to Interrogatories 53 and 64.

(a) See the answer to Interrogatories 53 and 64.

(b) See the documents that will be produced.

(c) Alan Schoem, Eric Stone, Eric Singer, Amy Brown, Shawn Cerruti, and Complaint Counsel have varying amounts of knowledge of this matter obtained through the course of the staff's investigation. See the answer to Interrogatory 64. Complaint Counsel believes that the Respondents, the Star ME-1's manufacturers, sprinkler installers, UL, and FM have knowledge of this matter arising from their experience with the Star ME-1 and from their testing and analyses of same. The identities of some of these persons and the substance of their knowledge is reflected in part in documents being produced and in documents that, because of confidentiality restrictions, cannot yet be produced or specifically referenced. Complaint Counsel believes fire protection personnel and some members of the public are likely to have certain knowledge of this matter, based on information made available to them over time by, among others, the manufacturers and UL. See the documents that will be produced.

(d) See the answer to subpart (c).

Interrogatory No. 73: What do you contend is the useful life expectation in years of Star ME-1 fire sprinklers? With respect to such useful life expectation:

(a) identify each and every document that describes, evidences, refers, or relates to it;

(b) identify each and every person whom Complainant knows and/or believes to have knowledge of the useful life expectation; and

(c) describe in detail the substance of each such person's knowledge and/or information.

Objections: This interrogatory is vague because the term "useful life expectation" is undefined and unclear. As a result, without the interrogatory being rephrased so as to eliminate the ambiguities, Complaint Counsel cannot determine if further objections would be necessary or provide an answer.

Interrogatory No. 74: Separately identify each and every known fire in which you contend that Star ME-1 fire sprinklers failed to operate. For each fire, state:

(a) the location of the fire;

(b) the type of location (e.g., cold storage facility, warehouse, loading dock, parking garage, etc.);

(c) the name and address of the owner of the location;

(d) a description of any injury or death allegedly suffered as a result of the fire;

(e) a description of any property damage allegedly suffered as a result of the fire; and

(f) the identity of the manufacturer, distributor, and seller of the Star ME-1 fire sprinkler involved in the fire.

Objections: This interrogatory is essentially duplicative of Interrogatory 7. This interrogatory seeks information protected by the law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this request, Complaint Counsel answers as follows: See the other answers herein including the answer to Interrogatory 7.

Interrogatory No. 75: Separately identify each and every known fire in which you contend that the Star ME-1 fire sprinklers manufactured by the Respondents failed to operate. For each fire, state:

(a) the location of the fire;

(b) the type of location (e.g., cold storage facility, warehouse, loading dock, parking garage, etc.);

(c) the name and address of the owner of the location;

(d) a description of any injury or death allegedly suffered as a result of the fire; and

(e) a description of any property damage allegedly suffered as a result of the fire.

Answer: Complaint Counsel is not aware of information responsive to this interrogatory.

Interrogatory No. 76: With respect to the statement on Page 6 of the Complaint regarding repair of all Star ME-1 fire sprinklers so that they will "operate as intended and required," identify and describe what you contend would constitute Star ME-1 fire sprinklers that "operate as intended and required" for purposes of the Complainant (sic), and identify and describe in detail the repairs you contend would be necessary so that Star ME-1 fire sprinklers will "operate as intended and required."

Objections: This interrogatory is vague and confusing. This interrogatory calls for speculation. This interrogatory is overbroad and unduly burdensome. Complaint Counsel objects to this interrogatory to the extent it seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's understanding of this interrogatory, Complaint Counsel answers as follows: See the answer to Interrogatory 50, and see all applicable standards, requirements, regulations, and laws. Complaint Counsel is not aware of any repairs that can be made to the Star ME-1's that would eliminate the defect and substantial product hazard the Star ME-1's present.

Interrogatory No. 77: With respect to the statement on Page 6 of the Complaint regarding the replacement of all Star ME-1 fire sprinklers "with a like or equivalent product that does not contain the defect, operates as intended and required, and will not present a risk of injury and hazard to the public," identify by make, model number, manufacturer, and current price, any and all "like or equivalent product" that you contend "does not contain the defect, operates as intended and required, and will not present a risk of injury and hazard to the public."

Objections: This interrogatory is vague and confusing. This interrogatory calls for speculation. This interrogatory is overbroad and unduly burdensome. Complaint Counsel objects to this interrogatory to the extent it seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence. Complaint Counsel objects to this interrogatory to the extent it seeks a legal conclusion.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's understanding of this interrogatory, Complaint Counsel answers as follows: Neither the Complaint, nor Complaint Counsel, makes the contention about which the Repondents inquire in this interrogatory.

Interrogatory No. 78: In the event of a decision to repair some or all of the Star ME-1 fire sprinklers at issue in the Complaint pursuant to 15 U.S.C. § 2064(d)(1), identify and describe the nature and amount of the "reasonable and foreseeable expenses" under 15 U.S.C. § 2064(e)(1) that you contend should be reimbursed by Respondents.

Objections: This interrogatory calls for speculation, and it calls for an answer without providing sufficient facts or other information. Complaint Counsel objects to this interrogatory to the extent it seeks a legal conclusion.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's understanding of this interrogatory, Complaint Counsel answers as follows: See the answer to Interrogatory 76. At this time, Complaint Counsel does not have sufficient information to fully answer this interrogatory. Complaint Counsel anticipates that the

reasonable and foreseeable expenses about which this interrogatory inquires would include all charges or costs to any person who avails himself or herself of such a remedy, including, but not necessarily limited to, costs of inspection, replacement parts, replacement sprinklers, shipping, and installation or other labor.

Interrogatory No. 79: In the event of a decision to replace some or all of the Star ME-1 fire sprinklers at issue in the Complaint pursuant to 15 U.S.C. § 2064(d)(2), identify and describe the nature and amount of the "reasonable and foreseeable expenses" under 15 U.S.C. § 2064(e)(1) that you contend should be reimbursed by Respondents.

Answer: See the objections and answer to Interrogatory 78.

Interrogatory No. 80: In the event of a decision to refund some or all of the Star ME-1 fire sprinklers at issue in the Complaint pursuant to 15 U.S.C. § 2064(d)(3), identify and describe the nature and amount of the "reasonable and foreseeable expenses" under 15 U.S.C. § 2064(e)(1) that you contend should be reimbursed by Respondents.

Objections: This interrogatory is vague and confusing because of the term "refund some or all of the Star ME-1 fire sprinklers," since it would not seem one could "refund" a sprinkler. Complaint Counsel interprets this interrogatory as intending to read "refund some or all of the purchase price of the Star ME-1 fire sprinklers." Interpreted this way, this interrogatory calls for speculation, and it calls for an answer without providing sufficient facts or other information. Complaint Counsel objects to this interrogatory to the extent it seeks a legal conclusion.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this interrogatory, Complaint Counsel answers as follows: See the answer to Interrogatory 78.

Interrogatory No. 81: Identify and describe in detail every known recall of any Star ME-1 fire sprinkler, including the dates of each such recall, the identity of the person or entity conducting the recall, the total number of sprinklers recalled, the cost of the recall to the person or entity

conducting the recall, the precise type of sprinkler recalled (including model number and a detailed description), and the type of locations where the recalled sprinklers were known to be installed.

Objections: This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Answer: Notwithstanding and without waiving the foregoing objection, Complaint Counsel answers as follows:

Complaint Counsel has information that beginning in 1990, Mealane Corporation privately recalled Star brand fire sprinklers including, but not limited to, the Star ME-1 manufactured in 1975 and 1976. Complaint Counsel does not know the cost of the recall to Mealane. Complaint Counsel believes these recalled Star ME-1's are installed nationwide, primarily in nursing homes, and that they also may be found in hospitals, schools, resorts, stores, office buildings, warehouses, and supermarkets.

On August 4, 1999, following a staff investigation after Mealane's "silent" recall, Mealane, in cooperation with the Commission, recalled Star brand fire sprinklers including, but not limited to, the Star ME-1 manufactured in 1975 and 1976. This 1999 recall publicized the recall more effectively than did Mealane's unilateral recall. The recall announcement noted that the sprinklers could fail in a fire, exposing people to bodily injury or death. This recall covered up to one million Star fire sprinklers manufactured from 1961 through 1976. The recall included the Star ME-1 manufactured in 1975 and 1976 (Complaint Counsel does not know the quantity of Star ME-1's), and its predecessor models. The news release states that these sprinklers had been installed nationwide, primarily in nursing homes, and that they also may be found in hospitals, schools, resorts, stores, office buildings, warehouses, and supermarkets. Complaint

Counsel does not know the cost of the recall to Mealane. See the documents that will be produced, including the news release.

On July 19, 2001, Central Sprinkler Company, in cooperation with the Commission, recalled millions of fire sprinklers including, but not limited to, the Star ME-1 that Star Sprinkler, Inc. manufactured from 1996 through 1998. The quantity of Star ME-1's covered by this recall is presently confidential pursuant to the manufacturer's request, though Complaint Counsel is seeking a waiver. Under the recall, Central Sprinkler Company will provide free replacement sprinklers and free replacement labor. Complaint Counsel does not know the cost of the recall to Central Sprinkler Company. Complaint Counsel believes these recalled Star ME-1's are located in the same types of locations as mentioned in the Complaint and elsewhere in these answers to interrogatories. See the documents that will be produced, including the news release.

With the 1999 recall and the 2001 recall, all Star ME-1's manufactured in the first two years (the earliest version) and final three years (the latest version) of its production have been recalled.

Interrogatory No. 82: Describe in detail any and all communications between the CPSC and any dealer, retailer, distributor, or installer in connection with your investigation of Star ME-1 fire sprinklers. Your response should include, without limitation, the following:

(a) the identity of any and all persons employed and/or retained by the CPSC who participated in the communications;

(b) the identity of any and all dealers, retailers, distributors, or installers with whom the CPSC communicated in connection with the investigation;

(c) a description of the content of the CPSC's communications with each such dealer, retailer, distributor, or installer;

(d) the identification of any questionnaires or other surveys used by the CPSC in communicating with each such dealer, retailer, distributor, or installer; and

(e) the identification of any and all data, reports, survey results, or other information revealing the results of the communications.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Information and documents relating to this interrogatory remain the subject of requests for confidentiality. Complaint Counsel has sought waivers of confidentiality, but such waivers have not yet been provided. See procedures explained in Second General Objection. Complaint Counsel will produce all responsive correspondence or other written communications not restricted by the objections.

Interrogatory No. 83: Describe in detail any and all communications between the CPSC and any state or local government authorities in connection with your investigation of Star ME-1 fire sprinklers. Your response should include, without limitation, the following:

(a) the identity of any and all persons employed and/or retained by the CPSC who participated in the communications;

(b) the identity of any and all state or local government authorities with whom the CPSC communicated in connection with the investigation;

(c) a description of the content of the CPSC's communications with each such state or local government authority;

(d) the identification of any questionnaires or other surveys used by the CPSC in communicating with each such state or local government authority; and

(e) the identification of any and all data, reports, survey results, or other information revealing the results of the communications.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Complaint Counsel will produce all responsive correspondence or other written communications not restricted by the objections.

Interrogatory No. 84: Describe in detail any and all communications between the CPSC and any non-CPSC federal government authorities in connection with your investigation of Star ME-1 fire sprinklers. Your response should include, without limitation, the following:

(a) the identity of any and all persons employed and/or retained by the CPSC who participated in the communications;

(b) the identity of any and all federal government authorities with whom the CPSC communicated in connection with the investigation;

(c) a description of the content of the CPSC's communications with each such federal government authority;

(d) the identification of any questionnaires or other surveys used by the CPSC in communicating with each such federal government authority; and

(e) the identification of any and all data, reports, survey results, or other information revealing the results of the communications.

Answer: See the objections and answer to Interrogatory 82.

Interrogatory No. 85: Identify and describe any and all testing of Star ME-1 fire sprinklers conducted by or on behalf of the CPSC, including:

(a) a description of any testing protocols used by the CPSC in testing Star ME-1 fire sprinklers;

(b) the identity of the person(s) who created or established any such testing protocols;

(c) a description of the methodology employed during each and every test of Star ME-1 fire sprinklers;

(d) a description of any industry standards to which the Star ME-1 fire sprinklers were tested and/or compared (e.g. 7 psi, etc.), and the date on which the standard was adopted, came into effect, and/or was generally accepted within the industry;

(e) the date and location of each and every test of Star ME-1 fire sprinklers;

(f) an identification of the person(s) who conducted, participated in, or were otherwise present during each test of Star ME-1 fire sprinklers;

(g) a description of the results of each and every test of Star ME-1 fire sprinklers;

(h) the identification of any and all documents (including videotapes and audiotapes) relating to any testing of Star ME-1 fire sprinklers;

(i) whether tested sprinklers were preserved and, if so, the current location and custodian;

(j) an identification of the manufacturer of the Star ME-1 sprinkler being tested; and

(k) if the sprinkler had previously been installed, the location where it was installed (including address, owner and type of location).

Objections: This interrogatory is essentially duplicative of other interrogatories herein, including Interrogatory 49. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: See the other answers to these interrogatories including the answers to Interrogatories 4, 49, and 64. See the documents being produced including the documents relating to USNA testing, the Interagency Agreements, the testing protocol, the database printout titled "USNA Test Results of Star ME-1 Manufactured After 1976" provided prior to the filing of the Complaint, and the updated USNA database printout being produced.

Interrogatory No. 86: Identify and describe any and all testing of Star ME-1 fire sprinklers conducted by or on behalf of someone other than the CPSC, including:

(a) a description of any testing protocols used in the testing;

(b) the identity of the person(s) who created or established any such testing protocols;

(c) a description of the methodology employed during each and every test of Star ME-1 fire sprinklers;

(d) a description of any industry standards to which the Star ME-1 fire sprinklers were tested and/or compared (e.g. 7 psi, etc.), and the date on which the standard was adopted, came into effect, and/or was generally accepted within the industry;

(e) the date and location of each and every test of Star ME-1 fire sprinklers;

(f) an identification of the person(s) who conducted, participated in, or were otherwise present during each test of Star ME-1 fire sprinklers;

(g) a description of the results of each and every test of Star ME-1 fire sprinklers;

(h) the identification of any and all documents (including videotapes and audiotapes) relating to any testing of Star ME-1 fire sprinklers;

(i) whether tested sprinklers were preserved and, if so, the current location and custodian;

(j) an identification of the manufacturer of the Star ME-1 sprinkler being tested; and

(k) if the sprinkler had previously been installed, the location where it was installed (including address, owner and type of location).

Objections: This interrogatory is essentially duplicative of other interrogatories herein, including Interrogatory 49. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Much of the information and documents relating to this interrogatory remain the subject of requests for confidentiality. Complaint Counsel has sought waivers of confidentiality, but such waivers have not yet been provided. See procedures explained in Second General Objection. Complaint Counsel does not have all of the information sought by this interrogatory, but Complaint Counsel believes the persons who provided the testing information would have some of that additional information sought. See the other answers to these interrogatories including the answers to Interrogatories 49 and 64. See the documents that will be produced and see the database printouts of test results provided prior to the filing of the Complaint.

Interrogatory No. 87: Identify by name, address, job description, and qualifications any and all outside consultants, experts, and/or other persons who assisted, advised, or otherwise communicated with the CPSC with respect to any testing of Star ME-1 fire sprinklers. For each such person, describe his or her role in the testing, and the communications between that person and the CPSC.

Objections: This interrogatory is vague because the term "outside" is undefined and unclear. This interrogatory is essentially duplicative of other interrogatories herein. This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information

protected by the law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Information and documents relating to this interrogatory remain the subject of requests for confidentiality. Complaint Counsel has sought waivers of confidentiality, but such waivers have not yet been provided. See procedures explained in Second General Objection. See the other answers to these interrogatories including the answer to Interrogatory. See the documents that will be produced.

Interrogatory No. 88: For each test of Star ME-1 fire sprinklers conducted by the CPSC, describe in detail the condition and age of the specific Star ME-1 fire sprinklers used in the test. Your response should include, without limitation, the following:

(a) an identification of each specific Star ME-1 fire sprinkler by model number or other distinguishing identification;

(b) an identification of the manufacturer of the Star ME-1 fire sprinkler being tested;

(c) a description of how and when the CPSC obtained each specific Star ME-1 fire sprinkler used in the testing;

(d) a description of the condition of each specific Star ME-1 fire sprinkler used in the testing;

(e) a statement of the age of each specific Star ME-1 fire sprinkler used in the testing; and

(f) a statement of whether the CPSC has retained and, if so, the current location and custodian of each specific Star ME-1 fire sprinkler used in the testing.

Answer: See the objections and answer to Interrogatory 85.

Interrogatory No. 89: For each test of Star ME-1 fire sprinklers conducted by the CPSC, describe in detail the piping used in the sprinkler system from which the Star ME-1 fire sprinklers were removed. Your response should include, without limitation, the following:

(a) the material constituting the piping;

(b) the presence of any treatments or substances applied to the piping;

(c) the contents of any and all materials or substances inside the piping; and

(d) a description of the overall condition of the piping.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information protected by the law enforcement investigatory privilege, deliberative process privilege, and work product doctrine. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence. This interrogatory seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Complaint Counsel has limited information responsive to this interrogatory. The documents that will be produced may contain responsive information.

Interrogatory No. 90: For each test of Star ME-1 fire sprinklers conducted by a person other than the CPSC, describe in detail the condition and age of the specific Star ME-1 fire sprinklers used in the test. Your response should include, without limitation, the following:

(a) an identification of each specific Star ME-1 fire sprinkler by model number or other distinguishing identification;

(b) an identification of the manufacturer of the Star ME-1 fire sprinklers being tested;

(c) a description of how and when the person conducting the test obtained each specific Star ME-1 fire sprinkler used in the testing;

(d) a description of the condition of each specific Star ME-1 fire sprinkler used in the testing;

(e) a statement of the age of each specific Star ME-1 fire sprinkler used in the testing; and

(f) a statement of whether the person conducting the test has retained and, if so, the current location and custodian of each specific Star ME-1 fire sprinkler used in the testing.

Answer: See the objections and answer to Interrogatory 86.

Interrogatory No. 91: For each test of Star ME-1 fire sprinklers conducted by a person other than CPSC, describe in detail the piping used in the sprinkler system from which the Star ME-1 fire sprinklers were removed. Your response should include, without limitation, the following:

(a) the material constituting the piping;

(b) the presence of any treatments or substances applied to the piping;

(c) the contents of any and all materials or substances inside the piping; and

(d) a description of the overall condition of the piping.

Answer: See the objections and answer to Interrogatory 89.

Interrogatory No. 92: For the time period 1991 through the present, identify and describe any and all testing of any non-Star ME-1 fire sprinklers conducted by or on behalf of the CPSC. Your response should include, without limitation, the following:

(a) a description of any testing protocols used by the CPSC in testing the non-Star ME-1 fire sprinklers;

(b) the identity of the person(s) who created or established any such testing protocols for the non-Star ME-1 sprinklers;

(c) a description of the methodology employed during each and every test of the non-Star ME-1 fire sprinklers;

(d) the dates and locations of each and every test of the non-Star ME-1 fire sprinklers;

(e) an identification of the person(s) who conducted, participated in, or were otherwise present during each test of the non-Star ME-1 fire sprinklers;

(f) a description of the results of each and every test of the non-Star ME-1 fire sprinklers; and

(g) an identification of any and all documents (including videotapes and audiotapes) relating to any testing of the non-Star ME-1 fire sprinklers.

Objections: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information and documents protected by the attorney-client privilege, law enforcement investigatory privilege, and work product doctrine. This interrogatory seeks information and documents prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel also objects to this interrogatory to the extent it seeks information and documents not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Complaint Counsel will make available for inspection and copying publicly available documents that have been segregated and that may include, but may not be limited to, documents responsive to this request.

Interrogatory No. 93: To the extent that you contend, or otherwise intend to present at the hearing in this matter, the feasibility and/or propriety of any alternative design features for Star ME-1 fire sprinklers, identify and describe any such proposed alternative design features, including, without limitation, a description of all data, testing, reports, or other information supporting this contention.

Objections: This interrogatory is vague and confusing. Among other things, the phrase "feasibility and/or propriety of any alternative designs for" contains terms the meanings of which are unclear in the context of the interrogatory. The interrogataory overall is unclear, and, without it being rephrased so as to eliminate the ambiguities, Complaint Counsel cannot determine if further objections would be necessary or provide a further written answer.

Interrogatory No. 94: Explain the factual basis underlying the level of hazard assigned to Star ME-1 fire sprinklers in the CPSC Staffs preliminary determination of the alleged risks associated with Star ME-1 fire sprinklers. Your response should include a statement of the specific factors considered, and the data or information relied upon by the CPSC Staff in determining the level of hazard assigned to Star ME-1 fire sprinklers.

Objection: This interrogatory is overbroad and unduly burdensome. This interrogatory is, in part, duplicative of other interrogatories herein. This interrogatory seeks information and documents not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence. This interrogatory seeks information and documents protected by the attorney-client privilege, deliberative process privilege, law enforcement investigatory privilege, and work product doctrine. This interrogatory seeks information and documents prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. This interrogatory is vague in part because the term "level of hazard assigned to" is undefined and unclear.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this interrogatory, Complaint Counsel answers as follows: In making its preliminary determination, the Commission staff relied on all of the facts, documents, and analyses available to it at the time. Many of those facts, documents, and analyses are disclosed in these answers to interrogatories (see other answers herein) or in the documents that will be produced (see the documents that will be produced) or were produced to the Respondents before the Complaint filing. Additional facts, documents, and analyses upon which the staff relied are presently restricted from disclosure because of confidentiality requests, but they will be provided or made available if otherwise discoverable once those restrictions are lifted. See also the Complaint.

Interrogatory No. 95: State whether the CPSC's preliminary determination and/or initial assignment of the level of hazard allegedly presented by Star ME-1 fire sprinklers has changed over time. If so, describe any such change and the information or testing giving rise to the change.

Objection: This interrogatory seeks information and documents not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence. This interrogatory seeks information and documents protected by the attorney-client privilege, deliberative process privilege, law enforcement investigatory privilege, and work product doctrine. This request seeks information and documents prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. This interrogatory is vague in part because the term "level of hazard assigned to" is undefined and unclear.

Answer: Notwithstanding and without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this interrogatory, Complaint Counsel answers as follows: No.

Interrogatory No. 96: For the period from 1991 through the present, identify all consumer products classified by the CPSC as presenting a hazard level equal to, or greater than, the hazard level assigned to Star ME-1 fire sprinklers. For example, if Star ME-1 fire sprinklers have been classified as a "Class B" hazard, identify all other consumer products that have been classified as "Class B" hazards and all consumer products identified as "Class A" hazards. For each consumer product identified in your response, you should provide the following:

(a) the identity of the consumer product by brand name or other description;

(b) the identification of the manufacturer of each such consumer product;

(c) the hazard level assigned each such consumer product; and

(d) a description of the hazard presented by each such consumer product.

Objection: This interrogatory is overbroad and unduly burdensome. This interrogatory seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence. This interrogatory seeks

information protected by the deliberative process privilege, law enforcement investigatory privilege, and work product doctrine. Complaint Counsel objects to this interrogatory to the extent it seeks information and documents prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Information regarding all Commission recalls is publicly available on the Commission's website "cpsc.gov."

Interrogatory No. 97: For each consumer product identified in your response to Interrogatory No. 96, describe any and all corrective action taken with respect to that product. Your response should include, without limitation, the following:

(a) a statement of the CPSC's role in effecting the corrective action;

(b) a statement of whether the corrective action that was taken was completely voluntary on the part of the manufacturer, retailer, or distributor, was the result of a negotiated corrective action plan with the CPSC, or was compelled by the CPSC, including through the initiation of an adjudicative proceeding pursuant to 15 U.S.C. § 2064; and

(c) the identification of all documents evidencing the corrective action taken with respect to each such consumer product.

Answer: See the objections and answer to Interrogatory 96. Further, Complaint Counsel objects to this interrogatory to the extent it seeks information and documents protected by the attorney-client privilege. Portions of Subpart (b) are vague because the terms "completely voluntary" and "compelled" are undefined and unclear.

Interrogatory No. 98: For each consumer product identified in your response to Interrogatory No. 96, describe the nature of the recall component, if any, of the corrective action taken. Your response should include, without limitation, the following:

(a) the number of individual units recalled;

(b) the remedy options offered to consumers (e.g., replacement, refund, substitute products);

(c) an assessment of consumer participation in the recall (e.g., percentage of units in the hands of consumers that were actually received by the recall);

(d) identification of any and all documents revealing the level of consumer participation in the recall; and

(e) a description of any studies conducted by the manufacturer, distributor, or retailer of the consumer product, or by the CPSC, or by both, or by any other person or entity, assessing the effectiveness of the recall program.

Answer: See the objections and answer to Interrogatory 96. Further, Complaint Counsel objects to this interrogatory to the extent it seeks information and documents protected by the attorney-client privilege. This interrogatory is vague and confusing because the term "nature of the recall component" is undefined and unclear.

Interrogatory No. 99: Describe in detail the public notice, recall, and/or other remedial measures that you contend are necessary with respect to Star ME-1 fire sprinklers in order to constitute a sufficient remedy and/or corrective action proposal under 15 U.S.C. § 2064.

Answer: See in their entirety sections B and C under "Relief Sought" in the Complaint.

Interrogatory No. 100: Identify all public statements, press releases, or other information released to the public by the CPSC that in any way relate to or otherwise refer to Star ME-1 fire sprinklers and/or Respondents.

Objections: This interrogatory is overbroad and unduly burdensome to the extent it seeks identification of such materials related to Chemetron Corporation, Chemetron Investments, Inc., and/or Sunbeam Corporation but not also related to the Star ME-1 or this proceeding. On that same basis, this request seeks information not relevant to the subject matter of the proceedings and not reasonably calculated to lead to the discovery of admissible evidence.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: See the press releases and video news release that will be produced. At the time of the Complaint filing, Commission staff verbally responded to various media inquiries concerning the lawsuit. All of Complaint Counsel's filings in the case to date with the Commission's Office of the Secretary are publicly available.

Interrogatory No. 101: Identify by name, address, title and qualifications each and every person whom you expect to call as an expert witness at the hearing on this matter, and for each such person, state the subject matter on which he/she is expected to testify, state the substance of the facts and opinions to which he/she is expected to testify, and provide a summary of the basis for each opinion.

Answer: Complaint Counsel has not yet determined whom it expects to call as an expert witness to testify at the hearing in this matter. Complaint Counsel will supplement this answer after it makes this determination.

Interrogatory No. 102: Identify each and every fact witness whom you expect to testify on your behalf at the hearing on this matter. For each such fact witness, identify and describe:

(a) the name, title, business and home addresses for each such witness; and

(b) the subject matter about which each witness is expected to testify.

Objections: Complaint Counsel objects to this interrogatory to the extent it seeks information protected by the work product doctrine.

Answer: Notwithstanding and without waiving the foregoing objection, Complaint Counsel answers as follows: Complaint Counsel has not yet determined whom it expects to call as a fact witness at the hearing in this matter. Complaint Counsel will provide this information as and to the extent required by pre-hearing orders and/or procedures.

Interrogatory No. 103: Identify and describe any and all oral or written statements made by Respondents that you contend constitute an admission with reference to any of the issues raised in the Complaint. For each such statement, identify and describe:

(a) the name, address, employer, and job title of the person making the alleged statement;

(b) that person's relationship to Respondents;

(c) the content of the statement;

(d) the date, time and place of the statement;

(e) the nature of the alleged statement (e.g., written or oral); and

(f) the identity of each person who heard the statement or otherwise has personal knowledge of the statement.

Objections: This interrogatory appears to call for a legal conclusion and/or documents as to which a legal conclusion may have to be made. This interrogatory is unduly burdensome. This interrogatory seeks documents protected by the law enforcement investigatory privilege and work product doctrine.

Response: Notwithstanding and without waiving the foregoing objections, Complaint Counsel responds that all statements made by Respondents that will be offered against them can be expected to constitute admissions. Complaint Counsel will produce all responsive documents not restricted by the objections.

Interrogatory No. 104: Identify by name, address, title and job description the person(s) answering these interrogatories and attesting to your answers.

Answer: Seth B. Popkin. For the additional information requested about Mr. Popkin, see the answer to Interrogatory 4.

Interrogatory No. 105: Identify by name, address, title and job description each person who provided information to assist you in answering these interrogatories, identify the interrogatory

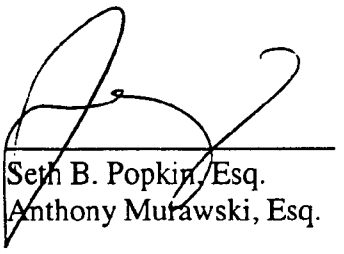
answers for which he/she provided information, and provide a general description of the source of his/her knowledge and information.

Objections: This interrogatory is vague because the term "provided information to assist you in answering these interrogatories" is undefined and unclear. Over the course of the investigation, many persons provided information relating to answers to the interrogatories. This interrogatory is overbroad and unduly burdensome. Complaint Counsel objects to this interrogatory to the extent it seeks information protected by the attorney-client privilege, law enforcement investigatory privilege, and work product doctrine. Complaint Counsel objects to this interrogatory to the extent it seeks information prohibited from disclosure pursuant to 15 U.S.C. § 2055 or a request for confidentiality. Complaint Counsel objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31(c)(4) regarding experts.

Answer: Notwithstanding and without waiving the foregoing objections, Complaint Counsel answers as follows: Eric L. Stone; Eric H. Singer; Amy J. Brown; Shawn M. Cerruti; Thelma E. Tucker; Dr. Angela L. Moran; Nicholas V. Marchica; Rikki Khanna; Caroleene Paul; and Mark Kumagai. For the additional information requested about these persons, see the answer to Interrogatory 4. They provided information regarding the answer to Interrogatory 4, and to some extent, information regarding other answers related to their roles in the investigation.

The following persons also provided information related to answering these interrogatories: Anthony Murawski (Trial Attorney, Office of Compliance, Complaint Counsel), Deborah S. Orlove (Trial Attorney, Office of Compliance), Michael Gidding (Trial Attorney, Office of Compliance), and Andrea S. Paterson (Trial Attorney, Office of Compliance). These

persons provided information relating to the interrogatories as a whole and in some cases to specific interrogatories.



Seth B. Popkin, Esq.
Anthony Murawski, Esq.

Complaint Counsel
U.S. Consumer Product Safety Commission
Office of Compliance
4330 East West Highway, Room 613
Bethesda, Maryland 20814
(301) 504-0626, ext. 1358

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

2001 OCT 30 A 11:1

In the matter of	
DAISY MANUFACTURING COMPANY, Inc., doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

COMPLAINT

Nature of Proceedings

1. This is an administrative proceeding pursuant to Section 15 of the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. § 1274, and Section 15 of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064, for public notification and remedial action to protect the public from substantial risks of injury and substantial product hazards created by Respondent Daisy Manufacturing Company, Inc.'s Powerline Airguns.

2. This proceeding is governed by the Rules of Practice for Adjudicative Proceedings before the Consumer Product Safety Commission, 16 C.F.R. Part 1025.

Jurisdiction

3. This proceeding is instituted pursuant to the authority contained in Sections 15(c), (d) and (f) of the CPSA, 15 U.S.C. §§ 2064(c), (d) and (f), and Sections 15(c)(1), (2) and (e) of the FHSA, 15 U.S.C. §§ 1274 (c)(1), (2) and (e).

Parties

4. Complaint Counsel is the staff of the Legal Division of the Office of Compliance (hereinafter referred to as "Complaint Counsel") of the United States Consumer Product Safety Commission (hereinafter referred to as "The Commission"), an independent regulatory commission established by Section 4 of the CPSA. 15 U.S.C. § 2053.

5. Respondent Daisy Manufacturing Company, Inc. (hereinafter referred to as "Daisy") is a Delaware Corporation, with its principal place of business located at 400 West Stribling Drive, Rogers, Arkansas.

6. Daisy "manufactures" Powerline Airguns and is, therefore, a "manufacturer" of consumer products as that term is defined in the CPSA, 15 U.S.C. § 2052(a)(4).

The Consumer Product

7. The Daisy Powerline Airgun is a pneumatic powered or carbon dioxide ("CO_2") charged gun designed to shoot BBs or pellets at a rate over 350 feet per second (fps). From September, 1972 to January, 2001, Daisy manufactured approximately 4,925,353 model 880 Powerline Airguns including the following models and product numbers: 880, 881, 882, 1880, 1881, 9072, 9082, 9083, 9093, 9393, 9382, 3305, 3480, 3933, 1455 and 5150. Daisy continues to manufacture the model 880 Powerline Airgun.

8. From 1984 through January, 2001, Daisy manufactured approximately 2,353,798 model 856 Powerline Airguns including the following models and product numbers: 860, 856, 2856, 7856 and 990. Daisy continues to manufacture the model 856

Powerline Airgun. (All models recited in paragraphs 7 and 8 above are hereinafter referred to as "Daisy Powerline Airguns.")

9. The retail cost of the Daisy Powerline Airgun currently being sold varies from approximately $39.95 to $67.95.

10. Daisy has and continues to produce and distribute the Powerline Airguns in United States commerce for sale to a consumer for use in or around a permanent or temporary household or residence, in recreation or otherwise or for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, in recreation or otherwise. These airguns are, therefore, "consumer products" that are "distributed in commerce." 15 U.S.C. § 2052(a)(1) and (11).

COUNT 1

The Daisy Powerline Airguns Contain Defects

Which Creates a Substantial Product Hazard

Defect

11. Paragraphs 1 through 10 are hereby realleged, and incorporated by reference as though fully set forth herein.

12. A user can load 50 to 100 BBs through a loading door on the Daisy Powerline Airguns, and into the magazine reservoir. The consumer may then pull a bolt handle toward the rear to cock the gun, and close a pump valve. When the muzzle is raised, at least 45° above the horizon, and the gun is not tilted towards either side, BBs move from the magazine, via gravity, onto a feed ramp, and to a loading port. This

allows a magnetic bolt tip to pick up a BB from the feed ramp. The user can then close the bolt by pushing the handle forward, and chamber the BB into the rifle.

On the pneumatic versions of these airguns, the user provides power to the Daisy Powerline Airguns by pumping the forearm lever on the gun. This pumping process builds air pressure and determines the speed and power with which the projectile is ultimately expelled from the airgun. On the CO_2 cartridge versions of the gun, the consumer can insert a replaceable CO_2 cartridge which provides all the power needed to expel the projectile.

13. The Daisy Powerline Airguns have a rifle barrel, which is concentrically supported and surrounded by an outer barrel casing. These airguns have a "virtual magazine", whose borders consist of the receiver halves, a casing surrounding the cylindrical pump that holds the projectile propellant, the outer barrel casing, and the inner rifle barrel's forward support tab. The Daisy design permits BBs to move freely around the inside of the magazine area.

14. During normal use of the Daisy Powerline Airguns, BBs may become lodged within the "virtual magazine" of the gun. A consumer using the gun may fire the gun repeatedly or shake the gun and receive no visual or audible indication that the airgun is still loaded.

15. Although Daisy made some changes to the Powerline Airguns to try to lessen the likelihood that BBs will lodge in the gun, BBs can still lodge inside of them. The Daisy Powerline Airguns design, and manufacturing variances, prevent BBs from loading into the firing chamber and lead consumers to believe the airgun is empty, are,

therefore, defective within the meaning of Section 15 of the CPSA, 15 U.S.C. § 2064, and Section 15 of the FHSA, 15 U.S.C. § 1274.

16. Because these Daisy airguns can lodge BBs or fail to feed BBs into the firing chamber under normal conditions of use, consumers may be unaware when a BB loads unless they look into the loading port. Daisy made design decisions that impair the ability of the user to ascertain whether a BB is loaded. Daisy manufactures BBs that are silver in color. The Powerline Airgun's feed ramp is made of a zinc material. Due to the color similarity, a user operating the airgun rapidly may not be able to discern the presence of a BB even if he is looking directly into the loading port. Further, Daisy designed the airgun so a user can install an optional riflescope on top of the receiver halves and over the loading port. The placement of the riflescope can obscure the user's ability to see a BB in the loading port.

17. Daisy's design relies unduly on consumers to see a BB in the loading port and then interferes with that ability in reasonably foreseeable circumstances. This design constitutes a defect under Section 15 of the CPSA, 15 U.S.C. § 2064, and Section 15 of the FHSA, 15 U.S.C. § 1274.

18. Daisy's Powerline Airguns use a safety mechanism that does not automatically engage when the airgun is loaded and ready to fire. An automatic safety design would prevent against accidental discharge.

19. The failure to incorporate an automatic safety into the Daisy Powerline Airgun constitutes a design defect under Section 15 of the CPSA, 15 U.S.C. § 2064, and Section 15 of the FHSA, 15 U.S.C. § 1274.

Substantial Risk of Injury

20. All of the approximately 7,279,151 Daisy Powerline Airguns, and the Powerline Airguns currently being sold, contain the defects alleged in paragraphs 11 through 19 above.

21. Most of the consumers using these airguns will be children or young adults. It is likely that these consumers will operate the gun rapidly and not continue to check the loading port to determine whether any BBs are feeding into the chamber when they believe the airgun is no longer loaded. It is also reasonably foreseeable consumers, during use, will be less careful with a gun they believe is not loaded. A BB that had previously been lodged or misfed can then be loaded, and fired from the airgun. Under these circumstances, BBs are likely to be fired at and strike the consumer or another person in the vicinity.

22. It is likely consumers will carry and handle the Daisy Powerline Airguns when they are cocked and loaded. Since these airguns do not have an automatic safety, it is likely the gun will be discharged during handling in the direction of the user or another person in the vicinity.

23. At close range, BBs fired from these airguns can penetrate tissue and bone, damaging internal organs, such as the brain, heart, liver, spleen, stomach, bowel and colon. The Commission has learned of at least 15 deaths and 171 serious injuries, including brain damage and permanent paralysis, caused by the defects in the Daisy Powerline Airguns. Most of these injuries were to children under the age of 18.

24. The defects in the Daisy Powerline Airgun create a substantial risk of injury, and the airguns create a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2).

COUNT 2

The Daisy Powerline Airguns Create

a Substantial Risk of Injury to Children

25. Paragraphs 1 through 24 are hereby realleged, and incorporated by reference as though fully set forth herein.

26. The Daisy Powerline Airguns were marketed for, and intended for the use of, children. Although Daisy marketed the airguns initially with no age recommendation, it later labeled them for users 14 and older and eventually 16 and older. A substantial number of the airguns are intended for use by children.

27. Given the pattern of the defects alleged above, the number of Powerline Airguns distributed in commerce, and the likelihood of further serious injury and death, especially to children, these airguns present a substantial risk of injury to children. Sections 15(c)(1) and (c)(2) of the FHSA, 15 U.S.C. § 1274(c)(1) and (c)(2).

Relief Sought

Wherefore, in the public interest, Complaint Counsel requests that the Commission:

A. Determine that Respondent Daisy's Powerline Airgun presents a "substantial product hazard" within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2).

B. Determine that Respondent Daisy's Powerline Airgun presents a "substantial risk of injury to children" within the meaning of Sections 15(c)(1) and (c)(2) of the FHSA, 15 U.S.C. § 1274(c)(1) and (c)(2).

C. Determine that public notification under Section 15(c) of the CPSA, 15 U.S.C. § 2064(c), and Section 15(c)(1) is required to protect the public adequately from the substantial product hazard and substantial risk of injury to children presented by the Powerline Airgun. We also want to prevent future distribution and order that the Respondents:

(1) Give prompt public notice that the Daisy Powerline Airgun presents a serious injury and death hazard to consumers and of the remedies available to remove the risk of injury and death;

(2) Mail such notice to each person who is or has been a distributor or retailer of the Daisy Powerline Airgun;

(3) Mail such notice to every person to whom Respondents know the Daisy Powerline Airgun were delivered or sold; and

(4) Include in the notice required by (1), (2) and (3) above a complete description of the hazard presented, a warning to stop using the Daisy Powerline Airgun immediately; and clear instructions to inform consumers how to avail themselves of any remedy ordered by the Commission.

D. Determine that action under Section 15(d) of the CPSA, 15 U.S.C. § 2064(d), and Section 15(c)(2) of the FHSA, 15 U.S.C. § 1274(c)(2) is in the public interest and order Respondents:

(1) To cease distribution of all Daisy Powerline Airguns until such time as all defects in the airguns are eliminated and the risk of injury reduced in a manner satisfactory to the Commission.

(2) With respect to Daisy Powerline Airguns already manufactured and distributed in commerce, Daisy must

(a) elect to repair all the Powerline Airguns so they will not create a serious injury and death hazard; replace all the Powerline Airguns with a like or equivalent product which will not create a serious injury or death hazard; or refund to consumers the purchase price of the Powerline Airgun;

(3) make no charge to consumers and reimburse them for any foreseeable expenses incurred in availing themselves of any remedy provided under any order issued in this matter;

(4) reimburse distributors and dealers for expenses in connection with carrying out any Commission Order issued in this matter;

(5) submit a plan satisfactory to the Commission, within ten calendar (10) days of service of the final Order, directing that actions specified in paragraphs D(2) through D(4) above be taken in a timely manner;

(6) submit monthly reports documenting progress of the corrective action program;

(7) For a period of five (5) years after entry of a Final Order in this matter, keep records of its actions taken to comply with paragraphs D(2) through D(4) above, and supply these records upon request to the Commission for the purpose of monitoring compliance with the Final Order.

E. Daisy shall notify the Commission at least 60 days prior to any change in their business (such as incorporation, dissolution, assignment, sale or petition for bankruptcy) that results in, or is intended to result in, the emergence of successor ownership, the creation or dissolution of subsidiaries, going out of business, or any other change that might affect compliance obligations under a Final Order issued by the Commission.

F. Daisy shall take such other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA and FHSA.

Issued by Order of the Commission

Dated this 30th day of October 2001

Alan H. Schoem

Alan H. Schoem
Assistant Executive Director
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Eric L. Stone
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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of Daisy Manufacturing Company, Inc. d/ba Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756, Respondent	CPSC Docket No. : 02-2

RESPONDENT'S FIRST REQUEST
FOR PRODUCTION OF DOCUMENTS

PLEASE TAKE NOTICE that, pursuant to 16 C.F.1025.33 general provisions governing discovery, Respondent, Daisy Manufacturing Company, by its attorneys, requests that the Consumer Product Safety Commission ("CPSC") produce and permit Respondent, or someone acting on its behalf, to inspect and copy the documents and things described in the attached schedule herein with 30 days of the date hereof at the offices of Locker, Greenberg & Brainin, P. C. 420 Fifth Avenue, New York 10018, or at such other time and place as the attorneys for the Commission and Respondent may agree.

PLEASE TAKE FURTHER NOTICE that this document request is a continuing one and requires further and supplemental production by the CPSC as and whenever the Commission

produces, creates or acquires additional documents covered by this request between the time of the initial production hereunder and the time of hearing by a Presiding Officer of this action.

Dated: New York, N.Y.
November 20, 2001

LOCKER GREENBERG & BRAININ, P.C.
Attorneys for Respondent

By: _____

Jeffrey M. Locker, Esq.
420 Fifth Avenue, 26th Floor
New York, NY 10018
Tel.: (212) 391-5200

FRIDAY ELDREDGE & CLARK
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400 West Capitol
Little Rock, ARK. 72201-3493
Tel.: (501) 376-2011

TO: Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408
(301) 504-0800, ext. 1230

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SCHEDULE

A. DEFINITIONS

1. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise) whether written or oral.

2. Consumer Product Safety Commission ("CPSC") shall refer to any and all commissioners and/or employees and any agents of them and all other persons acting on behalf of the CPSC, including consultants, advisors, employees, past and present, or person or organization acting in such consulting or advisory capacity.

3. "Concerning" means consisting of, constituting, containing, relating to, referring to, alluding to, explaining, describing, evidencing, reflecting, summarizing, or in any way logically or factually connected with the matter discussed.

4. "Document" is used herein in the broadest possible sense and means any written, printed, typed, recorded, graphic or other matter containing information of any kind or nature, however produced or reproduced, whether draft, revision, final, original, or reproduction, and includes all copies of any documents that are marked with any notation, or that are not identical in every respect to the documents requested, and specifically includes any handwritten notice and notations in whatever form; "documents" includes, but is not limited to, correspondence, letters, memoranda, notes, transcripts, minutes of meetings, intra-office and interoffice communications, reports, reports of consultations, forecasts, estimates, requests, claims, summaries, notes and/or summaries or oral communications, instructions, descriptions, analyses, inspections, schedules, specifications, statements, recommendations, inventories, studies, certificates, samples, permits, notices, return receipts, contracts, agreements, letter agreements (including modifications of

contracts, agreements, and letter agreements), certifications, approvals, authorizations, records, charts, plans, lists, diagrams, diaries, desk calendar notations, microfilm, microfiche, photographs, magnetic tape recordings, teletype messages, films, computer printouts, videotapes, materials on computer software or hardware, e-mail, computer files, backup tapes, floppy disks, telegrams, news releases, newspapers, periodicals, books, bulletins, circulars, pamphlets, manuals, brochures, advertisements, directions, affidavits, waivers, accounting worksheets, bills, invoices, vouchers, credit memoranda, financial statements, statements of account, ledger sheets, statistical statements, appraisals, credit files, evidence of indebtedness, checks, promissory notes, receipts, instruments, or material similar to any of the foregoing, however denominated, which are in the possession, custody or control of the CPSC or its employees, attorneys, agents, or representatives, or to which the CPSC can obtain access.

5. "And" as well as "or" shall be construed disjunctively as well as conjunctively as necessary in order to bring within the scope of the following document requests all documents which might otherwise be construed to be outside their scope.

6. The terms "you" and "your" refer to the CPSC.

7. The use of the singular form of any word includes the plural and vice versa, and the present tense shall include the past tense and vice versa.

B. TERMS OF PRODUCTION

1. Each request herein for a document or documents to be produced constitutes a request for production of the document or documents in its or their entirety, with all enclosures and attachments, and without abbreviation or expurgation.

2. In the event that any document falling within the description contained in this Schedule is to be withheld on the basis of a claim of privilege, that document is to be identified

as follows: (1) the nature or type of document (e.g., memorandum, letter, chart, record, etc.): (2) the date of such document and, if known, the date on which such document was prepared; (3) the author of such document; (4) the addressee (if any) of such document and of any indicated or blind copies; (5) the subject matter of such document; (6) the number of pages, attachments, or appendices to such document; (7) all persons to whom such document was distributed, shown or explained; (8) any person in whose possession such document is or was last known to be; and (9) the nature of the privilege asserted.

3. In the event that any document covered by this request has been destroyed or deleted, a list is to be furnished identifying each such document that has been destroyed or deleted together with the following information: (1) the date of the document; (2) the names of its author, authors or preparers; (3) the name of each person who was sent or furnished with the document, or in any way received or viewed the document, or has or has had custody of the document; (4) a brief description of the document; (5) the date of the destruction or deletion; and (6) the name of the person or persons who authorized the destruction or deletion of the document; and (7) the name of the person or persons who destroyed or deleted the document.

4. This request seeks documents in your possession, custody or control and includes documents in the possession, custody or control of your employees, representatives, and/or agents, including but not limited to, attorneys, accounts, or other professionals.

5. Unless otherwise indicated, this document request calls for production of documents created or referred to any time on or after January 1, 1972.

C. DOCUMENTS

1. Documents provided to the CPSC by other than Respondent pertaining to product liability lawsuits filed against Daisy Manufacturing Company.

2. CPSC In-depth Epidemiologic Investigation Reports of personal injury and fatality incidents involving the Powerline Model 856 and 880 airgun as defined in the Complaint or any derivative thereof.

3. CPSC Product Safety Assessments on Daisy Manufacturing Company airgun products from the Directorate for Engineering Sciences or any employee thereof, including but not limited to the dates the documents were prepared in chronological order and the identity and employee status of the person preparing each document.

4. CPSC Product Safety Assessments and economic analyses from the Directorate for Economic Analysis or any employee thereof on Daisy Manufacturing Company or its airgun products, including but not limited to the dates the documents were prepared in chronological order and the identity and employee status of each person preparing each document.

5. CPSC Product Safety Assessment or any analyses or reports on Daisy Manufacturing Company airgun products from the Directorate for Health Sciences or any employee thereof, including but not limited to the dates the documents were prepared in chronological order and the identity and employee status of each person preparing each document.

6. CPSC Product Safety Assessment on Daisy Manufacturing Company airgun products from the Directorate for Hazard Assessment or any employee thereof, including but not limited to the dates the documents were prepared in chronological order and the identity and employee status of each person preparing each document.

7. Technical reports, documents and notes from outside consultants or experts retained by the CPSC or its staff concerning Daisy Manufacturing Company airgun products, including but not limited to the dates the documents were prepared in chronological order and the

identity and credentials of each party involved in the preparation of each document.

8. All CPSC documents relating to CPSC involvement in voluntary standards ANSI/ASTM F589 and F590, including but not limited to the date each document was prepared and the identity and position of each party who prepared the document.

9. All documents relating to CPSC interaction with the family of Tucker Mahoney and their attorney, Shanin Spector or his law firm, including but not limited to the date each document was prepared and the identity and position of each party preparing the document.

10. From the period January 1, 1981 to the present, all mechanical engineering and metallurgical documents prepared by the CPSC staff on any and all Daisy products, including but not limited to the identity of the product, the dates the documents were prepared in chronological order and the identity and employee status of each person preparing each document.

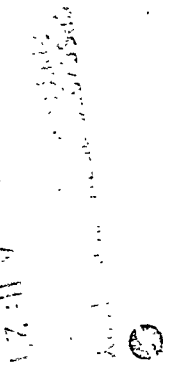
11. From the period January 1, 1981 to the present, all Human Factors Analyses prepared by the CPSC staff on any and all Daisy products, including but not limited to the identity of the product, the dates the documents were prepared in chronological order and the identity and employee status of each person preparing each document.

12. All CPSC staff-generated documents and memoranda involving any and all Daisy Powerline airguns, including but not limited to the dates the documents were prepared in chronological order and the identity and employee status of each person preparing each document.

13. All documents and memoranda generated by CPSC Commissioner Ann Brown or her staff involving Daisy Manufacturing Company, including but not limited to the dates the documents were prepared in chronological order and the identity and employee status of each person preparing each document.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of Daisy Manufacturing Company, Inc. d/ba Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756, Respondent	CPSC Docket No. : 02-2



RESPONDENT'S FIRST REQUEST
FOR PRODUCTION OF DOCUMENTS

PLEASE TAKE NOTICE that, pursuant to 16 C.F.1025.33 general provisions governing discovery, Respondent, Daisy Manufacturing Company, by its attorneys, requests that the Consumer Product Safety Commission ("CPSC") produce and permit Respondent, or someone acting on its behalf, to inspect and copy the documents and things described in the attached schedule herein with 30 days of the date hereof at the offices of Locker, Greenberg & Brainin, P. C. 420 Fifth Avenue, New York 10018, or at such other time and place as the attorneys for the Commission and Respondent may agree.

PLEASE TAKE FURTHER NOTICE that this document request is a continuing one and requires further and supplemental production by the CPSC as and whenever the Commission

produces, creates or acquires additional documents covered by this request between the time of the initial production hereunder and the time of hearing by a Presiding Officer of this action.

Dated: New York, N.Y.
November 20, 2001

LOCKER GREENBERG & BRAININ, P.C.
Attorneys for Respondent

By: _____

Jeffrey M. Locker, Esq.
420 Fifth Avenue, 26th Floor
New York, NY 10018
Tel.: (212) 391-5200

FRIDAY ELDREDGE & CLARK
2000 Regions Center
400 West Capitol
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TO: Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408
(301) 504-0800, ext. 1230

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SCHEDULE

A. DEFINITIONS

1. "Communication" means the transmittal of information (in the form of facts, ideas, inquiries, or otherwise) whether written or oral.

2. Consumer Product Safety Commission ("CPSC") shall refer to any and all commissioners and/or employees and any agents of them and all other persons acting on behalf of the CPSC, including consultants, advisors, employees, past and present, or person or organization acting in such consulting or advisory capacity.

3. "Concerning" means consisting of, constituting, containing, relating to, referring to, alluding to, explaining, describing, evidencing, reflecting, summarizing, or in any way logically or factually connected with the matter discussed.

4. "Document" is used herein in the broadest possible sense and means any written, printed, typed, recorded, graphic or other matter containing information of any kind or nature, however produced or reproduced, whether draft, revision, final, original, or reproduction, and includes all copies of any documents that are marked with any notation, or that are not identical in every respect to the documents requested, and specifically includes any handwritten notice and notations in whatever form; "documents" includes, but is not limited to, correspondence, letters, memoranda, notes, transcripts, minutes of meetings, intra-office and interoffice communications, reports, reports of consultations, forecasts, estimates, requests, claims, summaries, notes and/or summaries or oral communications, instructions, descriptions, analyses, inspections, schedules, specifications, statements, recommendations, inventories, studies, certificates, samples, permits, notices, return receipts, contracts, agreements, letter agreements (including modifications of

contracts, agreements, and letter agreements), certifications, approvals, authorizations, records, charts, plans, lists, diagrams, diaries, desk calendar notations, microfilm, microfiche, photographs, magnetic tape recordings, teletype messages, films, computer printouts, videotapes, materials on computer software or hardware, e-mail, computer files, backup tapes, floppy disks, telegrams, news releases, newspapers, periodicals, books, bulletins, circulars, pamphlets, manuals, brochures, advertisements, directions, affidavits, waivers, accounting worksheets, bills, invoices, vouchers, credit memoranda, financial statements, statements of account, ledger sheets, statistical statements, appraisals, credit files, evidence of indebtedness, checks, promissory notes, receipts, instruments, or material similar to any of the foregoing, however denominated, which are in the possession, custody or control of the CPSC or its employees, attorneys, agents, or representatives, or to which the CPSC can obtain access.

5. "And" as well as "or" shall be construed disjunctively as well as conjunctively as necessary in order to bring within the scope of the following document requests all documents which might otherwise be construed to be outside their scope.

6. The terms "you" and "your" refer to the CPSC.

7. The use of the singular form of any word includes the plural and vice versa, and the present tense shall include the past tense and vice versa.

B. TERMS OF PRODUCTION

1. Each request herein for a document or documents to be produced constitutes a request for production of the document or documents in its or their entirety, with all enclosures and attachments, and without abbreviation or expurgation.

2. In the event that any document falling within the description contained in this Schedule is to be withheld on the basis of a claim of privilege, that document is to be identified

as follows: (1) the nature or type of document (e.g., memorandum, letter, chart, record, etc.): (2) the date of such document and, if known, the date on which such document was prepared; (3) the author of such document; (4) the addressee (if any) of such document and of any indicated or blind copies; (5) the subject matter of such document; (6) the number of pages, attachments, or appendices to such document; (7) all persons to whom such document was distributed, shown or explained; (8) any person in whose possession such document is or was last known to be; and (9) the nature of the privilege asserted.

3. In the event that any document covered by this request has been destroyed or deleted, a list is to be furnished identifying each such document that has been destroyed or deleted together with the following information: (1) the date of the document; (2) the names of its author, authors or preparers; (3) the name of each person who was sent or furnished with the document, or in any way received or viewed the document, or has or has had custody of the document; (4) a brief description of the document; (5) the date of the destruction or deletion; and (6) the name of the person or persons who authorized the destruction or deletion of the document; and (7) the name of the person or persons who destroyed or deleted the document.

4. This request seeks documents in your possession, custody or control and includes documents in the possession, custody or control of your employees, representatives, and/or agents, including but not limited to, attorneys, accounts, or other professionals.

5. Unless otherwise indicated, this document request calls for production of documents created or referred to any time on or after January 1, 1972.

C. DOCUMENTS

1. Documents provided to the CPSC by other than Respondent pertaining to product liability lawsuits filed against Daisy Manufacturing Company.

2. CPSC In-depth Epidemiologic Investigation Reports of personal injury and fatality incidents involving the Powerline Model 856 and 880 airgun as defined in the Complaint or any derivative thereof.

3. CPSC Product Safety Assessments on Daisy Manufacturing Company airgun products from the Directorate for Engineering Sciences or any employee thereof, including but not limited to the dates the documents were prepared in chronological order and the identity and employee status of the person preparing each document.

4. CPSC Product Safety Assessments and economic analyses from the Directorate for Economic Analysis or any employee thereof on Daisy Manufacturing Company or its airgun products, including but not limited to the dates the documents were prepared in chronological order and the identity and employee status of each person preparing each document.

5. CPSC Product Safety Assessment or any analyses or reports on Daisy Manufacturing Company airgun products from the Directorate for Health Sciences or any employee thereof, including but not limited to the dates the documents were prepared in chronological order and the identity and employee status of each person preparing each document.

6. CPSC Product Safety Assessment on Daisy Manufacturing Company airgun products from the Directorate for Hazard Assessment or any employee thereof, including but not limited to the dates the documents were prepared in chronological order and the identity and employee status of each person preparing each document.

7. Technical reports, documents and notes from outside consultants or experts retained by the CPSC or its staff concerning Daisy Manufacturing Company airgun products, including but not limited to the dates the documents were prepared in chronological order and the

identity and credentials of each party involved in the preparation of each document.

8. All CPSC documents relating to CPSC involvement in voluntary standards ANSI/ASTM F589 and F590, including but not limited to the date each document was prepared and the identity and position of each party who prepared the document.

9. All documents relating to CPSC interaction with the family of Tucker Mahoney and their attorney, Shanin Spector or his law firm, including but not limited to the date each document was prepared and the identity and position of each party preparing the document.

10. From the period January 1, 1981 to the present, all mechanical engineering and metallurgical documents prepared by the CPSC staff on any and all Daisy products, including but not limited to the identity of the product, the dates the documents were prepared in chronological order and the identity and employee status of each person preparing each document.

11. From the period January 1, 1981 to the present, all Human Factors Analyses prepared by the CPSC staff on any and all Daisy products, including but not limited to the identity of the product, the dates the documents were prepared in chronological order and the identity and employee status of each person preparing each document.

12. All CPSC staff-generated documents and memoranda involving any and all Daisy Powerline airguns, including but not limited to the dates the documents were prepared in chronological order and the identity and employee status of each person preparing each document.

13. All documents and memoranda generated by CPSC Commissioner Ann Brown or her staff involving Daisy Manufacturing Company, including but not limited to the dates the documents were prepared in chronological order and the identity and employee status of each person preparing each document.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
	)	
Respondent	)	
	)	

ORDER ON RESPONDENT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS PURSUANT TO RESPONDENT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Daisy Manufacturing Company has filed a Motion, together with a supplemental affidavit in support thereof, seeking an order to compel production of documents pursuant to its first request for production of documents. Complaint Counsel has filed a response and opposition to that motion. Daisy, while noting that Complaint Counsel has furnished 19,396 pages of material in response to its first request for document production, relates that Complaint Counsel has not provided "... a single test report, engineering study, metallurgical study or product safety assessment evaluating Daisy's Powerline Model Nos. 880 and 856..." Motion at 2.

Respondent declares that, through a privilege log, Complaint Counsel has objected to "the release of all product safety assessments, engineering and metallurgical studies, and Human Factors evaluations... [which] had been conducted by Commission staff over the past 20 years ..." Daisy maintains that Complaint Counsel has only provided a privilege log which does not provide a description which is specific enough for the Court to decide whether a privilege applies. As one example, Daisy points to six documents referenced at page 125 of the Complaint Counsel's privilege log, noting that the list refers to reports of unstated dates and unidentified

authors.[1] Daisy's motion[2] asks the Court to "compel the production of all documents enumerated in the Privilege Log..."[3] In the event its document production request is not granted, Daisy, noting that the burden is on the party asserting a privilege, seeks a document-specific explanation, using a "Vaughn Index," to support Complaint Counsel's privilege claim.

In response, Complaint Counsel, asserting that, in terms of discovery in this proceeding, there has been "a chequered past by both parties," outlines its own discovery problems with Daisy and proposes "Glasnost."[4] It relates that during a July 1, 2002 telephone conference with Daisy's counsel, it agreed to provide Daisy with *all* the documents listed in Complaint Counsel's June 25th letter[5]. As these are the same documents referred to in Daisy's Supplemental Affidavit, this part of Daisy's objection has been resolved for the time being, pending any privilege assertions that may need to be resolved by the Court. Further, Complaint Counsel states that, after appropriate redactions, it will soon be providing Daisy will all the remaining documents and it will offer assistance to the extent Daisy still has problems interpreting the privilege log.[6]

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[1]On the basis of this document, no one could intelligently assess the validity of Complaint Counsel's claim that the "Attorney/Client, Work Product, Deliberative Process, [or] Investigatory Files" privilege applies. The documents are described only as a report or memorandum of a non-powder gun investigation.

[2]In support of its claim, Daisy alleges specific instances where it maintains that no attorneys or work product could be involved. Motion at 8-9. However, consideration of these references is premature at this juncture because the Court is not in a position to rule on the validity of any claim of privileges.

[3]In Daisy's Supplemental Affidavit it notes it received a document from Complaint Counsel concerning the identification of Engineering, Human Factors and Epidemiological PSAs. However Daisy asserts that without assigning a title to each document, one can not tell which type of document is referenced in the privilege log nor assess the validity of the claims.

[4]"Glasnost," many will remember, refers to a policy announced under the Soviet Union's Mikhail Gorbachev, which declared there would be candor and openness in that society on social issues.

[5]It is important to note that Complaint Counsel is only "suspending" its privilege claims as to those documents, pending a method to determine how they should be treated. Under this arrangement, it relates that Daisy has agreed to treat the documents as confidential.

[6]Complaint Counsel states that Daisy has been informed of all these actions. Opposition at 3. The Court notes, however, that the document Complaint Counsel refers to, Exhibit 5, a July 12, 2002 letter to Daisy does not support this assertion, as it relates to other matters. However, as Daisy has not filed any further papers challenging the assertions made in Complaint Counsel's

Trusting that its recent efforts have made Daisy's motion moot and will dispel the mutual "air of mistrust," Complaint Counsel expects that Daisy will be forthcoming as well.

Complaint Counsel also objects to Daisy's request that it compile a Vaughn Index.[7] It relates that the parties earlier agreed that a privilege log would be the vehicle for dealing with withheld documents. With this understanding, Complaint Counsel states that it has invested hundreds of hours compiling the log. Important to this dispute, Complaint Counsel concedes that it has "a duty to provide adequate information in its Privilege Log about documents about which it asserts valid claims of privilege." Opposition at 7. While the Court does not agree that the privilege log meets the standard acknowledged by Complaint Counsel, it is hard to discern the remaining controversy, given that Complaint Counsel has agreed to provide the documents themselves.[8]

Many arguments have been presented here on issues which are not ripe for decision,[9] but the Court must remained focused on the issue raised in Respondent's Motion: the adequacy of the privilege log. Although the Court declines to order that Complaint Counsel prepare a "Vaughn Index," it does direct that, consistent with FRCP 26(b)(5), Daisy be provided promptly

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July 15th Opposition, it is assumed the incorrect reference was a clerical error.

[7]Noting that the Vaughn Index arose in the context of a Freedom of Information Act ("FOIA") claim, Complaint Counsel asserts that in this instance it is more like a FOIA applicant because *it* is seeking information from the designer, manufacturer and marketer of the airguns, Daisy

[8]Complaint Counsel, having acknowledged the standard for the privilege log, then seems to recant by suggesting that the test for a proper privilege log is not solely an objective measure, but should take into account the "actual needs" of the party raising objections to it. In this instance Complaint Counsel suggests that Mr. Aaron Locker and his firm have such in-depth knowledge of the matters in this litigation that there is no one more knowledgeable and as such the Court should take this into account in deciding the amount of specificity needed in the privilege log. As this would involve the Court's attempt to evaluate the state of mind of counsel for Daisy, it rejects the contention. The determination of the required specificity for a privilege log will be measured objectively, under the criteria the parties acknowledge to apply.

[9]Addressing some of the specific privilege log deficiencies cited in Daisy's Motion, Complaint Counsel asserts that work done by non-lawyers, being performed at the request of the Office of Compliance and Enforcement, can still be claimed within the attorney/client privilege. Further, it contends that rulemaking documents, even when prepared by non-attorneys, can qualify as privileged and that the work-product privilege continues after the litigation for which it was prepared. The Court observes that these issues must be resolved in the context of the particulars and that it would serve no purpose to attempt to abstractly resolve these matters.

with a more detailed privilege log for those documents which remain withheld. The log must describe the nature of the documents, without revealing the information itself, such that opposing counsel and the court will be able to assess the applicability of the privilege or protection being asserted. The log must also provide a precise statement of the grounds for work product or attorney-client protection for each document.[10]

So Ordered.

William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: July 24, 2002

RGY motions
stands 8/26

[10] Where disputes cannot be resolved by the parties and the Court is unable to make a ruling based on the privilege log, an in camera inspection may be required.

In the Matter of Daisy Manufacturing Company, Inc.
d/b/a Daisy Outdoor Products, Respondent
Docket No. CPSC Docket No.: 02-2

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Respondent's Motion to Compel Production of Documents Pursuant to Respondent's First Request for Production of Documents**, dated July 24, 2002, was sent this day in the following manner:

Sent by Facsimile and Original by mail:

William Moore, Esq.
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Todd Stevenson, Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

William M. Griffin III, Esq.
Friday Eldredge & Clark
200 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esq.
Daisy Manufacturing Company, Inc.
400 W. Stribling Avenue
Rogers, AR 72756

Aaron Locker, Esq.
Jeffrey M. Locker, Esq.
LOCKER, GREENBERG & BRAININ
420 Fifth Avenue, 26th Floor
New York, NY 10018

Nelida Torres
Legal Staff Assistant

Dated: July 24, 2002

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

MOTION FOR PERMISSION TO TAKE AN INTERLOCUTORY APPEAL FROM ORDER DENYING RESPONDENT'S MOTION TO TRANSMIT PROPOSED CONSENT AGREEMENT TO THE COMMISSION

Pursuant to the provision of 16 C.F.R. §1025.24(b)(4), Respondent Daisy Manufacturing Company (hereinafter "Respondent") seeks permission of the Administrative Law Judge to take an interlocutory appeal to the Commission from his Order dated September 25, 2002 denying Respondent's Motion to Transmit a proposed Consent Agreement to the Commission on the grounds that there exists a controlling question of policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation.

THERE EXISTS A CONTROLLING QUESTION OF POLICY AS TO WHETHER HIGH VELOCITY BB GUNS AND AIRGUNS SHOULD BE REGULATED BY THE VOLUNTARY STANDARDS PROCESS AND THERE ARE SUBSTANTIAL GROUNDS FOR DIFFERENCES OF OPINION AS TO THAT POLICY

Since 1978, Respondent's airguns and those of other manufacturers of high velocity airguns have been produced under consensus voluntary standards developed under the auspices of the ASTM F589-78 for guns and F589-78 for ammunition. Since 1981, Commission personnel have participated in meetings leading to the revision, drafting and development of successive versions of these voluntary standards (in 1985, 1992 and 2000). The Commission has considered and rejected several petitions

initially filed in 1975 and again in 1981, 1984 and 1989 seeking mandatory regulation of airguns. The details concerning these petitions and voluntary standards are set forth in the Motion to Transmit Proposed Consent Agreement.[1]

Until 2001, the Commission repeatedly deferred issues concerning regulation of airguns to the voluntary standards process. This changed with the commencement of this proceeding, on the grounds that Daisy airguns uniquely contained an alleged defect described as lodging or the entrapment of BBs and that, among other things, they failed to contain an automatic safety device and were being sold to children.

The agency's commitment to voluntary standards is set out in the law itself. Congress enacted legislation in 1981 requiring the CPSC to rely on voluntary safety standards rather than issue a mandatory rule whenever a risk of injury can be reduced or eliminated thereby. The legislation also requires the Commission to provide administrative and technical assistance to public and private organizations and groups of manufacturers in the development of safety standards that address a risk of injury that is the subject of rulemaking proposed by the agency. The CPSC has deferred mandatory rulemaking on the basis of the adequacy of voluntary standards and has denied a number of petitions for rulemaking on the same grounds. However, the Commission may initiate a proceeding for the development of a mandatory standard if it determines there is no voluntary standard that will eliminate or adequately reduce a risk of injury. *CPS Act §7(b); CPS Act §5(a), see 16 CFR 1031, et seq.*

According to the agency's policy, the CPSC, in determining whether mandatory regulation of a product is necessary, considers whether there is an existing voluntary standard that adequately addresses the problem, and the extent to which the affected industry conforms to the standard. The

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[1] CPSC's Answer to Interrogatories confirms that between 1981 and 1999, CPSC staff conducted six independent investigations of the products in question and considered the very issues presented in this action and concluded that the guns were not "defective".

CPSC may then find that a mandatory standard is unnecessary if there is an adequate existing voluntary standard containing requirements and test methods acceptable to the Commission. If the CPSC evaluates a voluntary standard and finds it adequate in most respects, the CPSC may then defer the development of a mandatory standard and ask for revision of the existing voluntary standard.[2]

A. The Allegations of Defect Are Not Unique to the Respondent

Annexed as **Exhibit A** is a document indicating a pending Section 15 investigation of Crosman Corporation, a competitor of Daisy and the largest manufacturer of high velocity airguns in the United States. The seventh paragraph clearly states that the Crosman Model 760 "has both a BB reservoir and magazine where projectiles can remain (and be trapped) in the air gun". The sixth paragraph indicates that approximately 9 million Crosman Model 760 high velocity airguns were manufactured by the year 2000. The Crosman Model 760 does not contain an automatic safety and, according to this document, it traps BBs between the reservoir and the magazine. Crosman, which first developed the high velocity airgun, has produced more high velocity airguns than Respondent Daisy. The design and functioning of the feed system (gravity feed from a reservoir and a magazine to a feed port, which loads a visible BB into a chamber) is, in its essentials, the same as that of the Daisy Models 856 and 880. Crosman Corporation, like Daisy, markets its Model 760 high velocity airgun to persons 16 years of age and older, the age which is provided for by the voluntary standard. The staff allegations described above

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2 "CPS Act §7(b) Reliance of the Commission upon voluntary standards -
(1) The Commission shall rely upon voluntary consumer product safety standards rather than promulgate a consumer product safety standard prescribing requirements described in subsection (a) whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and its is likely that there will be substantial compliance with such voluntary standards.

(2) The Commission shall devise procedures to monitor compliance with any voluntary standards:
(A) upon which the Commission has relied under paragraph (1);
(B) which were developed with the participation of the Commission; or
(C) whose development the Commission has monitored."

are not unique to Respondent, but exist throughout the industry. Until this action, issues relating to airgun safety when they arose have always been dealt with via the voluntary standards process.

During the hegemony of Chairman Ann Brown, that changed with the commencement of this proceeding against Respondent.

In alleging a lodging defect in the Daisy Powerline airguns, Complaint Counsel ignores the commonly accepted precepts of safe shooting[3] and the fact that even if a BB lodges in the magazine, BB's, no matter what the behavior of the user, simply do not load from the magazine onto the magnetic tip into the visible open portal and then the chamber without the conscious action of the user [4]

Complaint Counsel instead relies on a 30 year old ad (prior to the adoption of ASTM Standards), plaintiff's attorney allegations, the intentional and unethical alteration of the product by the CPSC legal staff and the desire of the former Chairman of the Commission to "get a different result" to

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[3] **YOUR AIRGUN IS A REAL GUN, NOT A TOY.**
ALWAYS HAVE ADULT SUPERVISION WHEN YOU SHOOT.
ALWAYS KEEP THE GUN POINTED IN A SAFE DIRECTION.
These are the primary rules of gun safety. A "safe direction" means the gun is pointed so that even if it were to go off, it would not cause injury or damage.
NEVER POINT A GUN AT ANOTHER PERSON!
ALWAYS KEEP YOUR FINGER OFF THE TRIGGER UNTIL READY TO SHOOT.
ALWAYS KEEP THE GUN UNLOADED UNTIL READY TO USE.
LEAVE THE GUN EMPTY AND UNCOCKED UNTIL YOU ARE READY TO SHOOT.
KNOW THE TARGET AND WHAT IS BEYOND. WEAR HEARING AND EYE PROTECTION.

[4] OPERATION OF THE GRAVITY FEED POWERLINE AIRGUN

1. tipping the barrel up;
2. put 'on' trigger safety;
3. pumping the rifle;
4. pulling the bolt back and then pulling the bolt further back against spring resistance; load the BB onto the magnetic tip and into the visible portal, at which time the gun will not fire;
5. closing the bolt to put the visible BB into the firing chamber;
6. taking the safety off;
7. aiming and firing the airgun

selectively litigate industry-wide issues of gravity feed and high velocity against one manufacturer, rather than go through the ASTM voluntary standards process as directed by Congress.[5]

In attacking the voluntary standards process, Complaint Counsel outrageously equates Respondent and its counsel to "Osama Bin Laden" and the ASTM process in which the CPSC staff has been actively involved for over 20 years to "the Taliban Mullahs". Complaint Counsel's actions reflect poorly on the CPSC legal staff and do grave harm to the entire agency and the Commissioners.

Until this litigation, the CPSC staff was intimately involved in the ASTM process and as part of the ASTM never recommended to the Committee considering ASTM F589, the adoption of visible magazines (they could scratch and become cloudy), automatic safeties, velocity limitations and contrasting feed portals. Rather than go through the voluntary standards process, the Commission, driven by the personal belief of the former Chairman of the agency, has chosen to selectively proceed against one manufacturer on issues that affect the entire industry in lieu of proceeding through the ASTM voluntary standards process.

B. There is a New Chairman at the Commission
Who Recognizes Congressional Mandate

In August 2002, a new Chairman, Harold Stratton, appointed by the administration, was confirmed by the U.S. Senate. We believe that the policy of the new Commission regarding the role of voluntary standards in the regulation of BB guns will be viewed differently under new Commission

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[5] Depositions of CPSC Compliance Director Marc Schoem, CPSC Compliance Officer Jay DeMarco and CPSC Engineer Scott Snyder confirm that this action did not result from a new compliance investigation, but from a decision by the Chairman and CPSC legal staff to take possession of all files and to "get a different result" and litigate this matter. No efforts were made to deal with either voluntary standards or rulemaking. No new factors existed except a unconsented settlement in the Tucker Mahoney matter and CPSC legal staff intentionally and "unethically" altering the Model 880 airgun by backing out the screws, creating an unreported situation and using out of spec BB's to achieve lodging. This unusual action was taken because in all extensive Company and CPSC Engineering data and tests, a BB would not lodge in the Model 880 airgun. The Kate Sedney memo referenced by Complaint Counsel was previously considered and rejected by the Commission staff. Discovery to date provides no new factors or substantiated factual or scientific data proving defect, only dramatics and innuendo.

leadership by Chairman Stratton, a lawyer and a former Attorney General of New Mexico, and that the Commission will revert to the process of regulation through the voluntary standards process on issues that affect the entire industry. Recommendations of the Commission staff in the voluntary standards process have always been accorded great weight and implemented. The Commission staff has never, in the 21 years in which they have been involved in the voluntary standards process, urged that the Standard be changed to address the allegations of defect (gravity feed, limited BB feed, contrasting portals) in this proceeding. As a matter of fact, these allegations were before the staff in the two year investigation of Daisy which preceded the Commission statement in 1996 that the guns were not defective. This Commission should be given the opportunity to review the policy of the agency with regard to Congressionally mandated involvement in and adherence to voluntary standards as a preferred method of setting standards for the airgun industry which was abandoned by the Commission under Chairman Brown's leadership. The controlling policy difference should be addressed by the new Chairman and the Commission and Respondent's Motion to Transmit its proposed Consent Agreement to the Commission should be reviewed by the Commission in an interlocutory appeal.

Pursuant to the provisions of 16 C.F.R. 1025.24(b)(4), Respondent seeks the right to bring this controlling policy issue to the attention of the changed Commission.

CONCLUSION

For the foregoing reasons, Respondent seeks a determination by the Presiding Officer that there is a controlling question of policy, namely the use of the voluntary standards process as a means for setting safety standards for airguns, as to which there is substantial ground for differences of opinion. An immediate appeal, which will allow the Commission to review the denial of the Motion to Transmit the Proposed Consent Agreement, will materially advance the ultimate termination of the litigation if

the Commission should decide that these issues should once again be dealt with by the voluntary standards process.

Dated: October 4, 2002

Respectfully submitted,

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Attorneys for Respondent
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Daisy Manufacturing Co.
400 West Stribling Avenue
Rogers, AR. 72756
Tel.: (501) 636-1200

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CERTIFICATE OF SERVICE

I am over the age of 18 years and not a party to the within action. I hereby certify that on October 4, 2002, I have served the attached document described as **MOTION FOR PERMISSION TO TAKE AN INTERLOCUTORY APPEAL FROM ORDER DENYING RESPONDENT'S MOTION TO TRANSMIT PROPOSED CONSENT AGREEMENT TO THE COMMISSION** on all parties and participants of record in these proceedings as follows:

ON:

Todd Stevenson, Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408
Via FAX: (301) 504-0127

William Moore, Esq.
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
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Via FAX: (301) 504-0359

Honorable William Moran
c/o Whiting Beale
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Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
Rogers, AR 72756
Via FAX: (501) 636-1163

by facsimile transmission and by placing a true copy thereof enclosed in a sealed envelope . I am "readily familiar" with the firm's practice of collection and processing for mailing. Under the practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepared in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Jean Vincent

EXHIBIT A

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Crosman Air Gun Questions, PI010163

Date: March 28, 2002

TO : Case File

FROM : Richard Wright

SUBJECT : Investigation Questions

1. The Crosman Model 760 Pumpmaster manual says to use BBs or .177 caliber pellets. Are there other standard size pellets and/or BBs that a routine user might accidentally purchase and unknowingly use? Are Daisy and Crosman pellets and/or BBs interchangeable? Can the pellets and BBs from one manufacturer be used in the other manufacturer's air guns?

2. How much does a routine trip to a shop cost for an air rifle? Is it cheap enough that users will take their gun in for service? What percentage of air rifles/guns are routinely serviced? I assume the percentage of gun service is higher for the more expensive adult air guns?

3. I know/believe the National Rifle Association is a strong advocate of powdered and non-powder gun safety. The NRA teaches classes for various ages and various levels of users. What is the cost of these classes? Has the subject of mandatory classes (like a driving licenses for cars) for air guns users been discussed/evaluated, etc.? If so what were pros and cons for the classes?

4. Model 760 manual says that special tools and fixtures are needed to repair an air rifle. What is required?

5. What are the differences between the Model 760 and the Model 760 Clip series? Is the clip series for pellet clips?

6. Crosman has manufactured and sold how many Model 760 air rifles? The full report says approxiately 4,806,000. The Crosman website (http://www.crosman.com/who) says the 9,000,000th Model 760 was maufactured in 2000. Please explain difference in numbers sold.

7. The model 760 has both a BB reservoir and magazine where projecticles can remain (and be trapped) in the air gun.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, INC., doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

RECEIVED
CPSC
OFFICE OF COMPLIANCE
2002 APR 15 PM 5:09

RESPONDENT'S FIRST SET OF SPECIAL INTERROGATORIES

Respondent Daisy Manufacturing Company requests that Complainant, the Consumer Product Safety Commission, answer, under oath, separately and fully the following interrogatories within thirty (30) days, pursuant to 16 C. F. R. § 1025.32, and other provisions thereof.

INSTRUCTIONS

1. Each interrogatory is required to be answered on the basis of the entire knowledge of the Complainant, Complaint's agents, representatives or attorneys.

2. If any of the following interrogatories cannot be answered in full, please answer to the extent possible and specify the reason for your inability to answer the remainder, including whatever information or knowledge you have concerning the unanswered portion.

3. If your answer is qualified in any particular instance, please set forth, with specificity, the details of such qualifications.

4. Whenever an interrogatory may be answered by referring to a document, the

document has more than one page, specify the page and section where the answer to the interrogatory can be found. The specification shall be in sufficient detail to permit the propounding party to locate and to identify, as readily as the responding party can, the documents from which the answer may be ascertained.

5. In the first paragraph of the response immediately below the title of the case, there shall appear the identity of the responding party, the set number, and the identity of the propounding party. Each answer shall bear the same identifying number and be in the same sequence as the corresponding interrogatory.

DEFINITIONS

A. The term "you" as used herein means not only the Consumer Product Safety Commission, but also its directorates, departments, divisions, employees, contractors, agents, attorneys and any other person retained by the CPSC.

B. The term "document" means any written, graphic, photographic, audio or visual materials, however produced or reproduced, of any kind or description, whether sent or received or neither, including, but not limited to: papers, books, letters, telefacsimilies, photographs, motion pictures, video tapes, audio recordings, correspondence, drawings, sketches, schematics, manuals, blueprints, work papers, intro- and inter-office communications, transcripts, minutes, reports, and recordings of telephone or other conversations, or of interviews, conferences, or meetings, affidavit, statements, summaries, opinions, court pleadings, reports, indices, studies, analyses, evaluations, contracts, licenses, agreements, questionnaires, answers to questionnaires, statistical records, desk calendars, appoint books, diaries, telephone logs, lists, tabulations, charts, graphs, data sheets, computer tapes, disks, cards, printouts or programs, microfilms, all other

document kept by electronic, photographic or mechanical means and things similar to any of the foregoing, regardless of their author or origin, however denominated.

C. The term "person" includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.

D. The term "address" means the street address, including the city, state and zip code.

E. The term "Powerline Airgun" or "Daisy Powerline Airgun" includes the Powerline Airgun manufactured by Daisy Manufacturing Company.

F. The term "Daisy BB guns" includes all airguns manufactured by Daisy Manufacturing Company, including the Powerline Airgun.

G. The term "Model 880" includes the following airgun model and product numbers: 880, 881, 882,1880,1881,1882, 9072, 9082, 9083, 9093, 9393, 9355, 9382, 3305, 3480, 3933, 3934, 1455 and 5150.

H. The term "Model 856" includes the following air gun model and product numbers: 856, 860, 7856 and 990.

I. The term "Daisy" means "Daisy Manufacturing Company."

J. The term "CPSC" means "The Consumer Product Safety Commission."

K. The definition of terms listed in 15 U.S.C. § 2052, and 15 U.S.C. §1261 are incorporated in this definition as through fully set forth herein.

INTERROGATORIES

1. Please identify the name, address and telephone number of all persons at the CPSC or associated with the CPSC who are involved in the investigations of Daisy Powerline, Model Nos. 880 and 856 airguns.

15. Please identify, with particularity, for a subsequent inspection demand or subpoena duces tecum for each and every CPSC Product Safety Assessments in chronological order on the Daisy Model Nos. 856 and 880 Airguns that the CPSC produced and specified in the preceding Interrogatory No.14.

16. Please identify the name, address and telephone number of all persons at the CPSC or associated with the CPSC, in chronological order, who prepared or who were associated with the preparation of each Product Safety Assessment specified in the preceding Interrogatory No. 14.

17. Please identify, with particularity and in chronological order, all technical reports, documents and notes from outside consultants retained by the CPSC or its staff concerning the Daisy Model Nos. 856 and 880 Airguns including, but not limited to, the dates each document was prepared.

18. Please identify, with particularity, for a subsequent inspection demand or subpoena duces tecum for each and every technical report, document and note from outside consultants retained by the CPSC or its staff concerning the Daisy Airguns as specified in the preceding Interrogatory No.17.

19. If the technical reports from outside experts identified in Interrogatory No. 17 were oral, please state the substance and content of each such oral report.

20. Please identify the name, address and telephone number of all persons at the CPSC or associated with the CPSC who received or had knowledge of the technical reports, oral or written, documents and notes from outside consultants retained by the CPSC or its staff concerning the Daisy Airguns, as specified in the preceding Interrogatory No. 17.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Quynh H. Nguyen
Trial Attorney
Legal Division
Office of Compliance

Tel: (301) 504-0626, Ext. 1314
Fax: (301) 504-0359
Email: qnguyen@cpsc.gov

Via Hand Delivery

October 31, 2002

Todd A. Stevenson, Secretary
Office of the Secretary
Consumer Product Safety Commission
4330 East-West Highway, Room 502
Bethesda, MD 20814

Re: ***In the Matter of Daisy Manufacturing Company***
CPSC Docket No. 02-2

Dear Mr. Stevenson:

Enclosed for filing please find an original and three (3) copies of the following document in the above-referenced matter: **Complaint Counsel's Opposition to Respondent's Motion for Sanctions for Failure to Comply with Discovery Orders Pursuant to Commission Rule for Adjudicative Proceeding 16 C.F.R. § 1025.37** and **Proposed Order.**

Please provide a copy to Judge Moran, the Presiding Officer in the above-captioned case. This document is being served this date on all parties of record in this proceeding.

Sincerely,

Quynh Nguyen
Complaint Counsel

Enclosures

cc: Aaron Locker, Esq. (certified mail, return receipt requested, postage prepaid, and facsimile)
William M. Griffin, III, Esq. (via first class mail, postage prepaid)
Marianne McBeth, Esq. (via first class mail, postage prepaid)

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756 Respondent.	CPSC Docket No. 02-2

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR SANCTIONS FOR FAILURE TO COMPLY WITH DISCOVERY ORDERS PURSUANT TO COMMISSION RULE FOR ADJUDICATIVE PROCEEDING 16 C.F.R. § 1025.37

I. PRELIMINARY STATEMENT

Respondent Daisy Manufacturing Company's (hereinafter, "Daisy" or "Respondent") Motion for Sanctions for Failure to Comply with Discovery Orders Pursuant to Commission Rule for Adjudicative Proceeding 16 C.F.R. § 1025.37 (hereinafter, "Motion for Sanctions") is without merit in fact or law, as will be demonstrated below. Section 1025.37 states that if a party fails to obey an order to provide or permit discovery, the Presiding Officer may take such action as is just. 16 C.F.R. § 1025.37. Further, Section 1025.37 lists actions that may be taken if a Presiding Officer finds that a party failed to comply with a discovery order.

Complaint Counsel has not failed to comply with the Court's July 24, 2002 and July 26, 2002 Orders as Respondent alleges. Thus, sanctions in this matter are not appropriate and Respondent's Motion for Sanctions should be denied.

II. BACKGROUND

The discovery process in this matter is far from complete. Discovery has been hampered by various disputes regarding what should be produced raised by both sides. As a consequence, this case is far behind where the Court and parties anticipated it would be under the original schedule adopted by the Court during the Pre-Hearing Conference on June 7, 2002. The lack of a Commission quorum caused extensive delays at the beginning of this proceeding because the parties could not obtain subpoenas. In addition, the parties have spent a considerable amount of time filing and responding to potentially dispositive motions. Furthermore, there have been numerous disagreements regarding discovery matters that resulted in the parties filing various motions to compel.[1] Finally, the process of scheduling depositions of fact witnesses has taken longer than anticipated due, in part, to Daisy's failure to provide responses to Commission subpoenas, the rigorous trial schedule of William M. Griffin III, Esq. outside this litigation, and Daisy's insistence that Mr. Griffin be present to take and defend all depositions. Consequently, the parties still have many fact depositions to complete.

For these reasons, Complaint Counsel believes it is appropriate to revise and submit a new pre-hearing schedule that allows both parties to develop their respective cases, while also reflecting the desire to bring this case to hearing expeditiously.

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[1] Complaint Counsel notes that Daisy has failed to provide a great deal of information regarding its liability lawsuits and certain engineering documents. During the deposition of Marianne McBeth, counsel for Respondent and General Counsel for Daisy, Complaint Counsel learned that in responding to Complaint Counsel's discovery requests, neither Daisy counsel nor Ms. McBeth inquired whether law firms previously retained by Daisy had responsive documents or information. Complaint Counsel has since informed counsel for Daisy that Complaint Counsel's discovery requests also apply to Daisy's previously retained law firms that have defended the company on the subject BB guns. We have noted other gaps in the production of documents and filed a Motion to Compel. Furthermore, Daisy has failed to respond to two (2) Commission subpoenas issued to its current employees (J. Murfin and R. Hobbs), while three former Daisy employees (R. Joyce, R. Daniel, and A. Blalock) have not complied with Commission subpoenas.

Complaint Counsel intends to seek agreement from Respondent on a reasonable schedule; however, if agreement is not possible, the staff will unilaterally propose a schedule to this Court.

III. ARGUMENT

A. Complaint Counsel has been diligent in reviewing documents for production and compiling the more detailed privilege log pursuant to the Court's July 26, 2002 Order.

On May 13, 2002, Complaint Counsel provided Daisy with an extensive privilege log. On July 24, 2002, the Court ordered Complaint Counsel to provide a more detailed log to Daisy for documents we withheld, but encouraged Complaint Counsel to review its privilege claims and supply documents if possible. During the August 27, 2002 pre-hearing telephone conference call, Complaint Counsel explained that it was turning over documents on a rolling basis to Daisy that had previously been withheld based on a claim of privilege. This plan was acceptable to all parties and Complaint Counsel produced 3,200 pages on August 27th, 2,600 pages on September 10th, and roughly 400 pages on October 30th. [2]

A new, truncated log will be supplied to Respondent on November 1, 2002 and consists primarily of attorney notes, attorney draft documents, attorney work product and electronic mail between and among co-counsel and support personnel. Based upon the August 27, 2002 pre-hearing conference call, we believed that Daisy's primary concern was receiving Commission technical and other documents instead of a log of those documents. Further, the Court urged us to take the approach of erring on the side of disclosure. Therefore, Complaint Counsel's primary effort was focused on reviewing,

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copying, and producing documents previously listed on the privilege log even though we believed we had legitimate privilege claims for many of them. As we released these documents, the need for the revised log itself decreased and of course the potential content of the log changed as documents were released. (For the most part, the revised log is a listing of attorney communications and work product directly related to this case).[3]

Because our emphasis was on producing documents, not withholding them, Complaint Counsel concedes that it did not provide Daisy with a more detailed privilege log before the filing of this motion. Instead, Complaint Counsel focused the bulk of its efforts on reviewing and producing documents previously withheld as privileged. This approach followed the spirit and text of the July 24, 2002 Order. In addition, based upon the August 27, 2002 pre-hearing conference call, we believed that providing the documents responded to and addressed the concerns of Daisy and the Court. Complaint Counsel has been diligent in reviewing documents for production and has supplied thousands of pages of documents, before filing a log listing those documents.[4] It should also be noted that any privilege log is not a static document. In addition to reviewing thousands of documents that had been generated in the past, Complaint Counsel tried to review those that continue to be generated during the course of this litigation. Even the privilege log we will provide will be obsolete as soon as it is filed.[5] Daisy now has the vast majority of documents Complaint Counsel originally claimed as privileged. For

[3] To date, Daisy has not furnished Complaint Counsel with a privilege log in this proceeding.

[4] This review process has not been an insignificant one in terms of our resources at a time that we were also responding to various motions, attempting to obtain Respondent's cooperation in discovery, and taking and defending depositions.

[5] Given that both sides are generating privileged documents in their preparation for this litigation and will continue to do so, and given that Respondent has not indexed those documents at all, Complaint Counsel

these reasons, Complaint Counsel urges the Court to deny Respondent's Motion for Sanctions regarding its delay in providing a revised privilege log to Daisy.

B. Complaint Counsel Filed Responsive Supplemental Answers Pursuant to the Court's July 26, 2002 Order.

In its July 26, 2002 Order, the Court directed Complaint Counsel to furnish further responses to Respondent's Interrogatories nos. 17 and 19. Complaint Counsel filed and served supplemental answers to Daisy's First Set of Interrogatories on September 6, 2002. Counsel for Daisy admitted as much in its September 26, 2002 letter (See Exhibit A).

Respondent's concern is that Complaint Counsel did not provide Respondent with an expert witness list. Respondent based this demand on the original Pre-hearing schedule.[6]

During the Pre-Hearing Conference on June 7, 2002 in this matter, the parties jointly tendered a proposed pre-hearing schedule. As part of the schedule, the parties proposed that expert witness lists be **exchanged** on September 30, 2002. This date was set with the assumption that by this time, discovery would be complete or near completion. As previously explained, discovery is far from complete and a revised schedule submitted to the Court would be the most appropriate course of action to address the setbacks during the discovery process in this matter.

Both parties have failed to meet the September 30th deadline. However, Daisy believes that Complaint Counsel's failure to meet this deadline is a proper basis for

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hopes this Court will not find a need to continuously update the log with every e-mail, note, or other document that is generated as we progress.

[6] To date, Daisy has not identified experts or submitted reports to be used in this litigation to Complaint Counsel. Unfortunately, this is part of a continued pattern of behavior. Daisy always wants Complaint Counsel to provide information and witnesses, but is not itself always so forthcoming.

moving for sanctions. Complaint Counsel strenuously disagrees with this view. Instead, Complaint Counsel suggests that the pre-hearing schedule be revised to reflect the fact that the discovery process has been delayed in this matter. As stated above, Complaint Counsel will shortly submit a revised schedule to the Court.

As to identification of any materials that may have been generated by consultants retained by Complaint Counsel, the regulations are clear on this matter. Respondent may only discover facts known or opinions held by an expert retained by Complaint Counsel in anticipation of litigation or preparation for trial who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for Daisy to obtain facts or opinions on the same subject by other means. 16 C.F.R. § 1025.31(c)(4)(ii). Daisy has not made such a showing. In fact, Daisy has on occasion retained as a consultant, Ronald Joyce, former Daisy project engineer and one of the original designers of the Models 880 and 856 BB guns. This former Daisy engineer has the most knowledge of the subject BB guns. Daisy is unlikely to ever be able to meet this threshold test.

Complaint Counsel has always said it will identify the facts known and opinions held by experts as required by the Commission's Rules for Adjudicative Proceedings. Complaint Counsel reiterates that no final oral or written technical reports have been prepared for it by experts whom we expect to call as witnesses at trial, nor have we decided which of our consultants we might call as witnesses at trial. Our strategy will undoubtedly be affected by the depositions we still have not taken of key Daisy employees and former employees. Once these decisions have been made, Complaint Counsel intends to provide Respondent with such information as required by the Rules.

IV. CONCLUSION

Daisy's Motion for Sanctions should be denied because Respondent has not provided evidence that the requirements of 16 C.F.R. §1025.37 have been met.

A. Complaint Counsel has produced thousands of documents to Daisy that were included in our original privilege index. For this reason, Complaint Counsel's privilege log is much more condensed. The more detailed privilege will be provided on November 1, 2002.

B. Complaint Counsel provided proper supplemental answers to Daisy's Interrogatories nos. 17 and 19, pursuant to the Court's Order.

C. The exchange of expert witness lists is premature at this time because discovery of facts is far from complete. Complaint Counsel requests that the Court adopt a soon to be submitted revised schedule that more closely reflects where we are in this litigation.

Under 16 C.F.R. § 1025.37, the Presiding Officer "may" impose sanctions to remedy true discovery abuses "as is just." In this case, Complaint Counsel, instead of hunkering down and making privilege claims, has erred on the side of production. It would not be just to penalize Complaint Counsel under the circumstances.

WHEREFORE, Complaint Counsel respectfully requests that Respondent's Motion for Sanctions be denied.

Respectfully submitted,

Dated: October 31, 2002

Eric L. Stone
Quynh H. Nguyen
Complaint Counsel
4330 East West Highway
Bethesda, Maryland 20814
301-504-0626

EXHIBIT A

LOCKER GREENBERG & BRAININ, P.C.
ATTORNEYS AT LAW

AARON LOCKER
THEODORE M. GREENBERG
FREDERICK B. LOCKER
JEFFREY M. LOCKER

DAVID N. BRAININ
OF COUNSEL

420 FIFTH AVENUE, NEW YORK, N.Y. 10018
(212) 391-5200
TELECOPIER (212) 391-2035

September 26, 2002

Via Fax (301)504-0359 & Mail

Mr. William Moore
U S Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

Re: In the Matter of Daisy Manufacturing Company
CPSC Docket No 02-2

Dear Bill

As you know, on July 26, 2002 Judge Moran ordered that you provide us with a further response to our Interrogatories numbered 17 and 19 which required you to identify all technical reports of outside consultants and experts and to provide the substance thereof, if oral, or a copy thereof if in writing.

The Commission's response was that, while the Commission retained various consultants, no final oral or written reports have been prepared by experts who you expect to call as witnesses at trial, nor have you decided which of your consultants you intend to call as witnesses.

On September 30, 2002, under the pretrial schedule, you are required to furnish us with the names of all experts and consultants you intend to call at the trial. At that time we expect to receive a further response to Interrogatories 17 and 19 of our First Set of Special Interrogatories..

Very truly yours,

Jeffrey L. Locker

JML:dd
cc: Marianne McBeth, Esq.
William M. Griffin III, Esq.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No. 02-2
Respondent.	)	

ORDER

Upon consideration of Respondent's Motion for Sanctions, filed pursuant to 16 C.F.R. § 1025.37 for failure to comply with the Court's discovery Orders dated July 24, 2002 and July 26, 2002, and Complaint Counsel's response in opposition to,

IT IS HEREBY ORDERED that Respondent Daisy's Motion for Sanction for Failure to Comply with Discovery Orders Pursuant to Commission Rule for Adjudicative Proceeding 16 C.F.R. § 1025.37 is **DENIED**.

So Ordered.

William B. Moran
United States Administrative Law
Judge and Presiding Officer

Dated:
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2002, I caused a copy of the foregoing **Complaint Counsel's Opposition to Respondent's Motion for Sanctions for Failure to Comply with Discovery Orders Pursuant to Commission Rule for Adjudicative Proceeding 16 C.F.R. § 1025.37** and **Proposed Order** to be served upon all parties of record in these proceedings, as follows:

By facsimile and first class mail, postage prepaid to:

The Honorable William B. Moran, Administrative Law Judge
and Presiding Officer

By certified mail, return receipt requested, postage prepaid, and facsimile to:

Aaron Locker, Esq.
Jeffrey M. Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

Attorneys for Daisy Manufacturing Company

By first class mail, postage prepaid to:

William M. Griffin, III, Esq.
Friday, Eldredge & Clark
2000 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
Rogers, AR 72756

Attorneys for Daisy Manufacturing Company

By hand delivery to:

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408



Quynh Nguyen
Complaint Counsel for the
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814-4408

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Quynh H. Nguyen
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Fax: (301) 504-0359
Email: qnguyen@cpsc.gov

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Complaint Counsel

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756 Respondent.	CPSC Docket No. 02-2

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR SANCTIONS FOR FAILURE TO COMPLY WITH DISCOVERY ORDERS PURSUANT TO COMMISSION RULE FOR ADJUDICATIVE PROCEEDING 16 C.F.R. § 1025.37

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In its July 26, 2002 Order, the Court directed Complaint Counsel to furnish further responses to Respondent's Interrogatories nos. 17 and 19. Complaint Counsel filed and served supplemental answers to Daisy's First Set of Interrogatories on September 6, 2002. Counsel for Daisy admitted as much in its September 26, 2002 letter (See Exhibit A).

Respondent's concern is that Complaint Counsel did not provide Respondent with an expert witness list. Respondent based this demand on the original Pre-hearing schedule.[6]

During the Pre-Hearing Conference on June 7, 2002 in this matter, the parties jointly tendered a proposed pre-hearing schedule. As part of the schedule, the parties proposed that expert witness lists be **exchanged** on September 30, 2002. This date was set with the assumption that by this time, discovery would be complete or near completion. As previously explained, discovery is far from complete and a revised schedule submitted to the Court would be the most appropriate course of action to address the setbacks during the discovery process in this matter.

Both parties have failed to meet the September 30th deadline. However, Daisy believes that Complaint Counsel's failure to meet this deadline is a proper basis for

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hopes this Court will not find a need to continuously update the log with every e-mail, note, or other document that is generated as we progress.

[6] To date, Daisy has not identified experts or submitted reports to be used in this litigation to Complaint Counsel. Unfortunately, this is part of a continued pattern of behavior. Daisy always wants Complaint Counsel to provide information and witnesses, but is not itself always so forthcoming.

moving for sanctions. Complaint Counsel strenuously disagrees with this view. Instead, Complaint Counsel suggests that the pre-hearing schedule be revised to reflect the fact that the discovery process has been delayed in this matter. As stated above, Complaint Counsel will shortly submit a revised schedule to the Court.

As to identification of any materials that may have been generated by consultants retained by Complaint Counsel, the regulations are clear on this matter. Respondent may only discover facts known or opinions held by an expert retained by Complaint Counsel in anticipation of litigation or preparation for trial who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for Daisy to obtain facts or opinions on the same subject by other means. 16 C.F.R. § 1025.31(c)(4)(ii). Daisy has not made such a showing. In fact, Daisy has on occasion retained as a consultant, Ronald Joyce, former Daisy project engineer and one of the original designers of the Models 880 and 856 BB guns. This former Daisy engineer has the most knowledge of the subject BB guns. Daisy is unlikely to ever be able to meet this threshold test.

Complaint Counsel has always said it will identify the facts known and opinions held by experts as required by the Commission's Rules for Adjudicative Proceedings. Complaint Counsel reiterates that no final oral or written technical reports have been prepared for it by experts whom we expect to call as witnesses at trial, nor have we decided which of our consultants we might call as witnesses at trial. Our strategy will undoubtedly be affected by the depositions we still have not taken of key Daisy employees and former employees. Once these decisions have been made, Complaint Counsel intends to provide Respondent with such information as required by the Rules.

IV. CONCLUSION

Daisy's Motion for Sanctions should be denied because Respondent has not provided evidence that the requirements of 16 C.F.R. §1025.37 have been met.

A. Complaint Counsel has produced thousands of documents to Daisy that were included in our original privilege index. For this reason, Complaint Counsel's privilege log is much more condensed. The more detailed privilege will be provided on November 1, 2002.

B. Complaint Counsel provided proper supplemental answers to Daisy's Interrogatories nos. 17 and 19, pursuant to the Court's Order.

C. The exchange of expert witness lists is premature at this time because discovery of facts is far from complete. Complaint Counsel requests that the Court adopt a soon to be submitted revised schedule that more closely reflects where we are in this litigation.

Under 16 C.F.R. § 1025.37, the Presiding Officer "may" impose sanctions to remedy true discovery abuses "as is just." In this case, Complaint Counsel, instead of hunkering down and making privilege claims, has erred on the side of production. It would not be just to penalize Complaint Counsel under the circumstances.

WHEREFORE, Complaint Counsel respectfully requests that Respondent's Motion for Sanctions be denied.

Respectfully submitted,

Dated: October 31, 2002

Eric L. Stone
Quynh H. Nguyen
Complaint Counsel
4330 East West Highway
Bethesda, Maryland 20814
301-504-0626

EXHIBIT A

LOCKER GREENBERG & BRAININ, P.C.
ATTORNEYS AT LAW

AARON LOCKER
THEODORE M. GREENBERG
FREDERICK B. LOCKER
JEFFREY M. LOCKER

DAVID N. BRAININ
OF COUNSEL

420 FIFTH AVENUE, NEW YORK, N.Y. 10018
(212) 391-5200
TELECOPIER (212) 391-2035

September 26, 2002

Via Fax (301)504-0359 & Mail

Mr. William Moore
U S Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

Re: In the Matter of Daisy Manufacturing Company
CPSC Docket No 02-2

Dear Bill

As you know, on July 26, 2002 Judge Moran ordered that you provide us with a further response to our Interrogatories numbered 17 and 19 which required you to identify all technical reports of outside consultants and experts and to provide the substance thereof, if oral, or a copy thereof if in writing.

The Commission's response was that, while the Commission retained various consultants, no final oral or written reports have been prepared by experts who you expect to call as witnesses at trial, nor have you decided which of your consultants you intend to call as witnesses.

On September 30, 2002, under the pretrial schedule, you are required to furnish us with the names of all experts and consultants you intend to call at the trial. At that time we expect to receive a further response to Interrogatories 17 and 19 of our First Set of Special Interrogatories..

Very truly yours,

Jeffrey L. Locker

JML:dd
cc: Marianne McBeth, Esq.
William M. Griffin III, Esq.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No. 02-2
Respondent.	)	

ORDER

Upon consideration of Respondent's Motion for Sanctions, filed pursuant to 16 C.F.R. § 1025.37 for failure to comply with the Court's discovery Orders dated July 24, 2002 and July 26, 2002, and Complaint Counsel's response in opposition to,

IT IS HEREBY ORDERED that Respondent Daisy's Motion for Sanction for Failure to Comply with Discovery Orders Pursuant to Commission Rule for Adjudicative Proceeding 16 C.F.R. § 1025.37 is **DENIED**.

So Ordered.

William B. Moran
United States Administrative Law
Judge and Presiding Officer

Dated:
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2002, I caused a copy of the foregoing **Complaint Counsel's Opposition to Respondent's Motion for Sanctions for Failure to Comply with Discovery Orders Pursuant to Commission Rule for Adjudicative Proceeding 16 C.F.R. § 1025.37** and **Proposed Order** to be served upon all parties of record in these proceedings, as follows:

By facsimile and first class mail, postage prepaid to:

The Honorable William B. Moran, Administrative Law Judge
and Presiding Officer

By certified mail, return receipt requested, postage prepaid, and facsimile to:

Aaron Locker, Esq.
Jeffrey M. Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

Attorneys for Daisy Manufacturing Company

By first class mail, postage prepaid to:

William M. Griffin, III, Esq.
Friday, Eldredge & Clark
2000 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
Rogers, AR 72756

Attorneys for Daisy Manufacturing Company

By hand delivery to:

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408



Quynh Nguyen
Complaint Counsel for the
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814-4408

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Briana N. Harris
Trial Attorney
Legal Division
Office of Compliance

Tel: (301) 504-0626, Ext. 1367
Fax: (301) 504-0359
Email: bharris@cpsc.gov

Via Hand Delivery

August 30, 2002

Todd A. Stevenson, Secretary
Office of the Secretary
Consumer Product Safety Commission
4330 East-West Highway, Room 502
Bethesda, MD 20814

Re: ***In the Matter of Daisy Manufacturing Company***
CPSC Docket No. 02-2

Dear Mr. Stevenson:

Enclosed for filing please find four sets of the following document package in the above-referenced matter:

1. Application for Issuance of Subpoena Compelling Attendance, Testimony, and Production of Documents, with attachments **(Subpoena to Joe Murfin).**

Please forward the above to Judge Moran, the Presiding Officer in the above-captioned case. Please return one file-stamped copy set to the messenger for return to me. This document package is being served this date on all parties of record in this proceeding.

Sincerely,

Briana Harris
Complaint Counsel

Enclosure

cc: Aaron Locker, Esq. (via facsimile and first class mail, certified, return receipt requested)
William M. Griffin, III, Esq. (via first class mail)
Marianne McBeth, Esq. (via first class mail)

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

APPLICATION FOR ISSUANCE OF SUBPOENA
COMPELLING ATTENDANCE, TESTIMONY, AND PRODUCTION OF DOCUMENTS
(Joe Murfin)

To the COMMISSION
Through the PRESIDING OFFICER

Pursuant to the Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. §§ 1025.35 and 1025.38, a party may obtain a subpoena to compel attendance, testimony, and/or document production in connection with the deposition of another party (including the agents, employees, consultants, or prospective witnesses of that party) or a non-party. The party seeking the subpoena must submit an application through the Presiding Officer to the Commission for authorization.

The attached Subpoena Compelling Attendance, Testimony, and Production of Documents (hereinafter "Subpoena"; see Attachment A) is directed to Joe Murfin (hereinafter "Mr. Murfin"). Mr. Murfin is the current Vice-President of Marketing for Respondent Daisy Manufacturing Company (hereinafter "Daisy"), and in that capacity, Complaint Counsel believes that Mr. Murfin possesses knowledge about the following aspects of the Daisy Powerline BB

Guns that are the subject of this proceeding (hereinafter "the Daisy BB guns"): production quantity and production cost information for the Daisy BB guns; model designations for the Daisy BB guns; retail cost and sales information for the Daisy BB guns; marketing and advertising strategies for the Daisy BB guns; labeling and packaging strategies and changes for the Daisy BB guns; user demographics for the Daisy BB guns; guidelines and any and all changes for operation manuals, packaging inserts, and hangtags and/or labels for the Daisy BB guns.

Mr. Murfin's work at Daisy relates directly to allegations in the Complaint concerning, among other things, the defect and hazard issues in the case. Complaint Counsel believes that Mr. Murfin possesses knowledge relating to several issues relevant to the subject matter of this administrative proceeding.

Accordingly, Complaint Counsel asks that the Commission authorize the issuance of the attached Subpoena.

Respectfully submitted,

William J. Moore, Jr.
Briana N. Harris
Complaint Counsel
U.S. Consumer Product Safety Commission
Office of Compliance
4330 East West Highway, Room 613
Bethesda, Maryland 20814
(301) 504-0626, ext. 1367

August 30, 2002

ATTACHMENT A

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	**CPSC Docket No.: 02-2**
Respondent.	

TO: Joe Murfin
Daisy Manufacturing Company
400 West Stribling Drive
Rogers, Arkansas 72757

SUBPOENA COMPELLING ATTENDANCE,
TESTIMONY, AND PRODUCTION OF DOCUMENTS

On October 30, 2001, the staff (hereinafter "staff") of the United States Consumer Product Safety Commission (hereinafter "Commission") filed an administrative Complaint seeking public notification and remedial action to protect the public from an alleged substantial product hazard presented by Daisy Manufacturing Company's Powerline BB guns.

The Commission authorized issuance of this Subpoena Compelling Attendance, Testimony, and Production of Documents (hereinafter "Subpoena") under the Rules of Practice for Adjudicative Proceedings, 16 C.F.R. §1025.38 and its authority under Section 27(b)(3) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2076(b)(3).

I. GENERAL INSTRUCTIONS

The Commission's rules for adjudicative proceedings govern this Subpoena. See 16 C.F.R. § 1025.38.

You are required to produce the documents requested below under oath or affirmation, including, if applicable, a statement that all documents produced are true and correct copies of the originals and that they were maintained in the normal course of business. You shall answer the Subpoena, and you shall state your name, address, telephone number, and title, and describe your duties and responsibilities. To the extent the documents produced are within the scope of, and/or have been submitted in response to, the Subpoena, but are not within your custody and control, within seven calendar days after being served with this Subpoena: 1) identify the officials, employees, or other persons who have provided such documents; and 2) identify those individuals by name, address, title, duties, and responsibilities, and specify the documents they provided.

A sworn statement shall accompany your response attesting that a diligent search and inquiry was made for all responsive documents, and that your response is complete, true and accurate. If you cannot comply with a particular request for production of documents, the response shall specify with particularity the reason for the inability to comply. If the requested document is no longer in your possession, custody, or control, within seven calendar days of being served with this Subpoena, the response shall set forth the specific name, address, and telephone number of any person or organization you know or believe to have possession, custody, or control of that document.

If you believe any of the documents you are submitting contain or relate to a trade secret or other matter referred to in Section 1905 of Title 18 of the United States Code, you should

submit a written request for confidential treatment for that document, specifying in detail the basis for your claim.

If you fail to respond or you furnish false or misleading information, you may subject yourself to civil and criminal penalties under Sections 20 and 21 of the CPSA, 15 U.S.C. §§ 2069 and 2070, or to criminal prosecution under 18 U.S.C. § 1001.

Questions about this Subpoena should be directed to William J. Moore, Jr., Complaint Counsel, Consumer Product Safety Commission, Office of Compliance, Legal Division, 4330 East West Highway, Bethesda, Maryland 20814, (301) 504-0626, ext. 1348.

II. DEFINITIONS

1. "You" and "your" shall mean the party to whom this Subpoena is directed and Daisy Manufacturing Company (including if previously known under different names), including all of your past and present representatives, agents, and employees, and all other past and present persons acting or purporting to act on your behalf (including, but not limited to, all past and present agents and employees exercising discretion, discharging duties, making policy, or making decisions).

2. "Document" shall mean the original (or an identical copy when the original is not available) and each nonidentical copy of any written, graphic, photographic, audio, visual, or computer materials, however produced or reproduced, of any kind or description, whether sent, received, or otherwise, including, but not limited to, papers, books, letters, telefacsimiles, teletypes, photographs, motion pictures, videotapes, audio recordings, correspondence, drawings, engineering drawings, sketches, schematic drawings, manuals, blueprints, engineering change records, work papers, intra- and interoffice communications, corporate records, transcripts, minutes, reports, and recordings of telephone conversations, other conversations, interviews,

conferences, and meetings, affidavits, statements, summaries, opinions, court pleadings and filings, reports, indices, studies, analyses, proposals, evaluations, contracts, licenses, agreements, questionnaires, answers to questionnaires, statistical records, calendars, appointment books, diaries, telephone logs, lists, tabulations, charts, graphs, data sheets, computer tapes, records, disks, cards, printouts and programs; microfilms, electronic mail, all other records created or kept by electronic, photographic, mechanical, or computerized means, any other written, printed, or reproduced material, including all drafts, alterations, modifications, changes, amendments, and/or corrections of or to any of the foregoing, and things similar to any of the foregoing, regardless of their author or origin, however denominated.

3. "Person" shall mean any natural person, entity, group, committee, firm, sole proprietorship, partnership, corporation, business association, joint venture, trust, or other legal, business, or governmental entity, whether foreign or domestic.

4. "Relating to" or "related to" shall mean consisting of, referring to, describing, discussing, constituting, evidencing, containing, mentioning, concerning, pertaining to, citing, summarizing, analyzing, or bearing any logical or factual connection with the matter discussed.

5. "Identify" or "identity" when used with respect to a person shall mean to provide the person's present or last known name, residential address, telephone number, occupation, job or position, job title(s), employer, employer department and/or subject area in which the person works, business affiliation, and business or employment address, and the person's relationships or associations, if any, to you.

6. "Identify" or "identity" when used with respect to a business (including, but not limited to, Daisy Manufacturing Company and all other names by which said Company has been known), entity, building, property, or place shall mean the present or last known name, address, and telephone number, and all former names, of that business, entity, building, or place, its state

of incorporation, registration, or organization, the identity and address of its registered agent in each state where it is present and doing business or has a place of business, its present officers, directors, and shareholders, and its relationship, if any, to you.

7. "Identify" or "identity" when used with respect to a document shall mean the name or title of the document, a description of the document or record including its date of preparation and transmission, the author, sender, and recipient, a summary of the subject matter, and the identity of the person who currently has custody of, possession of, or control over the document. You may also identify a document by providing a complete and legible copy thereof, and by stating that you have done so.

8. The definition of terms listed in 15 U.S.C. § 2052 are incorporated in this definition as though fully set forth herein.

9. "The Daisy BB guns" shall mean the Powerline Airguns manufactured, labeled, designated, and/or distributed by Daisy Manufacturing Company (or by whatever names then known), including all versions, variations, and models, as identified in the Complaint filed in this matter, from 1972 through the present.

10. The term "model 880" includes the following Daisy BB gun model and product numbers: 880, 881, 882, 1455, 1880, 1881, 1882, 3305, 3480, 3933, 3934, 5150, 9072, 9082, 9083, 9093, 9355, 9382, and 9393.

11. The term "model 856" includes the following Daisy BB gun model and product numbers: 856, 860, 990, 2856, and 7856.

III. SPECIFIC INSTRUCTIONS

A. This request seeks production of all documents described herein and any attachments thereto, in your possession, custody, or control, or in the possession, custody, or

control of any of your attorneys, employees, agents, or representatives, and all documents and any attachments that you or any of your attorneys, employees, agents, or representatives have the legal right to obtain or have the ability to obtain from sources under their control.

B. This request for a document contemplates production of the document in its entirety, without abbreviation or expurgation, including any amendments thereto whether referred to in the document or otherwise.

C. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive. The word "including" shall be construed to mean without limitation. The words "any" and "all" shall be construed so as to make the request inclusive rather than exclusive.

D. The use of the past tense shall include the present tense, and the use of the present tense shall include the past tense, so as to make all definitions and discovery requests inclusive rather than exclusive.

E. The singular shall include the plural, and vice versa.

F. These requests shall be read, interpreted, and answered in accordance with these instructions and the definitions set forth herein. If the meaning of any word or phrase used herein is unclear to you, you are requested to contact William J. Moore, Jr. of the Commission staff for the purpose of resolving any perceived ambiguity. If any request cannot be complied with in full after exercising the required diligence, it shall be complied with to the extent possible with a full statement of all efforts to make full compliance and of all reasons full compliance cannot be made.

G. If it is claimed that the attorney-client privilege or any other privilege or exemption of any kind is applicable to any document ordered to be produced by this Subpoena,

specify the privilege claimed and the factual basis you contend supports the assertion of the privilege, and identify the document as follows:

i) State the date, nature, and subject matter of the document in sufficient detail so that the type and content can be readily ascertained;

ii) Identify each author of the document;

iii) Identify each preparer of the document;

iv) Identify each person who is an addressee or an intended recipient of the document;

v) Identify each person from whom the document was received;

vi) State the present location of the document and all copies thereof;

vii) Identify each person who has or ever had possession, custody, or control of the document or any copy thereof;

viii) State the number of pages, attachments, appendices, and exhibits; and

ix) Provide all further information concerning the document and the circumstances upon which the claim of privilege is asserted.

H. For any communication with respect to which a privilege or any other exemption is asserted, identify the persons or entities among whom the communication took place, the date of the communication, and the subject.

I. In the event that any document sought by this Subpoena has been destroyed, discarded, or otherwise disposed of, that document is to be identified as completely as possible including, without limitation, the following information:

i) Identify each author of the document;

ii) Identify each preparer of the document;

iii) Identify each addressee or intended recipient of the document;

iv) Identify each person who received the document;

v) State the date of the document;

vi) State the subject matter of the document with sufficient particularity to explain its nature and contents;

vii) State the date and reason for disposal of the document;

viii) Identify each person who authorized disposal of the document;

ix) Identify each person who disposed of the document.

J. If any document was, but is no longer, in your possession, custody, or control, identify the document in accordance with the "Definitions" section above and provide the following information:

i) State the disposition of the document;

ii) State the date such disposition was made;

iii) Identify the present custodian of the document, or, if the document no longer exists, so state;

iv) Identify the person(s) who made the decision regarding the disposition of the document; and

v) State the reasons for the disposition and describe the document and the contents of the document, including the title, author, position or title of the author, addressee, position or title of the addressee, whether indicated or blind copies were made, date, subject matter, number of pages, attachments or appendices, and all persons to whom the document was distributed, shown, or explained.

K. To facilitate identification and organization of the documents, bates-stamp all documents produced, and segregate the documents according to the numbered paragraph and subparagraph(s) to which they relate.

IV. PRODUCTION OF DOCUMENTS

You are hereby directed to provide the following:

1. All documents relating to the Daisy BB guns and of which you have knowledge and information of the facts therein relating to:

   a. all print advertisements for the Daisy BB guns;

   b. all marketing, promotion, age determination, and marketing plans of/for the Daisy BB guns;

   c. all labeling design information, strategies and changes for the Daisy BB guns;

   d. all marketing surveys and studies conducted for the Daisy BB guns;

   e. all operating manual and instruction manual information and changes for the Daisy BB guns;

   f. all packaging and insert design information and changes thereto for the Daisy BB guns;

   g. user, purchaser, and owner demographics for the Daisy BB guns;

   h. warnings contained on or provided with the Daisy BB guns;

   i. all product designs and design changes (and other changes) to the Daisy BB guns;

   j. all bases for evaluating or assessing consumer awareness or lack of awareness that the Daisy BB guns contain one or more BBs at any given time during use of said BB gun;

k. all safety mechanism(s) (automatic or otherwise) contained in the Daisy BB guns;

l. all data, evaluations, analyses or studies relating to actual user behavior while interacting with the Daisy BB guns;

m. BB muzzle velocity and accuracy when fired from the Daisy BB guns;

n. BB impact power when fired from the Daisy BB guns;

o. initial design and development of the Daisy BB guns; and

p. all reports and other documents concerning your evaluation and opinion rendered on behalf of Daisy in general and in connection with specific claims, lawsuits or other actions against Daisy involving the subject BB guns, whether as a Daisy employee and/or a consultant for Daisy.

2. All documents relating to the Daisy BB guns and of which you have knowledge and information of the facts therein relating to the personnel who designed, manufactured, marketed, sold, and tested the Daisy BB guns.

3. Your current curriculum vitae or resume.

You are ordered to produce the documents described in Section IV to William J. Moore, Jr., Complaint Counsel, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814 on or before September 9, 2002 at 5 P.M. EST.

V. APPEARANCE TO TESTIFY

You are directed to appear at the offices of Friday, Eldredge & Clark at 237 East Millsap Road, Suite 7, Fayetteville, Arkansas 72703-6282, to testify with respect to the subpoenaed documents, the subjects referred to in section IV (including documents previously provided to the CPSC staff relating to the Daisy BB guns), and related subjects, on September 20, 2002 at _____ CST, and continuing thereafter until your testimony is concluded.

BY ORDER OF THE COMMISSION

_____
TODD A. STEVENSON
Secretary
U.S. Consumer Product Safety Commission

DATE:

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2002, I served the foregoing **Application for Issuance of Subpoena Compelling Attendance, Testimony, and Production of Documents and the accompanying proposed Subpoena for Joe Murfin,** upon the following counsel for the parties of record in these proceedings:

By first class mail, certified, return receipt requested, postage prepaid, and facsimile to:

Aaron Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

Attorneys for Daisy Manufacturing Company

By first class mail, postage prepaid, to:

William M. Griffin, III, Esq.
Friday, Eldredge & Clark
2000 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
Rogers, AR 72756

Attorneys for Daisy Manufacturing Company

By hand delivery to:

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408

William J. Moore, Jr.
Briana N. Harris
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814-4408

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
	)	
Respondent	)	
	)	

Order on Respondent's Motion to Take an Interlocutory Appeal from Order Denying Respondent's Motion to Transmit Proposed Consent Agreement to the Commission

Respondent has filed a "Motion for Permission to Take an Interlocutory Appeal from Order Denying Respondent's Motion to Transmit Proposed Consent Agreement to the Commission." Citing 16 C.F.R. § 1025.24(b)(4) as the authority for interlocutory appeal, Daisy asserts there exists a controlling question of policy as to whether high velocity BB guns and airguns should be regulated by the voluntary standards process, that there is substantial ground for difference of opinion as to that policy, and that an immediate appeal may materially advance the ultimate termination of this litigation.

Daisy relates that since 1978 high velocity airguns have been produced under consensus voluntary standards and that, until this proceeding, the Consumer Product Safety Commission ("Commission") had deferred the regulation of such airguns to these voluntary standards. Daisy maintains that the law requires the Commission to rely upon such voluntary standards, as

opposed to regulation[1], "whenever a risk of injury can be reduced or eliminated thereby." Daisy Motion at 2. The Motion proceeds to discuss the factors to be weighed by the Commission in deciding whether to develop a regulation or rely upon a voluntary standard. Daisy then points to similarities between the airguns in this litigation and the guns produced by a competitor, asserting that the problems alleged are not unique to Daisy's guns "but exist throughout the industry."[2] *Id.* at 4. It concludes that the Court should determine that there is a controlling question of policy as to whether voluntary standards should once again be used as the means for setting safety standards for airguns and that such a determination will enable the Commission to review the Court's earlier denial[3] of Daisy's Motion to Transmit its Proposed Consent Agreement, all of which will materially advance the ultimate termination of this litigation.

In Complaint Counsel's memorandum in opposition to Daisy's Motion, it maintains that the standard for an interlocutory appeal under 16 C.F.R. § 1025.24(b), requiring a determination that there is a controlling question of law or policy as to which there is a substantial ground for differences of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation, has not been met. It takes issue with Daisy's contention that the Commission must defer to voluntary standards, observing that Section 15 of the Consumer Product Safety Act ("CPSA") and the Federal Hazardous Substances Act ("FHSA") do not support that claim. It also notes that this is not a rulemaking effort to promulgate a safety standard for airguns, but rather an adjudicative proceeding to determine whether the specific BB guns cited in the Complaint present a substantial product hazard. While maintaining that the problems alleged in the Complaint are unique in their design and characteristics to the cited guns, it asserts that even if other manufacturers' guns had these problems, the Commission would not be precluded from bringing this action against Daisy.

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[1]Daisy notes that voluntary standards, and revision of those standards, addressing high velocity airguns have been produced in 1985, 1992 and 2000 and that petitions seeking mandatory regulation of such airguns have been rejected by the Commission, with the most recent rejection occurring in 1989

[2]While the theme of Daisy's Motion is that this matter should be resolved by the voluntary standards or, implicitly, as a last resort, by mandatory regulation, it then proceeds to advance arguments to show the Complaint is without merit. These include assertions regarding user culpability, alleged chicanery by CPSC staff to twist facts, and the decision to "selectively proceed against one manufacturer... ." In its response, Complaint Counsel understandably felt it necessary to respond to these allegations. The Court will not prejudge this case. No decision, indeed no consideration, has been or will be made concerning the various claims regarding the merits of the claims or defenses by the parties. Properly, in deciding this case, the Court will only consider the evidence, in all its forms, which is admitted into evidence at the hearing.

[3]On September 25, 2002 the Court, with an economy of words, denied Daisy Motion to Transmit Proposed Consent Agreement and Order to the Commission. Obviously, implicit in the denial, it was determined that the requirements of 16 C.F.R.§ 1025.26(d) had not been met.

The Court agrees that Daisy has not demonstrated that there is a controlling question of policy, or law, raised by its proposed, unilateral, consent agreement, or in its motion to appeal the denial of its motion to transmit that consent agreement, nor has it shown that subsequent review will provide an inadequate remedy. Daisy seems not to appreciate that the question whether high velocity BB guns should be regulated under voluntary standards does not preclude a complaint under Section 15 of the CPSA or the FHSA. This proceeding does not involve a petition seeking mandatory regulation of airguns nor does it involve a determination whether the current voluntary standards for the regulation of airguns need to be revised.

Rather than framing the issue as Daisy presents it – whether a mandatory standard for airguns is necessary or whether there already is an adequate existing voluntary standard or whether such voluntary standard needs to be revised – the issue is whether certain Daisy Powerline Airguns models contain defects which create a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, and whether those models present a substantial risk of injury to children under Sections 15(c)(1) and 15(c)(2) of the FHSA. There is nothing in either of those sections suggesting that voluntary standards operate to stymie their application. The Court also agrees that, even if, as asserted, the alleged defects also exist in airguns produced by other manufacturers, this would not preclude the CPSC from proceeding against Daisy here. The Court concludes that it is not appropriate to certify Daisy's claim for interlocutory appeal. Daisy has not demonstrated that the Court's ruling, denying Daisy's Motion to transmit its Proposed Consent Agreement, involves a controlling question of law or policy as to which there is substantial ground for differences of opinion, nor that an immediate appeal from the ruling may materially advance the ultimate determination of the litigation or that subsequent review will provide an inadequate remedy.

Accordingly, Respondent Daisy's Motion is DENIED.

William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: October 23, 2002

In the Matter of Daisy Manufacturing Company d/b/a Daisy Outdoor Products, Respondent
CPSC Docket No. 02-2

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Respondent's Motion To Take An Interlocutory Appeal From Order Denying Respondent's Motion To Transmit Proposed Consent Agreement To The Commission**, dated October 23, 2002, was sent this day in the following manner to the addressees listed below:

Sent by Facsimile and Regular Mail to:

Eric L. Stone, Esquire
William Moore, Esquire
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Todd Stevenson, Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

William M. Griffin, III, Esquire
Friday Eldredge & Clark
2000 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esquire
Daisy Manufacturing Company, Inc.
400 W. Stribling Avenue
Rogers, AR 72756

Aaron Locker, Esquire
Jeffrey M. Locker, Esquire
Locker, Greenberg & Brainin
420 Fifth Avenue, 26th Floor
New York, NY 10018

Marian Whiting-Belle for
Nelida Torres
Legal Staff Assistant

Dated: October 23, 2002

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
	)	
Respondent	)	
	)	

Order on Respondent's Motion to Take an Interlocutory Appeal from Order Denying Respondent's Motion to Transmit Proposed Consent Agreement to the Commission

Respondent has filed a "Motion for Permission to Take an Interlocutory Appeal from Order Denying Respondent's Motion to Transmit Proposed Consent Agreement to the Commission." Citing 16 C.F.R. § 1025.24(b)(4) as the authority for interlocutory appeal, Daisy asserts there exists a controlling question of policy as to whether high velocity BB guns and airguns should be regulated by the voluntary standards process, that there is substantial ground for difference of opinion as to that policy, and that an immediate appeal may materially advance the ultimate termination of this litigation.

Daisy relates that since 1978 high velocity airguns have been produced under consensus voluntary standards and that, until this proceeding, the Consumer Product Safety Commission ("Commission") had deferred the regulation of such airguns to these voluntary standards. Daisy maintains that the law requires the Commission to rely upon such voluntary standards, as

opposed to regulation[1], "whenever a risk of injury can be reduced or eliminated thereby." Daisy Motion at 2. The Motion proceeds to discuss the factors to be weighed by the Commission in deciding whether to develop a regulation or rely upon a voluntary standard. Daisy then points to similarities between the airguns in this litigation and the guns produced by a competitor, asserting that the problems alleged are not unique to Daisy's guns "but exist throughout the industry."[2] *Id.* at 4. It concludes that the Court should determine that there is a controlling question of policy as to whether voluntary standards should once again be used as the means for setting safety standards for airguns and that such a determination will enable the Commission to review the Court's earlier denial[3] of Daisy's Motion to Transmit its Proposed Consent Agreement, all of which will materially advance the ultimate termination of this litigation.

In Complaint Counsel's memorandum in opposition to Daisy's Motion, it maintains that the standard for an interlocutory appeal under 16 C.F.R. § 1025.24(b), requiring a determination that there is a controlling question of law or policy as to which there is a substantial ground for differences of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation, has not been met. It takes issue with Daisy's contention that the Commission must defer to voluntary standards, observing that Section 15 of the Consumer Product Safety Act ("CPSA") and the Federal Hazardous Substances Act ("FHSA") do not support that claim. It also notes that this is not a rulemaking effort to promulgate a safety standard for airguns, but rather an adjudicative proceeding to determine whether the specific BB guns cited in the Complaint present a substantial product hazard. While maintaining that the problems alleged in the Complaint are unique in their design and characteristics to the cited guns, it asserts that even if other manufacturers' guns had these problems, the Commission would not be precluded from bringing this action against Daisy.

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[1]Daisy notes that voluntary standards, and revision of those standards, addressing high velocity airguns have been produced in 1985, 1992 and 2000 and that petitions seeking mandatory regulation of such airguns have been rejected by the Commission, with the most recent rejection occurring in 1989

[2]While the theme of Daisy's Motion is that this matter should be resolved by the voluntary standards or, implicitly, as a last resort, by mandatory regulation, it then proceeds to advance arguments to show the Complaint is without merit. These include assertions regarding user culpability, alleged chicanery by CPSC staff to twist facts, and the decision to "selectively proceed against one manufacturer... ." In its response, Complaint Counsel understandably felt it necessary to respond to these allegations. The Court will not prejudge this case. No decision, indeed no consideration, has been or will be made concerning the various claims regarding the merits of the claims or defenses by the parties. Properly, in deciding this case, the Court will only consider the evidence, in all its forms, which is admitted into evidence at the hearing.

[3]On September 25, 2002 the Court, with an economy of words, denied Daisy Motion to Transmit Proposed Consent Agreement and Order to the Commission. Obviously, implicit in the denial, it was determined that the requirements of 16 C.F.R.§ 1025.26(d) had not been met.

The Court agrees that Daisy has not demonstrated that there is a controlling question of policy, or law, raised by its proposed, unilateral, consent agreement, or in its motion to appeal the denial of its motion to transmit that consent agreement, nor has it shown that subsequent review will provide an inadequate remedy. Daisy seems not to appreciate that the question whether high velocity BB guns should be regulated under voluntary standards does not preclude a complaint under Section 15 of the CPSA or the FHSA. This proceeding does not involve a petition seeking mandatory regulation of airguns nor does it involve a determination whether the current voluntary standards for the regulation of airguns need to be revised.

Rather than framing the issue as Daisy presents it – whether a mandatory standard for airguns is necessary or whether there already is an adequate existing voluntary standard or whether such voluntary standard needs to be revised – the issue is whether certain Daisy Powerline Airguns models contain defects which create a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, and whether those models present a substantial risk of injury to children under Sections 15(c)(1) and 15(c)(2) of the FHSA. There is nothing in either of those sections suggesting that voluntary standards operate to stymie their application. The Court also agrees that, even if, as asserted, the alleged defects also exist in airguns produced by other manufacturers, this would not preclude the CPSC from proceeding against Daisy here. The Court concludes that it is not appropriate to certify Daisy's claim for interlocutory appeal. Daisy has not demonstrated that the Court's ruling, denying Daisy's Motion to transmit its Proposed Consent Agreement, involves a controlling question of law or policy as to which there is substantial ground for differences of opinion, nor that an immediate appeal from the ruling may materially advance the ultimate determination of the litigation or that subsequent review will provide an inadequate remedy.

Accordingly, Respondent Daisy's Motion is DENIED.

William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: October 23, 2002

In the Matter of Daisy Manufacturing Company d/b/a Daisy Outdoor Products, Respondent
CPSC Docket No. 02-2

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Respondent's Motion To Take An Interlocutory Appeal From Order Denying Respondent's Motion To Transmit Proposed Consent Agreement To The Commission**, dated October 23, 2002, was sent this day in the following manner to the addressees listed below:

Sent by Facsimile and Regular Mail to:

Eric L. Stone, Esquire
William Moore, Esquire
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Todd Stevenson, Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

William M. Griffin, III, Esquire
Friday Eldredge & Clark
2000 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esquire
Daisy Manufacturing Company, Inc.
400 W. Stribling Avenue
Rogers, AR 72756

Aaron Locker, Esquire
Jeffrey M. Locker, Esquire
Locker, Greenberg & Brainin
420 Fifth Avenue, 26th Floor
New York, NY 10018

Marian Whiting-Belle for
Nelida Torres
Legal Staff Assistant

Dated: October 23, 2002

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

TO: Marianne McBeth, Esq.
Daisy Manufacturing Company
400 West Stribling Drive
Rogers, Arkansas 72757

C/O Jeffrey M. Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

Attorneys for Daisy Manufacturing Company

SUBPOENA COMPELLING ATTENDANCE,
TESTIMONY, AND PRODUCTION OF DOCUMENTS

On October 30, 2001, the staff (hereinafter "staff") of the United States Consumer Product Safety Commission (hereinafter "Commission") filed an administrative complaint seeking public notification and remedial action to protect the public from a substantial product hazard presented by Daisy Manufacturing Company's Powerline Airguns.

The Commission authorized issuance of this Subpoena Compelling Attendance, Testimony, and Production of Documents (hereinafter "Subpoena") under the Rules of Practice

for Adjudicative Proceedings, 16 C.F.R. §1025.38 and its authority under Section 27(b)(3) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2076(b) (3).

I. GENERAL INSTRUCTIONS

The Commission's rules for adjudicative proceedings govern this Subpoena. See 16 C.F.R. § 1025.38.

You are required to produce the documents requested below under oath or affirmation, including, if applicable, a statement that all documents produced are true and correct copies of the originals and that they were maintained in the normal course of business. You shall answer the Subpoena, and you shall state your name, address, telephone number, and title, and describe your duties and responsibilities. To the extent the documents produced are within the scope of, and/or have been submitted in response to, the Subpoena, but are not within your custody and control, identify the officials, employees, or other persons who have provided such documents. Identify those individuals by name, address, title, duties, and responsibilities, and specify the documents they provided.

A sworn statement should accompany your response attesting that a diligent search and inquiry was made for all responsive documents, and that your response is complete, true and accurate. If you cannot comply with a particular request for production of documents, the response shall specify with particularity the reason for the inability to comply. If the requested document is no longer in your possession, custody, or control, the response shall set forth the name, address, and telephone number of any person or organization you know or believe to have possession, custody, or control of that document.

If you believe any of the documents you are submitting contain or relate to a trade secret or other matter referred to in Section 1905 of Title 18 of the United States Code, you should

submit a written request for confidential treatment for that document, specifying in detail the basis for your claim.

If you fail to respond or you furnish false or misleading information, you may subject yourself to civil and criminal penalties under Sections 20 and 21 of the CPSA, 15 U.S.C. §§ 2069 and 2070, or to criminal prosecution under 18 U.S.C. § 1001.

Questions about this Subpoena should be directed to Howard N. Tarnoff, Trial Attorney, Consumer Product Safety Commission, Office of Compliance, Legal Division, 4330 East West Highway, Bethesda, Maryland 20814, (301) 504-0626, ext. 1382.

II. DEFINITIONS

1. "You" and "your" shall mean the party to whom this Subpoena is directed (including if previously known under different names), including all of your past and present representatives, agents, and employees, and all other past and present persons acting or purporting to act on your behalf (including, but not limited to, all past and present agents and employees exercising discretion, discharging duties, making policy, or making decisions).

2. "Document" shall mean the original (or an identical copy when the original is not available) and each nonidentical copy of any written, graphic, photographic, audio, visual, or computer materials, however produced or reproduced, of any kind or description, whether sent, received, or otherwise, including, but not limited to, papers, books, letters, telefacsimiles, teletypes, photographs, motion pictures, videotapes, audio recordings, correspondence, drawings, sketches, schematics, manuals, blueprints, work papers, intra- and interoffice communications, transcripts, minutes, reports, and recordings of telephone conversations, other conversations, interviews, conferences, and meetings, affidavits, statements, summaries, opinions, court pleadings and filings, reports, indices, studies, analyses, evaluations, contracts, licenses,

agreements, questionnaires, answers to questionnaires, statistical records, calendars, appointment books, diaries, telephone logs, lists, tabulations, charts, graphs, data sheets, computer tapes, records, disks, cards, printouts and programs, microfilms, electronic mail, all other records created or kept by electronic, photographic, mechanical, or computerized means, any other written, printed, or reproduced material, including all drafts, alterations, modifications, changes, amendments, and/or corrections of or to any of the foregoing, and things similar to any of the foregoing, regardless of their author or origin, however denominated.

3. "Person" shall mean any natural person, entity, group, firm, sole proprietorship, partnership, corporation, business association, joint venture, trust, or other legal, business, or governmental entity, whether foreign or domestic.

4. "Relating to" or "related to" shall mean consisting of, referring to, describing, discussing, constituting, evidencing, containing, mentioning, concerning, pertaining to, citing, summarizing, analyzing, or bearing any logical or factual connection with the matter discussed.

5. "Identify" or "identity" when used with respect to a person shall mean to provide the person's present or last known name, residential address, telephone number, occupation, job or position, job title(s), employer, employer department and/or subject area in which the person works, business affiliation, and business or employment address, and the person's relationships or associations, if any, to you.

6. "Identify" or "identity" when used with respect to a business, entity, building, property, or place shall mean the present or last known name, address, and telephone number, and all former names, of that business, entity, building, or place, its state of incorporation, registration, or organization, the identity and address of its registered agent in each state where it

is present and doing business or has a place of business, its present officers, directors, and shareholders, and its relationship, if any, to you.

7. "Identify" or "identity" when used with respect to a document shall mean the name or title of the document, a description of the document or record including its date of preparation and transmission, the author, sender, and recipient, a summary of the subject matter, and the identity of the person who currently has custody of, possession of, or control over the document. You may also identify a document by providing a complete and legible copy thereof, and by stating that you have done so.

8. The definition of terms listed in 15 U.S.C. § 2052 are incorporated in this definition as though fully set forth herein.

9. "Powerline Airgun" or "airgun" or Daisy Airgun" or "Daisy Powerline Airgun" shall mean the Powerline Airguns manufactured, labeled, designated, and/or distributed by Daisy Manufacturing Company, including all versions, variations, and model years.

10. The term "model 880" includes the following airgun model and product numbers: 880, 881, 882, 1455, 1880, 1881, 1882, 3305, 3480, 3933, 3934, 5150, 9072, 9082, 9083, 9093, 9355, 9382, and 9393.

11. The term "model 856" includes the following airgun model and product numbers: 856, 860, 990, and 7856.

III. SPECIFIC INSTRUCTIONS

A. This request seeks production of all documents described herein and any attachments thereto, in your possession, custody, or control, or in the possession, custody, or control of any of your attorneys, employees, agents, or representatives, and all documents and

any attachments that you or any of your attorneys, employees, agents, or representatives have the legal right to obtain or have the ability to obtain from sources under their control.

B. This request for a document contemplates production of the document in its entirety, without abbreviation or expurgation, including any amendments thereto whether referred to in the document or otherwise.

C. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive. The word "including" shall be construed to mean without limitation. The words "any" and "all" shall be construed so as to make the request inclusive rather than exclusive.

D. The use of the past tense shall include the present tense, and the use of the present tense shall include the past tense, so as to make all definitions and discovery requests inclusive rather than exclusive.

E. The singular shall include the plural, and vice versa.

F. These requests shall be read, interpreted, and answered in accordance with these instructions and the definitions set forth herein. If the meaning of any word or phrase used herein is unclear, you are requested to contact Howard N. Tarnoff of the Commission staff for the purpose of resolving any ambiguity. If any request cannot be complied with in full after exercising the required diligence, it shall be complied with to the extent possible with a full statement of all efforts to make full compliance and of all reasons full compliance cannot be made.

G. If it is claimed that the attorney-client privilege or any other privilege is applicable to any document sought by this Subpoena, specify the privilege claimed and the

factual basis you contend supports the assertion of the privilege, and identify the document as follows:

i) State the date, nature, and subject matter of the document;

ii) Identify each author of the document;

iii) Identify each preparer of the document;

iv) Identify each person who is an addressee or an intended recipient of the document;

v) Identify each person from whom the document was received;

vi) State the present location of the document and all copies thereof;

vii) Identify each person who has or ever had possession, custody, or control of the document or any copy thereof;

viii) State the number of pages, attachments, appendices, and exhibits; and

ix) Provide all further information concerning the document and the circumstances upon which the claim of privilege is asserted.

H. For any communication with respect to which a privilege is asserted, identify the persons or entities among whom the communication took place, the date of the communication, and the subject.

I. In the event that any document sought by this Subpoena has been destroyed, discarded, or otherwise disposed of, that document is to be identified as completely as possible including, without limitation, the following information:

i) Identify each author of the document;

ii) Identify each preparer of the document;

iii) Identify each addressee or intended recipient of the document;

iv) Identify each person who received the document;

v) State the date of the document;

vi) State the subject matter of the document;

vii) State the reason for disposal of the document;

viii) Identify each person who authorized disposal of the document;

ix) Identify each person who disposed of the document.

J. If any document was, but is no longer, in your possession, custody, or control, provide the following information:

i) State the disposition of the document;

ii) State the date such disposition was made;

iii) Identify the present custodian of the document, or, if the document no longer exists, so state;

iv) Identify the person(s) who made the decision regarding the disposition of the document; and

v) State the reasons for the disposition and describe the document and the contents of the document, including the title, author, position or title of the author, addressee, position or title of the addressee, whether indicated or blind copies were made, date, subject matter, number of pages, attachments or appendices, and all persons to whom the document was distributed, shown, or explained.

K. To facilitate identification and organization of the documents, bates-stamp all documents produced, and segregate the documents according to the numbered paragraph or subparagraphs to which they relate.

IV. PRODUCTION OF DOCUMENTS

You are hereby directed to provide the following:

1. Each and every document identified in the following responses within Respondent's Answers to Complaint Counsel's First and Second Set(s) of Special Interrogatories: Answers 8, 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 54, 57, 64, 67, 70, 75, 81, 84, 87, 91, 94, 104, 106, 109, 115, 118, 121, 124, 128, 132, 135, 138, 141, 144, 147, 150, 153, 156, 159, 163, 168, 171, 174, 177, and 180.

2. To the extent not previously produced to the CPSC staff, all documents relating to Daisy Powerline Airguns and of which you have knowledge and information of the facts therein concerning:

   a. production quantity and production cost information;

   b. model designations;

   c. feature differentiation between different models;

   d. retail cost and sales information;

   e. BB loading and airgun operating information;

   f. BB movement and lodging within the airguns;

   g. powering the airguns;

   h. the rifle barrel, the magazine, and the riflescope for the airguns;

   i. changes (design or otherwise) to the airguns;

   j. awareness of consumers that the airguns contain BBs;

   k. the safety mechanism (automatic or otherwise) contained in the airguns;

   l. user demographics for the airguns;

   m. user behavior for the airguns; and

n. marketing of the airguns.

3. Your current curriculum vitae or resume.

You are ordered to produce the documents described in Section IV at the offices of Friday, Eldredge & Clark at 237 East Millsap Road, Suite 7, Fayetteville, Arkansas 72703-6282 on September 18, 2002 at 1:30 P.M.

V. APPEARANCE TO TESTIFY

You are directed to appear at the offices of Friday, Eldredge & Clark at 237 East Millsap Road, Suite 7, Fayetteville, Arkansas 72703-6282 to testify with respect to the documents and matters referred to in section IV (including documents previously provided to the CPSC staff relating to Daisy Powerline Airguns), on September 18, 2002 at 1:30 P.M., and continuing thereafter until your testimony is concluded.

BY ORDER OF THE COMMISSION

_____

TODD A. STEVENSON
Secretary
U.S. Consumer Product Safety Commission

DATE:

LOCKER GREENBERG & BRAININ, P.C.
ATTORNEYS AT LAW

AARON LOCKER
THEODORE M. GREENBERG
FREDERICK B. LOCKER
JEFFREY M LOCKER

DAVID N. BRAININ
OF COUNSEL

420 FIFTH AVENUE, NEW YORK, N.Y. 10018
(212) 391-8200
TELECOPIER (212) 391-2035

November 4, 2002

Via FAX - (202) 565-0044 & Mail

Honorable William Moran
c/o Whiting Beale
1200 Pennsylvania Avenue, N W
Suite 1900L
Washington, D C 20460-2001

Re: In the Matter of Daisy Manufacturing Company
CPSC Docket: 02-2

Dear Judge Moran:

Pursuant to the provisions of 16 C.F.R. 1025.23(c), which permits the Court, in its discretion, to allow a reply, Respondent's counsel seeks leave of the Presiding Officer to file the following Reply to Complaint Counsel's Opposition to Respondent's Motion for Sanctions for Failure to Comply with Discovery Orders Pursuant to the Commission Rule for Adjudicative Proceedings, 16 C F R. §1025 37

Sincerely,

Aaron Locker

AL:jv
Enc

cc: Mr. Todd Stevenson - via FAX & Mail
William Moore, Esq - via FAX & Mail

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, INC., doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No : 02-2
Respondent.	

RESPONDENT'S REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR SANCTIONS FOR FAILURE TO COMPLY WITH DISCOVERY ORDERS PURSUANT TO THE COMMISSION RULE FOR ADJUDICATIVE PROCEEDINGS, 16 C.F.R. §1025.37

A. Complaint Counsel's Failure to File Responsive Supplemental Answers Pursuant to the Court's July 26, 2002 Order

1 Pursuant to Respondent's First Set of Special Interrogatories served on Complaint Counsel on April 12, 2002 and its Motion to Compel More Complete Answers to Its First Set of Special Interrogatories served on June 24, 2002, Respondent, in Interrogatories 17 and 19, sought the identity of Complaint Counsel's expert witnesses, together with a copy of their written opinion or the substance of any oral opinion.

2 Although the Court ordered their production on September 26, 2002, to date, these have still not been provided on the grounds that Complaint Counsel has not yet selected those expert witnesses who will testify on its behalf at the trial.

3 The Complaint in this case issued on October 30, 2001, following Complaint Counsel's investigation of Respondent of approximately six (6) months or more in duration.

4 At the time of its issuance, Commissioner Mary Sheila Gall, in her dissenting opinion, referred to the Commission staff having retained a gunsmith expert and a materials science expert to examine Daisy BB guns alleged to lodge BB's in the magazine or elsewhere, and that the Commission had no written report from either of these experts as "part of a litigation strategy" [1]

5 Now, more than one year later, having failed to provide an adequate initial or supplemental response to Respondent's First Set of Interrogatories, Complaint Counsel still maintains that it has not designated any experts who will testify at the trial This is nonsense and an affront to the Court Respondent was entitled to a forthcoming response to its Interrogatories 17 and 19 After framing its Complaint alleging a theory of lodging more than a year ago, Complaint Counsel claims that because of delays in deposition and discovery process it still does not have experts which it can designate for the trial

6 Now, for the first time, Respondent is suggesting that the trial schedule agreed upon by the parties and approved by the Court which called upon Complaint Counsel to identify its experts on September 30, 2002, be advanced under a new pre-trial schedule it has not yet proposed

7 After a year and a half of investigation and discovery, more than one year after issuance of the Complaint herein, Complaint Counsel should be able to designate its experts and provide Respondent with copies of their written testimony or substance of their oral testimony in response to Interrogatories 17 and 19

8 Complaint Counsel merely seeks to delay these proceedings as long as possible without providing counsel for Respondent with the Court-ordered supplemental responses to

---

[1] See page 1 of Statement of Honorable Mary Sheila Gall dated October 30, 2001

Respondent's interrogatories The pre-trial process has and will continue to be protracted, but this has nothing to do with the experts selected by Complaint Counsel upon whose oral opinions it has framed and issued this Complaint and brings this action. Complaint Counsel's failure is deliberate and calculated and clearly in violation of the Commission's Rules for Adjudicative Proceedings

9. The Complaint should be stricken in accordance with the provisions of 16 C F R. 1025 37, which states as follows:

> "If a party fails to obey an order to provide or permit discovery, the Presiding Officer may take such action as is just, including but not limited to the following:
>
> ...
>
> (f) Order that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order was issued, be stricken, or that decision on the pleadings be rendered against the party, or both; ..."

See also *Fleet Capital Corp. v. Yamaha Motor Corp.*, No. 01 Civ 1047, 2002 WL 31108380 (Sept 23, 2002), " failure to disclose the identity of the expert witness was neither substantially justified, nor harmless "

Dated: November 4, 2002

Respectfully submitted,

LOCKER GREENBERG & BRAININ, P.C.
Attorneys for Respondent
DAISY MANUFACTURING COMPANY
420 Fifth Avenue
New York, NY 10018
Tel.: (212) 391-5200
FAX: (212) 391-2035

By: _____
Aaron Locker
A Member of the Firm

FRIDAY ELDREDGE & CLARK, LLP
Attorneys for Respondent
William M. Griffin, III
2000 Regions Center
400 West Capitol Avenue
Little Rock, AR 72201-3493
Tel: (501) 376-2011

Marianne McBeth, Esq.
General Counsel for Respondent
DAISY MANUFACTURING COMPANY
400 West Stribling Drive
Rogers, Arkansas 72757
Tel.: (501) 636-1200
FAX: (501) 636-1163

F:\WPFILES\Daisy\Reply to CC Opposition to Motion for Sanctions.wpd

CERTIFICATE OF SERVICE

I am over the age of 18 years and not a party to the within action. I hereby certify that on November 4, 2002, I have served the attached document described as **RESPONDENT'S REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR SANCTIONS FOR FAILURE TO COMPLY WITH DISCOVERY ORDERS PURSUANT TO THE COMMISSION RULE FOR ADJUDICATIVE PROCEEDINGS, 16 C.F.R. §1025.37** on all parties and participants of record in these proceedings as follows:

ON:

Todd Stevenson, Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408
Via FAX: (301) 504-0127

William Moore, Esq.
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408
Via FAX: (301) 504-0359

Honorable William Moran
c/o Whiting Beale
1200 Pennsylvania Avenue, N.W
Suite 1900L
Washington, D.C. 20460-2001
Via FAX: (202) 565-0044

William M. Griffin, III, Esq.
Friday Eldredge & Clark
2000 Regions Center
400 West Capitol
Little Rock, AR 72201-3493
Via FAX: (501) 376-2147

Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
Rogers, AR 72756
Via FAX: (501) 636-1163

by facsimile transmission and by placing a true copy thereof enclosed in a sealed envelope . I am "readily familiar" with the firm's practice of collection and processing for mailing. Under the practice it would be deposited with U.S Postal Service on that same day with postage thereon fully prepared in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Jean Vincent

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No.: 02-2
Respondent.	)	

COMPLAINT COUNSEL'S SUPPLEMENTAL ANSWERS TO RESPONDENT'S FIRST SET OF SPECIAL INTERROGATORIES

Complaint Counsel, pursuant to the Court's Order on Respondent's Motion to Compel More Complete Answers to Its First Set of Special Interrogatories, dated July 26, 2002, and 16 C.F.R. §1025.32, hereby provides the following Supplemental Answers to Respondent's First Set of Special Interrogatories.

Where Commission employees are identified in the Supplemental Answers, the present business address and telephone number of each such employee is as follows, unless otherwise stated: U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, 301-504-0626 x1348. Where persons associated with the Commission are named in the Supplemental Answers, the answers include their last known business address to the extent available to Complaint Counsel.

Complaint Counsel has not completed its investigation of the facts related to this matter, has not completed discovery and has not completed its preparation for trial. All answers contained herein are based on only such information and documentation that is

presently available to and specifically known to Complaint Counsel and relate to those contentions it has alleged. It is anticipated that further discovery, independent investigation, research and analysis may reveal additional facts, add to known facts as well as establish new factual and legal contentions. This may lead to substantial additions to, changes in and variations from the responses herein set forth.

The following Special Interrogatory responses are given without prejudice to the responding party's right to produce evidence of any subsequently discovered fact or facts. Accordingly, Complaint Counsel reserves the right to supplement or change these Supplemental Answers herein as additional facts are ascertained, analysis is made, legal research is completed. These Supplemental Answers should in no way prejudice Complaint Counsel in relation to further discovery, research, or analysis.

Complaint Counsel is providing Respondent with a more limited privilege log, identifying documents withheld, as a follow-up to Complaint Counsel's Response to Respondent's First Request for Production of Documents. By letters to Daisy dated July 15, 18 and 30, 2002, Complaint Counsel provided documents - test results, reports and PSA's from previous CPSC inquiries into various Daisy BB guns - requested by Daisy. Some of these same documents provided in correspondence are responsive to Respondent's First Set of Special Interrogatories. Furthermore, Complaint Counsel has begun the process of identifying and releasing documents for which no privilege claim is made or for which claims of privilege have been removed or suspended. As part of this process Complaint Counsel has already furnished Daisy with over 3,000 pages of documents to Respondent and will continue to provide documents on a rolling basis until this process is complete.

associated with the preparation of each Product Safety Assessment specified in the preceding Interrogatory No.14.

Objections: This interrogatory is vague and ambiguous and not susceptible of being answered because as used therein the term "associated with" is unclear. This interrogatory is over-broad and unduly burdensome, and it seeks information protected by the attorney-client privilege, deliberative process privilege, and work product doctrine. Moreover, it seeks information that is not relevant to the subject matter of this action, nor calculated to lead to the discovery of admissible evidence.

Answer: Without waiving the foregoing objections, and based on Complaint Counsel's interpretation of this request, Complaint Counsel answers as follows: Non-privileged documents containing information this interrogatory seeks were produced to Respondent in Complaint Counsel's Responses to Respondent's First Request for Production of Documents, Request No.3. Complaint Counsel provided Respondent with a privilege log of documents that may contain responsive documents that were not produced.

Supplemental Response: Complaint Counsel incorporates the response above and further answers that, although the names can be found on the documents provided to Daisy, the following individuals are listed as participants in the PSA process for the Directorate of Engineering Sciences: James A. DeMarco, Marc Schoem, Ronald Yelenik, Thomas Caton, and Ronald T. Reichel, John O'Connor, James I. Price, and R.T Garrett.

17. Please identify, with particularity and in chronological order, all technical reports, documents and notes from outside consultants retained by the CPSC or its staff concerning the Daisy Model 856 and 880 Airguns including, but not limited to, the dates each document was prepared.

Objections: This interrogatory is vague and ambiguous, particularly in light of Respondent's definition of "CPSC" and the usage of that term in this interrogatory. Given its context, however, Complaint Counsel interprets "CPSC" here as including the Commission itself, as only the Commission itself can make, and made, the decision to initiate this proceeding. This interrogatory is also vague and ambiguous, overly broad, burdensome and not susceptible of an answer because it does not specify a time period. Under agency procedures and regulations, Complaint Counsel is prohibited from communicating with the Commissioners, their staffs, and other designated persons, regarding information this interrogatory seeks. See also 16 C.F.R. §1025.68. This interrogatory is over-broad and unduly burdensome, and it seeks information protected by the attorney-client privilege, deliberative process privilege, and work product doctrine. Complaint Counsel also objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. § 1025.31 (c) (4) regarding experts.

Supplemental Response: Complaint Counsel incorporates the Objections and Answer above. During the course of the CPSC staff investigation of Daisy Powerline

BB guns in anticipation of the current litigation, Complaint Counsel retained various consultants. Discovery of these consultants is tied to whether Complaint Counsel identifies any of these consultants to testify as experts at the hearing in this matter. Pursuant to 16 C.F.R. § 1025.31(c)(4)(ii), discovery of another party's consultants/experts who were retained or specially employed in anticipation of litigation or preparation for trail, and who are not expected to be called as witnesses at trial, is impermissible without a showing of exceptional circumstances. Respondents have not demonstrated the exceptional circumstances required to obtain discovery on Complaint Counsel's non-testifying consultants. Complaint Counsel further responds that no final oral or written technical reports have been prepared for it by experts whom we expect to call as witnesses at trial, nor have we decided which of our consultants we intend to call as witnesses at trial.

19. If the technical reports from outside experts identified in Interrogatory No. 17 were oral, please state the substance and content of each such oral report.

Objections: This interrogatory is vague and ambiguous, particularly in light of Respondent's definition of "CPSC" and the usage of that term in this interrogatory. Given its context, however, Complaint Counsel interprets "CPSC" here as including the Commission itself, as only the Commission itself can make, and made, the decision to initiate this proceeding. This interrogatory is also vague because it does not specify a time period. Under agency procedures and regulations, Complaint Counsel is prohibited from communicating with the Commissioners, their staffs, and other designated persons, regarding information this interrogatory seeks. *See also*, 16 C.F.R. §1025.68. This interrogatory is overbroad and unduly burdensome, and it seeks information protected by the attorney-client privilege, deliberative process privilege, and work product doctrine. Complaint Counsel also objects to this interrogatory to the extent it exceeds the requirements and limitations of 16 C.F.R. §1025.31 (c) (4) regarding experts.

Supplemental Response: Please refer to the Supplementary Response to Interrogatory No. 17 above.

21. Please identify, with particularity and in chronological order, all CPSC documents relating to CPSC participation, amendment or involvement in the development of voluntary standards ANSI/ASTM F589 and F590 including but not limited to the dates each document was prepared.

Objections: This interrogatory is vague and ambiguous because as used therein the terms "participation," "amendment," and "involvement" are unclear and not previously defined. This interrogatory is over-broad and unduly burdensome because it uses the term "relating to" as it seeks information that is equally available to both parties. Moreover, it seeks information that is not relevant to the subject matter of this action, nor calculated to lead to the discovery of admissible evidence. Furthermore, it seeks information protected by the attorney client privilege, work product doctrine, and the

Supplemental Response: Please refer to Complaint Counsel's Supplemental Response to Interrogatory no. 85 above.

Respectfully submitted

Dated: September 6, 2002

William J. Moore, Jr.
Complaint Counsel
4330 East West Highway
Bethesda, MD 20814
301-504-0626 x 1348

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2002, I caused a copy of the foregoing **Complaint Counsel's Supplemental Answers To Respondent's First Set of Special Interrogatories** to be served upon all parties of record in these proceedings, as follows:

By facsimile and first class mail, postage prepaid to:

The Honorable William B. Moran, Administrative Law Judge
and Presiding Officer

By certified mail, return receipt requested, postage prepaid, and facsimile to:

Aaron Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

Attorneys for Daisy Manufacturing Company

By first class mail, postage prepaid to:

William M. Griffin, III, Esq.
Friday, Eldredge & Clark
2000 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
Rogers, AR 72756

Attorneys for Daisy Manufacturing Company

By hand delivery to:

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408

William J. Moore, Jr.
Complaint Counsel for the
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814-4408

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
	)	
Respondent	)	
	)	

Order on Respondent's Motion for Sanctions

Respondent, Daisy Manufacturing Company, has filed a Motion for Sanctions, pursuant to 16 C.F.R. § 1025.37, of the Consumer Product Safety Commission's Rules of Practice for Adjudicative Proceedings. The motion contends that Complaint Counsel failed to respond to the Court's July 24, 2002 Order which addressed Respondent's motion to compel production of documents pursuant to respondent's first request for production of documents ("documents' order"), and the Court's July 26, 2002 Order, which addressed Respondent's Motion to compel more complete answers to its first set of interrogatories ("interrogatories order").

Respondent states that the Court directed Complaint Counsel to promptly provide Respondent with the privilege log, describing the names of withheld documents. The log was to provide a precise statement of the basis for the privilege asserted. Respondent also relates that it informed Complaint Counsel, in a September 26, 2002 letter, that it would seek sanctions unless it received the privilege log by October 1st.

Regarding the interrogatories, Respondent identifies Complaint Counsel's supplemental responses to interrogatory numbers 17 and 19 as the basis of its objection. After reciting Complaint Counsel's supplemental answers to those questions, it contends that "[t]o date, Complaint Counsel has failed to furnish further responses to [those questions] and has neither identified the experts or consultants or provided Respondent with a copy of any written reports

they have provided to Complaint Counsel or the substance of any oral reports." Motion at 3.

Citing 16 C.F.R. § 1025.37, Daisy seeks to have any of Complaint Counsel's expert or consultant testimony or reports excluded from the proceeding and that Complaint Counsel be sanctioned by ordering it to "specifically identify and provide copies of all documents contained in the Privilege Log not heretofore furnished to Respondent."

Complaint Counsel filed an opposition to the motion, asserting that it had not failed to comply with the Court's orders of July 24th and July 26th. Complaint Counsel agrees that the Court directed it to provide a more detailed privilege log for documents it sought to withhold but notes that the Court also urged it to review its privilege claims and to reconsider providing documents, where it could. Complaint Counsel, largely acceding to the Court's request, decided to turn over many of the documents, while not waiving certain claims relative to them. Following this arrangement, Complaint Counsel relates that it has provided "3,200 pages on August 27th, 2,600 pages on September 10th, and approximately 400 pages on October 30th." Opposition at 3. It relates that a new, shortened privilege log would be produced by November 1st. Complaint Counsel believes that by providing, in large measure, the documents themselves, it was operating within the spirit of the Court's orders and that Daisy's interests would be met, as it was receiving the documents, instead of a more detailed privilege log. On this basis it devoted its initial energies to producing many of the documents that were listed on the initial privilege log. As a result of turning over these documents, the remaining log now consists mainly of "a listing of attorney communications and work product directly related to this case." *Id.* at 4.

Addressing the assertion that it failed to file responsive supplemental answers to Respondent's interrogatories nos. 17 and 19, Complaint Counsel states that it did provide such supplemental answers on September 6, 2002. It observes that Daisy specified that its objection arises from the failure to identify the "experts or consultants [n]or provided ... written reports [those experts] have provided to Complaint Counsel or the substance of any oral reports." Motion at 3. Complaint Counsel, addressing the expert and consultant aspect, acknowledges that it has not provided such a list, but attempts to place its failure in context. It notes that while the June 7, 2002 pre-hearing schedule anticipated that the expert witness list would be exchanged on September 30th, that date assumed that discovery would be nearly complete. However, the schedule, for a variety of reasons, was too ambitious and Complaint Counsel asserts that Daisy has itself failed to meet the September 30th deadline. Given the reality that discovery has lagged behind the schedule, Complaint Counsel submits that the proper course of action is a revised schedule,[1] not sanctions.

Further, Complaint Counsel, citing 16 C.F.R. § 1025.31(c)(4)(ii), states that Daisy may "only discover facts known or opinions held by an expert retained ... in anticipation of litigation or preparation for trial who is not expected to be called as a witness at trial only upon a showing of

[1]Complaint Counsel relates its intention to seek shortly the Court's approval of a revised schedule, either as jointly proposed by the parties or as individually submitted.

exceptional circumstances under which it is impracticable ... to obtain facts or opinions on the same subject by other means." It maintains such a showing has not been made. Further, Complaint Counsel states that it has no final oral or written reports prepared by its experts. Nor has it made a decision as to which experts it will call for trial. That decision will not be made until discovery has been completed. Opposition at 6.

Daisy, stating that the procedural rules "permit[] the Court, in its discretion, to allow a reply" sought leave to allow one and filed its Reply.[2] The reply rehashes facts already well known, such as the date the Complaint was issued and discovery dates and it introduces assertions about Complaint Counsel's "litigation strategy." The gist of Daisy's reply is that by now "Complaint Counsel should be able to designate its experts and provide Respondent with copies of their written testimony or substance of their oral testimony in response to Interrogatories 17 and 19." It reiterates that the Court should sanction Complaint Counsel by having the experts' information stricken.

The Court's Ruling

With respect to the documents, the Court did order that Daisy be provided promptly with a more detailed privilege log for those documents which remain withheld, but it cannot ignore that, for the most part, Complaint Counsel has opted to provide the documents themselves. While this does not excuse the order to provide a log for those documents still withheld, it does provide perspective. By the date of this Order, Complaint Counsel has likely provided the privilege log for those documents it has not turned over to Daisy.[3]

As to the interrogatories, the Court agrees that the thrust of Daisy's objections relate not to whether a supplemental answer was provided but to its displeasure, and disbelief, that its experts and reports cannot be identified by now. The problem is, as Complaint Counsel relates without contradiction, that neither side has met the discovery schedule, a fact which links with 16 C.F.R. § 1025.31(c)(4)(ii), and that regulation's limitation on discovery regarding experts.

In both respects, Daisy's demands are unreasonable. The relief Daisy seeks regarding the experts' testimony is an unwarranted attempt to cripple Complaint Counsel's case, by foreclosing a full evidentiary development on the issue of whether the subject BB guns present a substantial product hazard. By now, the parties should be well aware that the Court is determined to have a

[2] The rules are less than neutral on the issue of replies, providing "[u]nless otherwise permitted by the Presiding Officer or the Commission, *there shall be no reply* to the response expressing opposition to the motion." (emphasis added). The parties are advised that in the future only the motion seeking leave to file a reply is to be filed. **Any such motion is *not* to include the reply itself** but may only explain why a reply is needed.

[3] If this has not occurred, Complaint Counsel is to provide a current log to Daisy by November 20, 2002 or advise the Court why it cannot do so.

full exposition of the sides' respective material and relevant evidence so that the decision will be most well-informed. Similarly, Daisy's attempt to see all the remaining documents in the Privilege Log asks too much, as it is an attempt to circumvent Complaint Counsel's assertion of potentially valid privileges.

While the Court concludes that no sanctions are appropriate at this juncture, the parties are advised they should not misread this ruling as indicative of the Court's unwillingness to employ the sanctions' provision. There are many tools available to the Court for those who forget their scruples. Again, the overriding objectives for the Court are that discovery operate as intended by the procedural rules and thereafter that both sides have a full opportunity to present their respective admissible evidence at the hearing. Attempts to thwart these objectives will be dealt with appropriately and it would be wiser for the parties to proceed with these same high-minded objectives, and thereby avoid ruing stratagems taken.

Accordingly, Respondent Daisy's Motion is DENIED.

William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: November 13, 2002

In the Matter of Daisy Manufacturing Company, Inc.
d/b/a Daisy Outdoor Products, Respondent
Docket No. CPSC Docket No.: 02-2

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Respondent's Motion for Sanctions** dated November 13, 2002, was sent this day in the following manner:

Sent by Facsimile and Regular Mail to:

William Moore, Esq.
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Todd Stevenson, Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Friday Eldredge & Clark
200 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esq.
Daisy Manufacturing Company, Inc.
400 W. Stribling Avenue
Rogers, AR 72756

Aaron Locker, Esq.
Jeffrey M. Locker, Esq.
LOCKER, GREENBERG & BRAININ
420 Fifth Avenue, 26th Floor
New York, NY 10018

Nelida Torres
Legal Staff Assistant

Dated: November 13, 2002

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of DAISY MANUFACTURING COMPANY 400 West Stribling Drive Rogers, Arkansas 72756 Respondent	CPSC Docket No · 02-2

RESPONDENT'S REPLY TO COMPLAINT COUNSEL'S MOTION FOR REVISED PRE-HEARING SCHEDULE AND STATUS CONFERENCE

Respondent objects to Complaint Counsel's unilateral motion for a revised pre-hearing schedule Respondent has mutually agreed to extend discovery on two separate occasions but does not agree with Complaint Counsel's unilateral motion. In the Order on Respondent's Motion for Sanctions in this matter, the Court has clearly stated that Complaint Counsel is to "provide a privilege log to Daisy by November 20, 2002" and that the "Court is determined to have a full exposition of the sides' respective material and relevant evidence "[1]

Contrary to Complaint Counsel's argument that discovery has been delayed by actions of Respondent, Daisy has to the best extent of its knowledge and material availability, provided Complaint Counsel with full and unfettered discovery [2] Complaint Counsel would have this Court

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1 Motion for Sanctions denied by Court Order dated November 13, 2002

2 See discovery documents Bates stamped 0 to 40249. Additional discovery and complaint log and copies of all received litigation and Complaint documents as updated September 9, 2002 and October 11, 2002, respectively, and November 5, 2002 discovery documents of tapes, assembly drawings, manuals and videos regarding the marketing of Daisy airguns. Complaint Counsel has been provided with a fully updated claims and litigation log and documents as received

believe that any delay in discovery relates to discovery disputes and the difficulty in securing compliance with several key witnesses. This is simply not true and a misstatement of the facts. Unlike Complaint Counsel, Respondent has provided full and unfettered access to all documents able to be located and deponents It was Complaint Counsel who had previously canceled depositions of third party witnesses Richard Daniel, Ronald Joyce and Adam Blalock [3] Although Complaint Counsel would like the Court to believe otherwise, Complaint Counsel has to date failed to provide Respondent with "full exposition of material and relevant evidence" directly relating to the allegations of defect in the Complaint Complaint Counsel has provided a superfluous privilege log which fails to adequately identify the basis for privilege or the documents requested [4] See **Exhibit A** attached hereto To date, although requested and subject to Order by the Court, Complaint Counsel has failed to provide Respondent with any new engineering or Human Factors data or documents substantiating the basis for its claim of defect [5]

In its argument, Complaint Counsel takes the Court's Order regarding further clarification of issues and identity of Bates-stamped documents already provided by Respondent out of context

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[3] Daisy has provided Complaint Counsel with all documents in its possession. To the best of Respondent's knowledge, Mr Daniel, Mr. Joyce and Mr Blalock are third-party witnesses who have fully complied with Complaint Counsel's Subpoenas and discovery requests

[4] See synopsis of Privilege Log and synopsis of privileged documents provided, which are devoid of any new data relating to Complaint Counsel's allegations of defect

[5] Motion for Sanctions denied by Court Order dated November 13, 2002

and misstates that the "Order of the Court recognized that Complaint Counsel has been unable to secure numerous categories of documents relevant to Complaint Counsel to prepare its case." Nothing could be further from the truth While Respondent has provided substantially all files or outside litigation on a continuing basis[6], Complaint Counsel has failed to disclose the basic engineering and Human Factors documents which go to the heart of the case in substantiating the alleged defect and instead seeks to rely on unproven allegations in outside plaintiff's attorneys' records and treats such allegations as fact, thereby forming the basis of the "defect" allegation in its Complaint In requesting depositions and discovery of Commission employees Ron Reichel, Kate Sedney and Richard Wright, Complaint Counsel stated such parties would not be available except by subpoena [7] See **Exhibit B.**

The privilege documents provided by Complaint Counsel to date contain no relevant data relating to the allegations of defect contained in the Complaint and are strangely devoid of any new engineering data or Human Factors analysis

While Respondent has no objection to mutual revision of the pre-hearing schedule and status conference, it does object to Complaint Counsel's delay tactics, its inability to supply concrete documents relating directly to the allegations of defect and its subversion of the discovery process to a one-sided fishing expedition

Respondent respectfully requests Complaint Counsel's motion be denied, a pre-trial

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[6] Court Order on Complaint Counsel's Motion to Compel (November 30, 2002)

[7] See letter of Daisy counsel Will Griffin confirming that Mr Howard Tarnoff of Complaint Counsel advised Mr Griffin that Commission employees must be subpoenaed and would not be produced and later correspondence of William Moore, Esq , stating otherwise Application for Subpoenas have been filed with the Court

conference be held to establish open discovery issues and set a mutually agreed upon revised pre-hearing schedule and the Court require that Complaint Counsel, in compliance with previous court orders, provide Respondent with an adequate privilege log and provide open discovery of new engineering and Human Factors data relating to the Complaint's allegation of defect

Dated: December 2, 2002

Respectfully submitted,

LOCKER GREENBERG & BRAININ, P.C.
Attorneys for Respondent
420 Fifth Avenue, 26th Floor
New York, NY 10018
Tel · (212) 391-5200
By: Jeffrey M. Locker Esq
Aaron Locker, Esq

FRIDAY ELDREDGE & CLARK
Attorneys for Respondent
2000 Regions Center
400 West Capitol
Little Rock, AR. 72201-3493
Tel · (501) 376-2011
By: William M Griffin, III, Esq

MARIANNE MCBETH, ESQ.
Daisy Manufacturing Co.
400 West Stribling Avenue
Rogers, AR. 72756
Tel · (501) 636-1200

CERTIFICATE OF SERVICE

I am over the age of 18 years and not a party to the within action. I hereby certify that on December 2, 2002, I have served the attached document described as **RESPONDENT'S REPLY TO COMPLAINT COUNSEL'S MOTION FOR REVISED PRE-HEARING SCHEDULE AND STATUS CONFERENCE** on all parties and participants of record in these proceedings as follows:

Howard N Tarnoff
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408
Fax No (301)504-0359

William Moore, Esq
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408
Fax No (301)504-0359

Todd Stevenson, Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814
Fax No (301)504-0127

Honorable William Moran
c/o Whiting Beale
1200 Pennsylvania Avenue, N W
Suite 1900L
Washington, D.C. 20460-2001
Fax No (202)565-0044

Marianne McBeth, Esq.
Daisy Manufacturing Company, Inc
400 W Stribling Avenue
Rogers, AR 72756
(479)636-1163

William M. Griffin, III, Esq
Friday Eldredge & Clark
2000 Regions Center
400 West Capitol
Little Rock, AR. 72201-3493
(501)376-2147

by facsimile transmission and by placing a true copy thereof enclosed in a sealed envelope . I am "readily familiar" with the firm's practice of collection and processing for mailing. Under the practice it would be deposited with U.S Postal Service on that same day with postage thereon fully prepared in the ordinary course of business

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct

Jean Vincent

F:\WPFILES\Daisy\Certificate of Service Reply to Prehearing Schedule.wpd

EXHIBIT A



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Quynh H. Nguyen
Trial Attorney
Legal Division
Office of Compliance

Tel: 301-504-0626, x 1314
Fax: 301-504-0359
Email: qnguyen@cpsc.gov

Overnight Delivery and Via Facsimile (cover letter only)

November 1, 2002

Aaron Locker, Esq.
Locker Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

Re: ***In the Matter of Daisy Manufacturing Company***
CPSC Docket No. 02-2

Dear Mr. Locker:

Enclosed is Complaint Counsel's revised Privilege Log in the above-captioned matter.

Also enclosed with this correspondence are additional documents responsive to Respondent's First Request for Production of Documents. This mailing includes documents Bates numbered **25,668** to **25,694**. Redacted documents are listed on the revised Privilege Log as "Redacted."

Any remaining non-privileged documents responsive to Respondent's First Request for Production of Documents will be provided to you on a rolling basis.

Sincerely,

Quynh H. Nguyen
Complaint Counsel

Enclosures

cc: William M. Griffin, III, Esq. (via facsimile, cover letter only)
Marianne McBeth, Esq. (via facsimile, cover letter only)

Received Time Nov 2 12:27AM

Dec. 2. 2002 7:06PM locker greenberg No.0683 P. 9

Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000069	Draft typed notes	CPSC agenda regarding Daisy 10/30/01 news conference	undated	By: PAO staff	Deliberative Process
P000070	Email	Emails re: staff comments concerning draft Daisy news release	10/30/01	To: Wolfson From: Michael Gougisha (Commissioner Moore's assistant)	Attorney client Work Product Deliberative Process
P000071	Email	Emails re: staff comments concerning draft Daisy news release	10/30/01	To: Wolfson From: Alan Schoem	Attorney Client Work Product Deliberative Process
P000072 – P000074	Email	String of emails re: staff comments concerning draft Daisy news release	10/26/01	To and From: Solender, Bailey, Williams, Stone, Shakin, Sanders, Stone, Wolfson	Attorney Client Work Product Deliberative Process
P000075 - P000090	Draft typed notes some with handwritten additions	Media talking points for Chairman (talking points) re: issuance of complaint against Daisy	undated	By: Commission legal and PAO staff	Attorney Client Work Product Deliberative Process
P000091 - P000105	Draft typed questions and answers	Comments regarding Chairman's Q & A's concerning issues in the Daisy matter	undated	By: Commission legal and PAO staff	Attorney Client Work Product Deliberative Process
P000106 - P000110	Email	String of emails re: comments about Daisy press release	10/26/01	To and From: Solender, Bailey, Williams, Stone, Shakin, Sanders, Stone, Wolfson	Attorney Client Work Product Deliberative Process
P000111 - P000112	Email	String of emails re: comments concerning Chairman's final Q & A's	10/26/01	To and From: Solender, Bailey, Williams, Stone, Shakin, Sanders, Stone, Wolfson	Attorney Client Work Product Deliberative Process
P000113 - P000125	Draft news releases with changes	Comments concerning CPSC news release about Daisy lawsuit	10/25,26/01	By: Commission legal and PAO staff	Attorney Client Work Product Deliberative Process

Received Time_Nov 2. 12:27AM

Dec. 2. 2002 7:06PM locker greenberg No.0683 P. 10

Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000126	Email	E mail re: Daisy issue	10/25/01	To: Wolfson and Bailey From: Sanders	Work Product Deliberative Process
P000127	Email	String of emails re: suggested changes to Chairman's Q & A's	10/25, 26/01	To and From: Solender, Bailey, Williams, Stone, Shakin, Sanders, Stone, Wolfson	Attorney Client Work Product Deliberative Process
P000128 - P000129	Email	Email re: comments concerning Chairman's Q & A's	10/25, 26/01	To: Solender, Williams, Wolfson From: Bailey	Attorney Client Work Product Deliberative Process
P000130	Email	Email re: revision to draft Daisy press release	10/25/01	To: Bailey From: Wolfson	Deliberative Process
P000131 - P000134	Email with attachment	Email re: press release/second draft concerning Daisy law suit	10/25/01	To: Bailey From: Wolfson	Deliberative Process
P000136	Email	Email re: draft Daisy press release concerning law suit	10/25/01	To; Solender, Williams, Wolfson From; Bailey	Work Product Deliberative Process
P000137	Email	Email re: draft Daisy press release concerning law suit	10/26/01	To and from: Wolfson, Bailey and Quynh Tran (Legal Division)	Attorney Client Work Product Deliberative Process
P000138	Typed notes	Chairman's briefing for Daisy news conference	undated	To: Ann Brown From: Becky Bailey	Deliberative Process
P000139 - P000150	Draft typed notes	Chairman's briefing for Commission meeting re: Daisy	undated	By: Ann Brown's staff	Attorney Client Work Product Deliberative Process
P000151	Email	Email re: Daisy talking points	10/25/01	To: Solender, Williams, Wolfson From: Bailey	Work Product Deliberative Process

Received Time Nov. 2. 12:27AM

Dec. 2. 2002 7:06PM Jocker greenberg No.0683 P. 11

Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000152 - P000170	Email with attachments	Email re: Daisy draft press releases and talking points, some with handwritten notes	10/24/01	To: Stone, Bailey, Solender, Alan Schoem, Quynh Tran, Wolfson, San From: Williams	Attorney Client Work Product Deliberative Process
P000171	Draft typed notes with handwritten additions	Announcement to media of Daisy news conference	Undated	By: PAO staff	Deliberative Process
P000172 - P000176	Draft typed notes with handwritten additions	Media notification list	Undated	By: PAO staff	Deliberative Process
P000177 - P000173	Request form	CPSC product safety assessment (PSA) technical evaluation request re: Daisy air rifle	4/26/01	To: PSA Coordinator From: Richard Wright	Work Product Deliberative Process
P000179 – P000185	Draft report	PSA evaluation re: Daisy air rifle	undated	From: Catherine Sedney, Engineering psychologist	Work Product Deliberative Process
P000186	Email	Email re: Sedney draft PSA	6/27/01	From: Jimmie Williams To: Kate Sedney	Attorney Client Work Product Deliberative Process
P000187 - P000192	Draft report with handwritten notes	PSA evaluation re: Daisy air rifle	undated	From: Catherine Sedney, Engineering psychologist	Work Product Deliberative Process
P000193	Handwritten notes	Human factors issues & Daisy air rifle	8/9/01	By: Catherine Sedney	Deliberative Process
P000194 - P000196	Typed notes	Human factors issues & Daisy air rifle	6/28/01	By: Catherine Sedney	Work Product Deliberative Process
P000197	Handwritten notes	Human factors issues & Daisy air rifle	undated	By: Catherine Sedney	Deliberative Process
P000198 - P000200	Handwritten notes	Daisy air rifle issues	5/29/01	By: Catherine Sedney	Deliberative Process

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000201 - P000203	Draft form	CPSC preliminary determination re: Daisy air rifle	6/17/99	Author not indicated	Deliberative Process
P000204 - P000206	Draft form	CPSC preliminary determination re: Daisy air rifle	3/22/95	Author not indicated	Deliberative Process
P000207	Email	Email re: congressional inquiry concerning Daisy	7/16/2001	To and from: Solender, Williams, Melissa Hampshire, Todd Stevenson, Maureen O'Leary,	Attorney Client Work Product Deliberative Process
P000208	Cover memo	Rulemaking and non-powder guns	1/10/95	To: Douglas Noble, OPM From: Allen Brauninger, OGC	Attorney Client Work Product Deliberative Process
P000209 - P000216	Draft memo	Rulemaking and non-powder guns	Undated	To: The Commission From: Allen Brauninger, OGC	Attorney Client Work Product Deliberative Process
P000217 - P000231	Typed notes and copies	Summary of ASTM F589-85	1/89	John Preston, CPSC engineer	Deliberative Process
P000232 - P000235	Typed notes	Chronology re: non-powder guns	Undated	Author: unknown	Deliberative Process
P000236 - P000237	Cover memo	Potential petition re: non-powder guns	6/19/85	To: Brauninger, OGC From: Stan Morrow, Project Manager	Work Product Deliberative Process
P000238	Typed notes	Chronology re: non-powder guns	1/11/89	Author unknown	Deliberative Process
P000239	Handwritten notes	Non-powder guns	Undated	Author unknown	Work Product Deliberative Process
P000240 - P000242	Request forms	PSA request re: Daisy guns	8/24/00	By: Richard Wright	Work Product Deliberative Process

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000243	Request form	PSA request re: guns, airguns/rifles	1/22/97	By: Jay DeMarco	Deliberative Process
P000244	Typed notes	Petition re: non-powder guns	1/31/85	By: John Preston	Work Product Deliberative Process
P000246	Typed notes	Non-powder guns	Undated	Author unknown	Deliberative Process
P000247	Typed notes with handwritten comments	Non-powder guns/ASTM F589	1/89	By: John Preston	Deliberative Process
P000248	Typed notes	Injuries/Non-power handguns	Undated	Author unknown	Deliberative Process
P000249	Typed notes	List of attachments to memo	Undated	Author unknown	Deliberative Process
P000250	Typed notes	Results of data base check re: guns	1/12/89	Author unknown	Deliberative Process
P000251	Typed notes	Voluntary Standard, ASTM F589	1/89	By: John Preston	Deliberative Process
P000252 - P000296	Report with attachments	Epidemiologic investigation report re: Daisy air gun incident	2/3/00	Investigator 8608	Work Product Deliberative Process Law Enforcement
P000297	Email	Email re: Commissioner Gall statement re: Daisy	10/30/01	To: Wolfson From: Wilson	Attorney Client Work Product Deliberative Process
P000298	Typed forms with handwritten additions	In-depth investigation assignment	3/98	By: Catherine Downs	Deliberative Process Law Enforcement

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000299	Typed cover memo	Re: airguns	2/27/97	To: staff From: Jay DeMarco	Deliberative Process
P000300	Request form	PSA request re: non-powered airguns	11/2/98	By: Jay DeMarco	Deliberative Process
P000301	Handwritten notes	PSA and ASTM	11/4/98	Author unknown	Deliberative Process
P000302	Typed Form	Commission Agenda	10/23/01	Author unknown	Deliberative Process
P000304 - P000307	Typed Questions and Answers	Chairman's Q & A's re: issues in Daisy matter	undated	By: Commission legal and PAO staff	Attorney Client Work Product Deliberative Process
P000308 - P000309	Typed notes	Opening Statement by Ann Brown re: Daisy media briefing	Undated	By: PAO	Deliberative Process
P000310	Typed notes	Non-powder guns	Undated	Author unknown From: Solender files	Deliberative Process
P000311	Handwritten notes	F 589 Non-powder guns	Undated	Author unknown From: Solender files	Deliberative Process
P000312 - P000342	Memo with attachments	Recommendation re: issuance of administrative complaint in Daisy matter (with copies)	10/16/01	To: The Commission From: Jimmie Williams, Legal Division	Attorney Client Work Product Deliberative Process
P000343 - P000545	Memo and attachments	Recommendation re: issuance of administrative complaint in Daisy matter (with copies)	10/4/01	To: The Commission From: Jimmie Williams, Legal Division	Attorney Client Work Product Deliberative Process
P000546	Email	Email re: Daisy document collection	11/6/01	From: Jimmie Williams, To: CPSC Staff	Attorney Client Work Product Deliberative Process

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000547 - P000551	Email	String of emails re: Daisy press release revisions	10/26/01	To and From: Solender, Stone, Wolfson, Williams, Bailey, Shakin, Sanders	Attorney Client Work Product Deliberative Process
P000552 - P000553	Email	Email re: Daisy congressional issue	10/29/01	To: Williams, Solender, Stone, Bailey, Shakin, Sanders, Giles, Fultz-Morris From: Wolfson	Deliberative Process
P000554	Email	Email re: Daisy congressional issue	10/29/01	To and from: Shakin, Sanders, Solender, Oleary.	Attorney Client Work Product Deliberative Process
P000555 - P000558	Email with attachment	Emails re: Daisy press release with comments	10/26/01	To and from: Stone Williams, Solender, Bailey, Shakin, Sanders, Wolfson	Attorney Client Work Product Deliberative Process
P000559	Email	Emails re: Chairman's Q & A's in Daisy matter	10/26/01	To and from: Shakin, Solender, Bailey	Attorney Client Work Product Deliberative Process
P000560	Email	Email re: talking points for Daisy news conference	10/25/01	To: Bailey, Williams, Stone, Sanders, Shakin From: Solender	Attorney Client Work Product Deliberative Process
P000561 - P000567	Email with attachments	Several emails re: Daisy press release and talking points	10/24/01	To and From; Shakin, Solender, Stone, Bailey, Schoem, Tran, Wolfson, Sanders	Attorney Client Work Product Deliberative Process

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000568 - P000572	Email with attachment	Email re: Daisy draft press release and talking points	10/24/01	To: Williams, Stone, Bailey, A. Schoem, Shakin, From: Solender	Attorney Client Work Product Deliberative Process
P000573	Email	Emails re: Daisy talking points	10/29/01	To and From: Solender, Sanders, A. Schoem, Williams, Shakin, Bailey	Work Product Deliberative Process
P000574	Email	Email re: collection of Daisy Documents	11/6/01	To: Commission staff From: Jimmie Williams	Attorney Client Work Product Deliberative Process
P000575 - P000579	Email	String of emails re: Daisy Congressional issues	10/29/30 & 11/1/01	To and From: A. Schoem, Williams, Sanders, Solender, Shakin, Stone, O'Leary, Gongisha	Attorney Client Work Product Deliberative Process
P000580	Email	Several emails re: comments concerning Daisy briefing package	10/3/01	To and From: Stone, Solender, Shakin, A. Schoem, Williams	Attorney Client Work Product Deliberative Process
P000581	Email	Email re: Daisy meeting	10/11/01	Shakin, Stephen Lemberg	Deliberative Process
P000582	Email	Email re: letter concerning congressional issue	10/29/01	From: O'Leary To: Solender, Shakin	Deliberative Process
P000583 - P000588	Emails and attachments	Several emails re: preparation of notes for Chairman's Commission meeting re:Daisy	10/29/01	To and From: Sanders, Shakin, A. Schoem, Stone, Williams, Solender	Attorney Client Work Product Deliberative Process
P000589	Handwritten notes	Freedom of Information Act request re: Daisy	5/11/96	Author unknown; From: Solender files	Work Product Deliberative Process

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000590 - P000601	Emails and attachments	Several emails and attachments re: Chairman's Q & A's in Daisy matter	10/25/01	To and From: Bailey, Solender, Williams, Wolfson, Sanders, Shakin, Stone	Attorney Client Work Product Deliberative Process
P000602 - P000618	Emails and attachments	String of emails and attachments re: Draft Daisy press release	10/26/01	To and From: Sanders, Bailey, Solender Williams, Stone, Shakin, Wolfson	Attorney Client Work Product Deliberative Process
P000619 - P000627	Emails and attachment	String of emails and attachment re: Chairman's Q & A's in Daisy matter	10/25/26/ 01	To and From: Bailey, Williams, Solender, Wolfson, Sanders, Shakin, Stone	Attorney Client Work Product Deliberative Process
P000628	Emails	Several emails re: Daisy matter and Congressional issues	10/30/01	To and From: Gougisha, Solender, A. Schoem, O'Leary, Shakin, Hampshire	Attorney Client Work Product Deliberative Process
P000629 - P000641	Memo and attachment	Briefing package to Commission re: recommendation for issuance of administrative complaint in Daisy matter	10/16/01	To: The Commission From: Jimmie Williams, Legal Division	Attorney Client Work Product Deliberative Process
P000642 - P000848	Memo & ballot form with attachments	Recommendation for issuance of administrative complaint in Daisy matter	10/4/01	To: The Commission From: Michael Solender, Alan Shakin (OGC)	Attorney Client Work Product Deliberative Process
P000849 - 850	Draft memo & ballot form	Recommendation for issuance of administrative complaint in Daisy matter	10/4/01	To: The Commission From: Michael Solender, Alan Shakin (OGC)	Attorney Client Work Product Deliberative Process

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000851 - P000881	Draft memo and attachment	Briefing package to Commission re: recommendation for issuance of administrative complaint in Daisy matter	10/01	To: The Commission From: Jimmie Williams Legal Division	Attorney Client Work Product Deliberative Process
P000882	Email with handwritten notes	Email re: discussion of actions to be taken in Daisy matter	10/03/01	To: Williams, A. Schoem, Tran, Gidding From: Stone	Attorney Client Work Product Deliberative Process
P000883	Handwritten notes	Daisy investigation	undated	By: Alan Schoem	Work Product Deliberative Process
P000884 - P000887	Typed notes with handwritten additions	Questions on Daisy	undated	By: Commission legal and PAO staff.	Attorney Client Work Product Deliberative Process
P000888 - P000891	Draft memo with handwritten notes	Daisy investigation and litigation	10/15/01	To: Alan Schoem, Asoc. Exec. Director for Compliance & Enforcement From: Jimmie Williams, Legal Division	Attorney Client Work Product Deliberative Process
P000892 - P000894	Memo	Issuance of complaint in Daisy matter, with copies	10/30/01	To: The Commission From, Melissa Hampshire, Attorney, OGC	Attorney Client Work Product Deliberative Process
P000895 - P000916-b	Draft complaint	Several draft complaints in Daisy matter	undated	By: Jimmie Williams	Attorney Client Work Product Deliberative Process
P000917	Handwritten notes	Notes taken at meeting re: Daisy	Undated	By: Alan Schoem	Work Product Deliberative Process

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000918 - P000937	Email and attachments	String of emails re: Q & A's for Chairman in Daisy matter	10/25-26/01	To and From: Solender, Bailey, Williams, Wolfson, Sanders, Shakin, Stone	Attorney Client Work Product Deliberative Process
P000938	Draft letter	Regarding congressional issue pertaining to Daisy	10/30/01	To: Hon. James Greenwood From: Maureen O'Leary; with legal staff participation	Work Product Deliberative Process
P000939 - P000952	Email and attachments	String of emails and draft letters pertaining to congressional issues regarding Daisy	10/26/01	To and From: Solender, Shakin, Williams, Stone, A. Schoem, O'Leary, Sanders,	Attorney Client Work Product Deliberative Process
P000953 - P000954	Email	Several emails re: comments concerning Daisy press release	10/26/01	To and From: Sanders, Shakin, Solender, Wolfson, Bailey, Williams,, Stone	Attorney Client Work Product Deliberative Process
0025668	Typed form	Controlled correspondence form re: letter from Locker, Greenberg & Brainin concerning Daisy Powerline Airguns	10/19/01	To: The Chairman From: The Office of the Secretary	Deliberative Process Redacted
P000955 - P000956	Email and attachment	Emails re: presentation to reporters concerning Daisy news conference	10/24/01	To and From: Bailey, Solender, Shakin	Attorney Client Work Product Deliberative Process
P000957	Email	Email re: Locker letter concerning Daisy	10/11/01	To and From: Solender, Shakin, Lemberg, Williams	Attorney Client Work Product Deliberative Process

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000958 - P000960	Email	Emails re: legal procedures to be followed in Daisy matter	10/16/01	To and From: Stone, Williams, Shakin, A. Schoem	Attorney Client Work Product Deliberative Process
P000961	Email	Email re: sending briefing package in Daisy matter	10/3/01	To and From : Shakin, Solender, A. Schoem, Stone	Deliberative Process
P000962 - P000965	Email	Emails re: review of complaint in Daisy matter	10/3,4/01	To and From: Williams, Shakin, Solender, Stone, A. Schoem	Attorney Client Work Product Deliberative Process
P000966	Email	Email re: Daisy press release and talking points	10/25/01	To and From: Solender, Shakin, Williams, Stone, Bailey, A. Schoem, Tran, Wolfson, Sanders	Attorney Client Work Product Deliberative Process
P000967 - P000971	Email	Emails re: possible legal procedures in Daisy matter	10/9,16, /01	To and From: Stone, Shakin, Williams, A. Schoem, Solender	Attorney Client Work Product Deliberative Process
P000972	Email	Email re: Daisy complaint	10/4/01	To: Williams From: Shakin	Deliberative Process
P000973 - P000974	Draft letter	Re: Daisy congressional issue	10/26/01	To: Hon. James Greenwood From: Maureen O'Leary as reviewed by legal staff	Attorney Client Work Product Deliberative Process

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000975 - P000976	Email	Email and copy re: responses to issuance of complaint against Daisy	10/24/01	To: Bailey, Giles, A. Schoem, Frederica Clair, Sanders, Shakin, Stevenson, O'Leary, Marshea Garner, Patricia Adkins, Gougisha, Weller, Patricia Semple, Stone, Wilson, Williams	Attorney Client Work Product Deliberative Process
P000977	Email	Email re: Daisy draft press release and talking points	10/25/01	To and From: Shakin, Solender, Williams, Stone, Bailey, A. Schoem	Attorney Client Work Product Deliberative Process
0025669	Letter	Daisy law suit versus CPSC in federal court	1/22/98	From: Jeffrey Bromme, General Counsel To: Redacted	Law Enforcement Redacted
0025670 - 0025672	Email	String of emails re: Daisy air rifle recall	10/23,24 /01	To and From: Sanders, O'Leary, Solender, Shakin, Stevenson, A. Schoem, Gidding, Atkins, also Stevenson and Phil Starr	Attorney Client Work Product Deliberative Process Redacted
P000978 - P000987	Attachments to memo	Briefing package to Commission re: recommendation for issuance of administrative complaint in Daisy matter	10/01	To: The Commission From: Jimmie Williams, Legal Division	Attorney Client Work Product Deliberative Process
P000988 - P001017	Email with investigation report attachment	Email and report re: incident involving air rifle	2/19/02	To: Williams, Dennis Blasius From: Test 2	Work Product Deliberative Process

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P001018 - P001021	Memo with handwritten notes	Re: investigation/possible litigation against Daisy	10/15/01	To: A. Schoem, Stone From: Williams	Attorney Client Work Product Deliberative Process Law Enforcement
P001022 - P001025	Memo	Re: investigation/possible litigation against Daisy	Date crossed out	To: A. Schoem, Stone From: Williams	Attorney Client Work Product Deliberative Process Law Enforcement
P001026 - P001035	Draft Complaint	Re: administrative action against Daisy	Undated	From: Stone files	Attorney Client Work Product Deliberative Process
P001036	Memo	Issuance of complaint in Daisy matter	10/30/01	To: The Commission From: Melissa Hampshire, OGC	Attorney Client Work Product Deliberative Process
P001037 - P001059	Memo	Recommendation that administrative complaint be issued against Daisy	10/4/01	To: The Commission From: Jimmie Williams	Attorney Client Work Product Deliberative Process
P001060	Email	Email re: Daisy legal strategy	10/3/01	To: Williams, Tran, A. Schoem, Gidding From: Stone	Attorney Client Work Product Deliberative Process
P001061 - P001062	Chart	Daisy Power Line series	Undated	Daisy legal team	Work Product Deliberative Process
P001063 - P001096	Chart	Air rifle incidents	Undated	Quynh Tran	Work Product Deliberative Process

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P001097 - P001098	Typed notes	Non-powder gun study	Undated	Author unknown	Work product Deliberative Process Proprietary Information
P001099 - P001103	Draft memo	Airgun Mini-Project	Undated	To: Ronald Medford From: Scott Snyder	Deliberative Process
P001104 - P001138	Typed notes With attachments	Daisy preliminary determination	5/30/01	By: Daisy legal team	Attorney Client Work Product Deliberative Process Law Enforcement
P001139 - P001140	Handwritten notes	Daisy BB gun briefing to executive staff	Not dated	Not indicated	Attorney Client Work Product Deliberative Process
P001141 - P001169	Typed notes with handwritten additions and attachments	Daisy Preliminary determination meeting	5/30/01	By: Daisy legal team	Attorney Client Work Product Deliberative Process Law Enforcement
P001170 - P001183	Chart	BB gun incidents	Undated	By: Daisy legal team	Work Product Proprietary information
P001184 - P001212	Chart	BB gun incidents by manufacturer 1980-2001	Undated	By: Daisy legal team	Work Product Proprietary information
P001213 - P001217	Chart	BB gun incidents	Undated	By: Daisy legal team	Work Product

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P001218 - P001241	Memo	Summary re: Daisy Powerline BB guns	2/9/01	To: File From: Jimmie Williams, Legal Division	Work Product Deliberative Process
P001242 - P001258	Draft memo	Summary re: Daisy Powerline BB guns	11/13/00	To: File From: Jimmie Williams, Legal Division	Work Product Deliberative Process
P001259 - P001284	Draft memo	Summary re: Daisy Powerline BB guns	10/19/00	To: File From: Jimmie Williams, Legal Division	Work Product Deliberative Process
P001285 - P001288	Draft letter	Daisy Powerline Airguns	10/19/00	To: Aaron Locker From: Jimmie Williams	Work Product Deliberative Process
P001289	Email	Email re: meeting with BB gun expert	9/15/00	To: Richard Wright, Compliance Office From: Jimmie Williams	Work Product Deliberative Process
P001290 - P001291	Email with attached phone log	Email re:phone log of call to Linda Winchell	8/11/00	To and From: Williams, Thomas Caton, Engineering, Wright	Work Product Deliberative Process
P001292 - P001297	Draft letter	Daisy Powerline Airguns	11/21/2000	To: Aaron Locker From: Jimmie Williams	Work Product Deliberative Process
P001298 - P001334	Draft Typed notes with handwritten additions and attachments	Daisy PDP meeting	5/30/01	By: Daisy legal team	Attorney Client Work Product Deliberative Process Law Enforcement

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P001335 - P001353	Report	Epidemiological data review re: Daisy incidents	6/4/01	To: Richard Wright, CRC From: Alberta Mills, EPHA	Work Product Law Enforcement
P001554	Form	PSA request re: human factors evaluation of Daisy air rifle	3/6/01	By: Richard Wright	Work Product Deliberative Process
P001555	Form	PSA request re: engineering analysis of Daisy air gun	9/21/00	By: Richard Wright	Work Product Deliberative Process
P001556 - P001557	Draft typed notes	Airgun Mini-Project	3/18/97	Author unknown	Deliberative Process
P001358 - P001370	Draft memo	Summary re: Daisy Powerline BB guns	10/19/00	To: File From: Jimmie Williams, Legal Division	Work Product Deliberative Process
	Memo	Information on Airguns	6/25/01	To: Carlos Perez, Associate Director, Recalls and Compliance Division, Office of Compliance From: George Rutherford, Project Manager, Emerging Hazards	Work Product Deliberative Process
P001371 - P001426	Chart with handwritten notes	Daisy Power Line Airguns	undated	By: Daisy legal team	Work Product Deliberative Process
P001427 - P001428	Handwritten notes (2 pages)	Daisy Meeting	Undated	By: Carlos Perez	Deliberative Process

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P001429 - P001431	Handwritten notes	Daisy Meeting	10/2/01	By: Carlos Perez	Deliberative Process
0025673 - 0025677	Draft report	Report for Section 15 re:airguns and rifles/ projectile injuries	1/30/97	To: Jay DeMarco From; Suad Nakamura, Phd, Physiology, Directorate for Health Sciences	Deliberative Process Proprietary Information Redacted
P001432 - P001443	Typed instructions and forms	Investigation guidelines and questions re: non-powder gun incidents	11/13/97	By: R. Reichel, CPSC, Engineer	Deliberative Process Law Enforcement
P001444	Memo	Test of Daisy Powerline gun	11/21/01	To: Jay DeMarco From: Roanld Reichel, BSSEB	Work Product Deliberative Process
P001445	Email	Email re: air gun testing	2/18/99	To: Reichel From: DeMarco	Deliberative Process Proprietary Information
	Draft report	PSA evaluation re: non-powder rifles	2/13/97	To: Jay DeMarco Through: R.T. Garrett, Director, LSEL	Deliberative Process Proprietary Information Redact
P001446 - P001449	Draft report	PSA evaluation re: suggested changes to air gun	1/13/97	To: Jay DeMarco Through: R.T. Garrett, Director, LSEL	Deliberative Process Proprietary Information
P001450 - P001457	Email	String of emails re: possible problem with air gun	1/12,13/99	To and From: A. Schoem, Perez, M. Schoem, DeMarco, Troy Whitfield, engineer, Reichel, Snyder	Deliberative Process

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P001458	Email	String of emails re: investigation and testing of air guns	3/8/00	To and From: Larry Blend,, Reichel, DeMarco, Bob Baxter, Sidney Englander, Eric Ault, Dennis	Deliberative Process Law Enforcement
P001459 - P001465	Email	String of emails re: investigation and testing of air guns	3/8/00	To and From: DeMarco, Reichel, Blend, Duncan, Ault, Blasius, Englander, Baxter, Snyder, Perez, Erlinda	Deliberate Process Law Enforcement
P001466	Email	Email re: advice concerning Daisy contacts	10/20/00	To: Caton, DeMarco, Reichel From: Alan Schoem	Attorney Client Work Product
P001467	Email	Email re: Daisy investigation meeting	6/12/00	To: Reichel From: Perez	Deliberative Process
P001468 - P001469	Draft Report	Airgun Mini-Project	3/18/97	Not indicated	Deliberative Process
P001470	Email	Email re: Daisy document collection	11/6/01	To: CPSC Staff From: Jimmie Williams, Trial Attorney, Legal Division	Attorney Client Work Product Deliberative Process
P001471 - P001472	Typed list	Congressional letters re: Daisy BB guns	Undated	Not indicated	Deliberate Process
P001473 - P001479	Typed notes	Statement for Ann Brown Daisy Briefing	Undated	Chairman Brown's staff	Attorney Client Work Product Deliberative Process

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Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P001480 - P001485	Draft press releases, some with handwritten notes	CPSC lawsuit against Daisy	10/26/01	PAO and legal staff	Attorney Client Work Product Deliberative Process
P001486 - P001487	Email with handwritten comment	Consumer comment re: air guns	10/23/01	To: Patricia Adkins From: Todd Stevenson	Deliberate Process
P001488	Email	Consumer comment re: air guns	10/22/01	To: A. Schoem, M. Schoem From: Perez	Deliberate Process
P001489	Email	Consumer comment re: air guns	10/22/01	To: Adkins From: Stevenson	Deliberate Process
P001490 - P001547	Memo with attachments and handwritten notes	Recommendation re: issuance of administrative complaint in Daisy matter (with copies)	10/16/01	To: The Commission From: Jimmie Williams, Legal Division	Attorney Client Work Product Deliberative Process
P001548	Draft typed notes	CPSC agenda regarding Daisy 10/30/01 news conference	undated	By: PAO staff	Deliberative Process
P001549 - P001557	Draft typed questions and answers with handwritten notes	Q & A's concerning issues in the Daisy matter	undated	By: Commission legal and PAO staff	Attorney Client Work Product Deliberative Process
P001558 - P001565	Draft typed sheet with handwritten notes	Daisy talking points -revised	Undated	By: Commission legal and PAO staff	Attorney Client Work Product Deliberative Process

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Dec. 2. 2002 7:10PM locker greenberg
TOTAL P.26
Received Time Nov 2 12:27AM

Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P001566 - P001568	Form	Preliminary determination re: Daisy air gun	7/1/99	Carlos Perez & others	Attorney Client Work Product Deliberative Process
P0001569 - P0001583	Report with attachments	Epidemiologic investigation report re: Daisy air gun injury	2/18/00	Investigator 88320	Deliberative Process Law Enforcement
P0001584	Form	Accident investigation request form	7/12/96	By: Jay DeMarco	Deliberative Process Law Enforcement
P0001585 - P0001586	Partial draft report	Consumer product incident report re: BB gun incident	7/5/00	Not indicated	Deliberative Process Law Enforcement
P0001587 - P0001589	Report	Consumer product incident report Re: BB gun incident	12/2/99	Endorsed by Eric Ault	Deliberative Process Law Enforcement

Dec. 2. 2002 7:10PM locker greenberg No.0683 P. 30

Privilege Log

Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000001 - P000006	Draft memo with handwritten notes	CPSC engineering evaluation of Airguns	Undated	To: Ronald Medford, Assistant Executive Director, EXHR From: Scott Snyder, ESME & James DeMarco, CCA	Deliberative Process (this document was prepared by the CPSC staff and contains predecisional Commission matters, which are deliberative in nature and consist of either recommendations, opinions, options, strategies and/or analyses. If this document were disclosed, it would impair the deliberative process of the agency)
P000007	Chart	Gun injuries	1/24/98	Author unknown From: Craig Morris' files	Deliberative Process
P000008	Handwritten notes	Non-powder guns	9/8/00	By: Craig Morris	Deliberative Process
P000009	Email	Email re: Daisy document collection	11/6/01	To: CPSC Staff From: Jimmie Williams, Trial Attorney, Legal Division	Attorney Client (this document was prepared by CPSC attorneys for the purpose of providing legal advice to the Commission, staff line supervisors and others. The document, which contains legal advice, opinions, or observations, was prepared and maintained under conditions of confidentiality. Work Product (this document was prepared by CPSC attorneys or by Commission staff at the request of CPSC attorneys to assist the attorneys in preparation for litigation. The confidentiality of the document has been maintained from the time of its preparation) Deliberative Process
P000010 - P000011	Typed cover note	Airgun project	5/1/97	To: Ron (Medford) From: Scott Snyder	Deliberative Process

Received Time_Nov 2 12:27AM

Dec. 2. 2002 7:10PM locker greenberg No.0683 P. 31

Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000012	Hand written note	Airguns	5/20/??	To: Andrew Stadnik, Engineering From: Ron Medford	Deliberative Process
P000013 - P000017	Typed instructions/ form	Investigation Guideline & form /non-powder gun incidents	12/24/97	From: Medford files.	Deliberative Process Law Enforcement (this investigatory file contains information compiled for law enforcement purposes. Disclosure of the file would undercut the Commission's case by either revealing investigative techniques, deterring witnesses from coming forward, and/or prematurely revealing the facts of the Commission's case)
P000018 - P000019	Typed entry	Product codes	12/24/98	From: Medford files	Deliberate Process Law Enforcement
P000020	Email with hand-written notes	Non-powder Airgun Investigation	11/5/98	To: George Rutherford From: James DeMarco	Deliberative process Law Enforcement
P000021	Handwritten notes	Daisy press conference and other matters	Undated	By: Scott Wolfson, Public Affairs Office	Deliberative Process
P000022 - P000024	Memo and ballot form	Recommendation that administrative complaint be issued against Daisy	10/4/01	To: Commission, Todd Stevenson, Acting Secretary From: Michael Solender, General Counsel, Alan Shakin, Assistant General Counsel, Office of General Counsel (OGC)	Attorney Client Work Product Deliberative Process
P000025 - P000048	Memo	Recommendation that administrative complaint be issued against Daisy	10/4/01	To: The Commission From: Jimmie Williams, Legal Division	Attorney Client Work Product Deliberative Process

Received Time—Nov 2 —12·27AM

Dec. 2. 2002 7:10PM locker greenberg No.0683 P. 32

Bates Stamp Nos.	Type	General Subject Matter	Date	Author/Addressee	Privilege
P000049 - 000053	Email	Email string re: Daisy and media relations matters	10/24/01-10/25/01	To and From: Scott Wolfson, Becky Bailey, Ken Giles (Public Affairs Office [PAO])Patricia Adkins, Walter Sanders, Frederica Clair (Office of the Chairman), Solender, Williams	Deliberative Process
P000054 - P000055	Email	Email string re: draft press release in Daisy matter and draft questions and answers to be used by Chairman with media	10/25/01-10/26/01	To and From: Solender, Bailey, Scott Wolfson , Sanders, Shakin, Eric Stone (Director, Legal Division), Adkins	Attorney Client Work Product Deliberative Process
P000056	Email	Email re: Daisy and media relations issue	10/22/01	To: Wolfson, Giles From: Bailey	Deliberative Process
P000057	Email	Email re: Daisy and media relations matter.	10/19/2001	To: Earnice Cox, Giles, Mark Ross, Mathena Cowart, Nychelle Fleming, Paulette Moore, Rhonda Dulic, Wolfson, Yolanda Fultz-Morris From: Becky Bailey	Deliberative Process
P000058	Email	Email re: Daisy and media relations	10/22/01	To: Adkins, Sanders, Wolfson From: Bailey	Deliberative Process
P000059	Handwritten notes	Re: preparation for Daisy news conference	undated	By: Wolfson	Deliberative Process
P000060	Email	Email re: TV segments carrying Daisy event	11/01/01	To: Bailey, Giles From: Wolfson	Deliberative Process
P000061 - P000068	Draft typed questions and answers with suggested changes	Question and Answer format prepared for Chairman regarding issues expected to be raised in Daisy news conference (Q & A or A's)	undated	By: Commission legal and public affairs office (PAO) staff	Attorney Client Work Product Deliberative Process

Received Time-Nov 2 12:27AM

EXHIBIT B

FRIDAY ELDREDGE & CLARK

HERSCHEL H. FRIDAY (1927-1994)
WILLIAM H. SUTTON, P.A.
BYRON M. EISEMAN, JR., P.A.
JOE D. BELL, P.A.
JAMES A. DUNCAN, P.A.
FREDERICK S. URSERY, P.A.
OSCAR E. DAVIS, JR., P.A.
JAMES C. CLARK, JR., P.A.
THOMAS P. LECOCQ, P.A.
JOHN DEWEY WATSON, P.A.
PAUL B. BENHAM III, P.A.
LARRY W. BURKS, P.A.
A. WYCLIFF NISBET, JR., P.A.
JAMES EDWARD HARRIS, P.A.
J. PHILLIP MALCOM, P.A.
JAMES M. SIMPSON, P.A.
JAMES M. SAXTON, P.A.
J. SHEPHERD RUSSELL III, P.A.
DONALD H. BACON, P.A.
WILLIAM THOMAS BAXTER II, P.A.
RICHARD D. TAYLOR, P.A.
JOSEPH B. HURST, JR., P.A.

ELIZABETH ROBINSON MURRAY, P.A.
CHRISTOPHER HELLER, P.A.
LAURA HUNSLEY SMITH, P.A.
ROBERT S. SHAFFER, P.A.
WILLIAM M. GRIFFIN III, P.A.
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DIANE S. MACKEY, P.A.
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SCOTT H. TUCKER, P.A.
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PRICE C. GARDNER, P.A.
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DAVID D. WILSON, P.A.
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DAVID M. GRAF, P.A.

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208 NORTH FIFTH STREET
BLYTHEVILLE, ARKANSAS 72315
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FAX 870-762-2918

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ALLISON J. CORNWELL
ELLEN M. OWENS
JASON B. HENDREN
BRUCE D. TIDWELL
MICHAEL D. KARNEY
KELLY MURPHY MCQUEEN
JOSEPH P. MCKAY
ALEXANDRA A. IFRAH
JAY T. TAYLOR
MARTIN A. KASTEN

BRYAN W. DUKE
JOSEPH G. NICHOLS
ROBERT T. SMITH
RYAN A. BOWMAN
TIMOTHY C. EZELL
T. MICHELLE ATOK
KAREN S. HALBERT
SARAH M. COTTON
PHILIP D. MONTGOMERY
KRISTEN S. RIGGINS
ALAN G. BRYAN
LINDSEY MITCHAM SLOAN
KHAYYAM M. EDDINGS
JOHN F. PEISUKICH
AMANDA CAPPS ROSE
BRANDON J. HARRISON

OF COUNSEL
B.S. CLARK
WILLIAM L. TERRY
WILLIAM L. PATTON, JR.
N.T. LAKEBURE, P.A.
JOHN G. SCHOLS, P.A.

WILLIAM M. GRIFFIN III
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TEL 501-370-1515
FAX 501-244-5527
griffin@fec.net

November 18, 2002

Via facsimile

Mr. Jeffrey Locker
Locker Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th floor,
New York, New York 10018-2708

Re: CPSC v. Daisy

Dear Jeff:

I have recently talked to Howard Tarnoff. Mr. Tarnoff indicates that we are going to have to obtain leave of the presiding officer to notice the depositions of Kate Sedney and Richard Wright. Could you please take the necessary steps to do so? I am unfamiliar with the procedure but will be happy to take the depositions of these two individuals. I am available in the afternoon of December 18 and December 19. I am also available December 23 and would have no trouble scheduling the depositions on that date. Why don't we go ahead and schedule the depositions for December 23 and get out notices of depositions for the same?

If you have any questions or comments, please do not hesitate to call.

Sincerely,

William M. Griffin III

WMG:bcw
cc: Ms. Marianne McBeth (via fax)
19894.0040

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LITTLE ROCK
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griffin@fec.net

November 18, 2002

Via Facsimile

Mr. Howard N. Tarnoff
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

Re: In the matter of Daisy Manufacturing Company
CPSC Docket No. 02-2

Dear Howard:

I appreciate your revisionary history lesson contained in your letter of November 13, 2002. I would like to schedule Kate Sedney and Richard Wright for December 23. If that date is not available, I am available the afternoon of December 18 and the morning of December 19, 2002. I could also do it November 26, if necessary.

I look forward to hearing from you regarding the same.

Sincerely,

William M. Griffin III

WMG:bcw

cc: Mr. Jeffrey Locker (via fax)
Ms. Marianne Mc Beth (via fax)

19894.0006



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

William J. Moore, Jr
Trial Attorney
Legal Division
Office of Compliance

Tel: (301) 504-0626, Ext. 1348
Fax: (301) 504-0359
Email: wmoore@cpsc.gov

November 25, 2002

Via Facsimile and First Class Mail

William M. Griffin III, Esq.
Friday Eldredge & Clark, LLP
2000 Regions Center
400 West Capitol
Little Rock, Arkansas 72201

RE: In the Matter of Daisy Manufacturing Company; CPSC Docket No.: 02-2

Dear Mr. Griffin:

I have your faxed letter of November 25, 2002. When we spoke on November 19, 2002, we agreed to come up with some deposition dates that accommodate, within reason, both parties' schedules. As stated in our conversation, and in my e-mail to you on November 22, 2002, we wish to reach an agreement as to all deponents in this round at the same time.

CPSC Subpoenas schedule Mr. Jimmie Daniels and Lynn Scott depositions on December 16 and 17, 2002. Mr. Dick Daniel and Mr. Joyce state they are available on the 18th through the 20th. This is our second attempt to depose these men. Accordingly, we wish to take the week of December 16, or the better part thereof, in Arkansas, to depose these four third party witnesses. When we last talked, I asked you to come up with reasonable alternative dates to the Christmas Eve and New Year's Eve dates you proposed. I have not heard back.

My e-mail also says that Ms. Sedney and Mr. Wright are generally available beginning December 5, 2002 and thereafter. A Subpoena is not necessary to obtain their attendance. The Rules call only for a Notice of Deposition.

Please phone me to arrange mutually acceptable dates.

Received Time Nov 26 12:40PM

Thank you for your cooperation.

Sincerely,

William J. Moore, Jr.

cc: Aaron Locker, Esq. (via facsimile and certified first class mail return receipt requested)
Marianne McBeth, Esq. (via first class mail and facsimile)

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No.: 02-2
Respondent.	)	

COMPLAINT COUNSEL'S
THIRD SET OF INTERROGATORIES

Pursuant to 16 C.F.R. 1025.32, Complaint Counsel hereby requests that Respondent Daisy Manufacturing Company serve upon Complaint Counsel, within thirty (30) days, written answers, under oath, to each of the interrogatories set forth below.

I. DEFINITIONS

1. "You," "your," and "Respondent" shall mean the Respondent to whom these discovery requests are directed (including if previously known under different names), including all past and present officers, directors, representatives, agents, and employees of the Respondent, all other pas and present persons acting or purporting to act on the Respondent's behalf (including, but not limited to, all past or present agents and employees exercising discretion, discharging duties, making policy, or making decisions with respect to Respondent), and all past and present divisions and branches of the Respondent.

2. "Document" shall mean the original (or an identical copy when the original is not available) and each non-identical copy of any written, graphic, photographic, audio, visual, or computer materials, however produced or reproduced, of any kind or description, whether sent, received, or otherwise, including, but not limited to, records, papers, books, letters, telefacsimiles, teletypes, photographs, motion pictures, videotapes, audio recordings, correspondence, drawings, engineering drawings, sketches, schematic drawings, manuals, blueprints, engineering change records, work papers, intra- and interoffice communications, corporate records, transcripts, minutes, reports, and recordings of telephone conversations, other conversations, interviews, conferences, and meetings, affidavits, statements, summaries, opinions, court pleadings and filings, reports, indices, studies, analyses, proposals, evaluations, contracts, licenses, agreements, questionnaires, answers to questionnaires, statistical records, calendars, appointment books, diaries, telephone logs, lists, tabulations, charts, graphs, data sheets, computer tapes, records, disks, cards, printouts and programs, microfilms, electronic mail, all other records created or kept by electronic, photographic, mechanical, or computerized means, any other written, printed, or reproduced material, including all drafts, alterations, modifications, changes, amendments, and/or corrections of or to any of the foregoing, and things similar to any of the foregoing, regardless of their author or origin, however denominated.

3. "Person" shall mean any natural person, entity, group, firm, sole proprietorship, partnership, corporation, business association, joint venture, trust, or other legal, business, or governmental entity, whether foreign or domestic.

4. "Relating to" or "related to" shall mean consisting of, referring to, describing, discussing, constituting, evidencing, containing, mentioning, concerning, pertaining to, citing, summarizing, analyzing, or bearing any logical or factual connection with the matter discussed.

5. "Identify" or "identity" when used with respect to a person shall mean to provide the person's present or last known name, residential address, telephone number, occupation, job or position, job title(s), employer, employer department and/or subject area in which the person works, business affiliation, and business or employment address, and the person's relationships or associations, if any, to you.

6. "Identify" or "identity" when used with respect to a business, entity, building, property, or place shall mean the present or last known name, address, and telephone number, and all former names, of that business, entity, building, or place, its state of incorporation, registration, or organization, the identity and address of its registered agent in each state where it is present and doing business or has a place of business, its present officers, directors, and shareholders, and its relationship, if any, to you.

7. "Identify" or "identity" when used with respect to a document shall mean the name or title of the document, a description of the document or record including its date of preparation and transmission, the author, sender, and recipient, a summary of the subject matter, and the identity of the person who currently has custody of, possession of, or control over the document. You may also identify a document by providing a complete and legible copy thereof, and by stating that you have done so.

8. "Claim" shall mean a complaint, lawsuit, governmental action, governmental order, dispute, report or allegation of injury or death, report or allegation of malfunction, report or allegation of operational failure, request or demand for payment, request or demand for indemnification, request or demand for reimbursement, warranty claim, insurance claim, and request for insurance coverage.

9. "Communication" shall mean any transfer of information, ideas, opinions, or thought by means at any time or place under any circumstances, including, but not limited to, any transfer of information or data in a document or from one location to another by electrical, electronic, or similar means.

10. "Distribute" shall mean to deliver, sell, give, allot, or otherwise provide, and shall include the giving away of free samples and promotional items.

11. "Manufacture" shall mean to make, produce, assemble, fabricate, or work into usable form.

12. The definition of terms listed in 15 U.S.C. § 2052 is incorporated in this definition as though fully set forth herein.

13. "The Daisy Powerline BB guns" shall mean the Powerline Airguns manufactured, assembled, labeled, designated, and/or distributed by Daisy Manufacturing Company (or by whatever names then known) (hereinafter "Daisy"), including all versions, variations, and models, as identified in the Complaint filed in this matter, from 1972 through the present.

14. The term "model 880" includes the following Daisy Powerline BB gun model and product numbers: 880, 881, 882, 1455, 1880, 1881, 1882, 3305, 3480, 3933, 3934, 5150, 9072, 9082, 9083, 9093, 9355, 9382, and 9393.

15. The term "model 856" includes the following Daisy Powerline BB gun model and product numbers: 856, 860, 990, 2856, and 7856.

16. "Complaint" shall mean the Complaint filed in this action.

17. "Requests for Production" shall mean Complaint Counsel's First, Second, and Third Requests for Productions of Documents and Things served upon Daisy in this action.

18. "Answer" shall mean the Answer and Defenses of Daisy Manufacturing Company.

II. INSTRUCTIONS

A. This request seeks information and documents described herein and any attachments thereto, in your possession, custody, or control, or in the possession, custody, or control of any of your attorneys, previously retained attorneys, employees, agents, or representatives, and all documents and any attachments that you or any of your attorneys, previously retained attorneys, employees, agents, or representatives have the legal right to obtain or have the ability to obtain from sources under their control.

B. Interrogatories where the identity of documents are requested, the document should be provided in its entirety, without abbreviation or expurgation, including any amendments thereto whether referred to in the document or otherwise.

C. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive. The word "including" shall be construed to mean without limitation. The words "any" and "all" shall be construed so as to make the request inclusive rather than exclusive.

D. The use of the past tense shall include the present tense, and the use of the present tense shall include the past tense, so as to make all definitions and discovery requests inclusive rather than exclusive.

E. The singular shall include the plural, and vice versa.

F. The Interrogatory shall be read, interpreted, and answered in accordance with these instructions and the definitions set forth herein. If the meaning of any word or phrase used herein is unclear, you are requested to contact William J. Moore, Jr. of the Commission staff for the purpose of resolving any ambiguity. If any request cannot be complied with in full after exercising the required diligence, it shall be complied with to the extent possible with a full statement of all efforts to make full compliance and of all reasons full compliance cannot be made.

G. If it is claimed that the attorney-client privilege or any other privilege or exemption of any kind is applicable to any document ordered to be produced by this Subpoena, specify the privilege claimed and the factual basis you contend supports the assertion of the privilege, and identify the document as follows:

i) State the date, nature, and subject matter of the document in sufficient detail so that the type and content can be readily ascertained;

ii) Identify each author of the document;

iii) Identify each preparer of the document;

iv) Identify each person who is an addressee or an intended recipient of the document;

v) Identify each person from whom the document was received;

vi) State the present location of the document and all copies thereof;

vii) Identify each person who has or ever had possession, custody, or control of the document or any copy thereof;

viii) State the number of pages, attachments, appendices, and exhibits; and

ix) Provide all further information concerning the document and the circumstances upon which the claim of privilege is asserted.

H. For any communication with respect to which a privilege or any other exemption is asserted, identify the persons or entities among whom the communication took place, the date of the communication, and the subject.

I. In the event that any document sought by this Subpoena has been destroyed, discarded, or otherwise disposed of, that document is to be identified as completely as possible including, without limitation, the following information:

i) Identify each author of the document;

ii) Identify each preparer of the document;

iii) Identify each addressee or intended recipient of the document;

iv) Identify each person who received the document;

v) State the date of the document;

vi) State the subject matter of the document with sufficient particularity to explain its nature and contents;

vii) State the date and reason for disposal of the document;

viii) Identify each person who authorized disposal of the document;

ix) Identify each person who disposed of the document.

J. If any document was, but is no longer, in your possession, custody, or control, identify the document in accordance with the "Definitions" section above and provide the following information:

i) State the disposition of the document;

ii) State the date such disposition was made;

iii) Identify the present custodian of the document, or, if the document no longer exists, so state;

iv) Identify the person(s) who made the decision regarding the disposition of the document; and

v) State the reasons for the disposition and describe the document and the contents of the document, including the title, author, position or title of the author, addressee, position or title of the addressee, whether indicated or blind copies were made, date, subject matter, number of pages, attachments or appendices, and all persons to whom the document was distributed, shown, or explained.

K. To facilitate identification and organization of the documents, bates-stamp all documents produced, and segregate the documents according to the numbered paragraph and subparagraph(s) to which they relate.

III. INTERROGATORIES

1. Please state the number of Model 880 airguns manufactured by Daisy from January 2001 to the present.

2. Please state the number of Model 856 airguns manufactured by Daisy from January, 2001 to the present.

3. Please state the number of Model 880 airguns sold by Daisy, by retailer, from 1972 to the present.

4. Please state the number of Model 856 airguns sold by Daisy, by retailer, from 1985 to the present.

5. Please state the date Daisy began manufacturing the Model 856 as a pellet only airgun.

6. Please state the date Daisy began selling the Model 856 as a pellet only airgun.

7. Please state the reason(s) Daisy redesigned the Model 856 as a pellet only airgun.

8. Please state the name, address, and telephone numbers of all person who have knowledge of the facts stated in the preceding interrogatory no. 7.

9. Please state the date Daisy discontinued manufacturing the Model 9072 under the Sears brand name.

10. Please state the reason(s) Daisy discontinued manufacturing the Model 9072 under the Sears brand name.

11. Please identify, with specific particularity for a subsequent inspection demand or subpoena duces tecum, each and every document which you believe supports your response to the preceding interrogatory no. 10.

12. Please state the name, address, and telephone numbers of all person who have knowledge of the facts stated in the preceding interrogatory no. 10.

13. Please list the changes, by date, requester, and part number, Daisy made to lessen the likelihood that BBs will become lodged in the Model 880 from first production to the present.

14. Please list the changes, by date, requester, and part number, Daisy made to lessen the likelihood that BBs will become lodged in the Model 856 from first production to the present.

15. Please state all facts upon which you base your contention that automatic safeties are not generally used on American airguns.

16. Please identify, with specific particularity for a subsequent inspection demand or subpoena duces tecum, each and every document which you believe supports your response to the preceding interrogatory no. 15.

17. Please state the name, address, and telephone numbers of all person who have knowledge of the facts stated in the preceding interrogatory no. 15.

18. Please state all facts upon which you base your contention that automatic safeties provide a false sense of security and that accidents often occur when guns do not fire.

19. Please identify, with specific particularity for a subsequent inspection demand or subpoena duces tecum, each and every document which you believe supports your response to the preceding interrogatory no. 18.

20. Please state the name, address, and telephone numbers of all person who have knowledge of the facts stated in the preceding interrogatory no. 18.

21. Please state all facts upon which you base your contention that users will often disable the automatic safety on guns with automatic safeties.

22. Please identify, with specific particularity for a subsequent inspection demand or subpoena duces tecum, each and every document which you believe supports your response to the preceding interrogatory no. 21.

23. Please state the name, address, and telephone numbers of all person who have knowledge of the facts stated in the preceding interrogatory no. 21.

24. Please state the name, address, and telephone numbers for all of Daisy's authorized repair dealers.

25. Please provide the name, title, and length of employment for all Daisy employees in the Engineering/Design department between 1970-October 2001.

26. Please provide the name, title, and length of employment for all Daisy employees in the Marketing department between 1970-October 2001.

27. Please provide the name, title, and length of employment for all Daisy employees in the Sales department between 1970-October 2001.

28. Please provide the name, title, and length of employment for all Daisy employees in the Finance department between 1970-October 2001.

29. Please provide the name, title, and length of employment for all Daisy employees in the Customer Service department between 1970-October 2001.

30. Please provide the name, title, and length of employment for all Daisy employees in the Production/Assembly department between 1970-October 2001.

31. Please provide the name, title, and length of employment for all Daisy employees in the Quality/Product Evaluation department between 1970-October 2001.

32. Please provide the name, title, and length of employment for all Daisy employees in the Manufacturing department between 1970-October 2001.

33. Please provide the name, title, and length of employment for all Daisy employees in the department between 1970-October 2001.

34. Please provide a list of lawsuits of death or injury, by case name and number, filed against Daisy involving the Model 880 from August 2001 to the present.

35. Please provide a list of lawsuits of death or injury, by case name and number, filed against Daisy involving the Model 856 from August 2001 to the present.

36. Please provide a list of claims of death or injury, by claimant and brief description of claim, filed with Daisy involving the Model 880 from August 2001 to the present.

37. Please provide a list of claims of death or injury, by claimant and brief description of claim, filed with Daisy involving the Model 856 from August 2001 to the present.

38. Please state the official corporate status of Daisy Precision Products (hereinafter, "Daisy Precision")?

39. Please identify, with specific particularity for a subsequent inspection demand or subpoena duces tecum, each and every document which you believe supports your response to the preceding interrogatory no. 38.

40. Please identify the owners, corporate officers, and directors of Daisy Precision.

41. Please state whether you have ever been affiliated with or related to Daisy Precision?

42. If the Response to Interrogatory no. 41 is in the affirmative, what was the affiliation and from what years?

43. If Daisy Precision is no longer affiliated with Daisy, what year was the separation and how did the legal separation occur?

44. Has Daisy ever manufactured the BBs that were intended for use with the Powerline BB guns? If so, please provide the quantity, by year, Daisy manufactured the BBs for its Powerline BB guns?

45. Please identify, with specific particularity for a subsequent inspection demand or subpoena duces tecum, each and every document which you believe supports your response to the preceding interrogatory no. 44.

46. Please state whether Daisy has ever been involved in determining specifications (including, but not limited to, materials, size, dimensions, tolerances, shape, hardness, color, and other physical characteristics) for BBs that were intended for use with Daisy Powerline BB guns?

47. If your response to Interrogatory no. 46 is in the affirmative, please state the nature of the involvement, including specific recommendations made, why they were made, when they were made, and by whom specifically they were made?

48. Please identify, with specific particularity for a subsequent inspection demand or subpoena duces tecum, each and every document which you believe supports your response to the preceding interrogatory no. 47.

49. Please identify all Daisy and/or Daisy Precision employees who were involved in determining the specifications (including, but not limited to, materials, size, dimensions, tolerances, shape, hardness, color, and other physical characteristics) for BBs that were intended for use with Daisy Powerline BB guns from 1971 to the present.

50. Please identify, with specific particularity for a subsequent inspection demand or subpoena duces tecum, all documents outlining and/or changing the manufacturing processes used by Daisy and/or Daisy Precision to produce BBs designed for use in Daisy Powerline BB guns from 1990 to the present.

51. Please identify, with specific particularity for a subsequent inspection demand or subpoena duces tecum, all documents relating to changes to specifications (including, but

not limited to, materials, size, dimension, tolerances, shape, hardness, color, and other physical characteristics) and performance requirements used by Daisy and/or Daisy Precision for BBs designed for use in Daisy Powerline BB guns.

52. Please identify, with specific particularity for a subsequent inspection demand or subpoena duces tecum, all documents relating to changes to quality control procedures used by Daisy and/or Daisy Precision to ensure that its BBs designed for use in Daisy Powerline BB guns meet: (a) all Daisy and/or Daisy Precision Products' manufacturing and/or performance specifications; and (b) American Society for Testing and Materials International (hereinafter "ASTM") standards for non-powder gun projectiles from 1990 to the present.

53. Please identify, with specific particularity for a subsequent inspection demand or subpoena duces tecum, all documents relating to evaluation or testing of BBs manufactured by Daisy and/or Daisy Precision that were used in or with Daisy Powerline BB guns.

54. Please identify the Daisy and/or Daisy precision employees involved in evaluation or testing of these BBs from 1990 to the present.

55. Please identify, with specific particularity for a subsequent inspection demand or subpoena duces tecum, all documents relating to customer, dealer, or retailer complaints, returns, or any other problems with the quality (including, but not limited to, materials, size, dimension, tolerances, shape, hardness, color, and other physical characteristics) or performance of BBs shipped by Daisy and/or Daisy Precision Products that were intended for use with Daisy Powerline BB guns from 1990 to the present.

56. Please identify, with specific particularity for a subsequent inspection demand or subpoena duces tecum, all documents relating to: (a) all consumer complaints, dealer complaints, other complaints, claims, insurance forms, and reports of injury or death involving BBs manufactured by Daisy and/or Daisy Precision Products for use with Daisy Powerline BB guns, and all documents relating to those complaints, claims, insurance forms, and reports of injury or death; and (b) all documents constituting a record or memorialization of verbal consumer complaints, other complaints, claims, and reports of injury or death relating to Daisy Powerline BB guns or BBs manufactured by Daisy and/or Daisy Precision for use with Daisy Powerline BB guns.

57. Please identify the Daisy and/or Daisy Precision employees who received and/or evaluated: a) consumer complaints, dealer complaints, other complaints, claims, insurance forms, and reports of injury or death involving BBs manufactured by Daisy and/or Daisy Precision Products for use with Daisy Powerline BB guns.

58. Please identify, with specific particularity for a subsequent inspection demand or subpoena duces tecum, all correspondence and documents reflecting contacts (written or oral) between Daisy Precision and Daisy relating to specifications (including, but not limited to, materials, size, dimensions, tolerances, shape, hardness, color, and other physical characteristics), design, manufacturing, defects, and/or concerns about BBs that were intended for use with Daisy Powerline BB guns.

Respectfully submitted

Eric L. Stone
William J. Moore, Jr.
Complaint Counsel
4330 East West Highway

Bethesda, MD 20814
301-504-0626 x 1348

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

COMPLAINT COUNSEL'S
THIRD SET OF INTERROGATORIES

Pursuant to 16 C.F.R. 1025.32, Complaint Counsel hereby requests that Respondent Daisy Manufacturing Company serve upon Complaint Counsel, within thirty (30) days, written answers, under oath, to each of the interrogatories set forth below.

DEFINITIONS

1. "You," "your," and "Respondent" shall mean the Respondent to whom these discovery requests are directed (including if previously known under different names), including all past and present officers, directors, representatives, agents, and employees of the Respondent, all other pas and present persons acting or purporting to act on the Respondent's behalf (including, but not limited to, all past or present agents and employees exercising discretion, discharging duties, making policy, or making decisions with respect to Respondent), and all past and present divisions and branches of the Respondent.

2. "Document" shall mean the original (or an identical copy when the original is not available) and each non-identical copy of any written, graphic, photographic, audio, visual, or computer materials, however produced or reproduced, of any kind or description, whether sent, received, or otherwise, including, but not limited to, records, papers, books, letters, telefacsimiles, teletypes, photographs, motion pictures, videotapes, audio recordings, correspondence, drawings, engineering drawings, sketches, schematic drawings, manuals, blueprints, engineering change records, work papers, intra- and interoffice communications, corporate records, transcripts, minutes, reports, and recordings of telephone conversations, other conversations, interviews, conferences, and meetings, affidavits, statements, summaries, opinions, court pleadings and filings, reports, indices, studies, analyses, proposals, evaluations, contracts, licenses, agreements, questionnaires, answers to questionnaires, statistical records, calendars, appointment books, diaries, telephone logs, lists, tabulations, charts, graphs, data sheets, computer tapes, records, disks, cards, printouts and programs, microfilms, electronic mail, all other records created or kept by electronic, photographic, mechanical, or computerized means, any other written, printed, or reproduced material, including all drafts, alterations, modifications, changes, amendments, and/or corrections of or to any of the foregoing, and things similar to any of the foregoing, regardless of their author or origin, however denominated.

3. "Person" shall mean any natural person, entity, group, firm, sole proprietorship, partnership, corporation, business association, joint venture, trust, or other legal, business, or governmental entity, whether foreign or domestic.

4. "Relating to" or "related to" shall mean consisting of, referring to, describing, discussing, constituting, evidencing, containing, mentioning, concerning, pertaining to, citing, summarizing, analyzing, or bearing any logical or factual connection with the matter discussed.

5. "Identify" or "identity" when used with respect to a person shall mean to provide the person's present or last known name, residential address, telephone number, occupation, job or position, job title(s), employer, employer department and/or subject area in which the person works, business affiliation, and business or employment address, and the person's relationships or associations, if any, to you.

6. "Identify" or "identity" when used with respect to a business, entity, building, property, or place shall mean the present or last known name, address, and telephone number, and all former names, of that business, entity, building, or place, its state of incorporation, registration, or organization, the identity and address of its registered agent in each state where it is present and doing business or has a place of business, its present officers, directors, and shareholders, and its relationship, if any, to you.

7. "Identify" or "identity" when used with respect to a document shall mean the name or title of the document, a description of the document or record including its date of preparation and transmission, the author, sender, and recipient, a summary of the subject matter, and the identity of the person who currently has custody of, possession of, or control over the document. You may also identify a document by providing a complete and legible copy thereof, and by stating that you have done so.

8. "Claim" shall mean a complaint, lawsuit, governmental action, governmental order, dispute, report or allegation of injury or death, report or allegation of malfunction, report or allegation of operational failure, request or demand for payment, request or demand for indemnification, request or demand for reimbursement, warranty claim, insurance claim, and request for insurance coverage.

9. "Communication" shall mean any transfer of information, ideas, opinions, or thought by means at any time or place under any circumstances, including, but not limited to, any transfer of information or data in a document or from one location to another by electrical, electronic, or similar means.

10. "Sell" shall mean to exchange, surrender or give up for money or its equivalent.

11. "Distribute" shall mean to deliver, sell, give, allot, or otherwise provide, and shall include the giving away of free samples and promotional items.

12. "Manufacture" shall mean to make, produce, assemble, fabricate, or work into usable form.

13. The definition of terms listed in 15 U.S.C. § 2052 is incorporated in this definition as though fully set forth herein.

14. "The Daisy Powerline BB guns" shall mean the Powerline Airguns manufactured, assembled, labeled, designated, and/or distributed by Daisy Manufacturing Company (or by whatever names then known) (hereinafter "Daisy"), including all versions, variations, and models, as identified in the Complaint filed in this matter, from 1972 through the present.

15. The term "Model 880" includes the following Daisy Powerline BB gun

model and product numbers: 880, 881, 882, 1455, 1880, 1881, 1882, 3305, 3480, 3933, 3934, 5150, 9072, 9082, 9083, 9093, 9355, 9382, and 9393.

16. The term "Model 856" includes the following Daisy Powerline BB gun model and product numbers: 856, 860, 990, 2856, and 7856.

17. "Complaint" shall mean the Complaint filed in this action.

18. "Requests for Production" shall mean Complaint Counsel's First, Second, and Third Requests for Productions of Documents and Things served upon Daisy in this action.

19. "Answer" shall mean the Answer and Defenses of Daisy Manufacturing Company.

INSTRUCTIONS

A. This request seeks information and documents described herein and any attachments thereto, in your possession, custody, or control, or in the possession, custody, or control of any of your attorneys, previously retained attorneys, employees, agents, or representatives, and all documents and any attachments that you or any of your attorneys, previously retained attorneys, employees, agents, or representatives have the legal right to obtain or have the ability to obtain from sources under their control.

B. Interrogatories where the identity of documents are requested, the document should be provided in its entirety, without abbreviation or expurgation, including any amendments thereto whether referred to in the document or otherwise.

C. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive. The word

"including" shall be construed to mean without limitation. The words "any" and "all" shall be construed so as to make the request inclusive rather than exclusive.

D. The use of the past tense shall include the present tense, and the use of the present tense shall include the past tense, so as to make all definitions and discovery requests inclusive rather than exclusive.

E. The singular shall include the plural, and vice versa.

F. The Interrogatory shall be read, interpreted, and answered in accordance with these instructions and the definitions set forth herein. If the meaning of any word or phrase used herein is unclear, you are requested to contact William J. Moore, Jr. of the Commission staff for the purpose of resolving any ambiguity. If any request cannot be complied with in full after exercising the required diligence, it shall be complied with to the extent possible with a full statement of all efforts to make full compliance and of all reasons full compliance cannot be made.

G. If it is claimed that the attorney-client privilege or any other privilege or exemption of any kind is applicable to any document ordered to be produced by this Subpoena, specify the privilege claimed and the factual basis you contend supports the assertion of the privilege, and identify the document as follows:

i) State the date, nature, and subject matter of the document in sufficient detail so that the type and content can be readily ascertained;

ii) Identify each author of the document;

iii) Identify each preparer of the document;

iv) Identify each person who is an addressee or an intended recipient of the document;

v) Identify each person from whom the document was received;

vi) State the present location of the document and all copies thereof;

vii) Identify each person who has or ever had possession, custody, or control of the document or any copy thereof;

viii) State the number of pages, attachments, appendices, and exhibits; and

ix) Provide all further information concerning the document and the circumstances upon which the claim of privilege is asserted.

H. For any communication with respect to which a privilege or any other exemption is asserted, identify the persons or entities among whom the communication took place, the date of the communication, and the subject.

I. In the event that any document sought by this Subpoena has been destroyed, discarded, or otherwise disposed of, that document is to be identified as completely as possible including, without limitation, the following information:

i) Identify each author of the document;

ii) Identify each preparer of the document;

iii) Identify each addressee or intended recipient of the document;

iv) Identify each person who received the document;

v) State the date of the document;

vi) State the subject matter of the document with sufficient particularity to explain its nature and contents;

vii) State the date and reason for disposal of the document;

viii) Identify each person who authorized disposal of the document;

ix) Identify each person who disposed of the document.

J. If any document was, but is no longer, in your possession, custody, or control, identify the document in accordance with the "Definitions" section above and provide the following information:

i) State the disposition of the document;

ii) State the date such disposition was made;

iii) Identify the present custodian of the document, or, if the document no longer exists, so state;

iv) Identify the person(s) who made the decision regarding the disposition of the document; and

v) State the reasons for the disposition and describe the document and the contents of the document, including the title, author, position or title of the author, addressee, position or title of the addressee, whether indicated or blind copies were made, date, subject matter, number of pages, attachments or appendices, and all persons to whom the document was distributed, shown, or explained.

K. To facilitate identification and organization of the documents, bates-stamp all documents produced, and segregate the documents according to the numbered paragraph and subparagraph(s) to which they relate.

INTERROGATORIES

1. Please state the number of Model 880 airguns distributed or sold by Daisy from January 2001 to the present.

2. Please state the number of Model 856 airguns distributed or sold by Daisy from January 2001 to the present.

3. Please (a) identify each retailer to whom Daisy sold or distributed Model 880 airguns from 1972 to the present; and (b) state the number of Model 880 airguns sold or distributed to each such retailer.

4. Please (a) identify each retailer to whom Daisy sold or distributed Model 856 airguns from 1985 to the present; and (b) state the number of Model 880 airguns sold or distributed to each such retailer.

5. Please state the date Daisy began manufacturing the Model 856 as a pellet only airgun.

6. Please state the date Daisy stopped making the Model 856 airgun that could fire both BBs and pellets.

7. Please state the date Daisy began selling the Model 856 as a pellet only airgun.

8. Please (a) describe in detail all reasons why Daisy redesigned the Model 856 as a pellet only airgun; (b) identify each and every document that describes, evidences, refers, or relates in any way to the reasons why Daisy redesigned the Model 856 as a pellet only gun; and (c) identify all persons with knowledge of Daisy's redesign of the Model 856 as a pellet only gun and the reasons therefor.

9. Please state the date Daisy stopped manufacturing the Model 9072 under the Sears brand name.

9. Please (a) describe in detail all reasons why Daisy stopped manufacturing the Model 9072 gun under the Sears brand name; (b) identify each and every document that describes, evidences, refers, or relates in any way to the reasons why Daisy stopped manufacturing the Model 9072 gun under the Sears brand name; and (c) identify all persons with knowledge of the decision to stop manufacturing the Model 9072 gun under the Sears brand name and the reasons therefor.

10. (a) From the date of the Model 880's first production to the present, please describe in detail all design, engineering and other changes (by date, requester, and part number) made to the Model 880 that related in any way to the potential lodging of BBs in the gun; and (b) please identify each and every document (including, but not limited to, engineering drawings, engineering change notices, and memoranda) that describes, evidences, refers, or relates in any way to such changes.

11. (a) From the date of the Model 856's first production to the present, please describe in detail all design, engineering and other changes (by date, requester, and part number) made to the Model 856 that related in any way to the potential lodging of BBs in the gun; and (b) please identify each and every document (including, but not limited to, engineering drawings, engineering change notices, and memoranda) that describes, evidences, refers, or relates in any way to such changes.

12. Please (a) state all facts upon which you base your contention or position that automatic safeties are not generally used on American airguns; (b) identify each

and every document that describes, evidences, refers, or relates in any way to those facts; and (c) identify all persons with knowledge of those facts.

13. Please (a) state all facts upon which you base your contention or position that automatic safeties are not appropriate for use on Daisy Powerline BB guns; (b) identify each and every document that describes, evidences, refers, or relates in any way to those facts; and (c) identify all persons with knowledge of those facts.

14. Please (a) state all facts upon which you base your contention or position that automatic safeties provide a false sense of security and that accidents often occur when guns do not fire; (b) identify each and every document that describes, evidences, refers, or relates in any way to those facts; and (c) identify all persons with knowledge of those facts.

15. Please (a) state all facts upon which you base your contention that users will often disable the automatic safety on guns with automatic safeties; (b) identify each and every document that describes, evidences, refers, or relates in any way to those facts; and (c) identify all persons with knowledge of those facts.

16. Please state the name, address, and telephone numbers of all of Daisy's authorized repair dealers.

17. For the period 1970 to October 2001, please provide the name, title, duties, and years of employment for all Daisy employees in the following departments: (a) Engineering/Design Department; (b) Marketing Department; (c) Sales Department; (d) Finance Department; (e) Customer Service Department; (f) Production/Assembly Department; (g) Quality/Production Evaluation Department; (h) Manufacturing Department; and (i) Testing Department.

18. Please provide the title, duties, and years of employment at Daisy of Charles Lee.

19. For the period August 2001 to the present, please provide a list of all lawsuits (by case name, case number, court, plaintiff, plaintiff's attorney, and date of filing) filed against Daisy that allege death or injury involving the Model 880.

20. For the period August 2001 to present, please provide a list of all lawsuits (by case name, case number, court, plaintiff, plaintiff's attorney, and date of filing) filed against Daisy that allege death or injury involving the Model 856.

21. Please describe in detail all claims (including claim date, claimant, claimant's attorney, and nature of alleged injury), made from August 2001 to the present, that allege death or injury involving the Model 880.

22. Please describe in detail all claims (including claim date, claimant, claimant's attorney, and nature of alleged injury), made from August 2001 to the present, that allege death or injury involving the Model 856.

23. Please identify all shareholders of Daisy Precision Products LLC, and the equity interest of each such shareholder.

24. Please identify all officers and directors of Daisy Precision Products LLC.

25. This interrogatory relates to Note 14 of Daisy's Financial Statements for the year ended December 31, 1999. With respect to the statement that "[Daisy] maintained a preferred interest in the stock of the new [Daisy Precision Products] LLC," please: (a) describe in detail the nature of that "preferred interest"; (b) describe in detail any changes that have occurred to that "preferred interest" since December 31, 1999; and (c) describe in detail Daisy's current ownership interest, if any, in Daisy Precision Products LLC.

26. This interrogatory relates to Note 14 of Daisy's Financial Statements for the year ended December 31, 1999. With respect to the statement that "[e]ffective August 31, 1999, [Daisy] sold the shot business segment to Daisy Precision Products LLC," please: (a) describe in detail all assets and liabilities transferred from Daisy to Daisy Precision Products LLC in that transaction; (b) describe in detail all consideration that passed to Daisy in connection with that transaction; (c) describe in detail all indemnification and other agreements executed in connection with that transaction; and (d) identify each and every document that describes, evidences, refers, or relates in any way to the matters referenced in the foregoing subparts (a) through (c).

27. Since August 31, 1999, (a) please describe in detail all of Daisy's business relationships and arrangements with Daisy Precision Products LLC; and (b) identify all contracts, agreements and other documents relating to those relationships and arrangements.

28. Has Daisy ever manufactured BBs appropriate for use with Daisy Powerline BB guns? If yes, please also respond to the following: (a) identify the model numbers and trade names of those BBs; (b) state, by year and model, the quantities of those BBs manufactured by Daisy; (c) identify each and every document that describes, evidences, refers, or relates in any way to Daisy's manufacture of those BBs; and (d) identify all persons with knowledge of Daisy's manufacture of those BBs.

29. Please (a) describe in detail Daisy's involvement in determining specifications (including, but not limited to, materials, size, dimensions, tolerances, shape, hardness, color, and other physical characteristics) for BBs appropriate for use

with Daisy Powerline BB guns; (b) describe in detail such specifications and any changes thereto, and when such specifications and any changes thereto were made; and (c) identify each and every document that describes, evidences, refers, or relates in any way to such specifications and any changes thereto.

30. Please identify all employees of Daisy and Daisy Precision Products LLC who were involved in, or otherwise had knowledge of, specifications (including, but not limited to, materials, size, dimensions, tolerances, shape, hardness, color, and other physical characteristics) for BBs appropriate for use with Daisy Powerline BB guns from 1971 to the present.

31. Please identify each and every document that describes, evidences, refers, or relates in any way to the manufacturing processes used by Daisy and/or Daisy Precision Products LLC to produce BBs appropriate for use in Daisy Powerline BB guns.

32. Please identify each and every document that describes, evidences, refers, or relates in any way to changes in the specifications (including, but not limited to, materials, size, dimension, tolerances, shape, hardness, color, and other physical characteristics) and performance requirements for BBs appropriate for use in Daisy Powerline BB guns.

33. For the period 1990 to the present, please identify each and every document that describes, evidences, refers, or relates in any way to changes in quality control procedures used by Daisy and/or Daisy Precision Products LLC to ensure that BBs appropriate for use in Daisy Powerline BB guns meet: (a) all Daisy and/or Daisy Precision Products LLC manufacturing and/or performance specifications;

and (b) American Society for Testing and Materials International (hereinafter "ASTM") standards for non-powder gun projectiles.

34. Please: (a) identify each and every document that describes, evidences, refers, or relates in any way to evaluation and/or testing of BBs appropriate for use in Daisy Powerline BB guns; and (b) identify all employees of Daisy and/or Daisy Precision Products LLC employees who were involved in evaluation and/or testing of those BBs from 1990 to the present.

35. Please identify each and every document that describes, evidences, refers, or relates in any way to consumer, dealer, or retailer complaints, returns, or any other problems with the quality (including, but not limited to, materials, size, dimension, tolerances, shape, hardness, color, and other physical characteristics) or performance of BBs shipped by Daisy and/or Daisy Precision Products LLP that were appropriate for use with Daisy Powerline BB guns from 1990 to the present.

36. Please identify each and every document that describes, evidences, refers, or relates in any way to communications (written or oral) between Daisy Precision Products LLC and Daisy relating to specifications (including, but not limited to, materials, size, dimensions, tolerances, shape, hardness, color, and other physical characteristics), design, manufacturing, defects, and/or concerns about BBs that were appropriate for use with Daisy Powerline BB guns.

37. Please identify by brand name and model, all BBs that are appropriate for use with Daisy Powerline BB guns, including but not limited to, BBs manufactured by entities other than Daisy and Daisy Precision Products LLC.

38. Please identify by brand name and model, all BBs that have been packaged with Daisy Powerline BB guns for sale to consumers.

39. Please identify all makes and models of .177 caliber BBs that are not appropriate for use in Daisy Powerline BB guns, and explain why such BBs are not appropriate for such use.

40. Please identify all models and brands of BBs that were produced for use specifically with Daisy Powerline BB guns.

41. Please identify by name, model number and years of production, all airguns ever sold by Daisy that are/were equipped with automatic safeties.

42. Please identify by manufacturer, name, model number and years of production, all airguns, other than Daisy-manufactured airguns, that are/were equipped with automatic safeties.

43. Please identify by name, model number and years of production, all airguns ever sold by Daisy that are/were equipped with positive feed mechanisms.

44. Please state the date Daisy began manufacturing the Model 1105 with an automatic safety.

45. Please state the date Daisy began selling the Model 1105.

46. Please state the date Daisy stopped manufacturing the Model 1105.

47. Please (a) describe in detail all reasons why Daisy stopped manufacturing the Model 1105; (b) identify each and every document that describes, evidences, refers, or relates in any way to the foregoing reasons; and (c) identify all persons with knowledge of the reasons why Daisy stopped manufacturing the Model 1105.

48. Please (a) describe in detail all reasons why an automatic safety mechanism was not used on the Model 880 or Model 856; (b) identify each and every document that describes, evidences, refers, or relates in any way to the foregoing reasons; and (c) identify all persons with knowledge of the reasons why an automatic safety mechanism was not used on the Model 880 or Model 856.

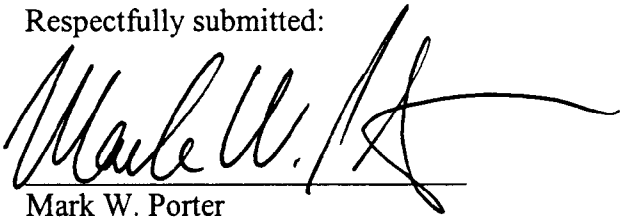
49. Please (a) describe in detail all facts upon which you base your contention or position that airguns are used for training in the use of firearms; (b) identify each and every document that describes, evidences, refers, or relates in any way to the foregoing facts; and (c) identify all persons with knowledge of those facts.

50. This interrogatory relates to the March 28, 2002 memorandum purportedly authored by Richard Wright regarding "Crosman Air Gun Questions, PI010163" (the "Wright Memo"), a copy of which was appended to Daisy's Motion For Permission to Take an Interlocutory Appeal, dated October 4, 2002. Please (a) identify the person(s) from whom Daisy (or its representatives or agents) received the Wright Memo; (b) identify the person(s) acting in Daisy's behalf who received the Wright Memo; (c) identify the date on which the Wright Memo was

received by such person(s); (d) describe in detail the circumstances in which Daisy (or its representatives or agents) came to possess the Wright Memo; and (e) state whether there were other pages and/or documents appended to the Wright Memo when it was received by Daisy (or its representatives or agents) and identify those pages and/or documents.

December 6, 2002

Respectfully submitted:



Mark W. Porter
Eric L. Stone
Sean R. Ward

Complaint Counsel
4330 East West Highway
Bethesda, MD 20814
301-504-0626 ext. 1104

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2002, I caused a copy of the foregoing **Complaint Counsel's Third Set of Interrogatories** to be served upon all parties of record in these proceedings, as follows:

By facsimile and first class mail, postage prepaid to:

The Honorable William B. Moran, Administrative Law Judge
and Presiding Officer

By first class mail, postage prepaid, and facsimile to:

Aaron Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

Attorneys for Daisy Manufacturing Company

By first class mail, postage prepaid and facsimile to:

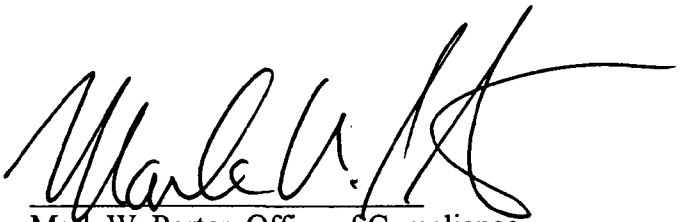
William M. Griffin, III, Esq.
Friday, Eldredge & Clark
2000 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
Rogers, AR 72756

Attorneys for Daisy Manufacturing Company

By hand delivery to:

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408



Mark W. Porter, Office of Compliance
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814-4408

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

OFFICE OF THE SECRETARY
2002 NOV 26 P 12:40

In the matter of	
DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

COMPLAINT COUNSEL'S

FOURTH SET OF REQUESTS FOR

PRODUCTION OF DOCUMENTS AND THINGS

Complaint Counsel makes the following request to Respondent, DAISY MANUFACTURING COMPANY, pursuant to 16 C.F.R. § 1025.33, and other provisions thereof.

INSTRUCTIONS

1. Each request is required to be answered on the basis of the entire knowledge of the respondent herein, including all information in the possession of, or reasonably accessible to, Respondent, Respondent's agents, representatives or attorneys.

2. In the first paragraph of the response immediately below the title of the case, identify the responding party, the set number, and the identity of the propounding party. Each answer shall bear the same identifying number and be in the same sequence as the corresponding requests.

3. Please identify in your written response, each and every record, writing, document, paper, book, account, letter, photograph, object or other tangible thing for each item or category specified below that is in your possession, custody or control. Any documents demanded shall either be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand.

4. If you are unable to comply with a particular demand for inspection, state that a diligent search and a reasonable inquiry have been made in an effort to comply with that demand. You shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. Set forth the name and address of any natural person or organization known or believed to have possession, custody, or control of that item or category of item.

5. Please produce and permit the inspection and copying or photographing by, or on behalf of, Complaint Counsel of the documents or things requested below. You may comply by forwarding copies of said documents or said items to Complaint Counsel or you may provide the documents or things for inspection and photocopying at the offices of Complaint Counsel, which is located at 4330 East West Highway, Bethesda, Maryland 20814.

6. To comply fully with this request you must produce actual photographs or negatives, if requested. Prints will be made at our expense and all photographs returned immediately thereafter. Photocopies of any requested photographs will <u>not</u> be deemed compliance with this request.

7. In the event you withold any document(s) responsive to this request on the basis of a claim of privilege, identify that document by providing (a) the nature or type of document (e.g. memorandum, letter, chart, report, e-mail, etc.); (b) the date of the document; (c) the date the document was prepared, if known; (d) the author or authors or creators of the document; (e) recipient or intended recipient of the document or the custodian of the document if it was neither sent nor received; (f) a description of the content of the document sufficient to assess the basis for your privilege claim; (g) the nature of the privilege asserted.

DEFINITIONS

For purposes of this Request, the following definitions apply:

a. The term "you" as used herein means not only the Respondent, but also all of Respondent's representatives, including Respondent's agents, employees, accountants, attorneys, investigators and anyone else acting on Respondent's behalf.

b. The term "document" means any written, graphic, photographic, audio or visual materials, however produced or reproduced, of any kind or description, whether sent or received or neither, including, but not limited to: records, papers, books, letters, telefacsimiles, photographs, motion pictures, video tapes, audio recordings, correspondence, drawings, sketches, schematics, manuals, blueprints, work papers, intra- and inter office communications, transcripts, minutes, reports, and recording or telephone or other conversations, or of interviews, conferences, or meetings, affidavits, statements, summaries, opinions, court pleadings, reports, indices, studies, analyses, evaluations,

contracts, licenses, agreements, questionnaires, answers to questionnaires, statistical records, desk calendars, appointment books, diaries, telephone logs, lists, tabulations, charts, graphs, data sheets, computer tapes, disks, cards, printouts, electronic mail or programs, microfilms, all other documents kept by electronic, photographic, or mechanical means, and things similar to any of the foregoing, regardless or their author or origin, however denominated.

c. The term "person" includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.

d. The term "address" means the street address, including the city, state, and zip code.

e. The term "Powerline Airgun(s)" or "Daisy Powerline Airgun(s)" shall mean airguns manufactured by Daisy Manufacturing Company, Daisy Manufacturing Company, Inc., Victor Comptometer Corporation, Daisy Division, and or Walter Kidde & Company, Daisy Division. The Powerline Airguns include, but are not limited to, models 880, 881, 882, 1880, 1881, 9072, 9082, 9083, 9093, 9393, 9382, 3305, 3480, 3933, 1455, 5150, 860, 856, 2856, 7856 & 990.

f. The term "Model 880" includes the following airgun models and product numbers: 880, 881, 882, 1880, 1881, 9072, 9082, 9083, 9093, 9393, 9382, 3305, 3480, 3933, 1455, 5150, 860, 856, 2856, 7856 & 990.

g. "Relating to" or "related to" shall mean consisting of, referring to, describing, discussing, constituting, evidencing, containing, mentioning, concerning, pertaining to, citing, summarizing, analyzing, or bearing any logical or factual connection with the matter discussed.

h.The definition of terms listed in 15 U.S.C. § 2052, and 15 U.S.C. § 1261 are incorporated in this definition as though fully set forth herein.

REQUEST FOR PRODUCTION OF DOCUMENTS

Provide the following documents:

1. All documents relating to the desirability, effectiveness, functionality, and/or use or misuse of automatic safeties in airguns, including, but not limited to, memoranda, test reports, technical evaluations, drawings, studies, human factors analyses, marketing analyses, engineering and manufacturing records, analyses or reports or complaints regarding actual use or misuse, repair and warranty records, compilations and/or analyses of incident data, training documents, product manuals, articles, patents, drawings, and all documents upon which Respondent intends to rely, in whole or in part, at trial related to this issue.
2. All documents not already produced relating to incidents of injury or alleged injury involving Daisy Powerline airguns and all documents relating to allegations that a Daisy airgun fired after it appeared to the user(s) not to be loaded.
3. All documents relating to the age, gender, and other demographic characteristics of users of Daisy Powerline Airguns and any other high powered guns.
4. All documents relating to, or comparing, the magazine design and safety design of Daisy Powerline Airguns and any other high powered (400 fps or more) airguns.
5. With the exception of documents produced by Complaint Counsel in discovery in this proceeding, all documents received by Respondent or its counsel from the Consumer Product Safety Commission, from the Commission's files, or from

any current or former member of the Commission's staff, relating to this case or to high powered (400 fps or more) airguns, and all documents transmitting or describing those documents or pertaining to conversations with such staffer(s).

6. All documents not already produced relating to Respondent's defenses regarding alleged procedural irregularities by the Chairman, Commissioners, or Commission staff. You should also provide all documents relating to contacts between Daisy, its counsel, and any other agents (including, but not limited to, lobbyists and public relations firms) and the media (including Jayne O'Donnell of *USA Today*, *The Washington Times*, *The Washington Post)*, the office of Commissioner Mary Sheila Gall, Members of Congress, airgun trade associations, the National Rifle Association and any other members of the public between September 1 and November 1, 2001.

7. All documents relating to the decision by Daisy to market the Powerline Airguns.

8. All documents relating to Daisy's participation and positions in the ASTM voluntary standards process relating to airguns and ammunition for airguns.

9. All documents, prepared since 1965, that summarize and/or analyze injury incidents involving Daisy's Youthline BB guns including, but not limited to, liability and insurance summaries; risk management summaries, studies, indexes or databases; and studies or analyses of injuries from any source.

10. All packaging, advertising, and operating manuals for each and every Daisy airgun that uses/used an automatic safety.

11. All documents relating to termination of Guy Braughler's employment by or with Daisy, including but not limited to, severance agreements and post-employment consulting agreements.

12. All documents related to the corporate ownership and financial relationships between Charter Oaks, Daisy, and Brass Eagle, and reflecting all changes in corporate structure or financing during the last five years.

13. All documents relating to the relative functionality and effectiveness of gravity feed mechanisms and positive feed mechanisms used by Daisy and/or its competitors including, but not limited to, all studies, analyses, comparisons, or testing.

14. All documents constituting or otherwise relating to Daisy's policies and/or recommendations regarding the appropriate age of Powerline Airgun users including, but not limited to, any expert or marketing advice, studies, guidance, contacts with distributors and retailers, contacts with clubs and organizations, articles, and advertisements.

15. All documents relating to testing or analysis of the energy, force and speed of BBs or pellets fired from Powerline Airguns and all documents relating to study or analysis of the injuries that could occur to human beings hit by BBs or pellets fired by such guns.

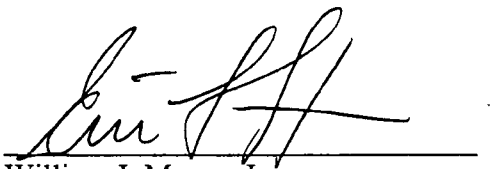
16. All documents provided by Daisy to the Commission in each of the past investigations of Daisy Powerline Airguns. Please segregate each set of documents by each individual investigation.

Provide the following things:

1. One unit of each Daisy model 880 airgun(s) manufactured in the years 1972, 1978, 1984, 1994, 1998. If you have guns in working order, you should provide them for inspection. Please provide any documents relating to the history of the particular guns produced.
2. One unit of each model of any Daisy airgun that contains an automatic safety. If you have guns in working order, you should provide them for inspection. Please provide any documents relating to the history of the particular guns produced.
3. All Daisy Powerline airguns that have been involved in alleged incidents of injury or death and all guns that allegedly fired after the user believed the gun was not loaded.
4. One unit of each model of 856 or 860 airgun manufactured in the years 1983, 1984, 1987, 1990, 1994, 1997 and 1999. If you have guns in working order, you should provide them for inspection. Please provide any documents relating to the history of the particular guns produced.
5. One unit of each model of Daisy airguns or BB guns models 104, 7104, 454, 1106, 1770, 1499, 400, 7084, 26. If you have guns in working order, you should provide them for inspection. Please provide any documents relating to the history of the

particular guns produced.

Date: November 26th, 2002



William J. Moore, Jr.
Eric L. Stone
Complaint Counsel
Legal Division
Office of Compliance
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408
(301) 504-0626, ext. 1348

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2002, I caused a copy of the foregoing **Complaint Counsel's Fourth Set of Requests for Production of Documents and Things** to be served upon all parties of record in these proceedings, as follows:

By facsimile and first class mail, postage prepaid to:

The Honorable William B. Moran, Administrative Law Judge
and Presiding Officer

By certified mail, return receipt requested, postage prepaid, and facsimile to:

Aaron Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

Attorneys for Daisy Manufacturing Company

By first class mail, postage prepaid and facsimile to:

William M. Griffin, III, Esq.
Friday, Eldredge & Clark
2000 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
Rogers, AR 72756

Attorneys for Daisy Manufacturing Company

By hand delivery to:

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408

Frederica C Clair

Frederica Clair, Office of Compliance
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814-4408

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, Inc., doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756 Respondent.	CPSC Docket No.: 02-2

NOTICE OF APPEARANCE

Pursuant to Section 1025.63 of the U.S. Consumer Product Safety Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. §1025.63, this filing constitutes Notice that the undersigned will appear as counsel for the Commission staff in the above-entitled action.

Respectfully submitted

Ronald S. Yelenik

Date: December 19, 2002

Ronald G. Yelenik
Complaint Counsel
Legal Division
Office of Compliance
4330 East West Highway
Bethesda, Maryland 20814-4408
(301) 504-0626, ext. 1351

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2002, a copy of the attached **Notice of Appearance** was served upon all parties of record in these proceedings. Specifically, a copy of same was mailed, first class, postage pre-paid, to:

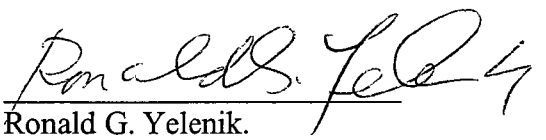
Aaron Locker, Esq.
Jeffrey M. Locker, Esq.
Locker, Greenberg & Brainin
420 Fifth Avenue, 26th Floor
New York, NY 10018

William M. Griffin, III, Esq.
Friday, Eldredge & Clark
2000 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
Rogers, AR 72756

By hand delivery to:

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408



Ronald G. Yelenik.
Complaint Counsel for the
U.S. Consumer Product Safety Commission

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

AARON LOCKER, ESQ.
JEFFREY M. LOCKER, ESQ.
420 FIFTH AVENUE, 26TH FLOOR
NEW YORK, NY 10018

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* D DAVIS

B. Date of Delivery 11/13/02

C. Signature

X [signature]

☐ Agent
☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

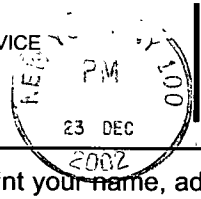
3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☑ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number *(Copy from service label)* 7000-1670-0013-2736-2047

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

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US CONSUMER PRODUCT SAFETY COMMISSION
ATTN: LEGAL DIVISION / Ron Yelenik
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814

35

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, Inc., doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756 Respondent.	CPSC Docket No.: 02-2

NOTICE OF APPEARANCE

Pursuant to Section 1025.63 of the U.S. Consumer Product Safety Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. §1025.63, this filing constitutes Notice that the undersigned will appear as counsel for the Commission staff in the above-entitled action.

Respectfully submitted

Ronald S. Yelenik

Date: December 19, 2002

Ronald G. Yelenik
Complaint Counsel
Legal Division
Office of Compliance
4330 East West Highway
Bethesda, Maryland 20814-4408
(301) 504-0626, ext. 1351

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2002, a copy of the attached **Notice of Appearance** was served upon all parties of record in these proceedings. Specifically, a copy of same was mailed, first class, postage pre-paid, to:

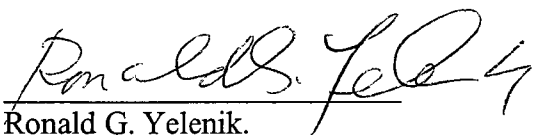
Aaron Locker, Esq.
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Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
Rogers, AR 72756

By hand delivery to:

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408



Ronald G. Yelenik.
Complaint Counsel for the
U.S. Consumer Product Safety Commission

SENDER: *COMPLETE THIS SECTION*

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1. Article Addressed to:

AARON LOCKER, ESQ.
JEFFREY M. LOCKER, ESQ.
420 FIFTH AVENUE, 26TH FLOOR
NEW YORK, NY 10018

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* D DAVIS

B. Date of Delivery 11/13/02

C. Signature

X [signature]

☐ Agent
☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

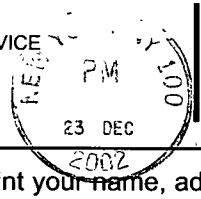
3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☑ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number *(Copy from service label)* 7000-1670-0013-2736-2047

PS Form 3811, July 1999 Domestic Return Receipt 102595-00-M-0952

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US CONSUMER PRODUCT SAFETY COMMISSION
ATTN: LEGAL DIVISION / Ron Yelenik
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814

35

KUTAK ROCK LLP

THE OMAHA BUILDING
1650 FARNAM STREET

OMAHA, NEBRASKA 68102-2186

402-346-6000
FACSIMILE 402-346-1148

FACSIMILE TRANSMISSION

DATE: December 9, 2002

TO:

NAME	FAX NO.	PHONE NO.
Howard N. Tarnoff, Esq. U.S. Consumer Product Safety Commission	(301) 504-0359	(301) 504-0626

If you experience any problems in receiving these pages, please call (402)346-6000 as soon as possible. Thank you.

FROM: Thomas J. Kenny **EMPL. NO.:** 1769

SECRETARY: Barb Brown/lmh

CLIENT NUMBER: 12041/01-40	
NUMBER OF PAGES, INCLUDING COVER PAGE: 9	CONFIRM: No

MESSAGE:

CONFIDENTIAL FACSIMILE TRANSMISSION

The information contained in this facsimile and the accompanying pages is intended solely for the addressee(s) named above. If you are not an addressee, or responsible for delivering these documents to an addressee, you have received these documents in error and you are strictly prohibited from reading or disclosing it. The information contained in these documents is highly confidential and may be subject to legally enforceable privileges. Unless you are an addressee, or associated with an addressee for delivery purposes, you may violate these privileges and subject yourself to liability if you do anything with these documents or the information it contains other than calling us immediately at the number listed above and returning these documents to us at once.

02 DEC -9 PM 8:16

GROUP CODE (FAXES)

- ☐ 7100 – Personal
- ☐ 7200 – Local
- ☒ 7300 – Long-Distance
- ☐ 7400 – International

Operator: _____

KUTAK ROCK LLP

THE OMAHA BUILDING
1650 FARNAM STREET
OMAHA, NEBRASKA 68102-2186

402-346-6000
FACSIMILE 402-346-1148

www.kutakrock.com

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PASADENA
RICHMOND
SCOTTSDALE
WASHINGTON

THOMAS J. KENNY
thomas.kenny@kutakrock.com
(402) 231-8768

December 9, 2002

VIA FACSIMILE AND FIRST-CLASS MAIL

Howard N. Tarnoff, Esq.
Trial Attorney
Legal Division
Office of Compliance
U. S. Consumer Product Safety Commission
Washington, DC 20207

Re: *In the Matter of Daisy Manufacturing Company*
CPSC Docket No. 022; Subpoena

Dear Mr. Tarnoff:

Enclosed are Wal-Mart's responses and objections to the Subpoena to Wal-Mart dated November 18, 2002.

With regard to the requested depositions of Wal-Mart employees, we understand you will contact us concerning scheduling. We have previously advised you that none of the Wal-Mart witnesses will be available until mid-January 2003. Since that time, we have consulted with the relevant witnesses, and wish to advise you that they are presently available in Bentonville on the following dates: January 13, 14, and February 10, 11, and 12. We will hold these dates open until this Friday, and ask you to contact us by then to confirm the dates. After Friday, these dates may no longer be available to the witnesses due to the press of other business. We assume you will contact Daisy's counsel or others who may be attending the depositions. As we have previously advised you, these witnesses will not be available to appear for deposition in Maryland.

We look forward to hearing from you this week.

Sincerely,

Thomas J. Kenny

Enclosures
cc: William J. Moore, Esq. (without enclosures)
Brian C. Buescher, Esq. (without enclosures)

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter Of DAISY MANUFACTURING COMPANY, INC. doing business as Daisy Outdoor Products,	CPSC Docket No.: 02-2

GENERAL OBJECTIONS

1. Wal-Mart objects to the Written Questions and Documents Requests (collectively, "Requests") to the extent they seek information which is not relevant to the subject matter of the pending action or reasonably calculated to lead to the discovery of admissible evidence.

2. Wal-Mart objects to the Requests to the extent they seek information about persons or entities other than the parties to the pending action for the reason that such information is not relevant to the subject matter of the pending action or reasonably calculated to lead to the discovery of admissible evidence.

3. Wal-Mart objects to the Requests to the extent they seek information protected from disclosure by the attorney-client privilege and/or the work product doctrine, the doctor-patient privilege or other privileges or protections accorded to personal health information.

4. Wal-Mart objects to each of the Requests to the extent it is overly broad or unduly burdensome, and specifically objects to each Request that seeks documents or information previously produced by the CPSC pursuant to a subpoena dated May 3, 2002. Wal-Mart produces responsive documents subject to the CPSC's agreement to reimburse Wal-Mart for reasonable costs incurred in producing such records.

5. Wal-Mart objects to each of the Requests to the extent it is unreasonably cumulative or duplicative, or that the information or documents requested therein are obtainable from some other source that is more convenient, less burdensome, or less expensive.

6. Wal-Mart objects to each of the Requests to the extent that the request seeks information or documents which contain trade secrets or other proprietary, confidential research, development or commercial information, and produces responsive documents and information subject to its Requests for Confidential Treatment to the CPSC.

7. Each of the General Objections set forth herein is applicable to, and included by this reference in, each answer to the Requests.

A. WRITTEN QUESTIONS

REQUEST NO. 1: Identify the Wal-Mart Stores, Inc. (hereinafter "Wal-Mart") employee(s) who has/had the most knowledge about advertisements, catalogs, posters, brochures, and other marketing used by Wal-Mart to promote the sale of the Daisy Powerline BB guns from 1990 to the present. The identification of each person shall include the years of service in the capacity noted above.

RESPONSE TO REQUEST NO. 1: Wal-Mart specifically objects to this Request as overly broad and unduly burdensome to the extent it seeks to identify both current and former employees over the past 12 years with the "most knowledge"; Wal-Mart currently employs more than 1.3 million employees, in more than 4,000 separate locations, and cannot conclusively state which of these current employees, or which former employees would have the "most knowledge." Notwithstanding this objection, and subject to its General Objections, Wal-Mart states that the following employee possesses knowledge of the subject matter identified in this Request:

Mr. Timothy Hart
Buyer/Sporting Goods (approximately 2 years)
Wal-Mart, Inc.
Bentonville, AR 72716
(approximately 14 years as a Wal-Mart employee)

REQUEST NO. 2: Identify the Wal-Mart employee(s) who has/had the most knowledge about Wal-Mart's in-store placement and retail display of the Daisy Powerline BB guns from 1990 to the present. The identification of each person shall include the years of service in the capacity noted above.

RESPONSE TO REQUEST NO. 2: Wal-Mart specifically objects to this Request as overly broad and unduly burdensome to the extent it seeks to identify, both current and former employees over the past 12 years with the "most knowledge"; Wal-Mart currently employs more than 1.3 million employees, in more than 4,000 separate locations, and cannot conclusively state which of these current employees, or which former employees would have the "most knowledge." Notwithstanding this objection, and subject to its General Objection, Wal-Mart states that the following employee possesses knowledge of the subject matter identified in this Request:

Mr. Timothy Hart
Buyer/Sporting Goods (approximately 2 years)
Wal-Mart, Inc.
Bentonville, AR 72716
(approximately 14 years as a Wal-Mart employee)

REQUEST NO. 3: Identify the Wal-Mart employee(s) who has/had the most knowledge about any restrictions that Wal-Mart placed or places on the retail purchase of the Daisy Powerline BB guns from 1990 to the present. These restrictions may include, but are not necessarily limited to, requiring that a purchaser of the Daisy Powerline BB guns be a certain minimum age,

a requirement placed on the purchaser to show identification before being allowed to purchase the Daisy Powerline BB guns, a bar coding system which indicates to the retail check-out clerk that certain procedures must be followed before the sale of the Daisy Powerline BB guns is final. The identification of each person shall include the years of service in the capacity noted above.

RESPONSE TO REQUEST NO. 3: Wal-Mart specifically objects to this Request as overly broad and unduly burdensome to the extent it seeks to identify, both current and former employees over the past 12 years with the "most knowledge"; Wal-Mart currently employs more than 1.3 million employees, in more than 4,000 separate locations, and cannot conclusively state which of these current employees, or which former employees would have the "most knowledge." Notwithstanding this objection, and subject to its General Objection, Wal-Mart states that the following employee possesses knowledge of the subject matter identified in this Request:

Mr. Raymond Crow
Licensing Analyst/Firearms' Information Manager
Wal-Mart, Inc.
Bentonville, AR 72716
(approximately 8 years as a Wal-Mart employee)

REQUEST NO. 4: Identify the current Wal-Mart employee who is responsible for verifying and authenticating those records that Wal-Mart maintains in the ordinary course of its business for the calendar year 2002.

RESPONSE TO REQUEST NO. 4: Wal-Mart specifically objects to this Request on the grounds that the phrase "responsible for verifying and authenticating" is ambiguous and assumes that any Wal-Mart employee has such a responsibility. Wal-Mart specifically objects to this Request as overly broad and unduly burdensome to the extent it seeks to identify an employee with knowledge of all Wal-Mart records. Wal-Mart currently employs more than 1.3 million employees, in more than 4,000 separate locations, and cannot conclusively state that any employee possesses such knowledge. Wal-Mart still further objects to this Request to the extent it seeks information which is not relevant to the subject matter of the pending action or reasonably calculated to lead to discovery of admissible evidence. Notwithstanding these objections, and subject to its General Objection, Wal-Mart states that the following employees possess knowledge of some of the documents Wal-Mart has produced to the CPSC in this action:

1. Mr. Timothy Hart

2. Mr. Raymond Crow
3. Ms. Brenda Bahn
   Casualty Claims Manager
   Claims Management, Inc.
   Rogers, AR 72757
   (approximately 16 years as a Wal-Mart employee)

REQUEST NO. 5: Identify the Wal-Mart employee(s) who is/was responsible for verifying and authenticating that those Wal-Mart records produced to the CPSC staff from 1999 to the present in response to this Subpoena or previous information requests pertaining to the Daisy Powerline BB guns are true, complete, and correct copies of Wal-Mart's original business records. The identification of each person shall include the years of service in the capacity noted above.

RESPONSE TO REQUEST NO. 5: Wal-Mart specifically objects to this Request on the grounds that the phrase "responsible for verifying and authenticating is ambiguous and assumes that any Wal-Mart employee has such a responsibility. Wal-Mart specifically objects to this Request as overly broad and unduly burdensome to the extent it seeks to identify an employee with knowledge of all Wal-Mart records. Wal-Mart currently employs more than 1.3 million employees, in more than 4,000 separate locations, and cannot conclusively state that any employee possesses such knowledge. Wal-Mart still further objects to this Request to the extent it seeks information which is not relevant to the subject matter of the pending action or reasonably calculated to lead to discovery of admissible evidence. Notwithstanding this objection, and subject to its General Objection, Wal-Mart states that the following employees possess knowledge of some of the documents Wal-Mart has produced to the CPSC in this action:

1. Mr. Timothy Hart

2. Mr. Raymond Crow

3. Ms. Brenda Bahn

B. DOCUMENT REQUESTS

REQUESTS NO. 1: To the extent not already provided by Wal-Mart to the CPSC staff, all documents relating to advertisements, catalogs, posters, brochures and other marketing used by Wal-Mart to promote the sale of the Daisy Powerline BB guns.

RESPONSE TO REQUESTS NO. 1: Wal-Mart specifically objects to this Request on grounds that it is overly broad and unduly burdensome, appears to request records from Wal-Mart's 4,400 stores, and contains no time limitation on the scope of the Request. Notwithstanding this objection, and subject to Wal-Mart's General Objections, Wal-Mart states that it has produced responsive records (or interposed appropriate objections) pursuant to a nearly identical request in the Subpoena from the CPSC to Wal-Mart dated May 3, 2002 ("First Subpoena"). Responsive documents may be found on CD-Roms Volumes 1 through 11 produced to the CPSC on July 3, July 19, August 13, September 17, September 30 and November 15, 2002, respectively.

REQUESTS NO. 2: To the extent not already provided by Wal-Mart to the CPSC staff, all documents relating to Wal-Mart's in-store placement and retail display of the Daisy Powerline BB guns.

RESPONSE TO REQUESTS NO. 2: Wal-Mart specifically objects to this Request on grounds that it is overly broad and unduly burdensome, appears to request records from Wal-Mart's 4,400 stores, and contains no time limitation on the scope of the Request. Notwithstanding this objection, and subject to Wal-Mart's General Objections, Wal-Mart states that it has produced all responsive records (or interposed appropriate objections) pursuant to a nearly identical request in the Subpoena from the CPSC to Wal-Mart dated May 3, 2002 ("First Subpoena"). Responsive documents may be found on CD-Roms Volumes 1 through 11 produced to the CPSC on July 3, July 19, August 13, September 17, September 30 and November 15, 2002, respectively.

REQUESTS NO. 3: All documents relating to or implementing any restrictions, or consideration of any restrictions, that Wal-Mart placed or places on the retail purchase of the Daisy Powerline BB guns. These restrictions may include, but are not necessarily limited to, requiring that a purchaser of the Daisy Powerline BB guns be a certain minimum age, a requirement placed on the purchaser to show identification before being allowed to purchase the Daisy Powerline BB guns, a bar coding system which indicates to the retail check-out clerk that certain procedures must be followed before the sale of the Daisy Powerline BB guns is final. These documents may include, but should not be limited to, internal Wal-Mart corporate communications, communications between Wal-Mart and its merchandising/marketing employees and agents, communications between Wal-Mart and its retail outlets and communications between Wal-Mart and Daisy.

RESPONSE TO REQUESTS NO. 3: Wal-Mart objects to this Request for the reason that it seeks documents protected from disclosure by the attorney-client privilege and work product doctrine. Wal-Mart specifically objects to this Request on grounds that it is overly broad and unduly burdensome, appears to request records from Wal-Mart's 4,400 stores, and contains no time limitation on the scope of the Request. Notwithstanding this objection, and subject to Wal-Mart's General Objections, Wal-Mart states that it has produced all responsive records (or interposed appropriate objections) pursuant to a nearly identical request in the Subpoena from

the CPSC to Wal-Mart dated May 3, 2002 ("First Subpoena"). Responsive documents may be found on CD-Roms Volumes 1 through 11 produced to the CPSC on July 3, July 19, August 13, September 17, September 30 and November 15, 2002, respectively. Notwithstanding these objections, Wal-Mart will produce any additional responsive records at a mutually convenient time and place.

REQUESTS NO. 4: All correspondence and documents exchanged between Wal-Mart and Daisy relating to Daisy's decision to change the model 856 Daisy Powerline BB gun from a gun that fires BBs and pellets to a gun that fires only pellets.

RESPONSE TO REQUESTS NO. 4: Wal-Mart specifically objects to this Request on grounds that it is overly broad and unduly burdensome, appears to request records from Wal-Mart's 4,400 stores, and contains no time limitation on the scope of the Request. Notwithstanding this objection, and subject to Wal-Mart's General Objections, Wal-Mart states that it has produced responsive records (or interposed appropriate objections) pursuant to a nearly identical request in the Subpoena from the CPSC to Wal-Mart dated May 3, 2002 ("First Subpoena"). Notwithstanding these objections, Wal-Mart will produce any additional responsive records at a mutually convenient time and place.

REQUESTS NO. 5: To the extent not previously produced by Wal-Mart to the CPSC staff:

(a) all consumer complaints, dealer complaints, other complaints, claims, insurance forms, lawsuits, and reports of injury or death, complete with all documents relating thereto, involving the Daisy Powerline BB guns; and

(b) all documents constituting a record or memorialization of verbal consumer complaints, other complaints, claims and reports of injury or death relating to the Daisy Powerline BB guns.

RESPONSE TO REQUESTS NO. 5: Subject to Wal-Mart's General Objections, Wal-Mart states that it has produced responsive records (or interposed appropriate objections) pursuant to a nearly identical request in the Subpoena from the CPSC to Wal-Mart dated May 3, 2002 ("First Subpoena"). Responsive documents may be found on CD-Roms Volumes 1 through 11 produced to the CPSC on July 3, July 19, August 13, September 17, September 30 and November 15, 2002, respectively.

REQUESTS NO. 6: To the extent not previously produced by Wal-Mart to the CPSC staff, all correspondence and documents reflecting contracts (written or oral) between Wal-Mart and Daisy relating to injuries, deaths, defects, and/or concerns about the Daisy Powerline BB guns.

RESPONSE TO REQUESTS NO. 6: Subject to Wal-Mart's General Objections, Wal-Mart states that it has produced responsive records (or interposed appropriate objections) pursuant to a nearly identical request in the Subpoena from the CPSC to Wal-Mart dated May 3, 2002 ("First Subpoena"). Responsive documents may be found on CD-Roms Volumes 1 through 11 produced to the CPSC on July 3, July 19, August 13, September 17, September 30 and November 15, 2002, respectively.

REQUESTS NO. 7: The current curriculum vitae or resumes of the person(s) identified by you in response to the questions in Section IV of this Subpoena.

RESPONSE TO REQUESTS NO. 7: Subject to Wal-Mart's General Objections, Wal-Mart will produce responsive records at a mutually convenient time and place.

Dated this 9th day of December, 2002.

WAL-MART, INC.

By _____

Thomas J. Kenny #20022
Kutak Rock LLP
The Omaha Building
1650 Farnam Street
Omaha, NE 68102-2186
(402) 346-6000

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
Respondent	)	
	)	

Order Directing Briefing on Issues of Significance

In October 2001 the Court issued an Order directing preliminary comment on the scope of admissible evidence. That Order represented an initial inquiry into issues that the Court believed would have significance in this proceeding. Now the Court formally directs the parties to brief those issues and a third issue that the Court perceives to be significant. The issues are as follows:

1. To what extent, if at all, should evidence of accidents involving the cited airguns be admissible to prove that those guns present a substantial product hazard defect under the Consumer Product Safety Act ("CPSA") or a substantial risk of injury to children under the Federal Hazardous Substances Act ("FHSA")?

In the initial response to this Order, Daisy suggested that evidence of airgun accidents should not be limited to the cited Daisy models but should include evidence of accidents involving other manufacturers' airguns. Complaint Counsel has indicated it intends to "rely upon evidence of incidents" to demonstrate the alleged defects. While not in any sense a final ruling, the Court wishes to alert the parties that its preliminary view is that evidence involving airgun accidents, beyond those models cited in the complaint, are not relevant. On the other hand, the Court also takes the preliminary view that evidence of accidents involving the cited airguns is also problematic because it would present the spectre of revisiting those instances, if any, where a trial occurred and would be even less probative where a settlement occurred. Therefore the parties should indicate why they agree with the Court's preliminary views, or the briefs should show the Court why these views are mistaken, by pointing to cases or other authority which support their respective positions.

2. To what extent, if any, should evidence of testing of airguns, other than the models cited in the Complaint, be admissible in the proceeding?

In its initial response, Daisy urges that testing of models beyond those cited in the complaint should be admissible and that such evidence should include models from *other* manufacturers. Complaint Counsel takes the position that previous investigations of the Powerline BB guns[1] or investigations of any other airguns are irrelevant to the determination of whether the cited guns present a hazard or defect in this case. The Court's preliminary view is that any testing of airguns, other than those cited in the Complaint, is immaterial to the issues in this proceeding. However, it does not agree with Complaint Counsel's position either, and believes that all testing of the same airguns should be admissible. Nor should such testing of Daisy airguns be inadmissible if the testing involved essentially the same gun although bearing a different model number.[2] As with the first issue, the parties should indicate, with supporting reasons, either why they agree with the Court's preliminary views, or the briefs should show why these views are in error by pointing to case law or other authority which supports their positions.

The Court directs the parties to also brief this additional issue for its consideration.

3. Can a defect creating a substantial product hazard or, as a separate issue, a can a defect creating a substantial risk of injury to children ever exist if no hazard can be presented without the intervention of a reckless act? For example, speaking purely hypothetically,[3] if it were assumed that a BB could lodge in an airgun but that no harm could occur to the user or to another from that circumstance except by firing an apparently empty gun at another person or by the user pointing the gun at himself, can such a problem properly be characterized as a substantial product hazard defect? As with the other issues, the Court directs the parties to point to case law and other authority in support of their positions. Unlike the first two issues, the Court will not make a ruling on this issue until after the benefit of the testimony and other evidence received at the

[1]Presumably, Complaint Counsel was using the term "Powerline BB guns" to refer to the specific models cited in the Complaint.

[2]The Court does not know, nor suggest, that such a situation exists where essentially the same gun bears model numbers that are different from those cited in the Complaint.

[3]The Court wants to emphasize that this is only a hypothetical question. Obviously, during the course of discovery the Court has developed some preliminary sense of potential issues in the case. However, *none* of this discovery is part of the record of admissible evidence at this time. Restated, no documents or other evidence has been admitted at this point. Therefore, no judgments, even preliminary judgments, are made or suggested by positing this question.

trial. However, it believes that it will be useful for the parties to brief this issue now. Because the Court appreciates that the parties are expending energy on other matters related to this proceeding, it is providing an extended period of time for submission of the briefs on these issues by directing that the briefs do not need to be filed until Thursday, February 27, 2003.

William B. Moran
William B. Moran
United States Administrative Law Judge

Dated: January 2, 2003

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
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Respondent	)	
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The Court directs the parties to also brief this additional issue for its consideration.

Reasonably foreseeable misuse

3. Can a defect creating a substantial product hazard or, as a separate issue, a can a defect creating a substantial risk of injury to children ever exist if no hazard can be presented without the intervention of a reckless act? For example, speaking purely hypothetically,[3] if it were assumed that a BB could lodge in an airgun but that no harm could occur to the user or to another from that circumstance except by firing an apparently empty gun at another person or by the user pointing the gun at himself, can such a problem properly be characterized as a substantial product hazard defect? As with the other issues, the Court directs the parties to point to case law and other authority in support of their positions. Unlike the first two issues, the Court will not make a ruling on this issue until after the benefit of the testimony and other evidence received at the

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William B. Moran
William B. Moran
United States Administrative Law Judge

Dated: January 2, 2003

FRIDAY ELDREDGE & CLARK

HERSCHEL H. FRIDAY (1922-1994)
WILLIAM H. SUTTON, P.A.
BYRON M. EISEMAN, JR., P.A.
JOE D. BELL, P.A.
JAMES A. BUTTRY, P.A.
FREDERICK S. URSERY, P.A.
OSCAR E. DAVIS, JR., P.A.
JAMES C. CLARK, JR., P.A.
THOMAS F. LIGGETT, P.A.
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ROBERT S. SHAFER, P.A.
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MICHAEL S. MOORE, P.A.
DIANE S. MACKEY, P.A.
WALTER M. DELL III, P.A.
KEVIN A. CRASS, P.A.
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SCOTT J. LANCASTER, P.A.
ROBERT B. BEACH, JR., P.A.
J. LEE BROWN, P.A.
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HARRY A. LIGHT, P.A.
SCOTT H. TUCKER, P.A.
GUY ALTON WADE, P.A.
PRICE C. GARDNER, P.A.
TONIA P. JONES, P.A.
DAVID O. WILSON, P.A.
JEFFREY H. MOORE, P.A.
DAVID M. GRAF, P.A.

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A.D. MCALLISTER

WILLIAM M. GRIFFIN III
LITTLE ROCK
TEL 501-376-1616
FAX 501-244-5327
griffin@frec.net

January 3, 2003

Via Facsimile and U.S. Mail

Mr. Howard N. Tarnoff
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

Re: In the matter of Daisy Manufacturing Company
CPSC Dockett No. 02-2

Dear Howard:

Enclosed please find executed Response to Subpoena to Ray Hobbs.

Sincerely,

William M. Griffin III

WMG:bcw
cc: Ms. Marianne McBeth (via fax)
Mr. Aaron Locker (via fax)

19894.0006

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, AR 72756	)	
	)	
	)	
	)	
Respondent	)	
	)	

RESPONSE TO SUBPOENA TO RAY HOBBS

Ray Hobbs, for his Response to the Subpoena issued upon him does state:

1. Please see attached Affidavit.

WHEREFORE, having fully complied with the Subpoena, the Respondent respectfully requests that Mr. Hobbs be relieved of any further responsibility in this matter, that the Complaint be dismissed, for attorneys' fees and all other costs to which Respondent is entitled.

Respectfully submitted,

FRIDAY, ELDREDGE & CLARK, LLP
2000 Regions Center
400 West Capitol Avenue
Little Rock, Arkansas 72201-3493
(501)-376-2011

Attorneys for Defendant

By: _____
William M. Griffin III #82069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by U. S mail, postage prepaid and addressed as follows, this 3rd day of January, 2003.

Mr. Howard N. Tarnoff
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

William M. Griffin III

AFFIDAVIT

Comes Affiant and sayth:

1. My name is Ray Hobbs. I am President of Daisy Manufacturing Company.

2. I received a subpoena along with a Request for Production of Documents in this case.

3. A diligent search and inquiry has been made of my documents separate and apart from the documents already produced by Daisy in this litigation.

4. In regard to the Response to Production of Documents, I have made a inquiry and diligent search along with counsel for Daisy Manufacturing Company for any documents responsive to the request for production.

5. Upon conclusion of the search, I have no documents that have not already been produced by Daisy Manufacturing Company in this litigation.

6. I certify that a full and diligent search has been made of all of the documents in order to comply with the notice.

7. If I remember correctly the above was explained during my oral deposition to counsel for the Commission.

Further the Affiant sayeth not.

Lewis Ray Hobbs

VERIFICATION

STATE OF ARKANSAS)
) ss.
COUNTY OF Benton)

I, Lewis Ray Hobbs, do hereby certify that the facts and matters contained in the foregoing Affidavit are true and correct to the best of my knowledge, information and belief.

Lewis Ray Hobbs

SUBSCRIBED AND SWORN TO before me on this 3rd day of January, 2003.

Notary Public

My Commission Expires:
03/01/2012

Julie A. Akee
County Of Benton
Notary Public - Arkansas
My Commission Exp. 03/01/2012

FRIDAY ELDREDGE & CLARK

HERSCHEL H. FRIDAY (1922-1994)
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CHRISTOPHER HELLER, P.A.
LAURA HENSLEY SMITH, P.A.
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A.D. MCALLISTER

WILLIAM M. GRIFFIN III
LITTLE ROCK
TEL 501-376-1616
FAX 501-244-5327
griffin@frec.net

January 3, 2003

Via Facsimile and U.S. Mail

Mr. Howard N. Tarnoff
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

Re: In the matter of Daisy Manufacturing Company
CPSC Dockett No. 02-2

Dear Howard:

Enclosed please find executed Response to Subpoena to Ray Hobbs.

Sincerely,

William M. Griffin III

WMG:bcw
cc: Ms. Marianne McBeth (via fax)
Mr. Aaron Locker (via fax)

19894.0006

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, AR 72756	)	
	)	
	)	
	)	
Respondent	)	
	)	

RESPONSE TO SUBPOENA TO RAY HOBBS

Ray Hobbs, for his Response to the Subpoena issued upon him does state:

1. Please see attached Affidavit.

WHEREFORE, having fully complied with the Subpoena, the Respondent respectfully requests that Mr. Hobbs be relieved of any further responsibility in this matter, that the Complaint be dismissed, for attorneys' fees and all other costs to which Respondent is entitled.

Respectfully submitted,

FRIDAY, ELDREDGE & CLARK, LLP
2000 Regions Center
400 West Capitol Avenue
Little Rock, Arkansas 72201-3493
(501)-376-2011

Attorneys for Defendant

By: _____
William M. Griffin III #82069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by U. S mail, postage prepaid and addressed as follows, this 3rd day of January, 2003.

Mr. Howard N. Tarnoff
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

William M. Griffin III

AFFIDAVIT

Comes Affiant and sayth:

1. My name is Ray Hobbs. I am President of Daisy Manufacturing Company.

2. I received a subpoena along with a Request for Production of Documents in this case.

3. A diligent search and inquiry has been made of my documents separate and apart from the documents already produced by Daisy in this litigation.

4. In regard to the Response to Production of Documents, I have made a inquiry and diligent search along with counsel for Daisy Manufacturing Company for any documents responsive to the request for production.

5. Upon conclusion of the search, I have no documents that have not already been produced by Daisy Manufacturing Company in this litigation.

6. I certify that a full and diligent search has been made of all of the documents in order to comply with the notice.

7. If I remember correctly the above was explained during my oral deposition to counsel for the Commission.

Further the Affiant sayeth not.

Lewis Ray Hobbs

VERIFICATION

STATE OF ARKANSAS)
) ss.
COUNTY OF Benton)

I, Lewis Ray Hobbs, do hereby certify that the facts and matters contained in the foregoing Affidavit are true and correct to the best of my knowledge, information and belief.

Lewis Ray Hobbs

SUBSCRIBED AND SWORN TO before me on this 3rd day of January, 2003.

Notary Public

My Commission Expires:
03/01/2012

Julie A. Akee
County Of Benton
Notary Public - Arkansas
My Commission Exp. 03/01/2012

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products	)	
400 West Stribling Drive	)	
Rogers, AR 72756	)	
	)	
	)	
Respondent	)	
	)	

MOTION FOR PROTECTIVE ORDER

Respondent Daisy moves for a Protective Order regarding the deposition of Wal-Mart employees and for reason states:

1. Apparently, on May 3, 2002, a subpoena was issued to Wal-Mart by the Consumer Product Safety Commission. Daisy was apparently provided with a copy of the proof of service of the subpoena.

2. Daisy only recently learned that in November, 2002, Wal-Mart produced over 30,000 documents in response to this subpoena. The CPSC failed to exercise the courtesy of providing Daisy with notice of the production or the opportunity to inspect the documents. As of the filing of this pleading, Daisy has not seen the documents produced.

3. As is the custom of the Consumer Product Safety Commission's legal staff, a second subpoena was served which was apparently close to identical to the first subpoena with a few differences. One of the differences was the request for deposition testimony of Wal-Mart witnesses.

14, 2003. Daisy has not been provided with notice of who exactly is going to be deposed and on what subjects they are going to be deposed other than what is provided in the subpoena. To reiterate, Daisy has none of the documents about which these witnesses are going to be deposed.

5. Daisy has been in contact recently with the attorney for Wal-Mart and has learned that a large portion of the document production apparently concerned incidents completely unrelated to the defect claims alleged in the present matter. (E.g., documents concerning shooting incidents on Wal-Mart store premises). Documents concerning such non-relevant matters should have no bearing upon this case or the determination of the alleged core issue of whether the air rifles involved in this litigation are somehow defective.

6. To the extent any of the documents produced by Wal-Mart are relevant to the determination of any issue in this adversary proceeding, Daisy is being subjected to undue surprise by virtue of the fact that it has received no notice of production, no opportunity to inspect the documents and little notice of the apparent impending depositions of Wal-Mart personnel.

7. Counsel for Daisy has contacted complaint counsel in an effort to address this matter; however, no word has yet been received in response to an e-mail sent on January 3, 2003. Accordingly, Daisy hereby seeks assistance in obtaining the relief for which it prays, described more fully below.

8. The Administrative Law Judge is referred to the attached Memorandum Brief.

WHEREFORE, Daisy Manufacturing Company prays for a Protective Order barring these depositions going forward on January 13 or 14, 2003, and for other relief to which Daisy is entitled including attorneys' fees and costs.

Respectfully submitted,

FRIDAY, ELDREDGE & CLARK, LLP
2000 Regions Center
400 West Capitol Avenue
Little Rock, Arkansas 72201-3493
(501)-376-2011

Attorneys for Defendant

By: William M. Griffin III #82069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by U. S mail, postage prepaid and addressed as follows, this 6th day of January, 2003.

Howard Tarnoff
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

William J. Moore, Esq.
Legal Division, Office of Compliance
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

Thomas J. Kenny, Esq.
Kutak Rock LLP
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102-2186

William M. Griffin III

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products	)	
400 West Stribling Drive	)	
Rogers, AR 72756	)	
	)	
	)	
Respondent	)	
	)	

MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Daisy has only recently learned that in November 2002, Wal-Mart produced over 30,000 documents to the CPSC in response to a subpoena served upon Wal-Mart in May 2002.[1] The CPSC failed to exercise the courtesy of providing Daisy with notice of the production or the opportunity to inspect the documents. As of the filing of this pleading, Daisy still has not seen the documents produced.

The CPSC served a second subpoena upon Wal-Mart, which was apparently close to identical to the first subpoena with a few differences. One of the differences was the request for deposition

[1]As in the instant proceeding against Daisy, the Consumer Product Safety Commission staff attorneys have reportedly demanded that Wal-Mart go to its individual counsel in various states and produce documents from those files regarding other incidents involving Daisy products. This is not legitimate discovery, but rather pure harassment designed for the direct purpose of damaging Daisy's business relationship with Wal-Mart, and the indirect purpose of damaging Daisy's business relationships with its other vendors who might fear similar treatment by the CPSC merely for selling Daisy's products.

testimony of Wal-Mart witnesses.

The depositions of the Wal-Mart employees are presently scheduled for January 13 and 14, 2003. Daisy, however, has not been provided with notice of who is to be deposed or on what subjects they are to be deposed. Because Daisy has none of the documents about which these witnesses presumably will testify, it cannot cross-examine these witnesses about the documents or even determine if the documents are in fact authentic.

Daisy has been in contact recently with an attorney for Wal-Mart and has thereby learned that a significant portion of the document production concerns incidents completely unrelated to the defect claims alleged in the present matter. (E.g., documents concerning shooting incidents on Wal-Mart store premises). Documents concerning such non-relevant matters have no bearing upon this case or the determination of the alleged core issue of whether certain Daisy air rifles are somehow defective. In addition, these other incidents/claims/lawsuits presumably involve specific facts which neither this Court nor Daisy can adequately investigate in order to determine even threshold relevancy or nonrelevancy. It would require conducting a "trial within a trial" on each and every incident to determine whether any had any relevance to the pending matter. In sum, the subpoena is apparently so broad as to require production of vast amounts of documentary material so irrelevant or so limited in relevance that the subpoena can serve absolutely no purpose other than to harass, annoy and inconvenience Wal-Mart and Daisy.[2]

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[2]Interestingly, one area that may be the subject of the subpoena is the fact that Wal-Mart has a cash register "prompt" system whereby air rifles and air pistols must be purchased by someone of age in accordance with the warnings and age gradation contained on Daisy packaging. Daisy has been aware that Wal-Mart and other retailers check the ages of purchasers. This, it seems, weighs heavily against the Consumer Product Safety Commission's staff counsel's position that Daisy is marketing to underage individuals. In fact, to the contrary, apparently the products are sold correctly and certain parents or guardians are not adequately

To the extent any of the documents produced by Wal-Mart are relevant to the determination of any issue in this adversary proceeding, Daisy is being subjected to undue surprise by virtue of the fact that it has received no notice of production, no opportunity to inspect the documents and little notice of the apparent impending depositions of Wal-Mart personnel.

Pursuant to applicable Federal rules as well as to the Administrative Procedures Act, Daisy specifically requests entry of a Protective Order barring these depositions from going forward because:

1. Daisy has had no access to the documents about which these witnesses are going to be questioned; thus, Daisy is prevented from conducting any meaningful cross examination at the depositions; and
2. Apparently, a great deal of the information that has been produced by Wal-Mart concerns claims which are irrelevant to the instant proceeding and will in no way serve to prove a defect in the air rifles at issue.

Daisy is at a loss to describe further reasons for this motion due to the simple fact that it cannot describe with even a reasonable degree of certainty which of the 30,000 documents might be addressed in the depositions. Accordingly, Daisy respectfully requests this Court enter a Protective Order barring (1) the conduct of the Wal-Mart depositions, and (2) the CPSC's use of the Wal-mart documents due to unfair surprise and lack of relevance. Daisy further requests an award of costs, attorneys' fees and all other proper relief to which it is entitled.

---

supervising their charges. Again, however, Daisy has not been provided with the documents provided in response to the subpoena.

Respectfully submitted,

FRIDAY, ELDREDGE & CLARK, LLP
2000 Regions Center
400 West Capitol Avenue
Little Rock, Arkansas 72201-3493
(501)-376-2011

Attorneys for Defendant

By: William M. Griffin III /EC
William M. Griffin III #82069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by facsimile and by U. S mail, postage prepaid and addressed as follows, this 6th day of January, 2003.

Howard Tarnoff
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

William J. Moore, Esq.
Legal Division, Office of Compliance
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

Thomas J. Kenny, Esq.
Kutak Rock LLP
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102-2186

William M. Griffin III /gec
William M. Griffin III

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, AR 72756	)	
	)	
	)	
Respondent	)	
	)	

RESPONSE TO SUBPOENA TO JIMMY G. DANIEL

Jimmy G. Daniel, for his Response to the Subpoena issued upon him does state:

1. Please see attached Affidavit.

WHEREFORE, having fully complied with the Subpoena, the Respondent respectfully requests that Mr. Daniel be relieved of any further responsibility in this matter, that the Complaint be dismissed, for attorneys' fees and all other costs to which Respondent is entitled.

Respectfully submitted,

FRIDAY, ELDREDGE & CLARK, LLP
2000 Regions Center
400 West Capitol Avenue
Little Rock, Arkansas 72201-3493
(501)-376-2011

Attorneys for Defendant

By: _____
William M. Griffin III #82069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by U. S mail, postage prepaid and addressed as follows, this 3rd day of January 2003.

Mr. Howard N. Tarnoff
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

William M. Griffin III

AFFIDAVIT

Comes Affiant and sayth:

1. My name is Jimmy G. Daniel. I am presently employed by Daisy Outdoor Products. I was previously employed by Daisy Precision Products.

2. I received a subpoena in this case.

3. I have reviewed the subpoena with counsel for Daisy Outdoor Products and can state that I have no documents responsive to the subpoena compelling attendance, testimony and production of documents.

4. I have requested that Daisy Outdoor Products provide a copy of the drawings and specifications for BBs. Those are not maintained at Daisy Precision Products. They will provide that to you under separate cover.

5. The Articles of Incorporation and Dissolution will be obtained and forwarded under separate cover. They are not in my possession but are in the possession of Daisy Outdoor Products.

6. A diligent search and inquiry has been made for all documents and this response is complete, true and accurate.

Further the Affiant sayeth not.

Jimmy G. Daniel

VERIFICATION

STATE OF ARKANSAS)
) ss.
COUNTY OF _____)

I, Jimmy G. Daniel, do hereby certify that the facts and matters contained in the foregoing Affidavit are true and correct to the best of my knowledge, information and belief.

Jimmy G. Daniel

SUBSCRIBED AND SWORN TO before me on this 2nd day of January, 2003.

Notary Public

My Commission Expires:

03/01/2012

Julie A. Akee
County Of Benton
Notary Public - Arkansas
My Commission Exp. 03/01/2012



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

January 10, 2003

OFFICE OF
THE ADMINISTRATIVE
LAW JUDGES

FACSIMILE AND REGULAR MAIL
Mr. Todd Stevenson
U.S. Consumer Product Safety Commission
Office of the Secretary
4330 East West Highway
Room 502, South Tower
Bethesda, Maryland 20814

Re: In the Matter of Daisy Manufacturing Company, Inc.
CPSC Docket No. 02-2

Dear Mr. Stevenson:

Enclosed is my Order, which was also sent via facsimile to you this date. Please transmit this Order via facsimile to all parties.

Sincerely,

William B. Moran

William B. Moran
United States Administrative Law Judge

Enclosure

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
	)	
Respondent	)	
	)	

Order on Claimed Privileges

In connection with the discovery in this proceeding, Complaint Counsel has produced a privilege log consisting of 24 pages. Pursuant to an earlier Order, Complaint Counsel was directed to produce the documents associated with the first eight pages of the privilege log for the Court's review. The Court has now reviewed those documents and determined that none of the asserted privileges apply to the following pages:

Bates **P 000007**
P 000013 through 17
P 000065 through 68
P 000079 through 80
P 000251 through 298

Complaint Counsel is directed to disclose those documents to Daisy within seven (7) days of this Order. However, within five (5) Complaint Counsel may seek reconsideration of the Court's Order for any particular documents directed to be released.[1] Such reconsideration must

[1]Neither party should construe the provision for reconsideration as a reflection of uncertainty about the Court's position. Rather, a motion for reconsideration is usually available

explain on a page-by-page basis the specific reasons Complaint Counsel believes the cited privileges obtain. Failure to be specific as to any page for which Complaint Counsel seeks reconsideration will be fatal to any review. Further, to assure fairness to Daisy, the Court directs that the remaining documents,[2] claimed as privileged per the log, are to be submitted to the Court for its *in camera* review within seven (7) days of this Order.

So Ordered.

William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: January 10, 2003

---

to the parties. In this instance, the Court's recognition of such a motion's availability merely reflects its respect, in principle, for the privileges raised.

[2]Thus, the documents for privilege log pages 9 through 24 are to be provided to the Court.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

COPY

OFFICE OF
THE ADMINISTRATIVE
LAW JUDGES

January 29, 2003

FACSIMILE AND REGULAR MAIL
Mr. Todd Stevenson
U.S. Consumer Product Safety Commission
Office of the Secretary
4330 East West Highway
Room 502, South Tower
Bethesda, Maryland 20814

Re: In the Matter of Daisy Manufacturing Company, Inc.
CPSC Docket No. 02-2

Dear Mr. Stevenson:

Enclosed is the executed Stipulated Protective Order Regarding Materials Produced by Non-Parties and the Confidentiality Order, which were also sent via facsimile to you this date. Please transmit these Orders via facsimile and regular mail to all parties.

Sincerely,

William B. Moran

William B. Moran
United States Administrative Law Judge

Enclosure

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of **DAISY MANUFACTURING COMPANY,** doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756 Respondent.	**CPSC Docket No.: 02-2**

STIPULATED PROTECTIVE ORDER REGARDING MATERIALS PRODUCED BY NON-PARTIES

It is hereby stipulated and agreed, by and between the attorneys for the respective parties:

1. This Stipulated Protective Order ("Order") governs the handling of information defined in Paragraph 2 as "Confidential Material" that is produced pursuant to subpoenas to non-parties.

2. For purposes of this Order, Confidential Material shall include any documents, deposition transcripts, or other materials designated by a non-party in writing as "Confidential Material," including trade secrets, commercial information, and/or otherwise confidential information. When designating a document as Confidential Material, the non-party claiming confidentiality shall label or otherwise mark each page of the document as being "Confidential," or may designate documents or other materials as Confidential by letter identifying the records or other materials to be designated as Confidential under this Order.

3. Except as otherwise provided, all Confidential Material shall be deemed to be confidential and may be used by the attorneys (and their staff) receiving it only for the purpose of preparing for and conducting administrative and court proceedings and appeals, if any, in the

above-captioned action and for no other purpose.

4. Except as otherwise provided herein and except as may be required by court order, Confidential Material may be disclosed by a party's attorneys only to the following persons and only after full compliance with Paragraph 5:

(a) attorneys appearing as counsel of record for any party or attorneys retained in any capacity to assist in the litigation;

(b) employees or agents of counsel of record for any party to assist in the preparation of this litigation, and with respect to Complaint Counsel, any employees or agents of the CPSC that might assist in the preparation of this litigation;

(c) consultants or experts retained or employed by any party in connection with this litigation, to the extent deemed necessary by such counsel of record for the prosecution or defense of this litigation;

(d) stenographers or court reporters in connection with the recording of sworn testimony;

(e) the court, including the judge in any administrative or court proceeding, if filed or introduced pursuant to Paragraph 8; and

(f) any person, if authorized in writing by the non-party asserting confidentiality;

(g) in-house counsel directly involved in the litigation.

5. **Before any person referred to in Paragraphs 4(c) or 4(f) of this Order is given access to Confidential Material, each such person shall be provided with a copy of this Order and shall execute an affidavit in the same form and with the same content as the affidavit attached as Exhibit A. A copy of each executed affidavit shall be delivered to counsel of record for each of the other parties and to counsel for the non-party which produced such Confidential Material. Counsel for any party may retain the executed affidavit for a person referred to in Paragraph 4(c) and need not deliver such affidavit to counsel for the other parties unless and/or until such person is disclosed by counsel as a**

potential witness at trial.

6. Any party, its counsel, and other persons given access to Confidential Material pursuant to this Order shall only make such copies of Confidential Material as may be reasonably necessary for preparation for pretrial proceedings, motions, court papers, trial or appeal. Any copies made shall be held as Confidential Material and shall be destroyed promptly after they are used. Any person receiving access to Confidential Material shall use the Confidential Material only for the purpose of this action (including administrative and court proceedings and appeals) and for no other purpose and further shall not disclose any Confidential Material to any third person not listed in Paragraph 4 herein except as authorized by this Order after execution by the third person of the affidavit referenced in Paragraph 5 herein and after delivery of that affidavit to counsel.

7. Notwithstanding any provision herein, any party may use Confidential Material in the taking of depositions of parties or non-parties or at trial; provided, however, that any deposition transcript, or portion of same, may be designated as "Confidential," in which case such transcript or portions of same shall constitute Confidential Material for purposes of this Order.

8. Confidential Material may be referred to in motions, briefs and other court papers or transcripts in this action, provided that unless the non-party asserting confidentiality otherwise agrees in writing prior to such reference, no such documents, nor any portion thereof, nor any information contained therein shall be used for any of these purposes unless the paper in which it is used is appropriately marked "Confidential" and, if filed, is separately filed under seal. Filing under seal with the Clerk shall be accomplished by enclosing the paper in an envelope or container on the face of which shall be typed or stamped:

CONFIDENTIAL

This document is filed under seal and unless otherwise ordered by the court, shall not be reproduced for, or shown to persons other than those entitled to access under the Protective Order entered *In the matter of Daisy Manufacturing Company*, CPSC Docket No. 02-2.

9. Upon final determination of this action, including administrative and court appeals, if any, each party in possession of documents, or copies thereof, constituting Confidential Material shall assemble and return such documents or copies thereof to the non-party who made the claim of confidentiality, or, with the agreement of the non-party, destroy the documents. Complaint Counsel shall be permitted to maintain one copy of such documents to comply with the requirements of the Federal Records Act, 44 U.S.C. § 2101, but shall also assemble and return or destroy any additional copies of such documents to the appropriate non-party. Despite retaining one copy of such documents, Complaint Counsel shall continue to treat those documents as Confidential under the terms of this Order.

10. Nothing in this Order shall limit or reduce the CPSC's obligations under 16 C.F.R. § 1015, *et seq.*, to treat documents or materials produced by non-parties as confidential under federal law.

11. Any person desiring relief from these provisions or further protection with respect to discovery may, if agreement cannot be reached, upon ten days notice to counsel of record and to any non-party whose documents are in issue, seek appropriate relief from the court.

Dated this ___ day of January, 2003.

BY: _____

Jeffrey M. Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

William M. Griffin, III, Esq.
Friday, Eldredge & Clark
2000 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
Rogers, AR 72756

Attorneys for Daisy Manufacturing Company

Dated this 13 day of January, 2003.

BY: Howard Zaff for

Eric L. Stone
William J. Moore

Complaint Counsel for the
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814-4408
Tel: (301) 504-0626

William B. Moran 1/29/03
Administrative Law Judge

01-458081.00

Exhibit A to Confidentiality Stipulation
Regarding Materials Produced by Non-Parties

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of **DAISY MANUFACTURING COMPANY,** doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756 Respondent.	**CPSC Docket No.: 02-2**

AFFIDAVIT

COUNTY OF _____)
) SS:
STATE OF _____)

_____, being sworn, deposes and says:

I understand that I am being given access to documents, information or other Confidential Material pursuant to a confidentiality stipulation and order in the above-captioned action. I have read the confidentiality stipulation and agree to be bound by its terms. I shall use Confidential Material only for the purpose of this action (including administrative and court proceedings and appeals) and for no other purpose and further shall not disclose any Confidential Material to any third person not listed in Paragraph 4 of the confidentiality stipulation, except as authorized by the confidentiality stipulation and only after execution by the third person of an affidavit in this form and delivery of that affidavit to counsel for a party.

_____

Sworn to before me this

_____day of _____, 2003.

_____
Notary Public

01-155\181.02

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

CONFIDENTIALITY ORDER

IT IS ORDERED that the Stipulated Protective Order Regarding Materials Produced By Non-Parties is hereby adopted by the Court.

William B. Moran
William B. Moran
United States Administrative Law Judge
and Presiding Officer

Dated: January 24, 2003

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ADMINISTRATIVE LAW JUDGES
MAIL CODE 1900L
1200 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20460

TELEPHONE: 202 564-6255 FACSIMILE: 202 565-0044

FAX TRANSMITTAL PAGE

Date:

From: Judge Moran

To: Mr. Todd Stevenson, Secretary, USCPSC

Fax: 301-504-0127 Telephone: 301-504-0800x1232

Hard Copy To Be Mailed: X Yes No
Any Questions or Problems May Be Directed To:

Nelly Torres Telephone: 202 564-6258

In the Matter of Daisy Manufacturing Company, Inc., CPSC Docket No. 02-2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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In the Matter of Daisy Manufacturing Company, Inc., CPSC Docket No. 02-2

Daisy Outdoor Products

January 29, 2003

Hon. William B. Moran
United States Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: In the Matter of Daisy Manufacturing Co, CPSC Docket 02-02
Daisy Manufacturing Company's Privilege Log and Documents

Dear Judge Moran,

Please find enclosed Daisy Manufacturing Company's Privilege Log and the corresponding documents, per your order.

Respectfully yours,

Marianne McBeth

Marianne McBeth
General Counsel / Administrative Manager

cc: Aaron Locker, Esq.
Jeffrey Locker, Esq.
William M. Griffin, III, Esq.
William Moore, Esq.

Enc.

DAISY MANUFACTURING COMPANY - PRIVILEGED LOG
SUBMITTED TO ADMINISTRATIVE LAW JUDGE MORAN 1-31-03

Bates number(s)	Description of Document	Lawsuit / claim	Date	Author	To / For
9542-9640	880 claims index	Wild	unknown	Daisy's atty C. Pittman	self / prep
5298-5299	handwritten notes	Dunn	unknown	Daisy's atty, unknown	self / prep
17826-17836	deposition summary notes on David Townshend	Rewis?	5/18/1986	Daisy's atty, unknown	self / prep
1682-1697	case summary, settlement letter, case preparation	Smith, J.	Oct-93	Daisy's atty M. Hale	self / prep
1698-1700	letter re: case status & prep	Smith, J.	6/24/1993	Daisy's atty M. Hale	Harry Evans, CNA Ins., cc: Daisy
1701-1705	letter re: case status & prep	Smith, J.	8/16/1993	Daisy's atty M. Hale	Harry Evans, CNA Ins., cc: Daisy
1706-1712	letter re: case status & prep	Smith, J.	8/23/1993	Daisy's atty M. Hale	Harry Evans, CNA Ins., cc: Daisy
1713-1714	letter re: case status & prep	Smith, J.	8/24/1993	Daisy's atty M. Hale	Harry Evans, CNA Ins., cc: Daisy
1715-1718	letter re: case status & prep	Smith, J.	9/15/1993	Daisy's atty M. Hale	Tim Morrell, CNA Ins., cc: Daisy
1719-1720	letter to defense expert	Smith, J.	9/2/1993	Daisy's atty M. Hale	J.I Galan, cc: Daisy
1721-1722	letter to defense expert	Smith, J.	10/15/1993	Daisy's atty M. Hale	H. Grossman, M.D., cc: Daisy
1723-1725	letter to defense expert	Smith, J.	9/21/1993	Daisy's atty M. Hale	Dr. T. Carle, cc: Daisy
1726-1741	confidential medical prognosis, Intracorp (this seems to have been attached to above letter to expert from Daisy's atty M. Hale)	Smith, J.	6/9/1992	Intracorp, case expert	M.A. Piker, Univ. of Ark. Med. Sciences
1742-1750	medical reports (attachments, see above)	Smith, J.	5/21/1993	Janis Faily, U. of A.	Madelyn Davis, plaintiff atty's office
1751-1801	deposition index and summary on David Townshend	Washburn	8/6/1996	Daisy's attorney either Weaver or Brochert	self / prep
1802-1822	deposition question outline for David Townshend	unknown	unknown	Daisy's atty, Brochert	self / prep
13213-13215	deposition summary notes on Brett Wilcox	Washburn	9-18-95, 11-14-95	Daisy's atty, Brochert	self / prep
13216-13220	deposition summary notes on Wayne Hill	Washburn	9-18-95, 11-26-95	Daisy's atty, Brochert	self / prep
13223-13226	deposition summary notes on David Ottoson	Washburn	9-18-95, 11-30-95	Daisy's atty, Brochert	self / prep
13229-13230	deposition summary notes on Ryan Buck	Washburn	5-1-96, 9-17-96	Daisy's atty, Brochert	self / prep

DAISY MANUFACTURING COMPANY - PRIVILEGED LOG
SUBMITTED TO ADMINISTRATIVE LAW JUDGE MORAN 1-31-03

13231-13233	deposition summary notes on Travis Buck	Washburn	5-1-96, 8-15-96	Daisy's atty, Brochert	self / prep
13247-13247	deposition summary notes on William Stuchlik	Washburn	2-15-96, 8-14-96	Daisy's atty, Brochert	self / prep
13249-13252	deposition summary notes on Ron Joyce	Washburn	2-15-96, 8-12-96	Daisy's atty, Brochert	self / prep
11832-11840	deposition summary notes on Terry Dye	Washburn	1/17/1996	Daisy's atty, Brochert	self / prep
12017-12019	deposition summary notes on Deborah Miela, J.D.	Washburn	3/18/1996	Daisy's atty, Brochert	self / prep
12125-12134	deposition notes on Miela, Vaal, Dye, Macaspac	Washburn	unknown	Daisy's atty, Brochert	self / prep
12185-12186	deposition summary notes on Tony Vaal	Washburn	3/18/1996	Daisy's atty, Brochert	self / prep
12187-12188	deposition summary notes on R. Macaspac	Washburn	3/18/1996	Daisy's atty, Brochert	self / prep
12734-12739	depositions and case notes (Not an exhibit - the atty used a sticker on first page for his notes.)	Wild	9/23/1999	Daisy's atty, Pittman	self / prep
17922-17927 (duplicate of above 12734-12739)	depositions and case notes (Not an exhibit - the atty used a sticker on first page for his notes.)	Wild	9/23/1999	Daisy's atty, Pittman	self / prep
13379-13393	deposition summary notes on Ron Joyce	Washburn	2/15&16/96	Daisy's atty, Brochert	self / prep
14264-14268	deposition summary notes on Wayne Hill	Washburn	9/18/1995	Daisy's atty, Brochert	self / prep
14407-14426	deposition summary notes on E. Patrick McGuire	Washburn	9/26/1996	Daisy's atty, Brochert	self / prep
14427-14446 (duplicate of above 14407-14426)	deposition summary notes on E. Patrick McGuire	Washburn	9/26/1996	Daisy's atty, Brochert	self / prep
14479-14510	deposition summary notes on E. Patrick McGuire	Washburn	6/13/1990	Daisy's atty, Brochert?	self / prep
14511-14513	deposition summary notes on Brett Wilcox	Washburn	9/18/1995	Daisy's atty, Brochert?	self / prep
14586-14593	deposition summary notes on Brett Wilcox	Washburn	9/18/1995	Daisy's atty, unknown	self / prep
14594-14605	deposition summary notes on D. Ottoson	Washburn	9/18/1995	Daisy's atty, unknown	self / prep
14720-14740	deposition summary notes on D. Ottoson? Or other fact deponent	Washburn	9/18/1995	Daisy's atty, unknown	self / prep
14741-14742	deposition summary notes on Travis Buck	Washburn	5/1/1996	Daisy's atty, unknown	self / prep
14819-14820	deposition summary notes on Ryan Buck	Washburn	5/1/1996	Daisy's atty, unknown	self / prep
1860-1861	memo on case summary	Heim?	2/1/1996	Daisy's atty, unknown	self / prep
2182	memo to defense attorney	Washburn	4/16/1996	Daisy's atty, Brochert	Mike Weaver
1872-1874	notes in preparation for hearing	Washburn	2/5/1996	Daisy's atty, Brochert	self / prep

DAISY MANUFACTURING COMPANY - PRIVILEGED LOG
SUBMITTED TO ADMINISTRATIVE LAW JUDGE MORAN 1-31-03

2114-2134	deposition summary notes on Wayne Hill, Wilcox, T. Buck and R. Buck	Washburn	2/5/1996	Daisy's atty, Brochert?	self / prep
17958-17959 (The next page 17960 begins the deposition, which was produced, no privilege claimed)	deposition notes on O. Frank Tarr (Typo-Privilege log listed numbers 17958-17989, but pages 17960-17989 is a partial of Tarr's official deposition, which is reproduced here to err on side of caution.)	Pursley	unknown	Daisy's atty, unknown	self / prep
18129-18143	deposition summary notes on James Warden	Wild	6/30/1997	Daisy's atty, Pittman	self / prep
18293-18296	deposition summary notes on Patricia Warden	Wild	6/30/1997	Daisy's atty, Pittman	self / prep
24350	notes on case, deposition	Washburn	6/12/1996	Daisy's atty, Brochert?	Frank Tarr for Daisy
24343	fax cover page	cpsc	1/17/1997	Daisy's atty, A. Locker	John Flynn, GC for Daisy
25744	fax cover page	cpsc	4/6/1998	Daisy's atty, A. Locker	John Flynn, GC for Daisy
24762-24766	notes for case	Rewis	1/6/1986	Daisy's atty, unknown	self / prep
24532-24536	letter re: case status	Strom	11/14/1994	Daisy's atty, Sullivan	Tom Jankowski (Ins.) and Joe Scott for Daisy
24517-24520	letter re: case status	Strom	11/18/1994	Daisy's atty, Sullivan	Tom Jankowski (Ins.) and Joe Scott for Daisy
31818-31832	fax cover page and data for expert witness in defense of case	Mahoney	7/14/2000	Daisy's GC, M. McBeth	Daisy's atty for case, N. Winschel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

COPY

January 29, 2003

OFFICE OF THE ADMINISTRATIVE LAW JUDGES

FACSIMILE AND REGULAR MAIL
Mr. Todd Stevenson
U.S. Consumer Product Safety Commission
Office of the Secretary
4330 East-West Highway
Room 502, South Tower
Bethesda, Maryland 20814

Re: In the Matter of Daisy Manufacturing Company, Inc.
CPSC Docket No. 02-2

Dear Mr. Stevenson:

Enclosed is my Order Memorializing Oral Orders Issued January 24, 2003, which was also sent via facsimile to you this date. Please transmit this Order via facsimile and regular mail to all parties.

Sincerely,

William B. Moran

William B. Moran
United States Administrative Law Judge

Enclosure

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of

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Respondent

Order Memorializing Oral Orders Issued January 24, 2003

During a conference call with the parties on January 24, 2003, the Court issued certain orders orally. This Order memorializes those oral orders.

- Complaint Counsel is to provide the Court with Bates pages P001944 through P001951. Further, Complaint Counsel is directed to provide all documents, on a continuing basis, which are listed on any privilege log, along with updates of the privilege log itself. Currently, the Court only has Bates pages through P001589.

- Daisy's counsel related that, despite initially representing that no privileges were being asserted by Daisy during document discovery, thereafter it advised in a December 17, 2002 letter that certain privilege claims were being asserted. Beyond those claimed in the December letter, Complaint Counsel noted that, with the late-arriving responses to its Fourth Request for Production of Documents, certain general and specific privilege claims were asserted but that no documents were identified with those claims and no privilege log has ever been provided by Daisy in this proceeding. Having heard the points raised by the parties on this issue, the Court ordered that Daisy was to provide, preferably by Monday, January 27, 2003, a list summing up all privilege claims and that Daisy is to submit *every one* of the documents themselves to the Court by Friday, January 31st. Thus, both the documents and an accompanying log are to be in the Court's possession by that date.

Counsel for Daisy related during the conference call that it has a document produced by CPSC employee Reichel, dated July 10, 1995, which was described as a draft test report. Reichel apparently generated two such reports but only one was provided by Complaint Counsel to Daisy while the other report was not listed in the privilege log. As Complaint Counsel did not have this document, it was unable to assess whether it is a final or a draft version. Thus, Complaint Counsel raised concerns about not knowing what documents Daisy was obtaining from sources beyond Complaint Counsel and consequently could not speak to their authenticity or lack thereof. Complaint Counsel noted that in other litigations where a party inadvertently comes into possession of documents, such documents have been returned to the source. The Court is aware of cases where documents which have been received unconventionally have been returned to counsel. Having heard the points raised by the parties on this issue, the Court ordered that Daisy was to disclose all such documents it has received, and intended to be used by Daisy for *any* purpose in this proceeding, other than those documents it has received through the discovery materials furnished by Complaint Counsel in this litigation. This Order extends as well to any documents received since this litigation began which Daisy intends to use for any purpose in this proceeding and, as one example, specifically includes any draft documents generated by Richard Wright.

SO ORDERED.

William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: January 29, 2003

Todd A Stevenson, Secretary
Consumer Product Safety Commission Office of the Secretary
4330 East West Highway, Room502
Bethesda, MD 20814 / Washington, DC 20207

US Consumer Product Safety Commission

Fax

To: 1. Aaron Locker, Jeffrey Locker / Locker, Greenberg & Brainin 212-391-2035

2. William Griffin / Friday, Eldridge & Clark 501-376-2147

3. Marianne McBeth / Daisy Manufacturing Company 479-636-1163

4. Eric Stone, Ron Yelenik, William Moore, Howard Tarnoff, Quynh Nguyen, CPSC 301-504-0008

From: Todd Stevenson, Secretary
Office of the Secretary

Fax:

Pages: 12

Phone: 301-504-7923, fax 301-504-0127

Date: 01/29/03

Re: In the Matter of Daisy Manufacturing Company, CPSC Docket No. 02-2: Order Memorializing Oral Orders Issued January 24, 2003; and Stipulated Protective Order Regarding Materials Produced by Non-Parties and Confidentiality Order

- **Comments:** Original copies of the Order will follow in the mail.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

COPY

January 29, 2003

OFFICE OF THE ADMINISTRATIVE LAW JUDGES

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William B. Moran
United States Administrative Law Judge

Enclosure

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)

By WED, FEB 12th, have to disclose documents currently in 1/24/03 letter/Daisy

By Sat 2/8 (Mon, 2/10) see Reconsideration of Court Order for any document ordered to be released.

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On a continuing basis, provide all documents on "any" privilege log, along w/ updates of "e logs (thereafter) Ct.

)
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)
Respondent)
)

Order Memorializing Oral Orders Issued January 24, 2003

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William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: January 29, 2003

Todd A Stevenson, Secretary
Consumer Product Safety Commission Office of the Secretary
4330 East West Highway, Room502
Bethesda, MD 20814 / Washington, DC 20207

US Consumer Product Safety Commission

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To: 1. Aaron Locker, Jeffrey Locker / Locker, Greenberg & Brainin 212-391-2035

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Pages: 12

Phone: 301-504-7923, fax 301-504-0127

Date: 01/29/03

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- **Comments:** Original copies of the Order will follow in the mail.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products	)	
400 West Stribling Drive	)	
Rogers, AR 72756	)	
	)	
	)	
Respondent	)	
	)	

DISCLOSURE OF EXPERT WITNESSES

Daisy Outdoor Products for its Disclosure of Expert Witnesses does state:

1. Gerald Goldhaber, Goldhaber Research
One NFA Park, Suite C
Amherst, New York 14228-1149

Dr. Goldhaber will testify regarding the adequacy of safety and warning information provided by Daisy to consumers. His opinions will be based on his experience as an expert in warning and communications. A separate disclosure will be provided within the next week.

2. Christine H. Wood, Ph.D.
149 Commonwealth Drive
Menlo Park, CA 94025

See attached disclosure. This report may be supplemented.

3. Michael Wayne Hampton Sr.
1255 SH211
San Antonio, TX 78254

See attached disclosure.

4. Robert D. Beeman Ph.D.
Sweetwater Valley Ranch
1600 Sweetwater Springs Road
Healdsburg, California 95448-9420

See attached Affidavit

5. Jess Galan
9765 Southwest 49th Street
Miami, FL 33165

See attached Affidavit.

6. John Preston
John Preston Consulting
4025 Peppertree Lane
Silver Springs, MD 20906-2586

Mr. Preston will testify as to procedures at the Commission, the use of "Draft" in documentation and procedure for investigations.

WHEREFORE, Daisy Outdoor Products has complied with the Court's ruling regarding disclosure of witnesses and Daisy Outdoor Products requests all relief to which it is lawfully entitled.

Dated: January 31, 2003

Respectfully submitted,

FRIDAY, ELDREDGE & CLARK
2000 Regions Center
400 West Capitol Avenue
Little Rock, Arkansas 72201
(501) 376-2011

Attorneys for Defendant

By _____
William M. Griffin III #82069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by U. S mail, postage prepaid and addressed as follows, this 31st day of January, 2003.

The Honorable William B. Moran,
Administrative Law Judge
and Presiding Officer

Mark W. Porter
Eric L. Stone
Sean R. Ward
Complaint Counsel
4330 East West Highway
Bethesda, Maryland 20814-4408

Office of the Secretary
Mr. Todd Stevenson
U.S. Consumer Product Safety Commission
4330 Est West Highway
Bethesda, MD 20814-4408

Aaron Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

Mr. Jeffrey Locker
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY

Ms. Marianne McBeth
Daisy Manufacturing Company, Inc.
Box 220
Rogers, AR 72757-0220

William M. Griffin III

CHRISTINE T. WOOD, PH.D
EXPERT WITNESS DISCLOSURE

Professional Background

I am a Principal Scientist and Director of Human Factors Practice Areas at Exponent. I focus on issues related to child safety, risk analysis, human learning, memory, and information processing, evaluation of the effectiveness of safety information and warnings, and the development of labels, warnings and instruction manuals. Before joining Exponent, I held research positions with RMC Research Corporation, SRA Technologies, Inc., and the Institute for Mathematical Studies in the Social Sciences.

Education and Professional Honors

I obtained a Bachelor of Arts in Psychology from Stanford University with Distinction and Honors in 1971. I obtained my Ph.D. in Experimental Psychology from Stanford University in 1974. I am a member of the Human Factors and Ergonomics Society as well as the American Educational Research Association.

Areas of Expected Testimony

I have reviewed the complaint filed by the Consumer Product Safety Commission in this matter as well as a copy of the dissent prepared by Commissioner Mary Sheila Gall.

In regard to the warnings, I have reviewed warnings on various Power Line air rifle products as well as the operation manuals that accompany the products and the warnings on the boxes. In my opinion, the warnings provided by Daisy are sufficiently located, sufficiently numerous, sufficiently clear and concise, and sufficiently conspicuous to communicate the messages that Power Line air rifles are "For Use by Ages 16 or Older", "Not a Toy", "Adult Supervision Required", and "Misuse or Careless Use May Cause Serious Injury or Death". The warnings and safety information provided by Daisy adequately state the injury consequences associated with careless use or misuse, including death.

For example, the boxes, air rifle products, and manuals warn that the Power Line air rifle product "is not a toy". The boxes and manuals warn that these are "high power" guns. The boxes, Power Line air rifle products themselves, and the front panel of the manual indicate to read all instructions before using.

The packaging sufficiently advises the purchaser, parent or guardian, of the hazards and injury consequences inherent in the use of the product should it be misused. The packaging further contains information about the recommended ages of product users, the need for adult supervision,

and that the product is not a toy. This information is available for purchasers to use in their consideration as to whether the product is appropriate for their household.

The reasonable parent would know that if someone is shot in the eye by a gun that shoots BBs of any power, not just a Power Line rifle, it could result in an eye being put out. This risk of injury, without even considering the risk of death, is a sufficient risk to motivate a reasonable parent to engage in active supervision. The possibility of the loss of an eye, or any other serious injury to a child, is a serious matter that reasonable parents would recognize and act upon through parental supervision.

The manuals contain warnings that state "This gun can cause death." and "Accidents happen fast, and accidentally injuring or killing someone is a terrible thing. Shoot safely." Among other relevant safety information, the manual indicates that the Daisy Power Line rifles shoot with up to ten times the muzzle energy of the traditional spring air BB gun. Various rules of proper gun handling include "always handle a gun as if it is loaded" and "always keep the muzzle pointed in a safe direction". It further indicates that 90% of airgun related accidents occurring in this country are caused by (1) careless handling of the gun, (2) believing the gun to be empty when it is not or (3) shooting at improper targets.

The Daisy age labeling guidelines that users should be at least 16 years old for use of the Daisy Power Line products is appropriate. While persons under the age of 16 may use this product safely, Daisy's guideline of the age of 16 is sufficiently conservative to be a reasonable guideline. By the age of 16, most teenagers can read and follow directions for use of a product, including Power Line rifles. The hazard and potential injury consequence of shooting someone with a high-power airgun is certainly recognizable.

By the age of 16, most teenagers have the skill and maturity to handle the responsibility of operating a motor vehicle. Many have employment during non-school hours. Many are independently taking responsibility for completing homework assignments and attending school regularly. Even without a formal course in physics, teenagers have sufficient life experience that permits them to understand the relationship between pumping an airgun and the speed and distance of a projectile.

Parents, as the people who know best the developmental skill and relevant experience of their specific child as well as the environment available for airgun use, will need to make specific decisions about the appropriateness of the Power Line airguns. Manufacturers provide an age guideline for parents to consider in the purchase and use of the airgun. In addition, Daisy indicates that parental supervision is required. Again, parents need to make decisions and judgements concerning the type and level of supervision to provide based upon their particular knowledge of the developmental level and experience of their child, the environment of use, and the warnings that are clearly stated on the packaging and in the manuals.

In reviewing the advertisement produced by Daisy, as well as the manual and packaging and

the knowledge that there are age prompts on cash registers at Wal-Marts and other stores requiring the product to be purchased by someone of the age of 16 years and older, I am of the opinion that the product is neither defectively marketed nor is it marketed to persons younger than the recommended age. The mere fact that a person younger than the age of 16 obtains the product and uses it does not necessarily mean the product is defectively marketed or improperly marketed.

In my opinion, the risk of gunshot wound injury associated with non-powder guns is extremely low and does not represent an unreasonably dangerous activity.

Participation in all types of sports and recreational activities poses a risk of injury. The Consumer Product Safety Commission through its National Electronic Injury Surveillance System gathers information on injuries associated with consumer products and activities based on data from a nationally representative sample of hospital emergency rooms throughout the United States. The first table attached to the report presents estimates of the number of children ages 15 through 19 years old treated in hospital emergency rooms nationwide in 1998 for injuries associated with various recreational activities, including gunshot wound injuries associated with non-powder guns. A second table presents the same age group and year, the number of hospitalized injuries associated with these recreational activities. In 1998 for ages 15 through 19, there were an estimated 3,559 gunshot wounds injuries involving non-powder guns and of that total 363 injuries required hospitalization.

The chance or likelihood of injury (i.e., the risk) can be quantified by dividing an estimate of the number of injuries for an activity, for a given level of injury security, by a measure of exposure to the activity. In this instance, the exposure to injury for non-powder guns was quantified in terms of the number of pellets and BBs sold in a year based on data provided by the NPGPA. The risk was calculated for all ages because the exposure measure could not be separated by age group. The annual risk in 1998 of gunshot wound injury for non-powdered guns for all ages is 2.20 injuries and 0.12 hospitalized injuries per million pellets and BBs sold, and is shown on the third table attached to this report.

These estimates represent the population risk of injury for an activity of shooting non-powder guns. For any individual the injury risk is greatly reduced when gun safety behavior is in compliance with the safety practices recommended by Daisy as well as other manufacturers and relevant organizations.

If called to testify at time of trial, I would present data on risk of injury as well as information contained on the box, airgun and manuals for Daisy Power Line air rifles.

My opinions may be modified or added to based upon a review of material from any experts submitted by the Consumer Product Safety Commission whose reports and or depositions I would appreciate the opportunity to review.

I may supplement this report based upon further documents I may review such as advertising

and reports from the Consumer Product Safety Commission. If I decide to do so, I will forward that addendum immediately.

Sincerely,

Christine Wood

Christine H. Wood, Ph.D.
Principal Scientist
Director of the Human Factors Practice

MICHAEL WAYNE HAMPTON SR.
EXPERT WITNESS DISCLOSURE

My name is Michael Wayne Hampton Sr. I have been involved in the hunting and shooting sports for most of my life. I was principal owner of a sporting goods company which was involved in wholesale and retail distribution of hunting equipment and other related equipment. I also owned Hampton Shooting Park. I have a Bachelor's Degree in Education and I have served in an advisory capacity for gun, ammunition and sport related manufacturers and have been asked to evaluate certain features on different types of guns from a consumer/user perspective. For fifteen years I was the Executive Director of the National Skeet Shooting Association and the National Sporting Clay Association.

I have been a clay target shooter for the last forty years and have owned and shot hundreds of firearms. I have been on All American shooting teams, collegiate shooting teams and state shooting teams. I held the title of World's Double Champion in trap shooting in 1981. I was elected to the Illinois Trap Shooting Hall of Fame in 1996. I have been affiliated in the clay target sports with the organizations for the last twenty-five years. I have the highest skill rating in all three clay target sports; AAA in skeet, AAA in trap and Masters in Sporting clay. I have been in charge of the management of tournaments that have shot in excess of one hundred million targets. I have held national titles in trap and skeet and the sportsman's team challenge, which is handgun, rifle and shotgun. I have also taught trap, skeet and sporting clays safety. I have taught numerous people how to safely handle and shoot firearms.

I am familiar with automatic safeties. Very few firearms used in the United States have automatic safeties. An automatic safety creates unnecessary danger in target shooting. When someone attempts to fire their gun and it does not go off and then the person turns to someone behind them to say that something is wrong with the shotgun, the barrel is pointed in an unsafe direction and creates a safety problem.

I have advised manufacturers that incorporate automatic safeties to remove them.

The National Sporting Clay Association has taken a position that the automatic safety is much more dangerous than the conventional manual safety that is found on 99% of today's firearms.

The reason for the existence of automatic safeties is that in Europe, there are driven-game hunts. They use a person called a loader who will load their gun for them. The hunters usually have a matched set (2) of guns and once they shoot one gun, the loader hands them another that is loaded. So there is a transfer of loaded and unloaded guns from one person to the other that necessitates the use of that type of safety in Europe. American hunters use only one firearm while hunting and handle it themselves. They do not use loaders.

I have witnessed the frustration people experience with automatic safeties and we do not generally allow beginners to use those on our shooting grounds.

I have reviewed the Complaint in this case alleging that Daisy should have an automatic safety on its Power Line air rifles. I know that the Power Line air rifles are bolt-action air rifles with a multi-pump ability. To my knowledge, there are no multi-shot bolt-action firearms made with automatic safeties. Since airguns are often used as training vehicles to step up to firearms, it would be inappropriate to have an automatic safety on the airgun which could build reliance on that type of device, which the shooter would never encounter when using firearms. It is my opinion as an instructor with many years of experience both in instructing with the use of firearms and BB guns, that automatic safeties are inappropriate and certainly create risks which a conventional safety does not have. It is my strong opinion that any firearms that do not incorporate automatic safeties are not defective or unreasonably dangerous in any way. Rather, it is an appropriate design based on the way that users use the product.

Michael Wayne Hampton Sr.

AFFIDAVIT

1. My name is Robert Beeman.

2. I previously owned Beeman Airguns, an importer and manufacturer of airguns.

3. I have been a consultant on numerous occasions in matters involving airgun litigation as well as airgun information issues.

4. I was the author of *Airgun Digest, First Edition*. I have also published numerous articles discussing airguns, automatic safeties, feeding mechanisms, loaded chamber indicators, visible magazines and other design concepts. I have written hundreds to technical bulletins regarding airguns.

5. I have tested, examined and reviewed hundreds, if not thousands, of different airguns and BB guns. I am quite familiar with the multi-pump pneumatic air rifle of the Model 856 and Model 880 variety as sold by Daisy Manufacturing Company for the last twenty to thirty years. In fact, I have owned a number of these rifles and have used them for various purposes.

6. The Daisy Model 856 and Model 880 (including various versions of those models) are not unreasonably dangerous and are quite safe for their intended uses. These rifles are reasonably designed air rifles employing the long popular multi-pump pneumatic power plant. These models are intended for marksmanship training, as well as general (especially outdoor) recreational shooting by persons 16 years of age and older, adult supervision required. The Model 880 and the Model 856 feature the dual and practical capability of allowing their use as a BB repeater as well as a .177 caliber lead pellet single shot rifle.

7. The Model 856 and the Model 880 require the natural motions of handling, cocking and pumping this gun to put it in a vertical position with the feed track directly in front of the shooter's face. Even with a scope mounted, the loading track is easily visible on the right side. The

shooter can very readily observe the motion of the projectile in its most important motion, moving into the firing position in the chamber of the barrel.

8. The cross-bolt manual trigger safety of the Model 856 and Model 880 is positive and uncomplicated in its design as well as operation. There are a number of manual and automatic safety mechanisms which have been known to firearm and airgun manufacturers for a number of years. These types of safeties are well known throughout the industry. The experience of the industry has led to how and when these well known mechanisms are applied or omitted. Several airgun makers have applied automatic safeties to their guns. Generally, the presence of automatic safeties has been poorly received by the users of these guns. In fact, automatic safeties have been so unpopular with shooters that guns which were supplied with automatic safeties by the factory are received to repair facilities, usually for other reasons, with their safeties intentionally disabled. Such a modification leads to an unsafe condition in that the shooter, familiar with such a model, might pick up such a specimen and expect it to automatically be safe when indeed it is ready to fire. The most modern airguns, intended for the youth or young adult market, are currently made by the U.S. makers of such guns: Daisy, Sheridan, Benjamin and Crosman, employ manually operated safeties, generally of the cross-bolt trigger blocking type. Centuries of experience of the international airgun market have indicated that the very simplicity of this design makes it particularly dependable, almost intuitively understood and effective.

The safeties on the Model 856 and the Model 880 function as almost all other such safeties operate. When the safety is disengaged, a red band is clearly visible around the safety button as an alert to the user regarding the rifle's condition of readiness. It is also possible to ascertain easily that the safety is not engaged by the tactile feel of the safety button protruding from the left side of the

trigger guard. In addition, the legends PUSH FIRE and PUSH SAFE can be seen in relief on the right and left sides of the trigger guard respectively, further to help the shooter ascertain the position of the trigger safety.

9. The action of the Model 856 and Model 880 can be readily kept open by retracting the bolt. This allows instant visual access to the breech area and the bolt tip in this gun, as well as in several other models which employ similar design. In a bolt-action firearm, the top cartridge in the magazine would be seen when the bolt is retracted. Obviously, the Model 856 and Model 880 do not use firearm cartridges, but small, round projectiles requiring a very different feed system. There is total visual access to any BB picked up by the bolt in the BB reservoir. Since the Model 856 and Model 880 are ideal as firearms trainers for new shooters of various ages, this design feature is of great value because it duplicates closely the general handling and cartridge loading characteristics of a cartridge bolt-action rifle.

Over the years, I have examined and used air rifles and BB guns with and without automatic safeties. First it should be noted that there are no semi-automatic bolt-action or pump firearms made, of which I am aware, that incorporate an automatic safety. Automatic safeties are relegated to a very small number of side by side shotguns, usually of foreign manufacturer and a few models of over and under shotguns. Because the Model 880 and the Model 856 are designed to be used as training models for later firearm use, it is important that they function similarly. The addition of an automatic safety on these air rifles would defeat this purpose. American firearms generally do not have automatic safeties for many, many good reasons.

(As indicated above, many users remove automatic safeties on firearms that come equipped with them. It is well known that automatic safeties create frustration in making followup shots. In

fact, on many trap and skeet shotguns, there are no safeties whatsoever. American shooting enthusiasts have not wanted an automatic safety. On the other hand, a manual safety is something that allows the user to always be in control of the position of the safety on the firearm.) An automatic safety on this type of air rifle would necessarily create a situation where the novice shooter would learn to rely on a device which he would be unlikely ever to encounter with firearms.

10. It is my opinion that while both gravity feed and spring driven mechanisms can be excellent ways of feeding a BB gun from a contained magazine, gravity feed is generally a somewhat better mechanism. Gravity feed is such a simple mechanism, depending on an infallible and intuitively understood force; it does not lend itself to mechanical failure, spring fatigue, or part breakage. Also, gravity feed systems, because of their simplicity, greater dependability and far greater capacity, generally are preferred by shooters. Gravity feed magazines have been favorably evaluated by safety experts and are such a basically good, simple design that they have been a standard feature of scores of models of repeating BB guns as made by virtually every maker of repeating BB guns for over a hundred years.

11. There have been ridiculous inferences that the lack of gravity feed magazines in firearms renders the feeding of firearms more dependable. Firearms are different from airguns in that the power for a modern firearm must be packed with a projectile as a cartridge. A cartridge does not lend itself to a gravity feed system.

The vertical feeding arrangement of the Daisy 856 and Daisy 880 is particularly desirable, not only because of the natural positioning of the all important loading track directly in, or close to, the vision line of the shooter, but because of its natural position for pumping.

The design of the Model 856 and Model 880 make it easy to see the BB as it is loaded into the chamber. A forced-feed system can obscure the BB entering the chamber. One of the great advantages of the gravity feed system, at least as it is incorporated in the Model 856 and Model 880, is the capability of allowing the user to see the BB entering the chamber. In fact, the user is able to pull back the bolt and see the BB. This advantage can be lost with the incorporation of a forced-feed system.

The Model 856 and Model 880 (as well as various versions of these models) incorporate a bolt safety interlock which is activated whenever the bolt is retracted in order to cock and load the rifle. The combination of the manual safety and the bolt safety interlock make the Model 880 and Model 856 remarkably safe air rifles to handle and shoot. However, the users, like users of all airguns, must follow the pertinent rules of safe gun handling.

12. To my knowledge, both the Model 856 and Model 880 comply with voluntary airgun industry standards promulgated by the ASTM. In fact, I actively participated in the development and drafting of the industry standards. We specifically considered automatic safeties and gravity feed systems and rejected their inclusion after full study of the issue. The only persons to raise these design concepts were persons who testified against airgun companies on a regular basis.

13. Over the years, I have seen the packaging and instruction manuals which accompany the Daisy Model 880 and Model 856. I believe the warnings are written in a clear and concise manner. Further, they are understandable and alert the user to the inherent capacity of airguns to inflict serious bodily injury and even death.

14. The pointing of any firearm or air rifle at another individual and intentionally discharging it, whether one thinks it is empty or loaded, is reckless in the extreme. To sanction such

actions as "expected human behavior" makes a mockery of the safety rules that we as firearms instructors, parents and adults try to pass on to our students, youth and readers. No matter what safety system is utilized, what feed system is implemented, or how the particular firearm or airgun is designed, no guarantee can every be made that an injury will not occur if an individual points an air rifle or firearm at another individual and pulls the trigger.

Further the Affiant sayeth not.

Robert Beeman, Ph.D.

VERIFICATION

STATE OF CALIFORNIA)
) ss.
COUNTY OF SONOMA)

I, Robert Beeman, Ph.D., do hereby certify that the facts and matters contained in the foregoing Affidavit are true and correct to the best of my knowledge, information and belief.

Robert Beeman, Ph.D.

SUBSCRIBED AND SWORN TO before me on this 10th day of July, 2001.

Notary Public

My Commission Expires:
May 21, 2005

VIVIAN J. SWANK
COMM. 1305291
NOTARY PUBLIC CALIFORNIA
SONOMA COUNTY
My Comm. Expires May 21, 2005

AFFIDAVIT

1. My name is Jess I. Galan.

2. I am employed by the Miami Dade County Police Department as a firearms examiner and firearms instructor. I am in the Firearm Identification Unit of that department. In addition, I am the Airguns Editor for: GUNS Magazine and RIFLE Magazine, as well as the author of Airgun Digest, Second and Third Editions. A copy of my curriculum vitae is attached as Exhibit A to this Affidavit.

3. I have tested, examined and reviewed hundreds, if not thousands, of different airguns and BB guns. I am quite familiar with the multi-pump pneumatic air rifle of the Model 856 and Model 880 variety as sold by Daisy Manufacturing Company for the last twenty to thirty years. In fact, I have owned a number of these rifles and have used them for various purposes.

4. The Daisy Model 856 and Model 880 (including various versions of those models) are not unreasonably dangerous and are quite safe for their intended uses. These rifles are reasonably designed air rifles employing the long-popular multi-pump pneumatic power plant. These models are intended for marksmanship training, as well as general recreational shooting by persons 16 years of age and older, adult supervision required. The Model 880 and Model 856 feature the dual and practical capability of allowing their use as a BB reservoir as well as a single shot rifle with a .177 caliber lead pellet.

5. The cross-bolt manual trigger safety of the Model 856 and 880 are positive and uncomplicated in their design as well as operation. These safeties are state of the art for an air rifle of this type and prevent unwanted discharge when engaged. When the safety is disengaged, a red band is clearly visible around the safety button as an alert to the user regarding the rifle's condition of readiness. It is also possible to ascertain easily that the safety is not engaged by tactile feel of the

safety button protruding from the left side of the trigger card. In addition, the legend's PUSH FIRE and PUSH SAFE can be seen in relief on the right and left sides of the trigger card respectively, further to help the shooter ascertain the position of the trigger safety.

6. The Model 856 and Model 880 (as well as various versions of those models) incorporate a bolt safety interlock and is activated whenever the bolt is retracted in order to cock and load the rifle. The combination of both safeties make the Model 880 and Model 856 remarkably safe air rifles to handle and shoot. However, the users, like users of all air rifles, must follow the pertinent rules of safe gun handling.

7. The gravity feed system of the Model 856 and Model 880 are well designed and reliable. The gravity feed for BBs is in my experience, at least as reliable as the forced-feed system. The gravity feed system is simple, has no moving parts, and is not dependant on mechanical means of advancing the BB. Gravity is a constant. Forced-feed systems are not "positive" feed systems. There is, in fact, no such thing as a positive feed system. Any feed system on any firearm or air rifle has the potential to fail to advance a cartridge, pellet or BB. For instance, any type of mechanical forced feed system relies on a mechanism that can malfunction at any time due to a variety of causes including breakage, fouling, debris, temperature extremes and a number of other causes that are too numerous to possibly enumerate.

Gravity feed systems have been used since the late 1800's in air rifles that shoot BBs. In fact, many of the largest selling BB guns in the history of air rifles have incorporated this feed system. It is a standard throughout the American air gun industry and has been such for decades if not a century.

8. A BB attached to the magnetic tip of the bolt is clearly visible in the Model 856 and

Model 880 and is a simple and reliable indicator regarding the presence of a BB about to be chambered. There is nothing about the design that makes the BB difficult to visualize in the slot.

9. The design of the Model 856 and Model 880 make for easy visualization of the BB as it is loaded into the chamber. A forced-feed system necessarily obscures the BB entering the chamber. Consequently, one of the great advantages of the gravity feed system, at least as it is incorporated in the Model 856 and Model 880, is the capability of allowing the user to visually see the BB entering the chamber and in fact is able to pull back the bolt and visualize the BB again. This is an advantage which is lost with the incorporation of a forced-feed type system.

10. As opposed to almost all pump shotguns and rifles as well as all semi-automatic rifles and shotguns, the Model 880 and Model 856 allow for visualization of the BB as it is loaded into the chamber. Again, this provides an extra measure of safety should the shooter choose to utilize the safety feature.

11. The action in the Model 856 and Model 880 can be readily kept open by retracting the bolt. This allows instant visual access to the breach area and the bolt tip in this gun, as well as in several other models which employ a similar design. In a bolt action firearm, the top cartridge in the magazine would be seen when the bolt is retracted. Obviously, the Model 856 and similar airguns do not use firearm cartridges but small round projectiles requiring a very different feed system. There is total visual access to any BB picked up by the bolt from the BB reservoir. Since the Model 856 and Model 880 are ideal as firearms trainers for new shooters of various ages, this design feature is of great value because it duplicates closely the general handling and cartridge loading characteristics of a cartridge bolt-action rifle.

Over the years, I have examined air rifles and BB guns with and without automatic safeties.

First, it should be noted there are no semi-automatic bolt action or pump firearms made, of which I am aware, that incorporate an automatic safety. Automatic safeties are relegated to a very small number of side by side shotguns, usually of foreign manufacture and a few models of over and under shotguns. Because the Model 880 and the Model 856 are designed to be used as training models for later firearm use, it is important that they function similarly. The addition of an automatic safety on these air rifles would defeat the purpose. American firearms generally do not have automatic safeties for many, many good reasons. (These reasons include that a large number of automatic safeties are taken off firearms when they have been incorporated in shotguns of foreign manufacture due to the fact that they create frustration in making follow up shots for the user. In fact, on many target shotguns, there are no safeties whatsoever. American shooting enthusiasts have not wanted an automatic safety. Thus, a manual safety is something that allows the user to always be in control of the position of the safety on the firearm.) An automatic safety on this type of air rifle would necessarily create a situation where the novice shooter would learn to rely on a device which he would be unlikely to ever encounter with firearms.

12. The instruction manuals which accompany the Daisy Model 880 and Model 856 are written in a clear and concise manner. They cover all aspects of the air rifles operations, complete with appropriate cautions, warnings and safety rules.

13. The Model 856 and Model 880 comply with voluntary air gun industry standards promulgated by the ASTM.

14. The packaging in which these air rifles reach the consumer also carry readily legible and understandable warnings alerting the user to the inherent capacity of these air rifles to inflict serious bodily injury and even death. In addition to the operational instructions in the manual, the

air rifles themselves carry these operating instructions engraved where they can be read by the user.

15. The pointing of any firearm or air rifle at another individual and intentionally discharging it, whether one thinks it is empty or loaded, is reckless in the extreme. To sanction such actions as expected human behavior makes a mockery of the safety rules that we as firearms instructors, parents and adults try to pass on to our students, youth and readers. No matter what safety system is utilized, what feed system is implemented or how the particular firearm or air gun is designed, no guarantee can ever be given that an injury will not occur if an individual points an air rifle or firearm at another individual and pulls the trigger.

Further the Affiant sayeth not.

Jess I. Galan

VERIFICATION

STATE OF Florida)
) ss.
COUNTY OF Miami Dade)

I, Jess I Galan, do hereby certify that the facts and matters contained in the foregoing Affidavit are true and correct to the best of my knowledge, information and belief.

Jess I. Galan

SUBSCRIBED AND SWORN TO before me on this 16 day of July, 2001.

Notary Public

Barry Wm. McCabe
Commission # CC 769449
Expires NOV 13, 2002
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TO: Mr. Eric Stone
USCPSC

TELECOPY NO.: 301-504-0359

FROM: William M. Griffin III

DIRECT DIAL: (b) (6)

TOTAL NO. OF PAGES: 22

DATE: January 31, 2003

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
	)	
Respondent	)	
	)	

Second Order on Claimed Privileges

In connection with the discovery in this proceeding, Complaint Counsel has produced a privilege log consisting of 24 pages. Pursuant to an earlier Order, issued January 10, 2003, the Court ruled as to the privilege claims for the documents Bates stamped P 000007 through P 000298. Complaint Counsel was then directed to produce the documents associated with the remaining pages of the privilege log for the Court's review. In today's Order, the Court rules on Bates Stamped Documents P 000299 through P 0001589. The Court has now reviewed those documents and determined[1] that none of the asserted privileges apply to the following pages:

Bates P 000368 through 375
P 000380 through 392
P 000394 through 397
P 000399 through 408
P 000410 through 414

P 000416 through 423
P 000425 through 430
P 000434 through 442

[1] In some instances, the Court reviewed documents for which it was impossible to determine the source. Thus, the privilege determination was made employing a liberal interpretation in favor of the documents' release.

For documents P 000444 through P 000467, the Court instructs that if those documents were generated by Daisy, they are to be released. If generated by CPSC or some other source, Complaint Counsel is directed to detail the basis for privilege claims through an *in camera* submission.

P 000469 through 472
P 000476 through 485

For documents P 000486 through P 000495, the Court instructs that if those documents were generated by Daisy, they are to be released. If generated by CPSC or some other source, Complaint Counsel is directed to detail the basis for privilege claims through an *in camera* submission.

P 000497 through 498

For documents P 000502 through P 000506, the Court instructs that if those documents were generated by Daisy, they are to be released. If generated by CPSC or some other source, Complaint Counsel is directed to detail the basis for privilege claims through an *in camera* submission.

P 000507 through 508

For documents P 000509 through P 000533, the Court instructs that if those documents were generated by Daisy, they are to be released. If generated by CPSC or some other source, Complaint Counsel is directed to detail the basis for privilege claims through an *in camera* submission.

For documents P 000571 through P 000572, the Court instructs that they are to be released or Complaint Counsel is to provide a further explanation for any privilege claims through an *in camera* submission.

P 000690 through 692
P 000694 through 705[2]
P 000712 through 721

[2]These documents appear to duplicates of P000380 through P000392. Many other documents listed within the first 24 pages of the privilege log appear to be duplicates. The Court did not routinely go back to compare documents which appeared to be duplicates. The Court does not believe that it made any inconsistent rulings among such duplicates, but instructs Complaint Counsel to bring this to the Court's attention should that have occurred. In all instances, it is the Court's intention that any handwritten marginal notations may be deleted from all documents ordered disclosed

P 000723 through 727

P 000729 through 736

P 000738 through 745

P 000747 through 755

P 000757 through 780

P 000782 through 789

P 000791 through 807

P 000809 through 810

P 000812 through 815

For documents, P 000817 through 848 the Court instructs that if those documents were generated by Daisy, they are to be released. If generated by CPSC or some other source, Complaint Counsel is directed to detail the basis for privilege claims through an *in camera* submission.

P 000989

P 000990 through 1017[3]

P 001107 through 1110[4]

P 001111 through 1138

P 001158 through 1217

P 001292 through 1297

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[3]The underscoring between this line and the next line was added to highlight the large segment of documents that need not be disclosed. Complaint Counsel should be alert to other such instances.

[4]This is an example of a document to be released, but only after the handwritten marginal notes have been deleted by Complaint Counsel.

P 001300 through 1355[5]

P 001371 through 1426

P 001444

P 001446 through 1447

P 001521 through 1547

P 001566 through 158

Because of the large number of documents ordered to be released, Complaint Counsel is directed to disclose those documents to Daisy within fourteen (14) days of the date of this Order. Consistent with the principle explained in the Court's earlier Order on Claimed Privileges, Complaint Counsel may, within ten (10) days of the date of this Order, seek reconsideration of the Court's Order for any particular documents directed to be released. Such reconsideration must explain on a page-by-page basis the specific reasons Complaint Counsel believes the cited privileges obtain. Failure to be specific as to any page[6] for which Complaint Counsel seeks reconsideration will be fatal to any review.

So Ordered.

William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: January 29, 2003

[5] **P 001327 is to have the handwritten marginal notes deleted.**

[6] Obviously, where it is clear from a particular numbered group of pages that they are a group, as for example, pages of the same report, then Complaint Counsel may speak to that group of documents and need not address each page of that group.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

January 29, 2003

FILED IN THE ADMINISTRATIVE LAW JUDGES

FACSIMILE AND REGULAR MAIL
Mr. Todd Stevenson
U.S. Consumer Product Safety Commission
Office of the Secretary
4330 East West Highway
Room 502, South Tower
Bethesda, Maryland 20814

Re: In the Matter of Daisy Manufacturing Company, Inc.
CPSC Docket No. 02-2

Dear Mr. Stevenson:

Enclosed is my Second Order on Claimed Privileges, which was also sent via facsimile to you this date. Please transmit this Order via facsimile and regular mail to all parties.

Sincerely,

William B. Moran

William B. Moran
United States Administrative Law Judge

Enclosure

FRIDAY ELDREDGE & CLARK

HERSCHEL H. FRIDAY (1922-1994)
WILLIAM H. SUTTON, P.A.
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JOE D. BELL, P.A.
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JAMES M. SIMPSON, P.A.
JAMES M. SAXTON, P.A.
J. SHEPHERD RUSSELL III, P.A.
DONALD H. BACON, P.A.
WILLIAM THOMAS BAXTER, P.A.
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DIANE S. MACKEY, P.A.
WALTER M. EBEL III, P.A.
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SCOTT J. LANCASTER, P.A.
ROBERT B. BEACH, JR., P.A.
J. LEE BROWN, P.A.
JAMES C. BAKER, JR., P.A.
HARRY A. LIGHT, P.A.
SCOTT H. TUCKER, P.A.
GUY ALTON WADE, P.A.
PRICE C. GARDNER, P.A.
TONIA P. JONES, P.A.
DAVID D. WILSON, P.A.
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K. COLEMAN WESTBROOK, JR.
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ELLEN M. OWENS
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BRYAN W. DUKE
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RYAN A. BOWMAN
TIMOTHY C. IZZELL
T. MICHELLE ATOR
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February 13, 2003

COPY

Office of the Secretary
Mr. Todd Stevenson
U.S. Consumer Product Safety Commission
4330 Est West Highway
Bethesda, MD 20814-4408

Re: Daisy v. CPSC, Docket :02-2

Dear Mr. Stevenson:

Enclosed please find an original and one copy of the Disclosure of Additional Expert Testimony which respondent seeks to file. This document has been served on all counsel of record.

If you have any questions or anything further is needed, please do not hesitate to call.

Respectfully,

William M. Griffin III/gec

William M. Griffin III

WMG:bcw
Enclosures
cc: Judge William B. Moran (via fax)
Mr. Eric Stone
Mr. Mark Porter (via fax)

Mr. Aaron Locker
Ms. Marianne McBeth

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, AR 72756	)	
	)	
	)	
	)	
Respondent	)	
	)	

DISCLOSURE OF ADDITIONAL EXPERT TESTIMONY

Daisy Outdoor Products for its Disclosure of Additional Expert Testimony does state:

1. Ronald Riechel

Ronald Riechel will testify by subpoena or by deposition. He is an employee of the Consumer Product Safety Commission. He has many years of engineering background and was one of the persons who was primarily involved in testing airguns from an engineering standpoint for the Consumer Product Safety Commission.

Mr. Reichel's expected opinions are that he has personally tested Daisy Powerline Rifles over the last ten (10) years. He has a great deal of experience in safe gun handling, teaching of gun handling and the shooting sports. Mr. Reichel will testify that the Consumer Product Safety Commission's complaint against Daisy has no basis based upon his investigation and his knowledge of shooting sports. Mr. Reichel, like every other person who has seen the Powerline series of rifles is of the opinion that the BBs are visible in the feed port. This opinion is echoed by Jay DeMarco and Richard Wright, the compliance officer who looked at airguns over the years.

In Mr. Reichel's opinion, the automatic safety is something that we would never recommend. An automatic safety can lead to unsafe gun handling because the shooter attempts to shoot, the rifle does not discharge and the rifle is then pulled down into an unsafe position. It takes proper safe gun handling out of the hands of the shooter and allows the person to improperly rely on a mechanical device.

BBs lodged in the magazine is not a safety or a hazard issue in Mr. Reichel's view. In fact, most feed systems will fail to feed from time to time. This does not give the shooter any right to point the firearm at another individual and pull the trigger.

The gravity feed system is not a defect but rather a design choice by the manufacturer. The gravity feed systems have been on airguns for one hundred years.

Velocity has an effect on trajectory. Although velocity is not an issue in this particular case, Mr. Reichel is of the opinion that the velocity is appropriate for this type of rifle.

Mr. Reichel will indicate that if safety rule number one is not violated, that is, not to point a rifle at another human being, there should be few if any accidents with airguns.

Mr. Reichel will also testify that the in-depth investigations which he looked at revealed a pattern of misuse of the product.

Mr. Reichel will testify that he and anyone else who had knowledge of airguns in the shooting sports were deliberately kept from reviewing matters against Daisy. Instead, there was an effort to reach a different result.

Mr. Reichel will also testify regarding the dangers of a visible magazine or a visible feed track.

Mr. Reichel will testify that he agrees with the conclusions reached by defendant's experts Jess Galan and Robert Beeman.

Mr. Reichel will testify in accordance with his deposition testimony and he will either be called by way of deposition testimony or be called live by subpoena.

2. Richard Wright.

Richard Wright is a compliance officer with Consumer Product Safety Commission.

Mr. Wright was assigned this case although he had no prior experience with airguns. As compliance officer, he did not feel that BBs were difficult to see in the feed port. He also had no opinion that an automatic safety would be needed on a Daisy Powerline airgun. Finally, the issues of BBs lodging in the magazine seemed to be dealt with by the fact that BBs had to be manually loaded from the magazine into the chamber.

Mr. Wright was of the opinion that is it misuse of the product to point a rifle at another individual and pull the trigger.

Mr. Wright will testify in accordance with his deposition testimony. He may testify

by deposition or pursuant to a subpoena.

3. Jay DeMarco

Mr. DeMarco will testify in accordance with his deposition. Specifically, he testified that he was taken off the case even though he was the compliance officer with the most knowledge regarding airguns. He was also one of the few people in the compliance section who had any knowledge of the shooting sports. He agreed that it was an open secret at the Commission that Ann Brown wanted the recall of the Daisy Powerline air rifles.

Mr. DeMarco's testimony will be similar to that elicited from Ron Reichel. Specifically, he will testify that there were no defects found in the Daisy Powerline air rifle over the ten, fifteen or more years that he reviewed these air rifles. He will testify as to how the rifle operates and that user error is required for the incident to occur.

Mr. DeMarco will testify by deposition or pursuant to a subpoena.

4. Scott Snyder

Scott Snyder is an engineer with the Consumer Product Safety Commission. His testimony will be in accordance with that in his deposition. He will testify that the tests performed by the outside experts employed by Attorney Jimmy Williams were inappropriate and improper for an engineer to perform.

Mr. Snyder will testify in accordance with his deposition. He may be called by way of deposition or pursuant to a subpoena

WHEREFORE, Daisy Outdoor Products has complied with the Court's ruling regarding disclosure of expert testimony and Daisy Outdoor Products requests all relief to which it is lawfully entitled.

Dated: February 13th, 2003

Respectfully submitted,

FRIDAY, ELDREDGE & CLARK
2000 Regions Center
400 West Capitol Avenue
Little Rock, Arkansas 72201
(501) 376-2011

Attorneys for Defendant

By William M. Griffin III #82069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by U. S mail, postage prepaid and addressed as follows, this 13th day of February, 2003.

The Honorable William B. Moran,
Administrative Law Judge
and Presiding Officer

Mark W. Porter
Eric L. Stone
Sean R. Ward
Complaint Counsel
4330 East West Highway
Bethesda, Maryland 20814-4408

Office of the Secretary
Mr. Todd Stevenson
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Aaron Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

Ms. Marianne McBeth
Daisy Manufacturing Company, Inc.
Box 220
Rogers, AR 72757-0220

William M. Griffin III

FRIDAY, ELDREDGE & CLARK
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TO: Judge William B. Moran — TELECOPY NO.: 202-565-0044
US Department of Environmental Protection
Office of Administrative Law Judges

TO: Mr. Mark Porter
Mr. Eric Stone
Mr. Sean Ward — 301-504-0359
USCPSC

TO: Marianne McBeth — 479-636-1163
Daisy Manufacturing

TO: Aaron Locker — 212-391-2035
Locker, Greenberg & Brainin, P.C.

FROM: William M. Griffin III — DIRECT DIAL: (b) (6)

Re: CPSC Docket No. :02-2

TOTAL NO. OF PAGES: 6

DATE: February 13, 2003

IF YOU DO NOT RECEIVE ALL THE PAGES PLEASE CALL 501/370-3303 ASAP.

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No.: 02-2
	)	
d/b/a Daisy Outdoor Products	)	
400 West Stribling Drive	)	
Rogers, Arkansas 72756	)	
	)	
	)	
	)	
Respondent	)	
	)	

Order on Daisy's Claimed Privileges

In connection with the discovery in this proceeding, Daisy, while initially asserting that it had no documents for which it claimed privileges, subsequently produced, on January 29, 2003, a privilege log listing underlying documents consisting of approximately 500 pages. The documents were delivered to the Court for its *in camera* review of the privileges. The Court's review of the underlying documents yields the following.

Documents with Bates numbers 9542 through 9640 are described as "880 claims index." While the index itself is privileged, the Court directs Daisy to confirm in writing that the following documents referenced in the index have been delivered to Complaint Counsel where discovery requests were made for the materials referenced in the "880 claims index" or to explain why those documents have not been produced. The index refers to items such as product specifications, testing procedures, warnings, drawings, blueprints, carton descriptions, operation manuals, significant changes in model 880, advertising, marketing surveys, expert reports, demographics reports, testing procedures and reports, expert reports, catalogs, service manuals, design reviews and the names of individuals who filed claims relating to model 880, together with references to various litigation filings related to those filings.[1]

[1] As *one* example of the underlying information referenced in this index, the Court draws Daisy's attention to Bates 9551, where several of these items are mentioned.

Daisy is directed to provide Complaint Counsel with the portions of Bates numbers 1692, 1693 in which Guy Brauchler is quoted from a November 2, 1971 memorandum, to state that it has already provided the information or to explain why such quotes are privileged.

The Court has examined each of the remaining pages which Daisy provided along with the privilege log dated 1-31-03 and determined that, except for the reservations listed above, the documents are privileged and need not be disclosed. However, the Court has concerns about the completeness of the documents submitted. For example, in a recent telephone conference call, Complaint Counsel called to the Court's attention, and Mr. Aaron Locher acknowledged, that a Consumer Product Safety Commission document, bearing a July 10th date[2], related to the issues in this litigation and apparently derived from the notes of CPSC employee Wright was in Daisy's possession, although apparently it had not been provided to Daisy through Complaint Counsel. This document was not among the documents delivered with the privilege log, nor has there been an indication that Daisy either has returned the document to Complaint Counsel or even provided it with a copy. The Court's direction to Daisy that it submit to the Court *all* documents for which a privilege was claimed was an unqualified Order. Therefore, where Daisy has not, even at this time, so long after requests for production have been made, delivered the requested documents to Complaint Counsel, it still has the obligation to submit the documents for an *in camera* review by the Court. There should not be any further delay in this matter.

So Ordered.

William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: February 5, 2003

[2]The parties were not precise about the year for this document, but the Court gathered from the context of the conversation that the July 10th document referred to 2002.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

February 5, 2003

OFFICE OF
THE ADMINISTRATIVE
LAW JUDGES

FACSIMILE AND REGULAR MAIL
Mr. Todd Stevenson
U.S. Consumer Product Safety Commission
Office of the Secretary
4330 East West Highway
Room 502, South Tower
Bethesda, Maryland 20814

Re: In the Matter of Daisy Manufacturing Company, Inc.
CPSC Docket No. 02-2

Dear Mr. Stevenson:

Enclosed is my Order on Daisy's Claimed Privileges, which was also sent via facsimile to you this date. Please transmit this Order via facsimile and regular mail to all parties.

Sincerely,

William B. Moran

William B. Moran
United States Administrative Law Judge

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ADMINISTRATIVE LAW JUDGES
MAIL CODE 1900L
1200 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20460

TELEPHONE: 202 564-6255 FACSIMILE: 202 565-0044

FAX TRANSMITTAL PAGE

Date: 2-5-03

From: Judge Moran

To: Mr. Todd Stevenson, Secretary, USCPSC

Fax: 301-504-0127 Telephone: 301-504-0800x1232

Hard Copy To Be Mailed: X Yes No
Any Questions or Problems May Be Directed To:

Nelly Torres Telephone: 202 564-6258

In the Matter of Daisy Manufacturing Company, Inc., CPSC Docket No. 02-2

COPY

OFFICE OF THE SECRETARY
2003 FEB 14 A 9:49

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

COMPLAINT COUNSEL'S SUPPLEMENTAL DISCLOSURE REGARDING EXPERT WITNESSES

Pursuant to the Court's order of February 6, 2003, Complaint Counsel makes the following supplemental disclosure concerning the expected testimony of the expert witnesses it expects to call at the hearing in this matter:

J. William Morris, Sc. D.

Dr. J. William Morris is a Professor of Metallurgy at the University of California, Berkeley. Educated at the Massachusetts Institute of Technology, Dr. Morris received his B.S. in Metallurgy in 1964 and his Sc. D. in Materials Science in 1969.

To prepare him for his analysis and testimony regarding Daisy's Powerline BB guns, Complaint Counsel has forwarded to Professor Morris samples of the Powerline BB guns, the complaint and answer in this matter, Daisy test reports for the Powerline BB guns, Daisy design drawings for the Powerline BB guns, Daisy engineering change notices for the Powerline BB guns, various deposition transcripts in litigations past and present involving the Powerline BB guns, Daisy and CPSC staff memoranda regarding the Powerline BB guns, expert reports prepared for previous Powerline BB gun litigations, portions of Daisy's Second Supplemental

Answers to Certain of Complaint Counsel's First and Second Sets of Interrogatories, and ASTM F590-92 (Standard Consumer Safety Specification for Non-Powder Gun Projectiles and Propellants).

Dr. Morris has confirmed that a BB can become lodged in both Model 856 and Model 880 Powerline BB guns.

In the Model 856 BB guns, Dr. Morris has observed that the inner rifle barrel is misaligned and off-center towards the left outer barrel casing. He has also observed that the force that holds the alignment of the inner and outer barrels of the Model 856 BB guns is light. He has also observed that there is inadequate dimensional spacing within the Model 856 BB guns. Any of these design elements can create a space where a BB can become entrapped within the Model 856 BB guns. Professor Morris is expected to testify about how the use of certain materials and design dimensions in the manufacture of Model 856 BB guns contributes to BB lodging. He is also expected to testify how Daisy implemented design changes in 1998 and 1999 to the Model 856 BB guns, in an effort to prevent BB lodging.

In the Model 880 BB guns, Dr. Morris has observed that a BB can become lodged in a space between the outer barrel and the receiver in the forward portion of the magazine. He is expected to testify that this lodging phenomenon can occur because of a loose screw in the receiver, use of an out of specification or deformed BB, the presence inside the gun of substances such as lubricating oil, or combinations of all three phenomena. Dr. Morris is expected to testify that the receiver screws in the Model 880 BB guns may loosen over the useful life of the BB gun. Finally, he will explain how Daisy implemented design changes in 1994 to prevent BB lodging in the Model 880 BB guns.

Dr. Morris is expected to testify about his observations that some BB's sold at retail that are used with Powerline BB guns may have been mismanufactured or deformed, and how this may lead to lodging of the BB's in the Powerline BB guns. He will also testify how the surface morphology of BB's and/or burrs and roughnesses present on the finished parts of the Powerline BB guns is a factor in BB entrapment in Powerline BB guns.

Dr. Morris is further expected to testify that if a BB becomes lodged in a Powerline BB gun, a user can proceed through the loading and firing procedures without dislodging the BB, resulting in a "dry fire" of the Powerline BB gun. He will testify that the application of a small amount of force (for example, applying a small amount of torque near the forward area of the magazine, which can occur with a child's simple bend or twist of the forearm) can dislodge a lodged BB, allowing the formerly lodged BB to fire, if the user proceeds through the loading and firing procedures following the dislodgment.

Dr. Morris' opinions may be modified or supplemented based on his review of reports or testimony of experts for Respondent. He may also supplement his opinions based on additional testing and/or review of documents or materials provided by Respondent or others.

Charles E. Irwin, M.D.

Charles E. Irwin, Jr., M.D., is a practicing pediatrician and a Professor of Pediatrics in the Department of Pediatrics, Division of Adolescent Medicine, at the University of California, San Francisco. Dr. Irwin received his M.D. in 1971 from the University of California, San Francisco, where he also completed his internship and residency.

Currently president of the Society of Adolescent Medicine, Dr. Irwin has been the principal or co-investigator on numerous research grants concerning adolescent behavior, including studies of adolescent risk perception. Dr. Irwin has published widely in the field of

adolescent medicine, including peer-reviewed articles relating to the psychosocial context of adolescent risk-taking behaviors. He has been a frequent lecturer and speaker on the biological, psychological and social correlates of risk-taking behavior during adolescence.

Dr. Irwin has read the complaint and answer in this proceeding and reviewed materials relating to a number of injuries caused by Daisy Powerline airguns. He has also reviewed certain instructional materials provided to users of Daisy Powerline airguns.

Dr. Irwin is expected to testify about adolescent psychosocial development and its effect on risk perception and behavior by adolescent users of Daisy Powerline airguns. He will testify further concerning the various contextual and environmental factors that influence adolescent users of the airguns and result in airgun-related injuries.

Specifically, based on his professional training and experience, Dr. Irwin is expected to testify, that:

- Certain risk-taking behavior is normative and expected among adolescents.
- Early and middle adolescents, because of their limited life experience, are not able to assess the possible consequences of their behavior as accurately as adults.
- While adolescents may be aware (from Daisy's own warnings and literature and elsewhere) of the serious injuries that may be inflicted by Powerline airguns, they often are incapable of integrating that awareness into their own behaviors in handling the guns. In addition, because early adolescents, in particular, tend to think concretely, inconsistent messages in Daisy's literature and warnings may lead adolescents to discount such messages or to otherwise fail to integrate such messages into their gun-use behavior.

- Adolescents are more likely to engage in risk-taking behaviors when their prior experiences with those behaviors have not resulted in negative outcomes. For example, some injury incidents involve adolescents who have "dry-fired" Powerline airguns at others after taking steps to assure themselves that the gun is unloaded. The experience of having "dry-fired" the gun in such circumstances without a negative result acts to reinforce the behavior in adolescents. The propensity for BB lodging in the magazine area of Powerline guns is particularly problematic in these circumstances.
- The adolescent's inability to realistically assess risk can be magnified by the context in which risk-taking behavior occurs. For example, some injury incidents occur in the context of playing or "roughhousing" by adolescent boys, which is, of course, perfectly normative behavior for that age group. However, such encounters among adolescent peers often involve emotional or stressful interactions that induce spontaneous thinking and reactions. In these conditions of "hot" cognition, adolescents are less likely to exercise their capacity for abstract, formal reasoning, decreasing their ability to assess possible risks or the consequences of their behavior. Such conditions may also create distractions for the adolescent user of a Daisy Powerline airgun, causing him to handle the product in a manner inconsistent with its lethal capacity.
- In most of the United States, BB gun use by early and middle adolescents is considered normative. This perception of BB guns generally may lead adolescents and parents to underestimate the lethal capacity of Daisy Powerline

airguns. Under these circumstances, it is unreasonable to expect that parents will closely supervise adolescents using these airguns.

- In psychosocial dimensions, normal adolescent development encompasses increasing independence, autonomy from parents, and greater peer affiliation. Particularly as a child enters middle adolescence, it is normative for parents to exercise less supervision. Given the normative perception of BB gun use in much of the country, it would be unreasonable to expect close parental supervision of middle adolescents using Powerline airguns. Indeed, the high level of parental supervision apparently expected by Daisy is not developmentally normal or consistent for these adolescents.
- Daisy's apparent reliance on close parental supervision of adolescent Powerline users is further belied by significant changes that have occurred in the environmental context of adolescence. An example is the increased labor force participation of women. By the time children reach early adolescence, both parents often are working outside the home. Associated with these changes in the family, there has been a decrease in effective monitoring of adolescents due to decreased resources within communities and lack of adult time to provide effective supervision. This lack of supervision may have effects on the incidence of risky adolescent behaviors, including behaviors associated with Powerline airgun use.

Dr. Irwin's opinions may be modified or supplemented based on review of reports or testimony of experts for Respondent. He may also supplement his opinions based on additional documents or materials provided by Respondent or others.

Arthur D. Fisk, Ph.D., CHFP

See statement attached hereto.

Stanton O. Berg

Mr. Berg is a firearms consultant and serves on several ATSM Standards Development Committees, including the committee for non-powder gun products (airguns).

To prepare him for his analysis and testimony regarding Daisy's Powerline BB guns, Complaint Counsel has forwarded to Mr. Berg samples of the Powerline BB guns, the complaint and answer in this matter, Daisy test reports for the Powerline BB guns, Daisy design drawings for the Powerline BB guns, Daisy engineering change notices for the Powerline BB guns, various deposition transcripts in litigations past and present involving the Powerline BB guns, Daisy and CPSC staff memoranda regarding the Powerline BB guns, expert reports prepared for previous Powerline BB gun litigations, and portions of Daisy's Second Supplemental Answers to Certain of Complaint Counsel's First and Second Sets of Interrogatories.

Mr. Berg is expected to testify that since the Powerline Airguns are used by youths and frequently available to children under the age of 16, they should be equipped with automatic safeties. Such devices do not require a young person to remember to activate them or place them on. The automatic safety goes on automatically when the gun is either cocked, or the action is opened for loading purposes.

Mr. Berg is expected to testify that automatic safeties have been designed and produced for firearms intended for the youth market for many years dating back to 1928. Such safeties on regular firearms date back to 1861. Airguns also have an early history of automatic safeties that dates back to 1889. Mr. Berg's research will demonstrate that there are over 175 makes and models of airguns having an automatic safety mechanism currently on the market. Based on a

review and analysis of air rifles listed in the Gun Digest for 2000, Mr. Berg is expected to testify that approximately 35% of the total number of the current makes and models surveyed have an automatic safety. Daisy had none in this category.

Mr. Berg is expected to testify that Daisy has manufactured several models of airguns with automatic safeties. Daisy also has a patent on an automatic safety (Fleming et. al., 3,839,999, filed May 26, 1971). Furthermore, Guy E. Braughler, the former Director of Product Evaluation for Daisy, designed an automatic safety for the Model 880 line of airguns, February 12, 1971, which was not used.

Mr. Berg is expected to testify that automatic safeties are a simple mechanism to design. He is also expected to testify that automatic safeties are reliable. Mr. Berg is expected to testify that Powerline Airguns, with an effective automatic safety design that can be activated at any time, would avoid incidents involving unintentional firings.

For its Model 880, Daisy advertises a velocity of a BB at approximately 685 feet per second ("f.p.s."). For the Model 856, Daisy advertises a velocity of a BB at approximately 650 f.p.s. Actual tests indicate that velocities can be obtained well above the advertised velocities. Mr. Berg is expected to testify that even less than ten pumps can produce a BB velocity that can significantly penetrate human tissue in both the Model 880 and Model 856 Powerline Airguns.

Mr. Berg has observed a series of penetration firing tests with BBs that indicate that a BB will penetrate skin if the velocity is around 350 f.p.s. Firing tests resulted in skin penetrations at a minimum velocity range of 338 f.p.s., up to 350 f.p.s. At a velocity of approximately 600 f.p.s., the BB would penetrate the skin and travel into the ballistic gelatin block approximately 3.7".

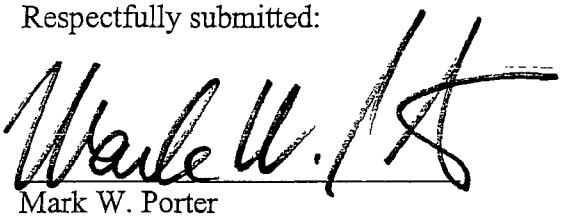
Mr. Berg has also performed some penetration tests into a pine board. These tests demonstrated the penetration potential of the Model 880 at one pump, two pumps, four pumps, six pumps eight pumps and ten pumps.

Mr. Berg is expected to testify that the Powerline Airguns are dangerous for several reasons: they are used by youth and available to children under the age of 16, they do not have an automatic safety that would prevent unintentional firings, and they have a high penetration potential that has caused lethal injuries. Mr. Berg is expected to testify that loaded Powerline Airguns may "dry-fire." He is also expected to testify generally about the loading, feeding and operating systems of the Powerline Airguns.

Mr. Berg's opinions may be modified or supplemented based on review of reports or testimony of experts for Respondent. He may also supplement his opinions based on additional documents or materials provided by Respondent or others.

February 13, 2003

Respectfully submitted:



Mark W. Porter

Eric Stone
Ronald Yelenik
Howard Tarnoff
Quynh Nguyen
Sean Ward

Complaint Counsel

Office of Compliance
U.S. Consumer Product
Safety Commission
4330 East West Highway, Room 613
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(301) 504-7732

Arthur D. Fisk, Ph.D., CHFP

Background

I received a Ph.D. in Experimental Psychology from the University of Illinois in 1982. I am currently a Professor and the Coordinator of the Engineering Psychology Program at Georgia Institute of Technology. Prior to my academic career I was a Manager, Human Factors Engineering, at AT&T.

I am a member of several scientific societies including: American Psychological Association; Gerontological Society of America; Human Factors and Ergonomics Society; and the Psychonomic Society. I am a Fellow of American Psychological Association and of the Human Factors and Ergonomics Society.

I am a Past President of the Human Factors and Ergonomics Society and a Past-President of the American Psychological Association's Division of Applied Experimental and Engineering Psychologists. I served as Editor of the scientific journal *Human Factors*, and I have served on the editorial board of numerous scientific journals.

Areas of Expected Testimony

Considering my review of the information that I have been provided and my knowledge of engineering psychology and human factors, I expect to testify concerning the human factors issues involving the hidden hazard created by the lodging of a BB in the magazine of the Daisy Model 880 and Model 856 power line airguns, unexpected characteristics of the Powerline air rifles products, as well as inadequacies associated with the warning system and instructional/user manual. These deficiencies made the product, from a human factors perspective, unreasonably dangerous.

Based on the materials I have reviewed as of this date (on-product warnings, user manuals, box/package materials, various advertisements, and various sales related documents), it is my opinion that:

- The product would perform in a manner unexpected to the consumer; hence, it would contain hazards hidden from the consumer.

- During the design and/or sale of the product, there was both a failure to warn of the hidden hazards and a failure to adequately instruct concerning safe use of the product.

- The information associated with the product was inadequate as warning information.

• There is no evidence that adequate testing during warning development was followed.

• There is no evidence that adequate user testing was followed concerning the user manual.

Daisy did not appear to adhere to standard human factors safety practice concerning hidden hazards. Common, good engineering practice dictates that if there is a potential hazard the lines of defense against that hazard are: First to attempt to design out the hazard. If the hazard cannot be designed out, then the second line of defense is to guard against the hazard. Finally, the very last line of defense is to adequately warn about the hidden hazard. If the least optimal solution is chosen, warning about a hidden hazard, then the warning system must be tested to ensure that the warning system conveys the proper, usable knowledge needed to avoid the hazard. Indeed, the on-product warning within the warning system must at least:

• Attract the user's attention to critical information unique to the situation.

• Overcome expectations that will lead to incorrect or incomplete understanding of the information.

• Prompt the user to think about information learned in another context that is relevant to the present situation.

• Provide enough information so that a user can employ or develop an appropriate mental model of the situation.

• Ensure that users need not make inferences concerning correct behavior when using the product.

The Daisy provided Operations Manual appears to fail from the perspective of designing to maximize comprehension of the materials. For example, an analysis of a 1994 Daisy Operations manual (860/856) indicates that the readability is higher than recommended for text designed for a general user population. The readability indices range from 7th to 10th grade reading level (a sixth grade reading level is generally the maximum recommended). The manual contains jargon and appears to have been written by an experienced gun user and to be written for other experienced gun owners and users. The terminology used seems to be the language of an experienced gun user. An experienced gun user might be able to use the manual as a quick reference for procedures having to do with the Daisy air gun. However, these instructions do not seem to cater to

the novice or youthful user. Though the manual is written in short sentences, the language contained within those sentences seems to assume knowledge of guns and gun terminology. The manual lacks a higher order organizational scheme to inform the user how to begin using and how to maintain the gun, which makes it difficult for novices to develop an appropriate mental model of the air gun system.

As with the warning labels and packaging materials, the review of the manual indicated that reliance on inference concerning actions would be required to understand safety related issues (and hidden hazards). Also, the use in the manual of the figure/graphical materials appears confusing. The analysis indicates that another flaw with the manual concerns its vagueness of meaning (for example: "may result", "extra precaution", "before putting gun away...shoot the gun at a safe target to make sure the pump system and barrel are empty...",). Finally, the physical layout of the manual is poor and is likely to discourage reading the physically densely packed passages.

This present discussion of my expected areas of testimony and opinions is based on the information available to me on the date of writing. The opinions contained within this report are subject to modification if future information is obtained that requires such modification.

Respectfully Submitted,

Arthur D. Fisk, Ph.D., CHFP

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2003, I caused a copy of the foregoing **Complaint Counsel's Supplemental Disclosure Regarding Expert Witnesses** to be served upon all parties of record in these proceedings, as follows:

By facsimile and first class mail, postage prepaid to:

The Honorable William B. Moran, Administrative Law Judge
and Presiding Officer

By facsimile and first class mail, postage prepaid to:

Aaron Locker, Esq.
Jeffrey Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

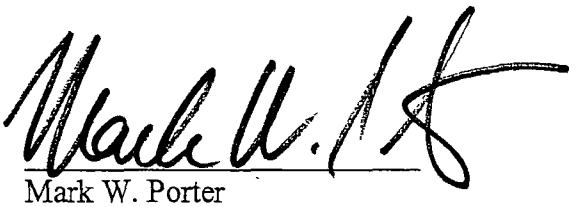
William M. Griffin, III, Esq.
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2000 Regions Center
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Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
Rogers, AR 72756

Attorneys for Daisy Manufacturing Company

By hand delivery (on February 14, 2003) to:

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408



Mark W. Porter
Office of Compliance, Legal Division
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814-4408

COPY

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2003 FEB 10 A 9:48

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

COMPLAINT COUNSEL'S SUPPLEMENTAL DISCLOSURE REGARDING EXPERT WITNESSES

Pursuant to the Court's order of February 6, 2003, Complaint Counsel makes the following supplemental disclosure concerning the expected testimony of the expert witnesses it expects to call at the hearing in this matter:

J. William Morris, Sc. D.

Dr. J. William Morris is a Professor of Metallurgy at the University of California, Berkeley. Educated at the Massachusetts Institute of Technology, Dr. Morris received his B.S. in Metallurgy in 1964 and his Sc. D. in Materials Science in 1969.

To prepare him for his analysis and testimony regarding Daisy's Powerline BB guns, Complaint Counsel has forwarded to Professor Morris samples of the Powerline BB guns, the complaint and answer in this matter, Daisy test reports for the Powerline BB guns, Daisy design drawings for the Powerline BB guns, Daisy engineering change notices for the Powerline BB guns, various deposition transcripts in litigations past and present involving the Powerline BB guns, Daisy and CPSC staff memoranda regarding the Powerline BB guns, expert reports prepared for previous Powerline BB gun litigations, portions of Daisy's Second Supplemental

Answers to Certain of Complaint Counsel's First and Second Sets of Interrogatories, and ASTM F590-92 (Standard Consumer Safety Specification for Non-Powder Gun Projectiles and Propellants).

Dr. Morris has confirmed that a BB can become lodged in both Model 856 and Model 880 Powerline BB guns.

In the Model 856 BB guns, Dr. Morris has observed that the inner rifle barrel is misaligned and off-center towards the left outer barrel casing. He has also observed that the force that holds the alignment of the inner and outer barrels of the Model 856 BB guns is light. He has also observed that there is inadequate dimensional spacing within the Model 856 BB guns. Any of these design elements can create a space where a BB can become entrapped within the Model 856 BB guns. Professor Morris is expected to testify about how the use of certain materials and design dimensions in the manufacture of Model 856 BB guns contributes to BB lodging. He is also expected to testify how Daisy implemented design changes in 1998 and 1999 to the Model 856 BB guns, in an effort to prevent BB lodging.

In the Model 880 BB guns, Dr. Morris has observed that a BB can become lodged in a space between the outer barrel and the receiver in the forward portion of the magazine. He is expected to testify that this lodging phenomenon can occur because of a loose screw in the receiver, use of an out of specification or deformed BB, the presence inside the gun of substances such as lubricating oil, or combinations of all three phenomena. Dr. Morris is expected to testify that the receiver screws in the Model 880 BB guns may loosen over the useful life of the BB gun. Finally, he will explain how Daisy implemented design changes in 1994 to prevent BB lodging in the Model 880 BB guns.

Dr. Morris is expected to testify about his observations that some BB's sold at retail that are used with Powerline BB guns may have been mismanufactured or deformed, and how this may lead to lodging of the BB's in the Powerline BB guns. He will also testify how the surface morphology of BB's and/or burrs and roughnesses present on the finished parts of the Powerline BB guns is a factor in BB entrapment in Powerline BB guns.

Dr. Morris is further expected to testify that if a BB becomes lodged in a Powerline BB gun, a user can proceed through the loading and firing procedures without dislodging the BB, resulting in a "dry fire" of the Powerline BB gun. He will testify that the application of a small amount of force (for example, applying a small amount of torque near the forward area of the magazine, which can occur with a child's simple bend or twist of the forearm) can dislodge a lodged BB, allowing the formerly lodged BB to fire, if the user proceeds through the loading and firing procedures following the dislodgment.

Dr. Morris' opinions may be modified or supplemented based on his review of reports or testimony of experts for Respondent. He may also supplement his opinions based on additional testing and/or review of documents or materials provided by Respondent or others.

Charles E. Irwin, M.D.

Charles E. Irwin, Jr., M.D., is a practicing pediatrician and a Professor of Pediatrics in the Department of Pediatrics, Division of Adolescent Medicine, at the University of California, San Francisco. Dr. Irwin received his M.D. in 1971 from the University of California, San Francisco, where he also completed his internship and residency.

Currently president of the Society of Adolescent Medicine, Dr. Irwin has been the principal or co-investigator on numerous research grants concerning adolescent behavior, including studies of adolescent risk perception. Dr. Irwin has published widely in the field of

adolescent medicine, including peer-reviewed articles relating to the psychosocial context of adolescent risk-taking behaviors. He has been a frequent lecturer and speaker on the biological, psychological and social correlates of risk-taking behavior during adolescence.

Dr. Irwin has read the complaint and answer in this proceeding and reviewed materials relating to a number of injuries caused by Daisy Powerline airguns. He has also reviewed certain instructional materials provided to users of Daisy Powerline airguns.

Dr. Irwin is expected to testify about adolescent psychosocial development and its effect on risk perception and behavior by adolescent users of Daisy Powerline airguns. He will testify further concerning the various contextual and environmental factors that influence adolescent users of the airguns and result in airgun-related injuries.

Specifically, based on his professional training and experience, Dr. Irwin is expected to testify, that:

- Certain risk-taking behavior is normative and expected among adolescents.
- Early and middle adolescents, because of their limited life experience, are not able to assess the possible consequences of their behavior as accurately as adults.
- While adolescents may be aware (from Daisy's own warnings and literature and elsewhere) of the serious injuries that may be inflicted by Powerline airguns, they often are incapable of integrating that awareness into their own behaviors in handling the guns. In addition, because early adolescents, in particular, tend to think concretely, inconsistent messages in Daisy's literature and warnings may lead adolescents to discount such messages or to otherwise fail to integrate such messages into their gun-use behavior.

- Adolescents are more likely to engage in risk-taking behaviors when their prior experiences with those behaviors have not resulted in negative outcomes. For example, some injury incidents involve adolescents who have "dry-fired" Powerline airguns at others after taking steps to assure themselves that the gun is unloaded. The experience of having "dry-fired" the gun in such circumstances without a negative result acts to reinforce the behavior in adolescents. The propensity for BB lodging in the magazine area of Powerline guns is particularly problematic in these circumstances.
- The adolescent's inability to realistically assess risk can be magnified by the context in which risk-taking behavior occurs. For example, some injury incidents occur in the context of playing or "roughhousing" by adolescent boys, which is, of course, perfectly normative behavior for that age group. However, such encounters among adolescent peers often involve emotional or stressful interactions that induce spontaneous thinking and reactions. In these conditions of "hot" cognition, adolescents are less likely to exercise their capacity for abstract, formal reasoning, decreasing their ability to assess possible risks or the consequences of their behavior. Such conditions may also create distractions for the adolescent user of a Daisy Powerline airgun, causing him to handle the product in a manner inconsistent with its lethal capacity.
- In most of the United States, BB gun use by early and middle adolescents is considered normative. This perception of BB guns generally may lead adolescents and parents to underestimate the lethal capacity of Daisy Powerline

airguns. Under these circumstances, it is unreasonable to expect that parents will closely supervise adolescents using these airguns.

- In psychosocial dimensions, normal adolescent development encompasses increasing independence, autonomy from parents, and greater peer affiliation. Particularly as a child enters middle adolescence, it is normative for parents to exercise less supervision. Given the normative perception of BB gun use in much of the country, it would be unreasonable to expect close parental supervision of middle adolescents using Powerline airguns. Indeed, the high level of parental supervision apparently expected by Daisy is not developmentally normal or consistent for these adolescents.
- Daisy's apparent reliance on close parental supervision of adolescent Powerline users is further belied by significant changes that have occurred in the environmental context of adolescence. An example is the increased labor force participation of women. By the time children reach early adolescence, both parents often are working outside the home. Associated with these changes in the family, there has been a decrease in effective monitoring of adolescents due to decreased resources within communities and lack of adult time to provide effective supervision. This lack of supervision may have effects on the incidence of risky adolescent behaviors, including behaviors associated with Powerline airgun use.

Dr. Irwin's opinions may be modified or supplemented based on review of reports or testimony of experts for Respondent. He may also supplement his opinions based on additional documents or materials provided by Respondent or others.

Arthur D. Fisk, Ph.D., CHFP

See statement attached hereto.

Stanton O. Berg

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Mr. Berg is expected to testify that since the Powerline Airguns are used by youths and frequently available to children under the age of 16, they should be equipped with automatic safeties. Such devices do not require a young person to remember to activate them or place them on. The automatic safety goes on automatically when the gun is either cocked, or the action is opened for loading purposes.

Mr. Berg is expected to testify that automatic safeties have been designed and produced for firearms intended for the youth market for many years dating back to 1928. Such safeties on regular firearms date back to 1861. Airguns also have an early history of automatic safeties that dates back to 1889. Mr. Berg's research will demonstrate that there are over 175 makes and models of airguns having an automatic safety mechanism currently on the market. Based on a

review and analysis of air rifles listed in the Gun Digest for 2000, Mr. Berg is expected to testify that approximately 35% of the total number of the current makes and models surveyed have an automatic safety. Daisy had none in this category.

Mr. Berg is expected to testify that Daisy has manufactured several models of airguns with automatic safeties. Daisy also has a patent on an automatic safety (Fleming et. al., 3,839,999, filed May 26, 1971). Furthermore, Guy E. Braughler, the former Director of Product Evaluation for Daisy, designed an automatic safety for the Model 880 line of airguns, February 12, 1971, which was not used.

Mr. Berg is expected to testify that automatic safeties are a simple mechanism to design. He is also expected to testify that automatic safeties are reliable. Mr. Berg is expected to testify that Powerline Airguns, with an effective automatic safety design that can be activated at any time, would avoid incidents involving unintentional firings.

For its Model 880, Daisy advertises a velocity of a BB at approximately 685 feet per second ("f.p.s."). For the Model 856, Daisy advertises a velocity of a BB at approximately 650 f.p.s. Actual tests indicate that velocities can be obtained well above the advertised velocities. Mr. Berg is expected to testify that even less than ten pumps can produce a BB velocity that can significantly penetrate human tissue in both the Model 880 and Model 856 Powerline Airguns.

Mr. Berg has observed a series of penetration firing tests with BBs that indicate that a BB will penetrate skin if the velocity is around 350 f.p.s. Firing tests resulted in skin penetrations at a minimum velocity range of 338 f.p.s., up to 350 f.p.s. At a velocity of approximately 600 f.p.s., the BB would penetrate the skin and travel into the ballistic gelatin block approximately 3.7".

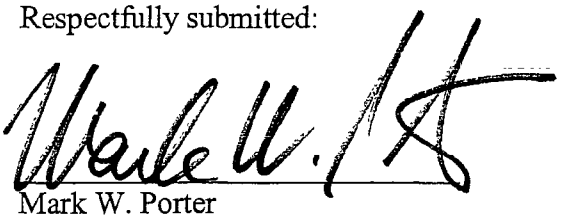
Mr. Berg has also performed some penetration tests into a pine board. These tests demonstrated the penetration potential of the Model 880 at one pump, two pumps, four pumps, six pumps eight pumps and ten pumps.

Mr. Berg is expected to testify that the Powerline Airguns are dangerous for several reasons: they are used by youth and available to children under the age of 16, they do not have an automatic safety that would prevent unintentional firings, and they have a high penetration potential that has caused lethal injuries. Mr. Berg is expected to testify that loaded Powerline Airguns may "dry-fire." He is also expected to testify generally about the loading, feeding and operating systems of the Powerline Airguns.

Mr. Berg's opinions may be modified or supplemented based on review of reports or testimony of experts for Respondent. He may also supplement his opinions based on additional documents or materials provided by Respondent or others.

February 13, 2003

Respectfully submitted:



Mark W. Porter

Eric Stone
Ronald Yelenik
Howard Tarnoff
Quynh Nguyen
Sean Ward

Complaint Counsel

Office of Compliance
U.S. Consumer Product
Safety Commission
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Arthur D. Fisk, Ph.D., CHFP

Background

I received a Ph.D. in Experimental Psychology from the University of Illinois in 1982. I am currently a Professor and the Coordinator of the Engineering Psychology Program at Georgia Institute of Technology. Prior to my academic career I was a Manager, Human Factors Engineering, at AT&T.

I am a member of several scientific societies including: American Psychological Association; Gerontological Society of America; Human Factors and Ergonomics Society; and the Psychonomic Society. I am a Fellow of American Psychological Association and of the Human Factors and Ergonomics Society.

I am a Past President of the Human Factors and Ergonomics Society and a Past-President of the American Psychological Association's Division of Applied Experimental and Engineering Psychologists. I served as Editor of the scientific journal *Human Factors*, and I have served on the editorial board of numerous scientific journals.

Areas of Expected Testimony

Considering my review of the information that I have been provided and my knowledge of engineering psychology and human factors, I expect to testify concerning the human factors issues involving the hidden hazard created by the lodging of a BB in the magazine of the Daisy Model 880 and Model 856 power line airguns, unexpected characteristics of the Powerline air rifles products, as well as inadequacies associated with the warning system and instructional/user manual. These deficiencies made the product, from a human factors perspective, unreasonably dangerous.

Based on the materials I have reviewed as of this date (on-product warnings, user manuals, box/package materials, various advertisements, and various sales related documents), it is my opinion that:

- The product would perform in a manner unexpected to the consumer; hence, it would contain hazards hidden from the consumer.

- During the design and/or sale of the product, there was both a failure to warn of the hidden hazards and a failure to adequately instruct concerning safe use of the product.

- The information associated with the product was inadequate as warning information.

• There is no evidence that adequate testing during warning development was followed.

• There is no evidence that adequate user testing was followed concerning the user manual.

Daisy did not appear to adhere to standard human factors safety practice concerning hidden hazards. Common, good engineering practice dictates that if there is a potential hazard the lines of defense against that hazard are: First to attempt to design out the hazard. If the hazard cannot be designed out, then the second line of defense is to guard against the hazard. Finally, the very last line of defense is to adequately warn about the hidden hazard. If the least optimal solution is chosen, warning about a hidden hazard, then the warning system must be tested to ensure that the warning system conveys the proper, usable knowledge needed to avoid the hazard. Indeed, the on-product warning within the warning system must at least:

• Attract the user's attention to critical information unique to the situation.

• Overcome expectations that will lead to incorrect or incomplete understanding of the information.

• Prompt the user to think about information learned in another context that is relevant to the present situation.

• Provide enough information so that a user can employ or develop an appropriate mental model of the situation.

• Ensure that users need not make inferences concerning correct behavior when using the product.

The Daisy provided Operations Manual appears to fail from the perspective of designing to maximize comprehension of the materials. For example, an analysis of a 1994 Daisy Operations manual (860/856) indicates that the readability is higher than recommended for text designed for a general user population. The readability indices range from 7th to 10th grade reading level (a sixth grade reading level is generally the maximum recommended). The manual contains jargon and appears to have been written by an experienced gun user and to be written for other experienced gun owners and users. The terminology used seems to be the language of an experienced gun user. An experienced gun user might be able to use the manual as a quick reference for procedures having to do with the Daisy air gun. However, these instructions do not seem to cater to

the novice or youthful user. Though the manual is written in short sentences, the language contained within those sentences seems to assume knowledge of guns and gun terminology. The manual lacks a higher order organizational scheme to inform the user how to begin using and how to maintain the gun, which makes it difficult for novices to develop an appropriate mental model of the air gun system.

As with the warning labels and packaging materials, the review of the manual indicated that reliance on inference concerning actions would be required to understand safety related issues (and hidden hazards). Also, the use in the manual of the figure/graphical materials appears confusing. The analysis indicates that another flaw with the manual concerns its vagueness of meaning (for example: "may result", "extra precaution", "before putting gun away...shoot the gun at a safe target to make sure the pump system and barrel are empty...",). Finally, the physical layout of the manual is poor and is likely to discourage reading the physically densely packed passages.

This present discussion of my expected areas of testimony and opinions is based on the information available to me on the date of writing. The opinions contained within this report are subject to modification if future information is obtained that requires such modification.

Respectfully Submitted,

Arthur D. Fisk, Ph.D., CHFP

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

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Dr. Morris is further expected to testify that if a BB becomes lodged in a Powerline BB gun, a user can proceed through the loading and firing procedures without dislodging the BB, resulting in a "dry fire" of the Powerline BB gun. He will testify that the application of a small amount of force (for example, applying a small amount of torque near the forward area of the magazine, which can occur with a child's simple bend or twist of the forearm) can dislodge a lodged BB, allowing the formerly lodged BB to fire, if the user proceeds through the loading and firing procedures following the dislodgment.

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For its Model 880, Daisy advertises a velocity of a BB at approximately 685 feet per second ("f.p.s."). For the Model 856, Daisy advertises a velocity of a BB at approximately 650 f.p.s. Actual tests indicate that velocities can be obtained well above the advertised velocities. Mr. Berg is expected to testify that even less than ten pumps can produce a BB velocity that can significantly penetrate human tissue in both the Model 880 and Model 856 Powerline Airguns.

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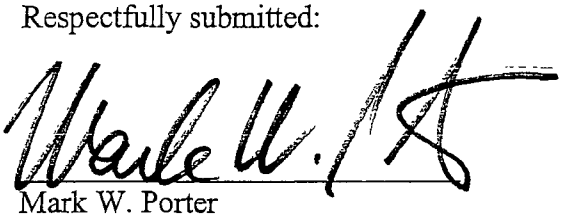
Mr. Berg has also performed some penetration tests into a pine board. These tests demonstrated the penetration potential of the Model 880 at one pump, two pumps, four pumps, six pumps eight pumps and ten pumps.

Mr. Berg is expected to testify that the Powerline Airguns are dangerous for several reasons: they are used by youth and available to children under the age of 16, they do not have an automatic safety that would prevent unintentional firings, and they have a high penetration potential that has caused lethal injuries. Mr. Berg is expected to testify that loaded Powerline Airguns may "dry-fire." He is also expected to testify generally about the loading, feeding and operating systems of the Powerline Airguns.

Mr. Berg's opinions may be modified or supplemented based on review of reports or testimony of experts for Respondent. He may also supplement his opinions based on additional documents or materials provided by Respondent or others.

February 13, 2003

Respectfully submitted:



Mark W. Porter

Eric Stone
Ronald Yelenik
Howard Tarnoff
Quynh Nguyen
Sean Ward

Complaint Counsel

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Arthur D. Fisk, Ph.D., CHFP

Background

I received a Ph.D. in Experimental Psychology from the University of Illinois in 1982. I am currently a Professor and the Coordinator of the Engineering Psychology Program at Georgia Institute of Technology. Prior to my academic career I was a Manager, Human Factors Engineering, at AT&T.

I am a member of several scientific societies including: American Psychological Association; Gerontological Society of America; Human Factors and Ergonomics Society; and the Psychonomic Society. I am a Fellow of American Psychological Association and of the Human Factors and Ergonomics Society.

I am a Past President of the Human Factors and Ergonomics Society and a Past-President of the American Psychological Association's Division of Applied Experimental and Engineering Psychologists. I served as Editor of the scientific journal *Human Factors*, and I have served on the editorial board of numerous scientific journals.

Areas of Expected Testimony

Considering my review of the information that I have been provided and my knowledge of engineering psychology and human factors, I expect to testify concerning the human factors issues involving the hidden hazard created by the lodging of a BB in the magazine of the Daisy Model 880 and Model 856 power line airguns, unexpected characteristics of the Powerline air rifles products, as well as inadequacies associated with the warning system and instructional/user manual. These deficiencies made the product, from a human factors perspective, unreasonably dangerous.

Based on the materials I have reviewed as of this date (on-product warnings, user manuals, box/package materials, various advertisements, and various sales related documents), it is my opinion that:

- The product would perform in a manner unexpected to the consumer; hence, it would contain hazards hidden from the consumer.

- During the design and/or sale of the product, there was both a failure to warn of the hidden hazards and a failure to adequately instruct concerning safe use of the product.

- The information associated with the product was inadequate as warning information.

• There is no evidence that adequate testing during warning development was followed.

• There is no evidence that adequate user testing was followed concerning the user manual.

Daisy did not appear to adhere to standard human factors safety practice concerning hidden hazards. Common, good engineering practice dictates that if there is a potential hazard the lines of defense against that hazard are: First to attempt to design out the hazard. If the hazard cannot be designed out, then the second line of defense is to guard against the hazard. Finally, the very last line of defense is to adequately warn about the hidden hazard. If the least optimal solution is chosen, warning about a hidden hazard, then the warning system must be tested to ensure that the warning system conveys the proper, usable knowledge needed to avoid the hazard. Indeed, the on-product warning within the warning system must at least:

• Attract the user's attention to critical information unique to the situation.

• Overcome expectations that will lead to incorrect or incomplete understanding of the information.

• Prompt the user to think about information learned in another context that is relevant to the present situation.

• Provide enough information so that a user can employ or develop an appropriate mental model of the situation.

• Ensure that users need not make inferences concerning correct behavior when using the product.

The Daisy provided Operations Manual appears to fail from the perspective of designing to maximize comprehension of the materials. For example, an analysis of a 1994 Daisy Operations manual (860/856) indicates that the readability is higher than recommended for text designed for a general user population. The readability indices range from 7th to 10th grade reading level (a sixth grade reading level is generally the maximum recommended). The manual contains jargon and appears to have been written by an experienced gun user and to be written for other experienced gun owners and users. The terminology used seems to be the language of an experienced gun user. An experienced gun user might be able to use the manual as a quick reference for procedures having to do with the Daisy air gun. However, these instructions do not seem to cater to

the novice or youthful user. Though the manual is written in short sentences, the language contained within those sentences seems to assume knowledge of guns and gun terminology. The manual lacks a higher order organizational scheme to inform the user how to begin using and how to maintain the gun, which makes it difficult for novices to develop an appropriate mental model of the air gun system.

As with the warning labels and packaging materials, the review of the manual indicated that reliance on inference concerning actions would be required to understand safety related issues (and hidden hazards). Also, the use in the manual of the figure/graphical materials appears confusing. The analysis indicates that another flaw with the manual concerns its vagueness of meaning (for example: "may result", "extra precaution", "before putting gun away...shoot the gun at a safe target to make sure the pump system and barrel are empty...",). Finally, the physical layout of the manual is poor and is likely to discourage reading the physically densely packed passages.

This present discussion of my expected areas of testimony and opinions is based on the information available to me on the date of writing. The opinions contained within this report are subject to modification if future information is obtained that requires such modification.

Respectfully Submitted,

Arthur D. Fisk, Ph.D., CHFP

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2003, I caused a copy of the foregoing **Complaint Counsel's Supplemental Disclosure Regarding Expert Witnesses** to be served upon all parties of record in these proceedings, as follows:

By facsimile and first class mail, postage prepaid to:

The Honorable William B. Moran, Administrative Law Judge
and Presiding Officer

By facsimile and first class mail, postage prepaid to:

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Jeffrey Locker, Esq.
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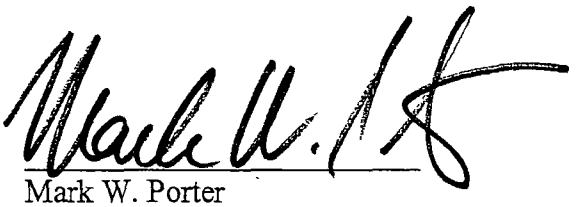
William M. Griffin, III, Esq.
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2000 Regions Center
400 West Capitol
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Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
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Attorneys for Daisy Manufacturing Company

By hand delivery (on February 14, 2003) to:

Office of the Secretary
U.S. Consumer Product Safety Commission
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Bethesda, Maryland 20814-4408



Mark W. Porter
Office of Compliance, Legal Division
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814-4408

COPY

OFFICE OF THE SECRETARY
2003 FEB 10 A 9:48

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

COMPLAINT COUNSEL'S SUPPLEMENTAL DISCLOSURE REGARDING EXPERT WITNESSES

Pursuant to the Court's order of February 6, 2003, Complaint Counsel makes the following supplemental disclosure concerning the expected testimony of the expert witnesses it expects to call at the hearing in this matter:

J. William Morris, Sc. D.

Dr. J. William Morris is a Professor of Metallurgy at the University of California, Berkeley. Educated at the Massachusetts Institute of Technology, Dr. Morris received his B.S. in Metallurgy in 1964 and his Sc. D. in Materials Science in 1969.

To prepare him for his analysis and testimony regarding Daisy's Powerline BB guns, Complaint Counsel has forwarded to Professor Morris samples of the Powerline BB guns, the complaint and answer in this matter, Daisy test reports for the Powerline BB guns, Daisy design drawings for the Powerline BB guns, Daisy engineering change notices for the Powerline BB guns, various deposition transcripts in litigations past and present involving the Powerline BB guns, Daisy and CPSC staff memoranda regarding the Powerline BB guns, expert reports prepared for previous Powerline BB gun litigations, portions of Daisy's Second Supplemental

Answers to Certain of Complaint Counsel's First and Second Sets of Interrogatories, and ASTM F590-92 (Standard Consumer Safety Specification for Non-Powder Gun Projectiles and Propellants).

Dr. Morris has confirmed that a BB can become lodged in both Model 856 and Model 880 Powerline BB guns.

In the Model 856 BB guns, Dr. Morris has observed that the inner rifle barrel is misaligned and off-center towards the left outer barrel casing. He has also observed that the force that holds the alignment of the inner and outer barrels of the Model 856 BB guns is light. He has also observed that there is inadequate dimensional spacing within the Model 856 BB guns. Any of these design elements can create a space where a BB can become entrapped within the Model 856 BB guns. Professor Morris is expected to testify about how the use of certain materials and design dimensions in the manufacture of Model 856 BB guns contributes to BB lodging. He is also expected to testify how Daisy implemented design changes in 1998 and 1999 to the Model 856 BB guns, in an effort to prevent BB lodging.

In the Model 880 BB guns, Dr. Morris has observed that a BB can become lodged in a space between the outer barrel and the receiver in the forward portion of the magazine. He is expected to testify that this lodging phenomenon can occur because of a loose screw in the receiver, use of an out of specification or deformed BB, the presence inside the gun of substances such as lubricating oil, or combinations of all three phenomena. Dr. Morris is expected to testify that the receiver screws in the Model 880 BB guns may loosen over the useful life of the BB gun. Finally, he will explain how Daisy implemented design changes in 1994 to prevent BB lodging in the Model 880 BB guns.

Dr. Morris is expected to testify about his observations that some BB's sold at retail that are used with Powerline BB guns may have been mismanufactured or deformed, and how this may lead to lodging of the BB's in the Powerline BB guns. He will also testify how the surface morphology of BB's and/or burrs and roughnesses present on the finished parts of the Powerline BB guns is a factor in BB entrapment in Powerline BB guns.

Dr. Morris is further expected to testify that if a BB becomes lodged in a Powerline BB gun, a user can proceed through the loading and firing procedures without dislodging the BB, resulting in a "dry fire" of the Powerline BB gun. He will testify that the application of a small amount of force (for example, applying a small amount of torque near the forward area of the magazine, which can occur with a child's simple bend or twist of the forearm) can dislodge a lodged BB, allowing the formerly lodged BB to fire, if the user proceeds through the loading and firing procedures following the dislodgment.

Dr. Morris' opinions may be modified or supplemented based on his review of reports or testimony of experts for Respondent. He may also supplement his opinions based on additional testing and/or review of documents or materials provided by Respondent or others.

Charles E. Irwin, M.D.

Charles E. Irwin, Jr., M.D., is a practicing pediatrician and a Professor of Pediatrics in the Department of Pediatrics, Division of Adolescent Medicine, at the University of California, San Francisco. Dr. Irwin received his M.D. in 1971 from the University of California, San Francisco, where he also completed his internship and residency.

Currently president of the Society of Adolescent Medicine, Dr. Irwin has been the principal or co-investigator on numerous research grants concerning adolescent behavior, including studies of adolescent risk perception. Dr. Irwin has published widely in the field of

adolescent medicine, including peer-reviewed articles relating to the psychosocial context of adolescent risk-taking behaviors. He has been a frequent lecturer and speaker on the biological, psychological and social correlates of risk-taking behavior during adolescence.

Dr. Irwin has read the complaint and answer in this proceeding and reviewed materials relating to a number of injuries caused by Daisy Powerline airguns. He has also reviewed certain instructional materials provided to users of Daisy Powerline airguns.

Dr. Irwin is expected to testify about adolescent psychosocial development and its effect on risk perception and behavior by adolescent users of Daisy Powerline airguns. He will testify further concerning the various contextual and environmental factors that influence adolescent users of the airguns and result in airgun-related injuries.

Specifically, based on his professional training and experience, Dr. Irwin is expected to testify, that:

- Certain risk-taking behavior is normative and expected among adolescents.
- Early and middle adolescents, because of their limited life experience, are not able to assess the possible consequences of their behavior as accurately as adults.
- While adolescents may be aware (from Daisy's own warnings and literature and elsewhere) of the serious injuries that may be inflicted by Powerline airguns, they often are incapable of integrating that awareness into their own behaviors in handling the guns. In addition, because early adolescents, in particular, tend to think concretely, inconsistent messages in Daisy's literature and warnings may lead adolescents to discount such messages or to otherwise fail to integrate such messages into their gun-use behavior.

- Adolescents are more likely to engage in risk-taking behaviors when their prior experiences with those behaviors have not resulted in negative outcomes. For example, some injury incidents involve adolescents who have "dry-fired" Powerline airguns at others after taking steps to assure themselves that the gun is unloaded. The experience of having "dry-fired" the gun in such circumstances without a negative result acts to reinforce the behavior in adolescents. The propensity for BB lodging in the magazine area of Powerline guns is particularly problematic in these circumstances.
- The adolescent's inability to realistically assess risk can be magnified by the context in which risk-taking behavior occurs. For example, some injury incidents occur in the context of playing or "roughhousing" by adolescent boys, which is, of course, perfectly normative behavior for that age group. However, such encounters among adolescent peers often involve emotional or stressful interactions that induce spontaneous thinking and reactions. In these conditions of "hot" cognition, adolescents are less likely to exercise their capacity for abstract, formal reasoning, decreasing their ability to assess possible risks or the consequences of their behavior. Such conditions may also create distractions for the adolescent user of a Daisy Powerline airgun, causing him to handle the product in a manner inconsistent with its lethal capacity.
- In most of the United States, BB gun use by early and middle adolescents is considered normative. This perception of BB guns generally may lead adolescents and parents to underestimate the lethal capacity of Daisy Powerline

airguns. Under these circumstances, it is unreasonable to expect that parents will closely supervise adolescents using these airguns.

- In psychosocial dimensions, normal adolescent development encompasses increasing independence, autonomy from parents, and greater peer affiliation. Particularly as a child enters middle adolescence, it is normative for parents to exercise less supervision. Given the normative perception of BB gun use in much of the country, it would be unreasonable to expect close parental supervision of middle adolescents using Powerline airguns. Indeed, the high level of parental supervision apparently expected by Daisy is not developmentally normal or consistent for these adolescents.
- Daisy's apparent reliance on close parental supervision of adolescent Powerline users is further belied by significant changes that have occurred in the environmental context of adolescence. An example is the increased labor force participation of women. By the time children reach early adolescence, both parents often are working outside the home. Associated with these changes in the family, there has been a decrease in effective monitoring of adolescents due to decreased resources within communities and lack of adult time to provide effective supervision. This lack of supervision may have effects on the incidence of risky adolescent behaviors, including behaviors associated with Powerline airgun use.

Dr. Irwin's opinions may be modified or supplemented based on review of reports or testimony of experts for Respondent. He may also supplement his opinions based on additional documents or materials provided by Respondent or others.

Arthur D. Fisk, Ph.D., CHFP

See statement attached hereto.

Stanton O. Berg

Mr. Berg is a firearms consultant and serves on several ATSM Standards Development Committees, including the committee for non-powder gun products (airguns).

To prepare him for his analysis and testimony regarding Daisy's Powerline BB guns, Complaint Counsel has forwarded to Mr. Berg samples of the Powerline BB guns, the complaint and answer in this matter, Daisy test reports for the Powerline BB guns, Daisy design drawings for the Powerline BB guns, Daisy engineering change notices for the Powerline BB guns, various deposition transcripts in litigations past and present involving the Powerline BB guns, Daisy and CPSC staff memoranda regarding the Powerline BB guns, expert reports prepared for previous Powerline BB gun litigations, and portions of Daisy's Second Supplemental Answers to Certain of Complaint Counsel's First and Second Sets of Interrogatories.

Mr. Berg is expected to testify that since the Powerline Airguns are used by youths and frequently available to children under the age of 16, they should be equipped with automatic safeties. Such devices do not require a young person to remember to activate them or place them on. The automatic safety goes on automatically when the gun is either cocked, or the action is opened for loading purposes.

Mr. Berg is expected to testify that automatic safeties have been designed and produced for firearms intended for the youth market for many years dating back to 1928. Such safeties on regular firearms date back to 1861. Airguns also have an early history of automatic safeties that dates back to 1889. Mr. Berg's research will demonstrate that there are over 175 makes and models of airguns having an automatic safety mechanism currently on the market. Based on a

review and analysis of air rifles listed in the Gun Digest for 2000, Mr. Berg is expected to testify that approximately 35% of the total number of the current makes and models surveyed have an automatic safety. Daisy had none in this category.

Mr. Berg is expected to testify that Daisy has manufactured several models of airguns with automatic safeties. Daisy also has a patent on an automatic safety (Fleming et. al., 3,839,999, filed May 26, 1971). Furthermore, Guy E. Braughler, the former Director of Product Evaluation for Daisy, designed an automatic safety for the Model 880 line of airguns, February 12, 1971, which was not used.

Mr. Berg is expected to testify that automatic safeties are a simple mechanism to design. He is also expected to testify that automatic safeties are reliable. Mr. Berg is expected to testify that Powerline Airguns, with an effective automatic safety design that can be activated at any time, would avoid incidents involving unintentional firings.

For its Model 880, Daisy advertises a velocity of a BB at approximately 685 feet per second ("f.p.s."). For the Model 856, Daisy advertises a velocity of a BB at approximately 650 f.p.s. Actual tests indicate that velocities can be obtained well above the advertised velocities. Mr. Berg is expected to testify that even less than ten pumps can produce a BB velocity that can significantly penetrate human tissue in both the Model 880 and Model 856 Powerline Airguns.

Mr. Berg has observed a series of penetration firing tests with BBs that indicate that a BB will penetrate skin if the velocity is around 350 f.p.s. Firing tests resulted in skin penetrations at a minimum velocity range of 338 f.p.s., up to 350 f.p.s. At a velocity of approximately 600 f.p.s., the BB would penetrate the skin and travel into the ballistic gelatin block approximately 3.7".

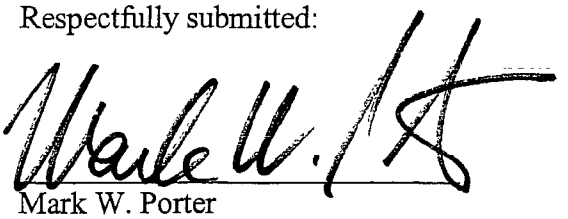
Mr. Berg has also performed some penetration tests into a pine board. These tests demonstrated the penetration potential of the Model 880 at one pump, two pumps, four pumps, six pumps eight pumps and ten pumps.

Mr. Berg is expected to testify that the Powerline Airguns are dangerous for several reasons: they are used by youth and available to children under the age of 16, they do not have an automatic safety that would prevent unintentional firings, and they have a high penetration potential that has caused lethal injuries. Mr. Berg is expected to testify that loaded Powerline Airguns may "dry-fire." He is also expected to testify generally about the loading, feeding and operating systems of the Powerline Airguns.

Mr. Berg's opinions may be modified or supplemented based on review of reports or testimony of experts for Respondent. He may also supplement his opinions based on additional documents or materials provided by Respondent or others.

February 13, 2003

Respectfully submitted:



Mark W. Porter

Eric Stone
Ronald Yelenik
Howard Tarnoff
Quynh Nguyen
Sean Ward

Complaint Counsel

Office of Compliance
U.S. Consumer Product
Safety Commission
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Arthur D. Fisk, Ph.D., CHFP

Background

I received a Ph.D. in Experimental Psychology from the University of Illinois in 1982. I am currently a Professor and the Coordinator of the Engineering Psychology Program at Georgia Institute of Technology. Prior to my academic career I was a Manager, Human Factors Engineering, at AT&T.

I am a member of several scientific societies including: American Psychological Association; Gerontological Society of America; Human Factors and Ergonomics Society; and the Psychonomic Society. I am a Fellow of American Psychological Association and of the Human Factors and Ergonomics Society.

I am a Past President of the Human Factors and Ergonomics Society and a Past-President of the American Psychological Association's Division of Applied Experimental and Engineering Psychologists. I served as Editor of the scientific journal *Human Factors*, and I have served on the editorial board of numerous scientific journals.

Areas of Expected Testimony

Considering my review of the information that I have been provided and my knowledge of engineering psychology and human factors, I expect to testify concerning the human factors issues involving the hidden hazard created by the lodging of a BB in the magazine of the Daisy Model 880 and Model 856 power line airguns, unexpected characteristics of the Powerline air rifles products, as well as inadequacies associated with the warning system and instructional/user manual. These deficiencies made the product, from a human factors perspective, unreasonably dangerous.

Based on the materials I have reviewed as of this date (on-product warnings, user manuals, box/package materials, various advertisements, and various sales related documents), it is my opinion that:

- The product would perform in a manner unexpected to the consumer; hence, it would contain hazards hidden from the consumer.

- During the design and/or sale of the product, there was both a failure to warn of the hidden hazards and a failure to adequately instruct concerning safe use of the product.

- The information associated with the product was inadequate as warning information.

• There is no evidence that adequate testing during warning development was followed.

• There is no evidence that adequate user testing was followed concerning the user manual.

Daisy did not appear to adhere to standard human factors safety practice concerning hidden hazards. Common, good engineering practice dictates that if there is a potential hazard the lines of defense against that hazard are: First to attempt to design out the hazard. If the hazard cannot be designed out, then the second line of defense is to guard against the hazard. Finally, the very last line of defense is to adequately warn about the hidden hazard. If the least optimal solution is chosen, warning about a hidden hazard, then the warning system must be tested to ensure that the warning system conveys the proper, usable knowledge needed to avoid the hazard. Indeed, the on-product warning within the warning system must at least:

• Attract the user's attention to critical information unique to the situation.

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• Provide enough information so that a user can employ or develop an appropriate mental model of the situation.

• Ensure that users need not make inferences concerning correct behavior when using the product.

The Daisy provided Operations Manual appears to fail from the perspective of designing to maximize comprehension of the materials. For example, an analysis of a 1994 Daisy Operations manual (860/856) indicates that the readability is higher than recommended for text designed for a general user population. The readability indices range from 7th to 10th grade reading level (a sixth grade reading level is generally the maximum recommended). The manual contains jargon and appears to have been written by an experienced gun user and to be written for other experienced gun owners and users. The terminology used seems to be the language of an experienced gun user. An experienced gun user might be able to use the manual as a quick reference for procedures having to do with the Daisy air gun. However, these instructions do not seem to cater to

the novice or youthful user. Though the manual is written in short sentences, the language contained within those sentences seems to assume knowledge of guns and gun terminology. The manual lacks a higher order organizational scheme to inform the user how to begin using and how to maintain the gun, which makes it difficult for novices to develop an appropriate mental model of the air gun system.

As with the warning labels and packaging materials, the review of the manual indicated that reliance on inference concerning actions would be required to understand safety related issues (and hidden hazards). Also, the use in the manual of the figure/graphical materials appears confusing. The analysis indicates that another flaw with the manual concerns its vagueness of meaning (for example: "may result", "extra precaution", "before putting gun away...shoot the gun at a safe target to make sure the pump system and barrel are empty...",). Finally, the physical layout of the manual is poor and is likely to discourage reading the physically densely packed passages.

This present discussion of my expected areas of testimony and opinions is based on the information available to me on the date of writing. The opinions contained within this report are subject to modification if future information is obtained that requires such modification.

Respectfully Submitted,

Arthur D. Fisk, Ph.D., CHFP

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2003, I caused a copy of the foregoing **Complaint Counsel's Supplemental Disclosure Regarding Expert Witnesses** to be served upon all parties of record in these proceedings, as follows:

By facsimile and first class mail, postage prepaid to:

The Honorable William B. Moran, Administrative Law Judge
and Presiding Officer

By facsimile and first class mail, postage prepaid to:

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Attorneys for Daisy Manufacturing Company

By hand delivery (on February 14, 2003) to:

Office of the Secretary
U.S. Consumer Product Safety Commission
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Bethesda, Maryland 20814-4408



Mark W. Porter
Office of Compliance, Legal Division
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814-4408

COPY

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
	)	
Respondent	)	
	)	

Order Regarding Final Prehearing Order

This Order relates to the provision in the procedural rules addressing the "Final Prehearing Order," as referenced at 16 C.F.R. § 1025.22(c), and to other matters connected with the hearing in this matter, which has been scheduled to commence on May 19, 2003. The section referred to advises that the final prehearing order "should contain, to the fullest extent possible [at the time of its issuance] all information which is necessary for controlling the course of the hearing." It also states that the Court "may require the parties to submit a jointly proposed final prehearing order, such as in the format set forth in Appendix I."

Pursuant to the Court's oral Order of January 31, 2003, the parties were directed to ~~present such a jointly proposed prehearing order by April 1,~~ 2003. In addition, two copies of this proposed order are to be submitted on floppy discs in a Word Perfect format at that time. The "~~final prehearing conference~~" will occur on ~~April 8, 2003~~. At this time it is planned that the final prehearing conference will be held by conference telephone call. However, after submission of the proposed prehearing order, it may be determined that it is necessary to hold the April 8th conference in person.[1] It is anticipated that the parties will sign the Prehearing Order upon

[1] Pursuant to Section 1025.21(c), notice of the April 8th conference will be provided to the public. The public will have an opportunity to listen to the final prehearing conference or, if it is held in person, to attend the conference. An announcement concerning this will appear in the Federal Register.

having a reasonable opportunity to make corrections and suggest additions to it and that this will occur on or about April 8th.

Consistent with Appendix I, the parties are to engage in a prehearing exchange of all exhibits intended to be introduced and to provide a copy of such exchanges to the Court. This exchange of exhibits is to occur on April 1st and the exhibits are to be presented in notebook form, with each exhibit in an 8 ½ x 11 inch format, tabbed and numbered.[2] The parties must also provide in separate notebook(s), any additional exhibits or documents intended to be used for cross-examination or rebuttal purposes. Exhibits or documents not disclosed at the time of the prehearing exchange will not be permitted to be used at the hearing.[3] All demonstrative exhibits, such as graphs, charts, enlargements, are also to be presented in an 8 ½ x 11 inch format. Thus, for example, items such as those listed at the suggested appendix at 2(g) must also be exchanged on April 1st. Models, objects and real evidence must be made available for inspection at that time as well.

Wherever a particular aspect of the proposed final prehearing order has not been addressed in this Order, the parties are directed to confer and jointly address each of the provisions set forth in the suggested form found at Appendix I. For example, on April 1, 2003, among other items identified in the suggested Form, the parties must provide a list of the witnesses each party *will* call. While the *suggested* prehearing order form refers to the ability to supplement the witness lists not later than ten (10) days before hearing, this will not be permitted here. Due to the extensive and extended discovery that has taken place, parties may not supplement their witness list after April 16, 2003, which date represents 30 days before the hearing. Thereafter, additional witnesses may be added only after application to the Court, for good cause shown. **The Court directs the parties to offer suggestions for the treatment of the disclosure of witnesses that *may* be called and for any rebuttal witnesses where they are not listed among those named who will be called to testify and to provide these views to the Court by February 12, 2003.** The Court is inclined to require that, absent death or debilitating

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[2] For example, "R-1" could be used to designate Respondent's Prehearing Exchange Exhibit 1."

[3] During the course of discovery, there have been issues raised as to whether one party or the other has made full disclosure of all documents sought. The Court makes no findings at this time regarding these issues. However, the prehearing exchange requirements have been designed with this in mind and are intended to prevent one party from surprising the other side at trial. **The exception to this disclosure requirement is for depositions. For these, the parties need only identify in the prehearing exchange exhibit notebooks the depositions intended to be used during the trial, by listing the date, circumstance and individual connected with a given deposition. Upon making the exchange, the parties are to verify that they have a copy of each deposition listed and to advise the opposing party and the Court if it has not been previously provided with each deposition. Given the extensive discovery that has taken place in this proceeding the Court does not expect such a circumstance to occur.**

illness, no modifications be permitted inside of 31 days before the hearing for any class of witness, but it will consider alternatives offered by the parties.

As announced during the January 31, 2003 conference call, the Court has decided to dispense with the procedural rules anticipation that the direct testimony of expert witness will be filed in advance of the hearing. The Court has determined that such advance filing of experts' direct testimony will not serve to make the proceeding more efficient and accordingly such testimony will be live. The parties should still endeavor to stipulate to the qualifications and denomination of expert status for such witnesses.

The parties are reminded that on February 7, 2003, they are to provide the Court with an estimate of the time required for each side's presentation of its case on direct. At that time they are also to provide a suggested plan for the location(s) for the hearing.

So Ordered.

William B. Moran
William B. Moran
United States Administrative Law Judge

Dated: February 5, 2003

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

February 5, 2003

OFFICE OF
THE ADMINISTRATIVE
LAW JUDGES

FACSIMILE AND REGULAR MAIL
Mr. Todd Stevenson
U.S. Consumer Product Safety Commission
Office of the Secretary
4330 East West Highway
Room 502, South Tower
Bethesda, Maryland 20814

Re: In the Matter of Daisy Manufacturing Company, Inc.
CPSC Docket No. 02-2

Dear Mr. Stevenson:

Enclosed is my Order Regarding the Final Prehearing, which was also sent via facsimile to you this date. Please transmit this Order via facsimile and regular mail to all parties.

Sincerely,

William B. Moran

William B. Moran
United States Administrative Law Judge

Enclosure

COPY

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
	)	
Respondent	)	
	)	

Order Regarding Conference Call

The parties are reminded that the conference call for this week will be on Thursday, February 6, 2003 at 11 a.m. The Court directs that Jeffrey Locher, Esquire, Counsel for Daisy, participate in this conference call.

William B. Moran
William B. Moran
United States Administrative Law Judge

Dated: February 5, 2003

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

February 5, 2003

OFFICE OF THE ADMINISTRATIVE LAW JUDGES

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Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF ADMINISTRATIVE LAW JUDGES
MAIL CODE 1900L
1200 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20460

TELEPHONE: 202 564-6255 FACSIMILE: 202 565-0044

FAX TRANSMITTAL PAGE

Date: February 5, 2003

From: Judge Moran

To: Mr. Todd Stevenson, Secretary, USCPSC

Fax: 301-504-0127 **Telephone:** 301-504-0800x1232

Hard Copy To Be Mailed: X Yes No
Any Questions or Problems May Be Directed To:

Nelly Torres **Telephone:** 202 564-6258

In the Matter of Daisy Manufacturing Company, Inc., CPSC Docket No. 02-2

Doc 1. Order Regarding the Final Prehearing

Doc 2. Order Regarding Conference Call

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

COPY

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
	)	
Respondent	)	
	)	

Order Regarding Final Prehearing Order

This Order relates to the provision in the procedural rules addressing the "Final Prehearing Order," as referenced at 16 C.F.R. § 1025.22(c), and to other matters connected with the hearing in this matter, which has been scheduled to commence on May 19, 2003. The section referred to advises that the final prehearing order "should contain, to the fullest extent possible [at the time of its issuance] all information which is necessary for controlling the course of the hearing." It also states that the Court "may require the parties to submit a jointly proposed final prehearing order, such as in the format set forth in Appendix I."

Pursuant to the Court's oral Order of January 31, 2003, the parties were directed to present such a jointly proposed prehearing order by April 1, 2003. In addition, two copies of this proposed order are to be submitted on floppy discs in a Word Perfect format at that time. The "final prehearing conference" will occur on April 8, 2003. At this time it is planned that the final prehearing conference will be held by conference telephone call. However, after submission of the proposed prehearing order, it may be determined that it is necessary to hold the April 8th conference in person.[1] It is anticipated that the parties will sign the Prehearing Order upon

[1] Pursuant to Section 1025.21(c), notice of the April 8th conference will be provided to the public. The public will have an opportunity to listen to the final prehearing conference or, if it is held in person, to attend the conference. An announcement concerning this will appear in the Federal Register.

having a reasonable opportunity to make corrections and suggest additions to it and that this will occur on or about April 8th.

Consistent with Appendix I, the parties are to engage in a prehearing exchange of all exhibits intended to be introduced and to provide a copy of such exchanges to the Court. This exchange of exhibits is to occur on April 1st and the exhibits are to be presented in notebook form, with each exhibit in an 8 ½ x 11 inch format, tabbed and numbered.[2] The parties must also provide in separate notebook(s), any additional exhibits or documents intended to be used for cross-examination or rebuttal purposes. Exhibits or documents not disclosed at the time of the prehearing exchange will not be permitted to be used at the hearing.[3] All demonstrative exhibits, such as graphs, charts, enlargements, are also to be presented in an 8 ½ x 11 inch format. Thus, for example, items such as those listed at the suggested appendix at 2(g) must also be exchanged on April 1st. Models, objects and real evidence must be made available for inspection at that time as well.

Wherever a particular aspect of the proposed final prehearing order has not been addressed in this Order, the parties are directed to confer and jointly address each of the provisions set forth in the suggested form found at Appendix I. For example, on April 1, 2003, among other items identified in the suggested Form, the parties must provide a list of the witnesses each party *will* call. While the *suggested* prehearing order form refers to the ability to supplement the witness lists not later than ten (10) days before hearing, this will not be permitted here. Due to the extensive and extended discovery that has taken place, parties may not supplement their witness list after April 16, 2003, which date represents 30 days before the hearing. Thereafter, additional witnesses may be added only after application to the Court, for good cause shown. **The Court directs the parties to offer suggestions for the treatment of the disclosure of witnesses that *may* be called and for any rebuttal witnesses where they are not listed among those named who will be called to testify and to provide these views to the Court by February 12, 2003.** The Court is inclined to require that, absent death or debilitating

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[2] For example, "R-1" could be used to designate Respondent's Prehearing Exchange Exhibit 1."

[3] During the course of discovery, there have been issues raised as to whether one party or the other has made full disclosure of all documents sought. The Court makes no findings at this time regarding these issues. However, the prehearing exchange requirements have been designed with this in mind and are intended to prevent one party from surprising the other side at trial. **The exception to this disclosure requirement is for depositions. For these, the parties need only identify in the prehearing exchange exhibit notebooks the depositions intended to be used during the trial, by listing the date, circumstance and individual connected with a given deposition. Upon making the exchange, the parties are to verify that they have a copy of each deposition listed and to advise the opposing party and the Court if it has not been previously provided with each deposition. Given the extensive discovery that has taken place in this proceeding the Court does not expect such a circumstance to occur.**

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The parties are reminded that on February 7, 2003, they are to provide the Court with an estimate of the time required for each side's presentation of its case on direct. At that time they are also to provide a suggested plan for the location(s) for the hearing.

So Ordered.

William B. Moran
William B. Moran
United States Administrative Law Judge

Dated: February 5, 2003

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

February 5, 2003

OFFICE OF
THE ADMINISTRATIVE
LAW JUDGES

FACSIMILE AND REGULAR MAIL
Mr. Todd Stevenson
U.S. Consumer Product Safety Commission
Office of the Secretary
4330 East West Highway
Room 502, South Tower
Bethesda, Maryland 20814

Re: In the Matter of Daisy Manufacturing Company, Inc.
CPSC Docket No. 02-2

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Sincerely,

William B. Moran

William B. Moran
United States Administrative Law Judge

Enclosure

COPY

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY, INC.	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
	)	
Respondent	)	
	)	

2003 MAY -5 A 9:02
OFFICE OF SECRETARY
CPSC

NOTICE OF HEARING

The first week of the hearing will be held in Washington, D.C. starting Monday, May 19, 2003 at 9:30 a.m. at the following location:

Environmental Protection Agency
Courtroom
Room 1152
1201 Constitution Avenue, N.W.
Washington, D.C. 20460

The second week of the hearing will start on Monday, May 26, 2003 at 9:30 a.m. in Arkansas. The Court's staff will endeavor to secure a courtroom in Fayetteville, Arkansas. If no courtroom is available there, then the hearing will be held in Fort Smith and, as a third choice, Little Rock, Arkansas. The exact location of the hearing will be announced shortly.

William B. Moran
William B. Moran
United States Administrative Law Judge

Dated: February 26, 2003
Wash., D.C.

In the Matter of Daisy Manufacturing Company, Inc.
d/b/a Daisy Outdoor Products, Respondent
Docket No. CPSC Docket No.: 02-2

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Notice of Hearing**, dated February 26, 2003, was sent this day in the following manner:

Sent by Facsimile and Regular Mail to:

William Moore, Esq.
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Todd Stevenson, Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

William M. Griffin III, Esq.
Friday Eldredge & Clark
200 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esq.
Daisy Manufacturing Company, Inc.
400 W. Stribling Avenue
Rogers, AR 72756

Aaron Locker, Esq.
Jeffrey M. Locker, Esq.
LOCKER, GREENBERG & BRAININ
420 Fifth Avenue, 26th Floor
New York, NY 10018

Nelida Torres
Legal Staff Assistant

Dated: February 26, 2003

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No.: 02-2
Respondent.	)	

COMPLAINT COUNSEL'S RESPONSE TO ORDER
DIRECTING BRIEFING ON ISSUES OF SIGNIFICANCE

Complaint Counsel submits this brief in response to the questions posed by the Court in its January 2, 2003 Order.

BACKGROUND

In defending this case, Daisy's principal argument seems to be that deaths and injuries resulting from use of its Powerline air guns are always the fault of the gun users or their parents. In Daisy's world, if the children and adolescents using their products always adhered to the "Ten Commandments of Gun Safety," injuries would be eliminated. In Daisy's world, it is enough to include rules about safe gun handling in its literature and simply expect that children will unfailingly abide by them and their parents will unfailingly enforce them. That is not the real world, however. As CPSC engineer Duncan Scott Snyder testified under questioning by Daisy's counsel:

> Mr. Griffin: . . . [I]f you follow [the safe gun rules]: Keep the muzzle pointed in a safe direction, always assume it's loaded, keep your finger off the trigger – you should be able to eliminate almost every conceivable accident. Correct?
>
> Mr. Snyder: **In a dream world.**

D. Snyder Tr. (Sept. 12, 2002) at 119 [emphasis added].

Fortunately, the federal statutes governing this proceeding recognize that children and other consumers do not inhabit a perfect world. Those statutes make manufacturers responsible for ensuring not only that their products are free from serious defect in their intended use, but also in their "reasonably foreseeable misuse" by consumers.

Indeed, in evaluating a potential product defect, the Commission considers not only whether a product is manufactured consistent with its intended design, but also whether the design creates a risk of injury. *Substantial Product Hazard Reports*, 16 CFR § 1115.04. Manufacturers who design a product that is fully functional for its intended use, may still have designed a defective product if significant numbers of consumers are likely to use it in an unsafe manner.

That products can be defective in their design "when the reasonably foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design. . ." is well established law. Restatement of the Law, Third, Torts, Product Liability, ALI 1998, section 2(b). The Commission has applied this principle in many litigated cases and probably hundreds of voluntary recalls. Like product liability law, the Commission's policies in this regard are based on one principle: bad designs are not cured by telling consumers how to behave and hoping they will accommodate their behavior to the design -- they are cured by redesigning the product.[1]

Complaint Counsel's case here is fully consistent with that principle. The Complaint alleges two principal modes of defect and corresponding patterns of injury

[1] In fact, Daisy has redesigned the Powerline airguns several times in an effort to reduce the likelihood that BB lodging will occur causing serious injuries and deaths.

involving use of Daisy Powerline Model 880 and 856 airguns,[2] by children and younger adolescents. First, during normal use of the airguns, BBs may become lodged within the guns' "virtual magazine." Users may "dry" fire the gun repeatedly or shake the gun and receive no visual or audible indication that the airgun is still loaded. Believing the gun to be unloaded, adolescent and younger users of Daisy Powerline guns have pointed the guns in unsafe directions, expecting only a discharge of compressed air, not a BB projectile traveling at lethal velocity. Second, the absence of an automatic safety mechanism on these high-velocity guns has resulted in multiple incidents involving accidental discharge of the guns by young users who were carrying or handling the guns while in a cocked and loaded condition.

Who should be legally responsible here? Daisy, like many other manufacturers of poorly designed products, would rather blame the user or the user's parents. The evidence at trial, however, will show that a gun that entraps BBs encourages a child to believe that the gun is not loaded and engage in behaviors that are unsafe.

Further, to characterize as "reckless" the behavior of children handling a loaded and cocked gun who accidentally activate the trigger misses the point on two counts. First, children and adolescents do not have the knowledge or ability to exhibit perfect behavior in all instances. Second, the behavior in these cases is often inadvertent and accidental, not intentional. It should also be very foreseeable to a firm, like Daisy, that knows a great deal about children's handling of guns from its experience with sales of less powerful airguns. For example, as shown below, Daisy's own witnesses concede (1) that the Powerline airguns are "dangerous" and (2) that the company has been on notice

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[2] And the various progeny of those basic models. *See* Complaint ¶¶ 7-8.

for decades that a substantial number of users were under the recommended age of 16.[3] The company thus has had ample experience with the problem of underage users of its high-velocity Powerline guns. Providing a design with an automatic safety and a magazine that precluded BB lodging would have been a far better alternative than trying to change behavior or prevent accidental behaviors.

THE COURT'S QUESTIONS[4]

I.

The Intervention of a Purportedly "Reckless Act" Is Not a Defense Where Consumer Misuse Is Reasonably Foreseeable

With respect to the Court's inquiry regarding the "intervention of a reckless act," Complaint Counsel respectfully takes issue with that characterization of consumer behavior in this case. As discussed above, the behavior of children and adolescent users of the Daisy Powerline airguns, while perhaps exhibiting a carelessness not uncommon to that age, does not always rise to the level of wanton disregard for safety. This is particularly true in cases involving inadvertent or accidental discharge of the gun, where the presence of an automatic safety mechanism likely would have prevented injury. Moreover, popular exposure to low-velocity, spring-air BB guns (for which Daisy is rightly famous) may lead children and parents to underestimate the lethal capacity of these high-velocity Daisy Powerline guns, which also bears on the reasonableness of consumer behavior in using these guns.

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[3] *See infra* at 7-8.

[4] Complaint Counsel has taken the liberty of reordering the issues as they appeared in the Court's January 2, 2003 Order, addressing the third (and larger) issue first.

The important question, however, is not whether the users' behavior was "reckless" or "negligent." The key legal inquiry is whether that behavior was "reasonably foreseeable" to the manufacturer. Where such consumer misuse is reasonably foreseeable, as it is in this case, the Consumer Product Safety Act and the Federal Hazardous Substances Act place the burden squarely on the manufacturer to account for that behavior in the design of its product. Daisy has not met that burden here.

Reasonably Foreseeable Misuse Must Be Considered in Assessing Severity of Risk

The Consumer Product Safety Act (CPSA) provides that a "substantial product hazard" may be shown by proof of any of several factors, including the "severity of the risk" associated with a product defect.[5] The Commission's interpretive regulations expressly provide that reasonably foreseeable misuse be considered in evaluating risk severity:

> A risk is severe if the injury which might occur is serious and/or if the injury is likely to occur. In considering the likelihood of any injury the Commission and the staff will consider the number of injuries reported to have occurred, the intended **or reasonably foreseeable use or misuse of the product**, and the population group exposed to the product (e.g., children, elderly, handicapped).

16 C.F.R. § 1115.13(g)(1)(iii) (2002) [emphasis added].[6]

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[5] Section 15 of the CPSA defines "substantial product hazard" as, among other things, "a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public." 15 U.S.C. § 2064(a)(2).

[6] The Commission's interpretation of its statute should be accorded substantial deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("considerable weight should be accorded an executive department's construction of a statutory scheme it is entrusted to administer . . .") (footnote omitted).

In other words, the statutes and regulations anticipate that consumers will sometimes make unsafe choices in using consumer products. Ill-advised consumer behavior, however, will not excuse the manufacturer where such behavior is reasonably foreseeable. In *Southland Power Mower Co. v. CPSC*, 619 F.2d 499 (5th Cir. 1980), for example, the court reviewed a power lawn mower safety standard promulgated by the Commission. The Commission standard required, among other things, a safety shield on the back of the mower to prevent an operator from accidentally placing his feet within reach of the blades. Based on evidence that consumers sometimes removed safety shields when they interfered with the mower's mobility, the Commission standard also required manufacturers to subject the shields to an "obstruction test" to ensure that they do not catch on certain surface obstructions.

Petitioners in *Southland* challenged the obstruction test, contending that "the risk of injury from consumer defeat of safety shielding is not 'unreasonable' because consumers would have chosen to incur the risk, and their judgment must be respected." *Id.* at 513. The Fifth Circuit rejected that argument, holding that "Congress intended for injuries resulting from foreseeable misuse of a product to be counted in assessing risk." *Id.* (citations omitted). The court stated further that it is "[t]his principle, and not the tort concept of 'assumption of risk,' [that] governs the Commission's authority [here]." *Id.*[7]

The *Southland* court recognized that there were circumstances in which a "[f]ully informed choice on the part of consumers to employ a dangerous product may provide information that is relevant to the Commission's assessment of the reasonableness of a risk of injury":

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[7] While the *Southland* court was reviewing a challenge of a consumer product safety standard, its statutory construction of the CPSA and the Commission's authority should not be limited to that context.

> For example, consumers' decisions to use sharp knives may pose a reasonable risk of injury because duller knives, while safe, would be useless for cutting purposes, and the Commission could reasonably find that consumers have accurate information of the severity and likelihood of injury posed by sharp knives.

Id. However, in the case before it, the court found that:

> **there is no evidence that consumers accurately appreciate the nature of the risk** of blade contact injuries and that their presumed willingness to defeat protective measures is reasonable.

Id. (emphasis added). Because consumers failed to appreciate the nature of the risk involved, the Fifth Circuit concluded that the Commission was justified in imposing a requirement that reduced the risk of foreseeable misuse.

Foreseeable Misuse is Critical in Weighing The Risks of Dangerous Products Used By Children

As the *Southland* court indicated, consideration of risk appreciation and foreseeable misuse by consumers is important in evaluating the safety of adult products, such as power mowers. These considerations assume critical importance in the context of children using dangerous consumer products. As Complaint Counsel will show at the hearing in this matter, children and young adolescent users of Daisy Powerline guns often lack the ability to appreciate the lethal risks associated with these products.

In this case, it cannot seriously be denied that the Daisy Powerline guns are both dangerous and routinely used by children under age 16. Indeed, Daisy's own witnesses concede as much. Guy E. Braughler, Daisy's former Director of Engineering and an expert designated by Daisy in this case, testified as follows about a memorandum he wrote when the Powerline Model 880 was being developed:

> Q: . . . The next paragraph, the first sentence reads, "This is a dangerous gun, it is not a controlled velocity play gun for which we are

noted." In what way or ways was the 880 a dangerous gun, as you used that term in the context of that sentence?

A: I felt I said it there. This is a gun that has higher velocity, it's much more dangerous, and severe injury could be inflicted by mishandling this and shooting somebody.

Braughler Tr. (Jan. 14, 2003) at 61. Mr. Braughler went on to state his view on use of the Powerline 880 by users younger than 16:

Q: In your view, should the 880 be generally available to a child under 16?

A: Not without adult supervision.

Q: And why is that?

A: We just didn't feel that they were mature enough to handle a gun that was this dangerous.

Id. at 69.

While marketing the Powerline guns as purportedly "adult" products, Daisy nevertheless was aware that the guns were being used by a substantial number of adolescents and children younger than the recommended age of 16. At his deposition, Richard I. Daniel, Daisy's former President and a Daisy-designated expert witness in this case, testified as follows:

Q: Now, when you first learned [in the 1970's] from the warranty cards that there was a large number of users under age 14 for the [Powerline] 880, do you recall approximately what percentage of under age 14 users –

A: I think over 50 percent or 40 or 50 percent were under 14, something like that. A substantial number.

* * *

Q: . . . At the time you left the company in '83, were you aware that there was still a significant percentage of users of the 880 who were under 16?

[Objection]

A: I think that I was aware that probably 40 percent or so were under 16 years of age, yes.

Daniel Tr. (Dec. 18, 2002) at 36-37; 41-42.

In cases such as this, where even the manufacturer concedes that children are using its dangerous products, the law expressly recognizes the importance of weighing foreseeable misuse. Commission regulations, for example, provide specifically that the "population group exposed to the product (e.g., children, elderly, handicapped)" be considered (along with reasonably foreseeable use and misuse) in assessing the severity of risk associated with a consumer product. 16 C.F.R § 1115.13(g)(1)(iii) (2002).

The Federal Hazardous Substances Act (FHSA) similarly recognizes the special considerations at issue when children are exposed to dangerous products. For example, Section 15(c)(1) of the FHSA empowers the Commission to recall toys or other articles intended for use by children that contain a defect resulting in a substantial risk of injury to children. 15 U.S.C. § 1274(c)(1). FHSA Section 15(c) was specifically intended to give the Commission the same recall authority under the FHSA that it had under the CPSA.[8]

Not surprisingly, FHSA Section 15(c)(1) -- like its CPSA Section 15(d) counterpart – lists "severity of the risk" as one of the factors that may demonstrate a substantial risk of injury to children.[9] As is true under the CPSA, reasonably foreseeable misuse must be considered in assessing the severity of risk created by a defect in a children's product under the FHSA. *See* 16 C.F.R. § 1115.13(g)(1)(iii) (2002); *Forester v. CPSC*, 559 F.2d 774, 789 (D.C. Cir. 1977) (defining "unreasonable risk" in case

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[8] *See* S. Rep. No. 98-591, at 2 (1984) (this provision "will permit the CPSC to use the same procedures to recall hazardous toys and children's articles that it now uses to recall other consumer products . . . The bill will thus speed the recall of dangerous toys").

[9] Closely paralleling the language of CPSA Section 15(d), FHSA Section 15(c)(1) provides, in part, that the Commission may recall "any toy or other article intended for use by children which creates a

brought under the FHSA, and referring to "similar language" and legislative history of the CPSA for support).

Indeed, the statutory framework of the FHSA evidences that reasonably foreseeable misuse is even more important in assessing products that may endanger children. For example, in defining when a toy or other article intended for use by children presents a thermal, mechanical or electrical hazard for purposes of FHSA Section 3, 15 U.S.C. § 1262, Congress refused to limit the Commission's authority to a product's intended use, but used the language "in normal use or when subjected to reasonably foreseeable damage or abuse."[10] *Id.* §§ 1261(r), (s), (t) (2002). The original bill was limited to addressing the danger of injury or illness "during or as the proximate result of the customary or reasonably foreseeable use of the article." Evidencing Congress' unmistakable intent, the reported bill included an amendment that broadened the language to address the danger of injury or illness "as the result of the normal use of the article or when it is subjected to reasonably foreseeable damage or abuse." As explained in the House Report:

> The committee considered [the amended definition] a clearer indication to the manufacturer of children's articles of the circumstances that he must take into account in designing and manufacturing those articles. He has a significant responsibility. Not only must he consider the safety of the article in normal use, he must also consider the safety of the article after damage or abuse; that is, **he must consider what the child using the article may reasonably be expected to do to it or with it.**

---

substantial risk of injury to children (because of the pattern of defect, the number of defective toys or other articles distributed in commerce, the severity of the risk, or otherwise) . . ." 15 U.S.C. § 1274(c)(1).

[10] The accompanying FHSA regulations contain four separate sections on "Test Methods for Simulating Use and Abuse of Toys and Other Articles Intended for Use by Children." *See* 16 C.F.R. §§ 1500.50, 1500.51, 1500.52, 1500.53 (2002).

H.R. Rep. No. 91-389, at 12, 13 (1969) [emphasis added].[11]

Daisy cannot prevail in this matter by labeling gun users' behavior "reckless" or their parents' supervision "negligent." Under the CPSA and the FHSA, the common-law tort principles of "intervening cause" or "assumption of risk" are no defense where the product misuse of which Daisy complains was reasonably foreseeable. At the hearing in this matter, Complaint Counsel intends to prove that such misuse by children and adolescents was entirely foreseeable.

II.

Limited Use of Evidence of Consumer Injuries Related to Daisy Powerline Guns Is Both Relevant and Probative

To prove, among other things, that consumer misuse of the Daisy Powerline guns is reasonably foreseeable, Complaint Counsel expects to rely, in part, on limited evidence of prior consumer deaths and injuries. However, Complaint Counsel emphasizes that it does not intend to retry the many lawsuits in which Daisy has been sued for deaths and injuries related to use of Powerline guns. Complaint Counsel agrees with the Court that

---

[11] The legislative history of the FHSA, as a whole, repeatedly underscores that manufacturers cannot escape responsibility for their defective products merely because they may be used improperly. In House hearings on the bill that amended the FHSA to protect children from toys and other articles that presented certain hazards, Rep. Elkind, the Chair of the National Commission of Product Safety, stated:

> We believe that forethought in the manufacture of children's articles can guard against certain kinds of human error despite the ingenuity of children in finding new ways to injure themselves by accident. We feel that manufacturers should perform with the realization that children may misuse their products despite the intended method of use.
>
> It is just not enough to defend injuries to children by pointing to the absence of parental supervision or parental instruction. In today's society, and particularly among poverty groups, as we were recently informed at public hearings in Chicago, most parents cannot constantly supervise their children's play. Nor should they be expected to . . .
>
> Designers and manufacturers must be able to foresee that children use products without supervision and instruction, and without complete awareness of even those hazards labeled as such . . .

Nat'l. Comm. On Product Safety Extension and Child Protection Act, Hearings before the Subcomm. on Commerce and Finance of the Comm. on Interstate and Foreign Commerce, 91st Cong. 15 (1969).

any attempt to convert this proceeding into a series of such "mini-trials" would be, at best, cumbersome and unwieldy.

Nevertheless, evidence of consumer deaths and injuries is highly relevant to, and probative of, essential issues in this case. Indeed, both the statutes and interpretive regulations contemplate use of such evidence. For example, to establish that the Daisy Powerline guns constitute a "substantial product hazard" under CPSA Section 15(d), 15 U.S.C. § 2064(d), Complaint Counsel may offer proof of, among other things, the "severity of the risk" created by the guns. Under the Commission's regulations, a risk is categorized as severe "if the injury which might occur is serious and/or if the injury is likely to occur." 16 C.F.R. § 1115.13(g)(iii) (2002). Among the factors to be considered in assessing likelihood of injury are "the number of injuries reported to have occurred, the intended or reasonably foreseeable use or misuse of the product, and the population group exposed to the product (e.g., children, elderly, handicapped)." *Id.*

Complaint Counsel expects to offer evidence of prior consumer deaths and injuries to address each of the foregoing factors. Mindful of the Court's concern about the orderliness of the proceedings, Complaint Counsel expects to offer such evidence largely through the testimony of one or more of its expert witnesses. For example, Complaint Counsel intends to call Dr. Charles Irwin as an expert on risk perception and risk-taking behavior among children and adolescents.[12] Dr. Irwin is expected to testify about, among other things, the social and environmental contexts in which Powerline gun incidents occur, and how those contexts can affect an adolescent's ability to realistically assess risk.

---

[12] *See* Complaint Counsel's Supplemental Disclosure Regarding Expert Witnesses (Feb. 13, 2003).

Dr. Irwin's testimony in this and other areas is expected to address, among other things, the extent to which misuse of Powerline guns is reasonably foreseeable among users in these age groups. To elucidate that testimony, Dr. Irwin may make reference to the objective facts and data relating to several such incidents, including, without limitation, the ages, sexes and backgrounds of the victims and shooters; their relationships; the locations of the incidents; the ages and sexes of other persons present at the incident; the nature of the injuries sustained; and the events leading up to the incidents.

To give the Court a better idea of the sources of these facts and data, the prior injury incidents are largely documented in one or more of the following ways: (1) In-Depth Investigations (IDIs) routinely conducted by Commission staff after receiving a report of an injury incident; (2) police or medical reports relating to injury incidents; and (3) sworn testimony of witnesses involved in court proceedings relating to such injury incidents (typically cross-examined by Daisy's counsel in those actions). Because all of these materials have been produced to Respondent in discovery, Daisy cannot complain about unfair surprise. While the IDIs, police reports, and medical reports likely are independently admissible under hearsay exceptions (namely Federal Rules of Evidence (FRE) 803(8) and/or 803(6)), these documents (along with the sworn deposition testimony), in any event, constitute facts or data "reasonably relied upon by experts in . . . the field," and thus may be relied upon by Dr. Irwin under FRE 703, which governs the bases of expert witness testimony.

In sum, Complaint Counsel does not intend to retry the merits of prior product liability cases involving Daisy. Nor will it argue for any collateral estoppel or other legal

effect arising from any cases previously litigated to verdict against Daisy or settled by Daisy. Complaint Counsel respectfully submits that use of prior injury data, in the limited way contemplated here, is entirely appropriate, is expressly contemplated by applicable law, and will assist the Court in its fact finding.

With respect to airgun incidents involving other manufacturers' products, Complaint Counsel shares the Court's preliminary view that such testing is not relevant to this proceeding. If Daisy were permitted to introduce evidence of deaths and injuries involving competing airguns, the proceeding necessarily would be side-tracked into considerations of whether those guns were equivalent. Complaint Counsel here has made specific allegations of defects in Daisy's Powerline guns. Assessing whether competing guns also suffer those defects would not only be irrelevant to whether Daisy's guns are defective, but would require testimony and other evidence regarding the design, engineering, operation, and use of those competing products. And the Court would be forced into this fact-finding mission without the benefit of having before it the parties most able to speak to those matters – the competing manufacturers themselves.

Daisy's apparent purpose in seeking to introduce such evidence is to establish that Daisy's guns are somehow equivalent to, or better than, airguns made by other manufacturers. Lurking under Daisy's claimed equivalence is essentially the argument that Daisy should not be liable here for its allegedly defective airguns because other manufacturers make guns that are no better or, in fact, may be worse. At its core, this argument reduces to a claim that "I shouldn't be ticketed for speeding because everybody else on the road is speeding too." Such an argument is specious as a matter of law and

public policy, and is offensive in the context of a proceeding to adjudicate whether a product presents an unreasonable risk of injury to children.

Nor can Daisy prevail on its argument that non-Powerline gun incidents would "show that, if a problem exists, it is an industry-wide problem that must be addressed on an industry-wide basis."[13] This amounts to an argument that the Commission chose the wrong forum in which to consider the alleged defects in Respondent's airguns. However, it is a well-settled principle of administrative law that "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). In this instance, the Commission, in the lawful exercise of its discretion, chose to authorize an administrative adjudication to determine whether Daisy Powerline airguns constitute a substantial product hazard and/or a substantial risk of injury to children. The point is to get on with that task, and not confuse the proceeding with extraneous and irrelevant evidence of competing airgun designs.

III.

Evidence of Airgun Testing Should Be Limited to the Daisy Powerline Models At Issue

For the reasons discussed immediately above, Complaint Counsel agrees with the Court's preliminary view that testing of airguns, other than the Daisy Powerline guns at issue here, is immaterial to this proceeding. Introduction of such extraneous and irrelevant evidence would serve only to burden the proceeding and confuse the record. Testing of competing airguns has no bearing on whether Daisy's Powerline guns are defective and present a substantial hazard or risk.

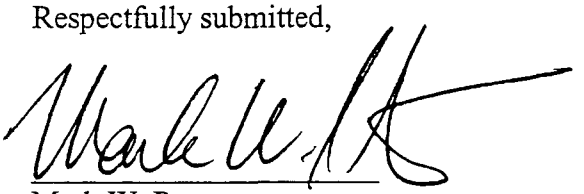
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[13] Daisy's Response to Order Directing Comment on the Scope of Evidence (Nov. 4, 2002) at 2.

Finally, Complaint Counsel will not object to the admission of testing from prior investigations of Daisy Powerline guns. While Complaint Counsel maintains that such evidence has little or no relevance to this proceeding, Complaint Counsel will forego contesting its admissibility in favor of demonstrating at trial why such evidence should be given little, if any, weight by the Court.

Dated: February 27, 2003

Respectfully submitted,



Mark W. Porter
Eric L. Stone

Complaint Counsel

U.S. Consumer Product Safety Commission
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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2003, I caused a copy of the foregoing **Complaint Counsel's Response to Order Directing Briefing on Issues of Significance** to be served upon all parties of record in these proceedings, as follows:

By hand delivery to:

The Honorable William B. Moran, Administrative Law Judge
and Presiding Officer

By facsimile and first class mail, postage prepaid to:

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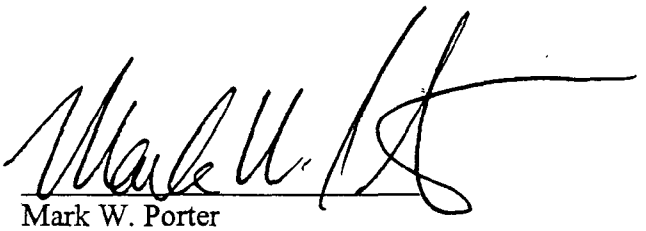
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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No.: 02-2
Respondent.	)	

COMPLAINT COUNSEL'S RESPONSE TO ORDER
DIRECTING BRIEFING ON ISSUES OF SIGNIFICANCE

Complaint Counsel submits this brief in response to the questions posed by the Court in its January 2, 2003 Order.

BACKGROUND

In defending this case, Daisy's principal argument seems to be that deaths and injuries resulting from use of its Powerline air guns are always the fault of the gun users or their parents. In Daisy's world, if the children and adolescents using their products always adhered to the "Ten Commandments of Gun Safety," injuries would be eliminated. In Daisy's world, it is enough to include rules about safe gun handling in its literature and simply expect that children will unfailingly abide by them and their parents will unfailingly enforce them. That is not the real world, however. As CPSC engineer Duncan Scott Snyder testified under questioning by Daisy's counsel:

> Mr. Griffin: . . . [I]f you follow [the safe gun rules]: Keep the muzzle pointed in a safe direction, always assume it's loaded, keep your finger off the trigger – you should be able to eliminate almost every conceivable accident. Correct?
>
> Mr. Snyder: **In a dream world**.

D. Snyder Tr. (Sept. 12, 2002) at 119 [emphasis added].

Fortunately, the federal statutes governing this proceeding recognize that children and other consumers do not inhabit a perfect world. Those statutes make manufacturers responsible for ensuring not only that their products are free from serious defect in their intended use, but also in their "reasonably foreseeable misuse" by consumers.

Indeed, in evaluating a potential product defect, the Commission considers not only whether a product is manufactured consistent with its intended design, but also whether the design creates a risk of injury. *Substantial Product Hazard Reports*, 16 CFR § 1115.04. Manufacturers who design a product that is fully functional for its intended use, may still have designed a defective product if significant numbers of consumers are likely to use it in an unsafe manner.

That products can be defective in their design "when the reasonably foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design. . ." is well established law. Restatement of the Law, Third, Torts, Product Liability, ALI 1998, section 2(b). The Commission has applied this principle in many litigated cases and probably hundreds of voluntary recalls. Like product liability law, the Commission's policies in this regard are based on one principle: bad designs are not cured by telling consumers how to behave and hoping they will accommodate their behavior to the design -- they are cured by redesigning the product.[1]

Complaint Counsel's case here is fully consistent with that principle. The Complaint alleges two principal modes of defect and corresponding patterns of injury

[1] In fact, Daisy has redesigned the Powerline airguns several times in an effort to reduce the likelihood that BB lodging will occur causing serious injuries and deaths

involving use of Daisy Powerline Model 880 and 856 airguns,[2] by children and younger adolescents. First, during normal use of the airguns, BBs may become lodged within the guns' "virtual magazine." Users may "dry" fire the gun repeatedly or shake the gun and receive no visual or audible indication that the airgun is still loaded. Believing the gun to be unloaded, adolescent and younger users of Daisy Powerline guns have pointed the guns in unsafe directions, expecting only a discharge of compressed air, not a BB projectile traveling at lethal velocity. Second, the absence of an automatic safety mechanism on these high-velocity guns has resulted in multiple incidents involving accidental discharge of the guns by young users who were carrying or handling the guns while in a cocked and loaded condition.

Who should be legally responsible here? Daisy, like many other manufacturers of poorly designed products, would rather blame the user or the user's parents. The evidence at trial, however, will show that a gun that entraps BBs encourages a child to believe that the gun is not loaded and engage in behaviors that are unsafe.

Further, to characterize as "reckless" the behavior of children handling a loaded and cocked gun who accidentally activate the trigger misses the point on two counts. First, children and adolescents do not have the knowledge or ability to exhibit perfect behavior in all instances. Second, the behavior in these cases is often inadvertent and accidental, not intentional. It should also be very foreseeable to a firm, like Daisy, that knows a great deal about children's handling of guns from its experience with sales of less powerful airguns. For example, as shown below, Daisy's own witnesses concede (1) that the Powerline airguns are "dangerous" and (2) that the company has been on notice

[2] And the various progeny of those basic models. *See* Complaint ¶¶ 7-8.

for decades that a substantial number of users were under the recommended age of 16.[3] The company thus has had ample experience with the problem of underage users of its high-velocity Powerline guns. Providing a design with an automatic safety and a magazine that precluded BB lodging would have been a far better alternative than trying to change behavior or prevent accidental behaviors.

THE COURT'S QUESTIONS[4]

I.

The Intervention of a Purportedly "Reckless Act" Is Not a Defense Where Consumer Misuse Is Reasonably Foreseeable

With respect to the Court's inquiry regarding the "intervention of a reckless act," Complaint Counsel respectfully takes issue with that characterization of consumer behavior in this case. As discussed above, the behavior of children and adolescent users of the Daisy Powerline airguns, while perhaps exhibiting a carelessness not uncommon to that age, does not always rise to the level of wanton disregard for safety. This is particularly true in cases involving inadvertent or accidental discharge of the gun, where the presence of an automatic safety mechanism likely would have prevented injury. Moreover, popular exposure to low-velocity, spring-air BB guns (for which Daisy is rightly famous) may lead children and parents to underestimate the lethal capacity of these high-velocity Daisy Powerline guns, which also bears on the reasonableness of consumer behavior in using these guns.

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[3] *See infra* at 7-8.

[4] Complaint Counsel has taken the liberty of reordering the issues as they appeared in the Court's January 2, 2003 Order, addressing the third (and larger) issue first.

The important question, however, is not whether the users' behavior was "reckless" or "negligent." The key legal inquiry is whether that behavior was "reasonably foreseeable" to the manufacturer. Where such consumer misuse is reasonably foreseeable, as it is in this case, the Consumer Product Safety Act and the Federal Hazardous Substances Act place the burden squarely on the manufacturer to account for that behavior in the design of its product. Daisy has not met that burden here.

Reasonably Foreseeable Misuse Must Be Considered in Assessing Severity of Risk

The Consumer Product Safety Act (CPSA) provides that a "substantial product hazard" may be shown by proof of any of several factors, including the "severity of the risk" associated with a product defect.[5] The Commission's interpretive regulations expressly provide that reasonably foreseeable misuse be considered in evaluating risk severity:

> A risk is severe if the injury which might occur is serious and/or if the injury is likely to occur. In considering the likelihood of any injury the Commission and the staff will consider the number of injuries reported to have occurred, the intended **or reasonably foreseeable use or misuse of the product**, and the population group exposed to the product (e.g., children, elderly, handicapped).

16 C.F.R. § 1115.13(g)(1)(iii) (2002) [emphasis added].[6]

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[5] Section 15 of the CPSA defines "substantial product hazard" as, among other things, "a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public." 15 U.S.C. § 2064(a)(2).

[6] The Commission's interpretation of its statute should be accorded substantial deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("considerable weight should be accorded an executive department's construction of a statutory scheme it is entrusted to administer . . .") (footnote omitted).

In other words, the statutes and regulations anticipate that consumers will sometimes make unsafe choices in using consumer products. Ill-advised consumer behavior, however, will not excuse the manufacturer where such behavior is reasonably foreseeable. In *Southland Power Mower Co. v. CPSC*, 619 F.2d 499 (5th Cir. 1980), for example, the court reviewed a power lawn mower safety standard promulgated by the Commission. The Commission standard required, among other things, a safety shield on the back of the mower to prevent an operator from accidentally placing his feet within reach of the blades. Based on evidence that consumers sometimes removed safety shields when they interfered with the mower's mobility, the Commission standard also required manufacturers to subject the shields to an "obstruction test" to ensure that they do not catch on certain surface obstructions.

Petitioners in *Southland* challenged the obstruction test, contending that "the risk of injury from consumer defeat of safety shielding is not 'unreasonable' because consumers would have chosen to incur the risk, and their judgment must be respected." *Id.* at 513. The Fifth Circuit rejected that argument, holding that "Congress intended for injuries resulting from foreseeable misuse of a product to be counted in assessing risk." *Id.* (citations omitted). The court stated further that it is "[t]his principle, and not the tort concept of 'assumption of risk,' [that] governs the Commission's authority [here]." *Id.*[7]

The *Southland* court recognized that there were circumstances in which a "[f]ully informed choice on the part of consumers to employ a dangerous product may provide information that is relevant to the Commission's assessment of the reasonableness of a risk of injury":

[7] While the *Southland* court was reviewing a challenge of a consumer product safety standard, its statutory construction of the CPSA and the Commission's authority should not be limited to that context.

> For example, consumers' decisions to use sharp knives may pose a reasonable risk of injury because duller knives, while safe, would be useless for cutting purposes, and the Commission could reasonably find that consumers have accurate information of the severity and likelihood of injury posed by sharp knives.

Id. However, in the case before it, the court found that:

> **there is no evidence that consumers accurately appreciate the nature of the risk** of blade contact injuries and that their presumed willingness to defeat protective measures is reasonable.

Id. (emphasis added). Because consumers failed to appreciate the nature of the risk involved, the Fifth Circuit concluded that the Commission was justified in imposing a requirement that reduced the risk of foreseeable misuse.

Foreseeable Misuse is Critical in Weighing
The Risks of Dangerous Products Used By Children

As the *Southland* court indicated, consideration of risk appreciation and foreseeable misuse by consumers is important in evaluating the safety of adult products, such as power mowers. These considerations assume critical importance in the context of children using dangerous consumer products. As Complaint Counsel will show at the hearing in this matter, children and young adolescent users of Daisy Powerline guns often lack the ability to appreciate the lethal risks associated with these products.

In this case, it cannot seriously be denied that the Daisy Powerline guns are both dangerous and routinely used by children under age 16. Indeed, Daisy's own witnesses concede as much. Guy E. Braughler, Daisy's former Director of Engineering and an expert designated by Daisy in this case, testified as follows about a memorandum he wrote when the Powerline Model 880 was being developed:

> Q: . . . The next paragraph, the first sentence reads, "This is a dangerous gun, it is not a controlled velocity play gun for which we are

noted." In what way or ways was the 880 a dangerous gun, as you used that term in the context of that sentence?

A: I felt I said it there. This is a gun that has higher velocity, it's much more dangerous, and severe injury could be inflicted by mishandling this and shooting somebody.

Braughler Tr. (Jan. 14, 2003) at 61. Mr. Braughler went on to state his view on use of the Powerline 880 by users younger than 16:

Q: In your view, should the 880 be generally available to a child under 16?

A: Not without adult supervision.

Q: And why is that?

A: We just didn't feel that they were mature enough to handle a gun that was this dangerous.

Id. at 69.

While marketing the Powerline guns as purportedly "adult" products, Daisy nevertheless was aware that the guns were being used by a substantial number of adolescents and children younger than the recommended age of 16. At his deposition, Richard I. Daniel, Daisy's former President and a Daisy-designated expert witness in this case, testified as follows:

Q: Now, when you first learned [in the 1970's] from the warranty cards that there was a large number of users under age 14 for the [Powerline] 880, do you recall approximately what percentage of under age 14 users –

A: I think over 50 percent or 40 or 50 percent were under 14, something like that. A substantial number.

* * *

Q: . . . At the time you left the company in '83, were you aware that there was still a significant percentage of users of the 880 who were under 16?

[Objection]

A: I think that I was aware that probably 40 percent or so were under 16 years of age, yes.

Daniel Tr. (Dec. 18, 2002) at 36-37; 41-42.

In cases such as this, where even the manufacturer concedes that children are using its dangerous products, the law expressly recognizes the importance of weighing foreseeable misuse. Commission regulations, for example, provide specifically that the "population group exposed to the product (e.g., children, elderly, handicapped)" be considered (along with reasonably foreseeable use and misuse) in assessing the severity of risk associated with a consumer product. 16 C.F.R § 1115.13(g)(1)(iii) (2002).

The Federal Hazardous Substances Act (FHSA) similarly recognizes the special considerations at issue when children are exposed to dangerous products. For example, Section 15(c)(1) of the FHSA empowers the Commission to recall toys or other articles intended for use by children that contain a defect resulting in a substantial risk of injury to children. 15 U.S.C. § 1274(c)(1). FHSA Section 15(c) was specifically intended to give the Commission the same recall authority under the FHSA that it had under the CPSA.[8]

Not surprisingly, FHSA Section 15(c)(1) -- like its CPSA Section 15(d) counterpart – lists "severity of the risk" as one of the factors that may demonstrate a substantial risk of injury to children.[9] As is true under the CPSA, reasonably foreseeable misuse must be considered in assessing the severity of risk created by a defect in a children's product under the FHSA. *See* 16 C.F.R. § 1115.13(g)(1)(iii) (2002); *Forester v. CPSC*, 559 F.2d 774, 789 (D.C. Cir. 1977) (defining "unreasonable risk" in case

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[8] *See* S. Rep. No. 98-591, at 2 (1984) (this provision "will permit the CPSC to use the same procedures to recall hazardous toys and children's articles that it now uses to recall other consumer products . . . The bill will thus speed the recall of dangerous toys").

[9] Closely paralleling the language of CPSA Section 15(d), FHSA Section 15(c)(1) provides, in part, that the Commission may recall "any toy or other article intended for use by children which creates a

brought under the FHSA, and referring to "similar language" and legislative history of the CPSA for support).

Indeed, the statutory framework of the FHSA evidences that reasonably foreseeable misuse is even more important in assessing products that may endanger children. For example, in defining when a toy or other article intended for use by children presents a thermal, mechanical or electrical hazard for purposes of FHSA Section 3, 15 U.S.C. § 1262, Congress refused to limit the Commission's authority to a product's intended use, but used the language "in normal use or when subjected to reasonably foreseeable damage or abuse."[10] *Id.* §§ 1261(r), (s), (t) (2002). The original bill was limited to addressing the danger of injury or illness "during or as the proximate result of the customary or reasonably foreseeable use of the article." Evidencing Congress' unmistakable intent, the reported bill included an amendment that broadened the language to address the danger of injury or illness "as the result of the normal use of the article or when it is subjected to reasonably foreseeable damage or abuse." As explained in the House Report:

> The committee considered [the amended definition] a clearer indication to the manufacturer of children's articles of the circumstances that he must take into account in designing and manufacturing those articles. He has a significant responsibility. Not only must he consider the safety of the article in normal use, he must also consider the safety of the article after damage or abuse; that is, **he must consider what the child using the article may reasonably be expected to do to it or with it**.

---

substantial risk of injury to children (because of the pattern of defect, the number of defective toys or other articles distributed in commerce, the severity of the risk, or otherwise) . . ." 15 U.S.C. § 1274(c)(1).

[10] The accompanying FHSA regulations contain four separate sections on "Test Methods for Simulating Use and Abuse of Toys and Other Articles Intended for Use by Children." *See* 16 C.F.R. §§ 1500.50, 1500.51, 1500.52, 1500.53 (2002).

H.R. Rep. No. 91-389, at 12, 13 (1969) [emphasis added].[11]

Daisy cannot prevail in this matter by labeling gun users' behavior "reckless" or their parents' supervision "negligent." Under the CPSA and the FHSA, the common-law tort principles of "intervening cause" or "assumption of risk" are no defense where the product misuse of which Daisy complains was reasonably foreseeable. At the hearing in this matter, Complaint Counsel intends to prove that such misuse by children and adolescents was entirely foreseeable.

II.

Limited Use of Evidence of Consumer Injuries Related to Daisy Powerline Guns Is Both Relevant and Probative

To prove, among other things, that consumer misuse of the Daisy Powerline guns is reasonably foreseeable, Complaint Counsel expects to rely, in part, on limited evidence of prior consumer deaths and injuries. However, Complaint Counsel emphasizes that it does not intend to retry the many lawsuits in which Daisy has been sued for deaths and injuries related to use of Powerline guns. Complaint Counsel agrees with the Court that

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[11] The legislative history of the FHSA, as a whole, repeatedly underscores that manufacturers cannot escape responsibility for their defective products merely because they may be used improperly. In House hearings on the bill that amended the FHSA to protect children from toys and other articles that presented certain hazards, Rep. Elkind, the Chair of the National Commission of Product Safety, stated:

> We believe that forethought in the manufacture of children's articles can guard against certain kinds of human error despite the ingenuity of children in finding new ways to injure themselves by accident. We feel that manufacturers should perform with the realization that children may misuse their products despite the intended method of use.
>
> It is just not enough to defend injuries to children by pointing to the absence of parental supervision or parental instruction. In today's society, and particularly among poverty groups, as we were recently informed at public hearings in Chicago, most parents cannot constantly supervise their children's play. Nor should they be expected to . . .
>
> Designers and manufacturers must be able to foresee that children use products without supervision and instruction, and without complete awareness of even those hazards labeled as such . . .

Nat'l. Comm On Product Safety Extension and Child Protection Act, Hearings before the Subcomm. on Commerce and Finance of the Comm. on Interstate and Foreign Commerce, 91st Cong. 15 (1969).

any attempt to convert this proceeding into a series of such "mini-trials" would be, at best, cumbersome and unwieldy.

Nevertheless, evidence of consumer deaths and injuries is highly relevant to, and probative of, essential issues in this case. Indeed, both the statutes and interpretive regulations contemplate use of such evidence. For example, to establish that the Daisy Powerline guns constitute a "substantial product hazard" under CPSA Section 15(d), 15 U.S.C. § 2064(d), Complaint Counsel may offer proof of, among other things, the "severity of the risk" created by the guns. Under the Commission's regulations, a risk is categorized as severe "if the injury which might occur is serious and/or if the injury is likely to occur." 16 C.F.R. § 1115.13(g)(iii) (2002). Among the factors to be considered in assessing likelihood of injury are "the number of injuries reported to have occurred, the intended or reasonably foreseeable use or misuse of the product, and the population group exposed to the product (e.g., children, elderly, handicapped)." *Id.*

Complaint Counsel expects to offer evidence of prior consumer deaths and injuries to address each of the foregoing factors. Mindful of the Court's concern about the orderliness of the proceedings, Complaint Counsel expects to offer such evidence largely through the testimony of one or more of its expert witnesses. For example, Complaint Counsel intends to call Dr. Charles Irwin as an expert on risk perception and risk-taking behavior among children and adolescents.[12] Dr. Irwin is expected to testify about, among other things, the social and environmental contexts in which Powerline gun incidents occur, and how those contexts can affect an adolescent's ability to realistically assess risk.

[12] *See* Complaint Counsel's Supplemental Disclosure Regarding Expert Witnesses (Feb. 13, 2003).

Dr. Irwin's testimony in this and other areas is expected to address, among other things, the extent to which misuse of Powerline guns is reasonably foreseeable among users in these age groups. To elucidate that testimony, Dr. Irwin may make reference to the objective facts and data relating to several such incidents, including, without limitation, the ages, sexes and backgrounds of the victims and shooters; their relationships; the locations of the incidents; the ages and sexes of other persons present at the incident; the nature of the injuries sustained; and the events leading up to the incidents.

To give the Court a better idea of the sources of these facts and data, the prior injury incidents are largely documented in one or more of the following ways: (1) In-Depth Investigations (IDIs) routinely conducted by Commission staff after receiving a report of an injury incident; (2) police or medical reports relating to injury incidents; and (3) sworn testimony of witnesses involved in court proceedings relating to such injury incidents (typically cross-examined by Daisy's counsel in those actions). Because all of these materials have been produced to Respondent in discovery, Daisy cannot complain about unfair surprise. While the IDIs, police reports, and medical reports likely are independently admissible under hearsay exceptions (namely Federal Rules of Evidence (FRE) 803(8) and/or 803(6)), these documents (along with the sworn deposition testimony), in any event, constitute facts or data "reasonably relied upon by experts in . . . the field," and thus may be relied upon by Dr. Irwin under FRE 703, which governs the bases of expert witness testimony.

In sum, Complaint Counsel does not intend to retry the merits of prior product liability cases involving Daisy. Nor will it argue for any collateral estoppel or other legal

effect arising from any cases previously litigated to verdict against Daisy or settled by Daisy. Complaint Counsel respectfully submits that use of prior injury data, in the limited way contemplated here, is entirely appropriate, is expressly contemplated by applicable law, and will assist the Court in its fact finding.

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Daisy's apparent purpose in seeking to introduce such evidence is to establish that Daisy's guns are somehow equivalent to, or better than, airguns made by other manufacturers. Lurking under Daisy's claimed equivalence is essentially the argument that Daisy should not be liable here for its allegedly defective airguns because other manufacturers make guns that are no better or, in fact, may be worse. At its core, this argument reduces to a claim that "I shouldn't be ticketed for speeding because everybody else on the road is speeding too." Such an argument is specious as a matter of law and

public policy, and is offensive in the context of a proceeding to adjudicate whether a product presents an unreasonable risk of injury to children.

Nor can Daisy prevail on its argument that non-Powerline gun incidents would "show that, if a problem exists, it is an industry-wide problem that must be addressed on an industry-wide basis."[13] This amounts to an argument that the Commission chose the wrong forum in which to consider the alleged defects in Respondent's airguns. However, it is a well-settled principle of administrative law that "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). In this instance, the Commission, in the lawful exercise of its discretion, chose to authorize an administrative adjudication to determine whether Daisy Powerline airguns constitute a substantial product hazard and/or a substantial risk of injury to children. The point is to get on with that task, and not confuse the proceeding with extraneous and irrelevant evidence of competing airgun designs.

III.

Evidence of Airgun Testing Should Be Limited to the Daisy Powerline Models At Issue

For the reasons discussed immediately above, Complaint Counsel agrees with the Court's preliminary view that testing of airguns, other than the Daisy Powerline guns at issue here, is immaterial to this proceeding. Introduction of such extraneous and irrelevant evidence would serve only to burden the proceeding and confuse the record. Testing of competing airguns has no bearing on whether Daisy's Powerline guns are defective and present a substantial hazard or risk.

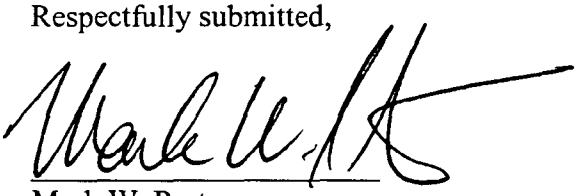
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[13] Daisy's Response to Order Directing Comment on the Scope of Evidence (Nov. 4, 2002) at 2.

Finally, Complaint Counsel will not object to the admission of testing from prior investigations of Daisy Powerline guns. While Complaint Counsel maintains that such evidence has little or no relevance to this proceeding, Complaint Counsel will forego contesting its admissibility in favor of demonstrating at trial why such evidence should be given little, if any, weight by the Court.

Dated: February 27, 2003

Respectfully submitted,



Mark W. Porter
Eric L. Stone

Complaint Counsel

U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814
301-504-7732

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2003, I caused a copy of the foregoing **Complaint Counsel's Response to Order Directing Briefing on Issues of Significance** to be served upon all parties of record in these proceedings, as follows:

By hand delivery to:

The Honorable William B. Moran, Administrative Law Judge
and Presiding Officer

By facsimile and first class mail, postage prepaid to:

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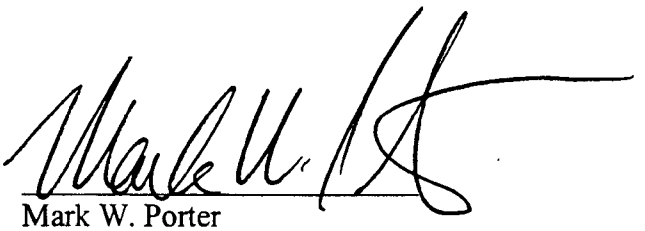
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By hand delivery to:

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Mark W. Porter
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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

CPSC
OFFICE OF COMPLIANCE
2003 FEB 27 AM 9:23

In the Matter of	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No.: 02-2
d/b/a Daisy Outdoor Products	)	
400 West Stribling Drive	)	
Rogers, AR 72756	)	
	)	
	)	
Respondent	)	

COPY

RESPONSE TO ORDER DIRECTING
BRIEFING ON ISSUES OF SIGNIFICANCE

On January 2, 2003, the Court directed the parties to brief three issues significant to this action. Daisy Manufacturing Company will address these issues in the order requested by the Court.

1. To what extent, if at all, should evidence of accidents involving the cited airguns be admissible to prove that those guns present a substantial product hazard defect under the Consumer Product Safety Act ("CPSA") or a substantial risk of injury to children under the Federal Hazardous Substances Act ("FHSA")?

The Court takes the preliminary view that accidents involving airguns beyond the models cited in the Complaint are not relevant. The Court also takes the preliminary view that accidents involving the cited airguns are problematic because they would present the spectre of revisiting those instances, if any, where a trial occurred and because they would be of questionable or no probative value where a settlement occurred. Evidence of accidents involving the cited airguns should not be admitted to prove that those guns present a substantial product hazard defect under the CPSA or a substantial risk of injury to children under the FHSA. For the following reasons, the incidents are inadmissible.

In this matter, the Consumer Product Safety Commission (the "Commission") alleges that the Daisy 880 and 856 airguns are defective because: (1) BB's might become lodged in the gun's magazine; (2) the silver color of BB's are difficult to see when loaded into the chamber view port; and (3) the lack of an automated safety creates an unreasonable hazard. These alleged defects, however, have never been the proximate cause of injury to anyone. Therefore, evidence of incidents where individuals have been injured while using a Daisy 880 or 856 should not be admitted.

To admit incidents involving firearms, a party must lay a foundation showing that the other incidents occurred under circumstances substantially similar to the circumstances surrounding the defect complained of. See Lewy v. Remington Arms Co., 836 F.2d 1104, 1108 (8th Cir. 1988). Evidence of firearm discharges that may have resulted from other causes unrelated to the alleged defect are inadmissable. Id.

In the current matter, the Commission cannot show that there is a standard set of circumstances where injury was caused by the alleged defects. In fact, all of the incidents which the Commission will attempt to introduce involve situations where a third party deliberately fired an airgun in the direction of an individual. There are no incidents where the alleged defects caused a firearm to discharge and injure a victim. The Commission's own in-house airgun expert, Ronald Reichel, conducted investigations and testing of the Daisy Model 880 and 856 airguns over the course of many years. Mr. Reichel never found the defects alleged in this Complaint to be the cause of any discharge or injury; rather, he identified as the causative agent an intervening act. See Exhibit 1, Reichel deposition, pp. 25, 26, 28 29, 30,48, 49, 78, 80, and 97. As stated in Mr. Reichel's deposition:

Q: Okay. And almost all of the IDI's, if not all of them, you

looked at were shootings where the rifle was pointed directly at the individual, correct?

A: Correct, and there were shootings reported. There were no reports of the gun firing by itself that didn't result in an injury. I didn't see any of those.

Q: Right. The rifle, if it is pointed in the direction of another human being, is misuse, correct?

A: Correct.

See Reichel deposition, pp. 30-31. Because the Commission cannot show that there is a set of circumstances to which substantially similar incidents can be compared, evidence of other incidents is irrelevant, prejudicial, and inadmissible. See Lewy v. Remington Arms Co., 836 F.2d 1104, 1108 (8th Cir. 1988); Shields v. Sturm, Ruger and Company, 864 F.2d 379 (5th Cir. 1989); Fed. R. Evid. 401, 402, and 403. Therefore, incidents involving the cited airguns should not be admitted.

Evidence of other accidents involving the cited airguns is also inadmissible because the parties would be forced to retry, or try for the first time, the other incidents during the hearing of this matter. The fact that injuries may have occurred in other incidents is not evidence that Daisy's product was defective or caused injury. This is especially true where a gun was misused. Carelessness and misuse of a gun does not make an "inherently dangerous" product defective or unreasonably dangerous. See Wasylow v. Glock, Inc., 975 F.Supp. 370, 380 (D. Mass. 1996). As stated in Wasylow, "that death may result from careless handling of firearms is known by all Americans from an early age." Id. at 380. In Wasylow, the court held as a matter of law that the misuse of the gun was the proximate cause of injuries, even had the gun been defective. Id. Because the incidents offered by the Commission undeniably involve accidents where guns were misused in intentional firings, such incidents offer no evidence as to whether Daisy BB guns are defective, and

the incidents should be excluded.

Likewise, such incidents do not show that a product presents a substantial product hazard defect or a substantial risk of injury to children. If the Commission is allowed to admit evidence of other incidents, Daisy will be forced to defend each and every incident by offering witnesses and evidence to prove that the alleged defects were not the proximate cause of injuries in each incident. This will result in numerous "sub-trials" during this hearing, which will not only waste the resources of the Court and the parties, but will prejudice Daisy by having to defend the other incidents. See Rush v. State, 324 Ark. 147, 919 S.W.2d 933 (1996) (excluding evidence of other bad acts because "the spectre of a trial within a trial looms large," witnesses could have disappeared, evidence could have been lost, and memories could have faded). Given the incidents' lack of probative value, the potential for prejudice, and the certain waste of judicial and other resources, the incidents should be excluded.

2. To what extent, if any, should evidence of testing of airguns, other than the models cited in the Complaint, be admissible in the proceedings?

The Court's preliminary view is that any testing of airguns, other than those cited in the Complaint, is immaterial to the issues in this proceeding. The Commission takes the position that previous investigations of the Powerline BB guns are irrelevant to the determination of whether the cited guns present a hazard or defect. Daisy takes the position that all investigations and testing of the cited Powerline BB guns are relevant to this matter and should be admissible.

(a) The Commission's previous testing shows that the cited airguns are not defective and do not present a risk of injury to consumers.

In this matter, the government has to make a *prima facie* showing that the Daisy airguns are defective. The Commission's own testing and evaluations of the Daisy Models 880 and 856 airguns,

which has been ongoing for the last fifteen years, are certainly relevant to show whether these airguns are defective. In fact, the Commission previously concluded, based on its own testing, that there were no defects in the Daisy airguns. See Reichel deposition, p. 52. The test data of the Commission will show that the alleged defects do not cause the airguns to malfunction or inadvertently fire a BB. As pointed out by the Commission's top in-house gun expert, BB's lodged in a magazine do not present a hazard because they cannot be fired until someone intentionally loads a BB into the chamber. See Reichel deposition, pp. 48-49. The only danger presented by the Daisy airguns is when an individual misuses the gun by loading a BB into the chamber, pointing a loaded weapon at a victim, inserting a finger into the trigger guard, and squeezing the trigger. See Reichel deposition, pp. 55, 66-67. As stated by Mr. Reichel, "[i]t is hard to see fault in the product when somebody pulls the trigger and fires it." See Reichel deposition, p. 67.

In U.S. v. General Motors Corp., 656 F.Supp. 1555 (D.D.C. 1987), *affirmed* 841 F.2d 400, (D.C. Cir. 1988), the Court held that test data was admissible to rebut the government's *prima facie* showing that an automobile had a defective braking system. Moreover, test data showed that factors other than the braking malfunction caused the event which could lead to injury. Id. In the current matter, all of the testing and evaluations performed by the Commission with regard to the Daisy Models 880 and 856 are relevant to show whether the airguns are in fact defective (they are not) and whether the alleged defects present a substantial risk of injury to consumers. For these reasons, such evidence should be admitted.

(b) Evidence of the industry's standard regarding automatic safety devices is relevant and should be admitted.

One of the Commission's allegations is that the Daisy airguns are defective because they do

not have an automatic safety which engages after each BB is fired. Though Daisy does not intend to introduce testing of other airguns in this regard, Daisy believes that the industry's standard concerning automatic safety devices on bolt action rifles is relevant to this proceeding. It is very rare to see any gun with an automatic safety. See Reichel deposition, p. 11. When compared to other airguns, the Commission has admitted that there is no better safety design on the market than Daisy's design. See Exhibit 2, Richard Kearney Wright, Jr. deposition, pp. 109, 110. Mr. Wright was the Commission's compliance officer assigned to this case.

Evidence that other airgun manufacturers do not use automatic safeties on their guns is relevant to show that Daisy BB guns are not defective and do not create a substantial product hazard or risk of injury to children. Moreover, the Commission's admission that Daisy's safety on its airguns is the best design on the market is relevant to rebutting the Commission's allegations otherwise. For these reasons, such evidence should be admitted.

(c) The Consumer Product Safety Commission's allegations that the cited Daisy airguns create a substantial risk of injury to the public are arbitrary, capricious, and manifestly contrary to the tests conducted by the Commission.

In the current matter, the Commission's allegations contradict prior testing conducted by the Commission. In 1995, the Consumer Product Safety Commission took the position that the Daisy Model 880 BB gun was not defective. See Reichel deposition, p. 37. In February of 1996, the Commission issued a statement to Daisy which indicated, based on the evaluation of Jay DeMarco and others, that the Daisy 880 BB gun was not defective. See Reichel deposition, pp. 37-38, see also Exhibit 3 (Exhibit 1 to Mr. Reichel's deposition). Within the Commission, the two most knowledgeable people regarding shooting sports were Mr. Jay DeMarco and Mr. Ronald Thomas Reichel. See Reichel deposition, pp. 32-33. Over the years, there were various other people at the

Commission who also concluded that there were no defects in the 880 and the 856. See Reichel deposition, p. 35.

Mr. Reichel never concluded during any of his evaluations of Daisy airguns that the silver BB was difficult for a user to see. See Reichel deposition, p. 44. In fact, Mr. Reichel does not know where anyone at the Commission would get the idea that it is difficult to see a silver BB in the chamber of the airguns. See Reichel deposition, p. 44. According to the Commission's own in-house expert, it is totally ludicrous to allege that the Daisy airguns are defective based on the ability or inability to see a silver BB in the chamber. See Reichel deposition, pp. 44-45. Likewise, Richmond Wright, the compliance officer assigned to this case, testified that the BB is visible as it loads into the chamber of the Daisy BB guns. See Wright deposition, pp. 96-97.

Mr. Reichel stated that it is equally ludicrous for the Commission to say that the airguns are defective due to the lack of an automatic safety. See Reichel deposition, p. 45. An automatic safety is a mechanism which activates after each round is fired and prevents further discharge until the safety is deactivated. Mr. Reichel previously concluded that automatic safeties promote a false sense of security and that BB guns, as a matter of standard industry practice, are not made with automatic safeties. See supra, Section 2(b). In addition to being very rare on any gun, automatic safeties on airguns would create an unwanted reliance on a feature that a user is unlikely to find on any other firearm. See Reichel deposition, pp. 11, 17. In fact, automatic safeties would create a hazard to children and adults alike because the user would panic and become careless while trying to figure out why the weapon does not fire after pulling the trigger. See Reichel deposition, p. 116. Moreover, when you need the reliability of being able to fire a gun, an automatic safety could impede the correct functioning of the gun. See Reichel deposition, p. 74. For these reasons, it is standard

practice in the BB gun industry to produce guns without automatic safeties and the lack of such safety does not constitute a product defect.

With regard to the Commission's position that the gravity feed system is defective, Mr. Reichel admitted that whether you have a gravity feed system or a force feed system, BB's may not feed reliably from the magazine if BB's get dirty. See Reichel deposition, p. 46. In fact, Mr. Reichel has never used any firearm or air rifle that was totally impervious to feeding problems. See Reichel deposition, p. 46. Even more importantly, the failure of a BB to load properly does not give a user the right to point a rifle at somebody and pull the trigger. See Reichel deposition, p. 46.

During Mr. Reichel's extensive investigation and testing of the Daisy airguns, he was never able to duplicate the alleged defect with the gravity feed system. See Reichel deposition, p. 46. As Mr. Reichel pointed out, shaking a rifle is no way to determine whether a BB is in the magazine. See Reichel deposition, p. 47. Reichel emphasized at deposition that BB's lodged in a magazine do not present a hazard to anyone. See Reichel deposition, p. 48; see also Exhibits 4 and 5 (Exhibits 3 and 4 to Reichel's deposition). If a BB becomes lodged in the magazine, a user has to manually feed the BB into the chamber in order to prepare the rifle to fire the BB. See Reichel deposition, p. 48. If the user does not manually go through the steps of feeding the BB into the chamber, pointing the rifle at an individual, and pulling the trigger, no hazard is presented by a BB lodging in the magazine. See Reichel deposition, p. 48. Because of this fact, even after being advised that BB's could lodge in the magazine if they were oily or the bolt was partially open, the Commission staff concluded that the Model 880 gun was not defective. See Reichel deposition, p. 52. Mr. Reichel's testing conclusively showed that there were no design faults with the Daisy airguns. See Reichel deposition, p. 52.

Jay DeMarco, another in-house gun expert at the Commission, has also conducted extensive testing of the Daisy airguns. He has worked as a compliance officer at the Commission since 1984. See Exhibit 6, DeMarco deposition, pp. 8-9. He handled regulatory matters and enforcement of federal regulations, and negotiated recalls with companies. Id. He has extensive experience with firearms shooting and testing, and in determining whether a gun is defective. Id. at 11, 23, 24, 25, 34. Based on his testing of the gravity fed magazine, the color of Daisy BB's, and the color of the loading port, Mr. DeMarco never determined that the Daisy airguns were defective. Id. at 129, 155, 156. In fact, all the Daisy BB gun incidents he reviewed involved consumer misuse. Id. at 43-44.

The Commission concluded in 1995 that the fact that a BB can lodge in a magazine from time to time does not create a defect that is dangerous to anybody, unless the product is misused. See Reichel deposition, p. 78. The fact that somebody used BB's that were not designed for the Daisy guns is equally insufficient to show that the guns are defective. See Reichel deposition, p. 79. As long as Mr. Reichel investigated and tested the Daisy Powerline airguns, he had no reason to believe that the rifles were defective, dangerous, or needed to be recalled. See Reichel deposition, p. 80.

In 1997, the Commission tested numerous air rifles as part of a multi-disciplinary project. See Reichel deposition, p. 88. The Daisy 880 and Daisy 856 were both included in these tests. Id. Only one rifle, which was not a Daisy, was found to be hazardous. See Reichel deposition, pp. 88-89. There was no indication that any Daisy air rifle should have been recalled after the 1997 tests. See Reichel deposition, p. 89.

Before the Commission filed this Complaint, Mr. Jay DeMarco and Mr. Ronald Reichel were removed from the Daisy airgun cases. See Reichel deposition, p. 35. They were told to turn over

all of their papers and that they were no longer going to be working on the project. Id. At that time, Mr. Reichel had heard that the Commission was not happy with the fact that he and Mr. DeMarco were finding no defects in the Daisy 880 and 856. See Reichel deposition, pp. 34-36. There was a feeling at the Commission that the new Commissioner, Ann Brown, was upset with the staff for not finding that the Daisy 880 and 856 air rifles were defective. Both Mr. Reichel and Mr. DeMarco felt that Ms. Brown "had it in for BB guns." See Reichel deposition, p. 94.

The evidence available to the Commission overwhelmingly shows that, even based on its own testing, the Commission previously concluded there were no defects in the Daisy Models 880 and 856 prior to Ms. Brown taking over the Commission. The Commission's allegations are not only arbitrary and capricious, but are manifestly contrary to its own testing and evaluations. This previous testing further illustrates the Daisy airguns do not present a substantial risk of injury to the public under the FHSA or the CPSA.

3. Can a defect creating a substantial product hazard, or as a separate issue, can a defect creating a substantial risk of injury to children ever exist if no hazard can be presented without the intervention of a reckless act?

(a) The Consumer Product Safety Commission cannot show that the product was defective, or that any alleged defect has caused, or will cause, injury to consumers.

At issue in this matter is whether the Daisy airguns create a substantial product hazard or risk of injury to children. Because the government cannot establish the alleged defects cause injury, their claims cannot be proven. Any injuries to the public derive merely from the inherent properties of an airgun which are obvious to the user. No injury has ever been caused by the alleged defects.

A defect creating a substantial product hazard or risk of injury to children can never exist if

the hazard cannot be presented without the intervention of a reckless act. In order to show that a product is "defective," the government is required to show that the alleged defect caused the incident which results in injury. See U.S. v. General Motors Corp., 841 F.2d 400 (D.C. Cir. 1988) (holding that in order to show that an automobile had a defective braking system within the meaning of the National Traffic and Motor Vehicle Safety Act, the government was required to show not only that the automobiles experienced incidents of skidding, but that the incidents would not have occurred absent the defect). Where a party cannot establish that the alleged defect was the proximate cause of the injury, the claims must be dismissed. Id. at 1067.

In product liability and negligence actions, a product is "unreasonably dangerous" if it fails to perform in the manner reasonably to be expected in light of its nature and intended function. See Rodriguez v. Glock, Inc., 28 F. Supp. 2d 1064, 1069 (N.D. Ill. 1998). An injury does not raise an inference that a defect exists. See Sherk v. Daisy-Heddon, 450 A.2d 615, 619 (Pa. 1982) (holding Daisy not liable for death of victim shot by BB gun where the alleged defect was not the proximate cause of the injury). A plaintiff must demonstrate that a particular defect subjected him to an unreasonable risk of harm and that the defect caused the injury. See Rodriguez, 28 F.Supp. 2d at 1069; Sherk, 450 A.2d at 619. The lack of an external safety device on a firearm is insufficient to show that a gun is unreasonably dangerous. See Rodriguez, 28 F.Supp. 2d 1069.

Similarly, the fact that BB's might become lodged in a magazine, or that a user does not observe a BB in the chamber's loading port, are insufficient to show that a gun is defective. Just because a condition is created which makes injury possible, does not establish that the condition is the proximate cause of injury or that the condition presents a substantial product hazard. Id. at 1071; see also, Sherk, 450 A.2d 615 (holding that misuse of Daisy BB gun by 14 year old user was cause

of death, not an alleged defect). Where the independent act of a third person is the intervening cause which breaks the causal connection between the condition and the injury, a manufacturer is not responsible for the injury. Id.

An intervening cause will prohibit liability for a defendant unless the intervening cause could have been reasonably anticipated. Id. It is common knowledge that a gun is a dangerous object with the ability to inflict great bodily harm or death. Id. at 1072; see also, Novak v. Piggly Wiggly Puget Sound Co., et. al., 22 Wash. App. 407, 591 P2d 791 (1979)(holding that Daisy had no duty to warn of injury where 11 year old user misused the BB gun and appreciated the risk of such misuse); Menard v. Newhall, 135 Vt. 53, 373 A.2d 505, 507 (1977)(holding that a 7 year old child knows that a BB gun can injure an eye, and Daisy need not warn of that danger). Yet, the law declines to hold a manufacturer liable for every injury connected with its product. See Rodriguez, 28 F.Supp. 2d at 1072. If a design does nothing more than furnish a condition which makes an injury possible by a subsequent intervening cause, the condition is not the proximate cause of the injury. Id.;see also Sherk, 450 A.2d 615, 619 (holding that misuse of BB gun caused injury, not Daisy's alleged failure to warn). To hold otherwise would make the manufacturer an insurer of its product, a position which has been rejected by numerous courts. See Rodriguez, 28 F.Supp. 2d at 1072. The reckless act of pointing a gun at an individual, whether the gun is defective or not, excuses the manufacturer because the reckless act is the independent intervening cause of injury. Id. at 1073; see also Raines v. Colt Industries, Inc., 757 F.Supp. 819, 826 (E.D. Mich. 1991).

In this matter, it is the intervening reckless act of the user which creates a substantial hazard, not the alleged defects. In the case of Davis v. McCort, 226 F.3d 506 (6th Cir. 2000), the Sixth Circuit Court of Appeals held that a manufacturer is not required to design safety features to protect

users from dangers of a simple tool when the dangers are obvious and inherent in the product's utility. Id. The plaintiff in that case alleged that the defendant was liable for designing a defective firearm and for failing to warn an individual that a bullet may still be in the rifle's chamber even after the magazine clip was removed. Id. at 508. Numerous courts have held that the dangers presented by a loaded gun are open and obvious and that a gun is a simple product as a matter of law. Id. at 512. The normal and intended operation of a gun does not place the user in a dangerous position unless the gun is misused by firing at an individual. Id. Gun manufacturers intend for users to fire guns not at themselves or innocent individuals, but at targets, animals, or in the event of self defense, other humans. Id. As stated by the U.S. District Court of Michigan:

> Only a defective person would fail to realize the obvious dangers associated with these actions. [Deliberately picking up a weapon, inserting finger through the trigger guard, pointing weapon at the head of an individual, and pulling the trigger,] . . . a loaded firearm must be considered dangerous . . . it is an instrument of death. That is its primary function. Yet, only deliberative action will cause discharge, when properly handled, the gun can safely be used.

See Raines v. Colt Industries, Inc., 757 F. Supp. 819, 826(E.D. Mich. 1991).

The fact that an individual does not know a gun is loaded is irrelevant. See Davis, 226 F.3d at 512. Any reasonable gun user should know that no gun, loaded or unloaded, should ever be pointed at another human, much less pointed and mockingly fired. Id.; Sherk v. Daisy-Heddon, 450 A.2d 615 (1982)(holding that 14 year old knows better than to point a BB gun at an individual and pull the trigger). As such, the law does not require a manufacturer to design safety features to protect users from the dangers of a firearm when the dangers are "obvious and inherent in the product's utility." See Davis, 226 F.3d at 512. Therefore, where a gun is misused, the alleged product defect cannot be a proximate cause of injury and does not constitute a substantial product hazard defect or

a substantial risk of injury to children. See Davis, 226 F.3d 506; Raines, 757 F.Supp. 819; Sherk, 450 A.2d 615.

In the case of Treadway v. Smith & Wesson Corp., 950 F. Supp. 1326 (E.D. Mich. 1996), the plaintiff alleged that the gun was defectively designed because it could fire from a "hang-up position" without the user intentionally pulling the trigger and because the gun manufacturer did not include a manual safety guard. In that case, the plaintiff was killed when a third party jokingly pointed a .38 caliber revolver at his head and the handgun accidentally discharged. The district court held that a gun was a "simple tool," which is perfectly safe "in adult hands, but dangerous in the hands of unsupervised children." Id. at 1333 (citing Kirk v. Haynes Corp., 163 F.3d 705 (6th Cir. 1994)). Because the risk of harm requires misbehavior on the part of supervising adults and misuse by the user, the court refused to hold that the manufacturer acted unreasonably. Id. at 1333. In Taylor v. Gerry's Ridgewood, Inc., 141 Ill. App. 3d 780, 490 N.E.2d 987 (1986), the court stated that a user who deliberately picks up a gun, inserts his finger through the trigger guard, points it at the head of another, and pulls the trigger, is a defective person who fails to realize the obvious dangers associated with such actions. Id. As such, the Commission cannot show that Daisy BB guns present a product hazard or a risk of injury to children where independent intervening misuse causes injuries, not the alleged defects.

(b) The Consumer Product Safety Commission cannot show that Daisy failed to exercise reasonable care to eliminate an avoidable or foreseeable danger.

In a negligence action, a party must show that a manufacturer failed to exercise reasonable care to eliminate an avoidable or foreseeable danger. See Bolduc v. Colt's Mfg. Co., 968 F.Supp. 16 (D. Mass. 1997). A gun is an obviously dangerous product and is not defective simply because

an injury results from its careless misuse. Id. at 18; Sherk v. Daisy-Heddon, 450 A.2d 615 (Pa. 1982)(holding that the lethal propensity of a BB gun should have been known by the 14 year old user, therefore, liability was not imposed on Daisy). Pointing a gun at another and pulling the trigger is a deliberate misuse "so foreign from any proper use contemplated by [a manufacturer] that it cannot, even by broad construction, be forced within the critical concept of 'intended' or 'ordinary' use." Id. at 18 (citing Venezia v. Miller Brewing Co., 626 F.2d 188 (1st Cir. 1980)). Thus, the cited airguns do not constitute a substantial product hazard defect or substantial risk of injury to children where the only injury results from misuse of the weapon which was not intended by the manufacturer.

As a matter of law, an airgun is not unreasonably dangerous. Moss v. Crosman Corp., 945 F. Supp. 1167 (N.D. Ind. 1996), affirmed 136 F.3d 1169 (7th Cir. 1998) Airguns are not defective where injuries result in a way that is not a foreseeable use of the weapon. Id. at 1183. In Moss, the parents of a child killed by a BB gun alleged that the BB gun was defective due to inadequate warnings. The plaintiffs argued that the airgun should have had warnings because Crosman knew that children used their airguns without supervision and that injuries were foreseeable. Id. at 1180. The Court did not even consider the plaintiffs' failure to warn claim because the Court held that misuse of the BB gun was not foreseeable and therefore, Crosman was not liable for injuries resulting thereof. The Court held:

> The ordinary user of a BB gun or airgun is aware of the danger that a projectile fired from it could hit a person and cause serious injury . . . [t]he Court finds that the ordinary consumer is aware of the risk of being hit by a BB when using a BB gun. . . a product is not unreasonably dangerous if it injures in a way that is known to the community of consumers.

Id. at 1182. To determine whether injury from a BB gun was foreseeable, the Court stated:

> Reasonably expectable use like reasonable care involves questions concerning the ordinary prudent person, or in the case of products liability the ordinary prudent consumer.

Id. at 1182. The Court held that the BB gun manufacturer was not liable because the misuse of the BB gun (firing the BB gun in the direction of an individual) was not a reasonably expectable use:

> Their use was not that of a reasonably prudent consumer, even given their ages, in light of the known risks that BB guns present. 'The intended purpose of a BB gun obviously does not include pointing and firing a gun . . . at another person,' . . . knowingly pointing and firing a BB gun toward another person, even for pre-teens, is not an intended or reasonably expectable use.

Id. at 1183. Therefore, the Court held that Crosman was not liable for the eleven year old's misuse of the BB gun because the misuse was not a reasonably expectable use.

In the case of Sherk v. Daisy Heddon, 450 A.2d 615 (Pa. 1982), the plaintiff's mother sued Daisy after her 14 year old son was killed by a Daisy Model 880 airgun. Id. at 616. The plaintiff claimed that the Daisy Model 880 was defective because Daisy failed to provide an adequate warning of the airgun's lethal propensity. Id. at 617. The Court held that Robert Saenz, the 14 year old, who shot the plaintiff with the BB gun, was legally chargeable with knowledge of the lethal propensity of a BB gun. Id. at 617. The Court held that Daisy was entitled to a verdict in its favor because the allegedly inadequate warning was not the cause of the plaintiff's death. Id. at 620. Where the lethal propensity of a BB gun should have been known to the user, liability cannot be imposed upon the manufacturer when the gun is misused. Id. at 618. Even pre-teens know the risks that BB guns present. Id. Knowingly pointing and firing a BB gun toward another person, even for pre-teens, is not an intended or reasonably expected use of a BB gun. Id.; see also Dias v. Daisy-

Heddon, 180 Ind. App. 657, 390 N.E.2d 222, 225-26 (1979).

In Rosser v. Wal-Mart Stores, Inc., 947 F. Supp. 903 (E.D. N.C. 1996), the plaintiff filed suit against Wal-Mart based on the sale of a Daisy 880 air rifle to a 12 year old boy. The court noted that the Daisy BB gun sold to the plaintiff had warnings on the box which specifically read:

> **Danger – this is not a toy.**
>
> **This airgun should only be used by persons 16 years of age or older.**
>
> **Warning – not a toy, adult supervision required, misuse or careless use may cause serious injury or death.**
>
> **May be dangerous up to 291 yards (266 meters).**
>
> **This is a high powered airgun recommended for use by those 16 years of age or older.**
>
> **Read all instructions before using.**
>
> **The purchaser should conform to all laws governing the use of airguns.**

Id. at 908. The court held that a 12 year old was old enough to be expected to take caution in response to such warnings. Id. Moreover, the court held that the intentional deliberate act of pointing the airgun at one's self and pulling the trigger was the proximate cause of the injury, not a defect associated with the BB gun. Id. at 910. Because the 12 year old's misuse of the BB gun was not foreseeable, Wal-Mart was not liable for the plaintiff's injuries. Id. The court granted Wal-Mart's motion for summary judgment on the plaintiff's claims. Id.

The fact that BB guns have been misused does not create a foreseeable hazard for which Daisy should be held liable. In Bookout v. Victor Comptometer Corp., 40 Colo. App. 417, 576 P.2d 197 (1978), the Court held that the manufacturer of a BB gun was not liable for an eye injury which

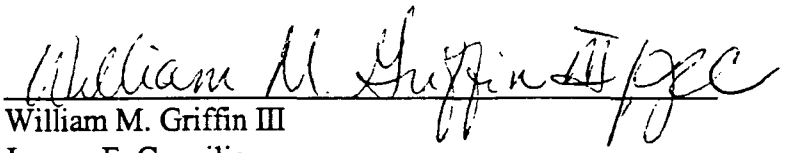
the plaintiff suffered during a BB gun fight because the plaintiff unreasonably used the product with knowledge of the dangers imposed. The Court held that "the potential for danger inherent in a BB gun is readily apparent and a warning for the obvious is not a requirement of the doctrine of product's liability." Id. at 419. Therefore, the plaintiff could not recover against the BB gun manufacturer because the gun manufacturer cannot be liable when consumers do not use BB guns in a reasonably foreseeable manner.

The current matter is no different than the cases cited above. The defects alleged by the Consumer Product Safety Commission include: (1) that the user is lured into believing the airgun is empty when BB's become lodged in the magazine of the gun; (2) that the silver color of BB's manufactured by Daisy prevent a user from easily seeing the presence of a BB in the loading port; and (3) that the lack of an automated safety design is an unreasonable hazard. None of the alleged defects has ever caused injury to a user. See Reichel deposition, p. 30. In all incidents in which an individual was injured by the cited airguns, the rifle was pointed at an individual and deliberately fired, or a BB ricocheted from a weapon that was deliberately fired. Id. at pp. 26-30. Even the Commission's own in-house airgun expert, Mr. Reichel, confirmed that pointing an airgun in the direction of another human being is a misuse of the weapon. Id. at pp. 30-31. Because such misuse is not a reasonably expected use and because the alleged defects have not caused, and cannot cause, injury, the Daisy airguns do not present product hazard defects or substantial risks of injuries to children.

The Daisy airguns cannot be shown to present a substantial product hazard or a substantial risk of injury to children because the Commission cannot show that: (1) the alleged defects cause harm without an intervening cause; (2) misuse of a firearm is something a manufacturer is required

to protect against; and (3) deliberately pointing a loaded weapon at an individual and pulling the trigger is a reasonably expected use of an airgun, even for pre-teens. Moreover, the Commission's own testing shows that the alleged defects do not present a hazard to anyone without an intervening misuse of the gun. For these reasons, the Commission cannot show that the Daisy airguns present a substantial product hazard or risk of injury to children and their claims should be denied.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Notice of Appearance has been served upon all counsel of record by U.S. Mail, postage prepaid and addressed as follows, this 25th day of February, 2003:

The Honorable William B. Moran
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William M. Griffin III

EXHIBIT 1

(Deposition of Ronald Thomas Reichel)



UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

In The Matter Of

DAISY MANUFACTURING COMPANY, INC.
CPSC Docket No. 02-2
doing business as Daisy Outdoor Products
400 West Stribling Drive
Rogers, Arkansas 72756

Respondent

Bethesda, Maryland
Friday, February 7, 2003

Deposition of

RONALD THOMAS REICHEL

a witness called for examination by counsel for Defendant pursuant to notice and agreement of counsel, beginning at approximately 10:15 a.m. at Consumer Products Safety Division, 4330 East West Highway, Room 711, Bethesda, Maryland, before Sandy Medford Nelson, Notary Public in and for the State of Maryland, when were present on behalf of the respective parties:

experience in firearms or air rifles?

A Gosh, I always shot and did hand-loading of rounds for six millimeter 243 rifles, and then later I did hunting with a seven millimeter Remington Magnum.

Q Is that the bolt action?

A Bolt action Winchester.

Q Okay. And did the bolt action have an automatic safety?

A No. The 243 I had also had -- it was a Manlicker and no automatic safety. I've never seen a gun with an automatic safety, except that Plainsman BB gun.

Q That's a very rare and unusual --

A A rare and unusual thing.

Q On the Manlicker and the Remington, you would pull the bolt up, pull it back --

A Yes.

Q -- and that would eject the cartridge, and then load a new shell from the magazine?

A No. They are very different. One of them, the Manlicker, cocks on the up stroke of the

Q Twenty-two's. Whether you're training on air rifles or firearms, the same safety rules apply, don't they?

A Yeah.

Q And one of the things you want is for the user to always know the position of its safety, correct?

A If the gun has a safety.

Q They should always know whether it's on or off?

A Or off.

Q And, in your mind, that's one of the problems with the automatic safety, is it may go on when you pull back the bolt, and you don't know that, correct?

A Right.

Q And it also creates unwanted reliance or reliance on a device you're not likely to find on any other firearm, correct?

A Yeah.

Q So, if you were training on an air rifle that had an automatic safety and that's what you

danger to anybody just sitting there, do they?

A Inherently, they are not dangerous until they are loaded.

Q And the rifle itself, if you don't pump it, is basically inert, isn't it?

A Yeah. There's no energy contained or stored anywhere.

Q So, in order for someone to actually injure somebody with a Daisy 880 air rifle, they have to go through a specific series of steps to cause that to happen, don't they?

A Yeah. To make it so it will fire, there is a specific set of steps you have to follow.

Q And they have to pull the bolt back?

A Correct.

Q If they don't do that, no accident?

A They can't, right. If the bolt is not pulled back, you cannot pump up the gun.

Q And they have to have the barrel tipped up to load the BB's up on there?

A Yes.

Q They also have to close the action to get

it into the chamber?

A Chamber, right.

Q No accident if they don't do that?

A (Nodding.)

Q They have to pump it up, correct?

A Correct.

Q They have to take the safety off, correct?

A Correct. Oh, wait. The safety may be off anyway.

Q It may be off anyway.

A Off anyway.

Q But it has to be in the off position?

A Yes.

Q And they have to point it in an unsafe direction, don't they?

A Yes.

Q And they have to pull the trigger; is that correct?

A Correct.

Q So, in order for there to be an accident with the Daisy 880 or 856, based on your testing, there really has to be deliberate misuse of

product, doesn't there?

MR. STONE: Objection. You can answer the question.

THE WITNESS: I wouldn't say misuse. Well, there has to be a definite action. That can be misuse.

BY MR. GRIFFIN:

Q Okay. In order for a BB to come out of here and injure somebody, the rifle has to be pointed at them or ricochet, correct?

A Yeah, yes, I would say that.

Q Okay. And almost all of the IDI's, if not all of them, you looked at were shootings where the rifle was pointed directly at the individual, correct?

A Correct, and there were shootings reported. There were no reports of the gun firing by itself that didn't result in an injury. I didn't see any of these.

Q Right. The rifle, if it is pointed in the direction of another human being, is misuse, correct?

A Correct.

Q And if you directly point it at someone after you've cocked it, pumped it up, closed the action, taken the safety off, and pulled the trigger, you are engaging in the deliberate misuse of the product, aren't you?

A Well, I can't say deliberate misuse. You are misusing the product. You are not supposed to shoot other human beings, but it was intentional. The gun did what it was supposed to. You pulled the trigger, and it released a BB.

Q And that's what the rifle is designed to do?

A That's correct.

Q And if an individual does that, as far as you are concerned, that's a misuse of the product, isn't it?

A I can't say that -- well, shooting anybody unintentionally is a misuse of the product, but the question is, is it intentional or unintentional.

Q Okay. Well, you have to get the rifle pointed in the direction of somebody else, correct?

A Correct.

Q And you have to pull the trigger, correct?

A Yes.

Q To get this gun to fire?

A Yes. And there's no defect in the product that when you pull the trigger, it fires. I mean, that's the function of the gun, to fire when you pull the trigger.

Q In fact, you looked at these rifles in 1995 at the request of Jay Demarco, didn't you?

A I probably did. I'd have to look and see what you've got there to refresh my memory.

Q Yeah. Let me do that.

A It was when I was a collocated engineer. Jay would ask me many questions on how to do something.

Q And Mr. Demarco was a shooter as well, correct?

A I believe so.

Q And within the Commission, you were probably two of the most knowledgeable people regarding shooting sports, weren't you?

A I'd say that's true.

Q Tell me: In the years 2000 or 2001, were you consulted at all about air guns?

A I can't answer that. I don't remember that.

Q Okay. You know you did tests under Jay Demarco on air guns, correct?

A Never under Jay Demarco.

Q Okay. At his request?

A Yes.

Q Okay. You did tests at his request. Did you do any tests at Richard Wright's request in the year 2001?

A Not that I remember.

Q Okay. And you know Jay Demarco got taken off the air guns in 2000, 2001, didn't you?

A Oh, yeah. I believe I was taken off at the same time.

Q Do you know why you were taken off?

A No.

Q Would it be fair to say the two most knowledgeable people in the Consumer Products

Q And you were aware that they came in Jay Demarco's office and just removed all of his files?

A I didn't know that.

Q Oh, you didn't know that. One of the things you heard is that they, basically, were not happy with the fact you were finding no defects in the Daisy 880 and the 856, correct?

A That is a rumor I heard, correct.

(Defendant's Deposition Exhibit No. 1 was marked for identification.)

BY MR. GRIFFIN:

Q I'm going to show you what's been an exhibit to other depositions. It's a letter from Mark Schoem dated February 3, 1996. It's two pages, and this was written in -- do you remember when Daisy was on 20/20?

A No, I don't.

Q Okay. Well, this was a letter from Mark Schoem sent to Aaron Locker, who represented Daisy. And it states, for the record, the Commission undertook an extensive two-year investigation of

the Daisy 880 BB gun to determine whether it was defective. In November of 1995, the technical staff concluded the Daisy Model 880 BB gun was not defective. Staff evaluating this BB gun included experts in mechanical engineering, metallurgy, and human factors. The BB gun was also found to meet all applicable industry voluntary safety standards. The Commission continues to warn that BB guns are not toys and that they should be used only with adult supervision. That was the position of the Commission in 1995, 1996 as far as you were familiar, correct?

A Yeah. I've never seen this before, but I would say that was the position and -- what was the date on this?

Q The date is on the front. It's February.

A February.

Q 1996.

A 1996.

Q So, as of February 1996, that statement is issued to Daisy, and that comports with your memory of the testing you had done, doesn't it?

A Yes.

Q And that was the position that you, Jay Demarco, and many other people who evaluated Daisy BB guns had as of --

A This was on the 880.

Q On the 880 as of 1996, correct?

A Correct.

Q And is it this position and these findings that someone didn't like and took you guys off the case?

A I have no idea.

Q You were available to do testing on Daisy 880's in 1990 and 1991, weren't you?

A Well, I'm trying to think. That's probably, I think, when Scott started doing more because I was not out at the lab.

Q Scott Snyder was available to do it?

A Yeah. I wasn't as available because I was located primarily here.

Q And Scott --

A But I would consult with Scott.

Q And Scott Snyder was a shooter also,

A Right.

Q Yeah. In the early 1970's, this side was solid. It's been completely opened up?

A Opened up, right. So, when you say 880, it kept the same designation.

Q Did you have every trouble seeing a silver BB in the feed port?

A No. I didn't look for it all the time.

Q No. But if you looked --

A You didn't need to.

Q No. It loaded every time you worked with it.

A Right.

Q But if you wanted to see a silver BB, did you ever have any trouble seeing a silver BB?

A No.

Q Do you know where anyone at the Consumer Products Safety Commission would get the idea it's hard to see a silver BB?

A I don't understand that.

Q I mean, that's totally ludicrous, isn't it?

A To me, it is.

Q And the idea that this rifle should have an automatic safety, that's total ludicrous to you as well, isn't it?

A I think automatic safeties would not be a good thing on any guns.

Q And that's the position of every writer you've ever heard about as well, isn't it?

A I haven't read.

Q Oh, you haven't read?

A These are just things that I have discussed with my brothers and other shooters at times.

Q And you determined back as early as 1995 that you could lodge BB's in here if they were oily or dirty --

A If somebody, you know, had really put some excessive oil -- excessive oil is a real danger on any of these.

Q It's not just this. If you get too much gunk or debris on a firearm, it may not load reliably?

A Right.

Q And whether you have a gravity feed system or a force feed system, if they get dirty, they may not feed reliably?

A Right.

Q No firearm or air rifle that you've ever used was totally infallible in feeding, correct?

A Correct.

Q And just because a BB doesn't load or a bullet doesn't load, doesn't give anyone the right to point a rifle at somebody and pull the trigger, does it?

A Never.

Q Does it?

A Never.

Q So, BB's lodging in the magazine of an 880 or 856 is no defect at all, as far as you're concerned, is it?

A I would not want -- well, I wouldn't say it's a defect. It's a hazardous situation if they lodge. I was never able to get anything to lodge.

Q Okay. If a BB lodges, you don't want that

to happen?

A You don't want that to happen.

Q Just like on any of the rifles or shotguns you've used, you don't want the one shell to stovepipe, and the other one not to load?

A Right.

Q You don't want that to happen?

A Right.

Q But it's going to happen.

A It happens.

Q And it's not going to happen just to Daisy. It's going to happen to every rifle or every firearm made, isn't it?

A Well, any of these large chambered -- where you can put a hundred rounds in a magazine -- there's never any assurance that another BB just isn't in there, you know. You can't, by shaking a rifle make -- that's not a way. I'm sure Daisy in their instructions never said that's the way to check.

Q One of the things that you want to make sure -- well, let's go back to this. The BB's,

even if they are lodged in the magazine, do not present a hazard to anyone --

A Until they feed.

Q Someone has to feed them manually into the chamber?

A Yes.

Q So, they don't automatically get into the chamber, do they? They have to be manually fed in there?

A True.

Q So, BB's lodged in the magazine, as far as you were concerned when you were doing your testing, that wasn't how you wanted the gun to operate, if it happened. But it wasn't going to present a hazard to anybody if they didn't manually go through all the steps?

A That's right.

Q So, the real hazard as far as the BB's lodging is not the gun itself, but the user intentionally then doing something with the product, correct?

A Will you say that again?

Q Okay. That wasn't very clear. I agree. BB's lodged in the magazine do not present any hazard because they can't be fired, correct?

A They are not in a position to be fired, correct. A BB has to be in the chamber for it to potentially harm anybody.

Q And when you did your testing, you were unable to get BB's to lodge; is that correct?

A I'm not sure. You'd have to show me what I said in the reports. I haven't seen these reports for...

Q Okay. Let me mark these two, and I'll just give them to you so you'll have them.

(Defendant's Deposition Nos. 3 and 4 were marked for identification.)

(Brief recess.)

BY MR. GRIFFIN:

Q I'm going to show you, Mr. Reichel, Exhibits 3 and 4. I'm going to ask you to look at those and let me know if those are your reports.

MR. STONE: Could I make a suggestion that

Q And yet, after all of these studies were done, the Commission staff concluded the Daisy Model 880 gun not defective; is that correct?

A That's what this says here.

Q So, even after you advised them that BB's could lodge in the magazine under certain circumstances, the conclusion of the Commission staff was that's not a defect; isn't that true?

A That appears from this paper to be true.

Q And, in fact, your opinion on July 10, 1995, I think, in the summary portion in the second sentence, basically, there were no design faults found with the air gun. That was your opinion?

A Yeah. The request, I'm sure, on that was to list any design faults that you find.

Q And you found none in the 880 --

A Well, what I don't have on this is the PSA request.

Q And we don't either. And in that regard, a number of things are stamped "draft" here at the Commission, aren't they?

A Yes.

there's not a BB near it --

Q Right.

A -- when there is. And this BB can become unlodged, and then when they are doing something -- they are cocking the gun inside or something, without looking, the gun can become loaded.

Q But it only becomes loaded if they pull the bolt back --

A And don't look.

Q And the BB has to go across the visible feeding port?

A Right.

Q And whether it's loaded or unloaded -- well, regardless of the condition, it's supposed to be treated as if it's loaded?

A It's supposed to be.

Q But some people don't?

A Some people don't. The majority of accidents happen when people are misbehaving with the gun, and they claim, I didn't know the gun was loaded. But they point it at somebody and pull the trigger, which is a definite no-no.

Q According to depositions they've taken, Wal-Mart actually has a scanner on there. It pops up on the screen, and you have to show identification. If that is, in fact, true, not only is there misuse by the actual shooter in these accidents, there's misuse by the responsible adult who purchased the product; is that correct?

A I felt that.

Q In fact, that's your belief about almost any --

A Well, the thing is that if we'd had guns like this when we were kids, we never would have shot them at each other because we would have realized the velocity.

Q The first time you fired one of these, you realized --

A Yeah. You realize this is, hey, this is -- your old BB guns -- they were steel cans, but they would not even penetrate it.

Q No. The first time you fire one of these, you see what --

A And you would not aim it.

Q Right. And, in your mind, most of these accidents that you can remember looking at --

A Are violations of safety rules.

Q And violation of parental responsibility.

A Well, I don't think any one of them would have happened if they hadn't been aimed at somebody.

Q Right.

A And I think the aiming was intentional.

Q The product --

A In most of the cases, you know.

Q The product is doing what it's supposed to do, correct?

A It's hard to see fault in the product when somebody pulls the trigger and it fires.

Q And if we really want to reduce accidents with air guns or firearms, if that's really the goal of the Consumer Products Safety Commission, what you would recommend, and any reasonable shooter would recommend, is more hunting and safety courses, shooter courses, those types of programs, correct?

safety. I wouldn't even want to bring the concept of automatic safeties into consideration.

Q And that is a logical design choice by a manufacturer, as far as you are concerned, not to put an automatic safety on that rifle, correct?

A I think it would be one of the choices they make, and it's logical, and there's reasons not to.

Q And, in fact, in your mind, that's the best decision, isn't it?

A I would not like to see automatic safeties on any weapons or any guns. I shouldn't say weapons, but any firearms because I think it brings a false sense of security. And when you need the reliability, it could possibly impede the correct functioning.

Q Another thing the Consumer Products Safety Commission alleges is that because BB's may lodge in a Daisy 880 or an 856 air rifle, that the rifle is somehow defective and should all be recalled. You told the Commission staff in 1995 that, in fact, BB's could lodge under certain circumstances,

Q So, I guess what I'm saying is the fact that BB's lodge in a magazine from time to time doesn't create a defect that's dangerous to anybody, unless somebody misuses the product, correct?

MR. STONE: Objection. Go ahead.

THE WITNESS: I would say its potential. One of the hazards of any BB lodging in there is you may, you know, get the impression -- it's a false impression if the gun is in a relatively safe state.

BY MR. GRIFFIN:

Q And that's what you explain in your memos in 1995, correct?

A Correct.

Q And despite that finding, the Commission in 1996 found no defect, correct?

A Apparently, I mean, their statement says that.

Q What in the world could change from 1995 to 2000 to now the Commission believes that BB's lodging are defective --

A Well, you told me they used odd-sized BB's. ASTM requires certain standards on BB's, you know, roundness and certain dimensions.

Q Well, you don't think that would be a reason to recall somebody's product because you use somebody else's defective BB's, do you?

A Well, people try to do very stupid things. They try to reuse BB's.

Q Right. But that's not an indictment of the Daisy 880, is it?

A No.

Q And tell me, what could have possibly changed from 1995 to now. When you all looked at the product, you saw no need for an automatic safety, correct?

MR. STONE: Objection. Hold on a second. Objection. Foundation. Calls for speculation. You can answer, if you can.

BY MR. GRIFFIN:

Q Okay. Let me rephrase it. In 1995, the Commission staff and the engineering staff, people looking at this, found no reason for a Complaint to

be issued or for a recall of these rifles, did they?

A According to Mark Schoem's statement there, that's the position they took at that time.

Q And as long as you looked at Daisy air rifles, the Powerline series, you found no reason to tell anybody that these rifles needed to be recalled, were defective or dangerous, did you?

A That's true. I found no reason.

Q And that was the same position that everyone that you worked with had on the Daisy air rifles?

A I believe that's so. That's what my impression is. As I recall it now, nobody found...

Q Well, tell me, when you all found out about this Complaint being issued against Daisy -- you heard about it, didn't you?

A I heard about it, but I never read the Complaint.

Q Did you talk to Jay Demarco? Did you talk to Scott Snyder? Did you talk to other people who knew air guns?

Q Exhibit 6 will be two pages, the 880 and 856 tests, to this deposition.

(Witness examined document.)

THE WITNESS: What is your question?

BY MR. GRIFFIN:

Q Okay. Do Exhibit 5 and Exhibit 6 represent work that you did on Daisy 880 and 856 air rifles as late as 1997?

A I'm trying to see the dates. Yes, this is '97, yes.

Q Do you remember being involved in an air gun mini project that was set up by Jay Demarco and, I think, Scott Snyder?

A Yes, I remember that.

Q And various disciplines were involved in evaluating Daisy the 880, as well as many other manufacturers' air rifles, correct?

A Correct.

Q And, as a result of all of those studies in '97, only one air rifle was found to be hazardous, and it wasn't Daisy; isn't that correct?

A Now, you're talking about the one that had

a drop test failure?

Q Right.

A I believe that was the one we found out.

Q So, as late as 1997 after this multi-disciplinary approach -- this multi-disciplinary approach was done in 1997, correct?

A Correct. These same tests were done on a whole series.

Q The same tests were done on other manufacturers --

A Right.

Q And the purpose of the project was to look at the IDI's again, the injuries, look at how these accidents happened, and test all these manufacturers' products, correct?

A Correct.

Q And after this multi-disciplinary approach in 1997 again, there was no finding that Daisy air rifles should be recalled, was there?

A Right. From this, I can't see there was any indication of that.

it was an open secret here at the Commission it was Daisy --

A Well, you've got to realize I was out of the lab, not here at the Commission, and we don't get as much information out there.

Q Maybe that's good. That's pretty much true, though, isn't it?

MR. STONE: Objection. Lack of foundation.

THE WITNESS: I can't really state that that.

BY MR. GRIFFIN:

Q Was that your opinion?

MR. STONE: Same objection. Go ahead.

THE WITNESS: I felt that she had it in for BB guns. We knew that. Jay and I felt like that when we were taken off of that, and other people that had worked on this. We didn't find fault. She was upset with us for not finding fault.

BY MR. GRIFFIN:

Q And as far as you and Jay and Scott Snyder

the chamber; isn't that correct?

A True.

Q And so, to put a visible feed track, it can sometimes be misleading, correct?

A Yes.

Q And do you find any fault with Daisy for not putting a visible feed track on here?

A No. But it's never been -- I didn't find any fault over the years with Daisy.

(Brief recess.)

BY MR. STONE:

Q Just as a preliminary matter, in 1995 and 1996 when you did those studies and when that statement -- do you have that statement?

A Which one?

Q The statement that's marked -- it's marked as Exhibit No. 1 -- were issued -- who was the Chairman of the agency?

A I don't know. I'm totally unaware. Before Anne Brown, it was Jacqueline Jones Smith.

Q And she was the Chairman during the Bush Administration, wasn't she?

ask you about your observations. In your observations of kids handling guns, do they always understand when they first start to handle a gun that their fingers shouldn't be inside the trigger guard?

A No. They don't understand that.

Q That's something you would teach a child, right?

A Yes. Don't put your finger in the trigger guard until you intend to shoot. But the other thing that kids do that was very upsetting is they get very hazardous when they try to make a shot and the safety has been left on. They seem to panic when the weapon doesn't fire right. That's when they pick it up and swing it around, and this is what happens with the automatic safety. If it's on and they try to pull the trigger and it won't go off, they are wondering what's wrong. Then they bring the gun around, it sweeps, and it's not treated like it's loaded. They know it's not working.

Q Now, this is based on your observation of

caliber -- what caliber might be ideal, if you choose one caliber, it might be interchangeable between machine guns and rifles.

Q In your experience M16's, don't have any safeties, right?

A They have a safety on.

Q They don't have an automatic safety?

A No, no automatic safety.

Q Are you aware of any repeater rifles that have automatic safeties?

A I'm not aware of any, but I understand that there are some.

Q Are you aware of any break barrel guns that have automatic safeties?

A I'm not aware of any.

Q Are you aware of whether there are any?

A No.

Q Are you aware of, other than the Marksman gun, whether there are other BB guns with automatic safeties?

A I've never seen one.

Q Would it surprise you -- never mind. Are

CERTIFICATION OF SHORTHAND REPORTER - NOTARY PUBLIC

I, Sandy Medford Nelson, the officer before whom the foregoing deposition was taken, do hereby certify that the foregoing transcript is a true, correct record of the testimony given; that said testimony was taken by me stenographically and therefore reduced to typewriting under my supervision, and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS THEREOF, I have hereunto set my hand and affixed my notarial seal this 14th day of February 2003.

My commission expires:

March 14, 2006

Sandy Medford Nelson

SANDY MEDFORD NELSON

NOTARY PUBLIC IN AND FOR

THE STATE OF MARYLAND

EXHIBIT 2

(Deposition of Richard Kearney Wright, Jr.)



UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

In The Matter Of

DAISY MANUFACTURING COMPANY, INC.
CPSC Docket No. 02-2
doing business as Daisy Outdoor Products
400 West Stribling Drive
Rogers, Arkansas 72756

Respondent

Bethesda, Maryland

Friday, January 24, 2003

Deposition of

RICHARD KEARNEY WRIGHT, JR.

a witness called for examination by counsel for Defendant pursuant to notice and agreement of counsel, beginning at approximately 1:51 p.m. at Consumer Products Safety Division, 4330 East West Highway, Fourth Floor, Bethesda, Maryland, before Sandy Medford Nelson, Notary Public in and for the State of Maryland, when were present on behalf of the respective parties:

A Okay. A BB is visible at this point.

Q When you pull the bolt back?

A Pull the bolt back, yes.

Q Okay. Did you fire the Daisy 880?

A At some point, I think I did.

Q And when you would do that, you would pull the bolt back, tip the barrel up, and a BB would load onto the magnetic tip, and then you would push it into the chamber?

A Correct.

Q Okay. And the BB becomes visible as it attaches to the magnetic tip, and you can see it right there if you want to tell whether it's loaded, correct?

A You should be able to, yes.

Q And if you pull it back, you see the BB on the bolt tip if you want to check afterwards, correct?

A I would say yes. And, if I remember, that seemed to be in Daisy's instructions.

Q And, as far as you were concerned, that was a good feature of the rifle, that this area was

left open where a BB could be seen as it loaded into the chamber?

A I'd say it's a good feature that you can see it, yes.

Q And that was never an issue, as far as you were concerned as the Compliance Officer in charge, that a BB could not be seen?

A We agree that I was not charge.

Q Okay. Well, you're the one whose name is on it. That's why I'm asking.

A Okay.

Q The bolt tip held the BB and pushes into the chamber across this open, visible loading port, correct?

A Yes, and I would say that's a good feature, yes.

Q And when you operated the rifle, you had no difficulty whatsoever in visualizing the BB going into the chamber if you looked, correct?

A I had no trouble when I looked, yes.

Q And you would agree with me that BB's in the magazine cannot be fired from this rifle

BY MR. GRIFFIN:

Q And all I want to know --

A I would assume if I took that gun apart and put it back together, I could put the safety there so it looks like it's functional, and it's not.

Q And that's not my point. I'm talking about from a design standpoint, if it's functioning. The design itself, to you, is fine. A manual safety on a high-powered rifled is an okay design, correct?

MS. NGUYEN: Objection.

BY MR. GRIFFIN:

Q If it functions?

MS. NGUYEN: Objection.

THE WITNESS: I would say if it functions, it a reasonable thing to have on there, should be on there. It's just something that can improve it, I don't know.

Q Okay. During the entire time you were involved in the investigation, and up until today, you've never advocated changing the design of the

Daisy safety to some other design, correct?

MS. NGUYEN: Objection.

THE WITNESS: I did not advocate it, but I did not get enough information, be involved in studies long enough, to decide if there wasn't something better.

BY MR. GRIFFIN:

Q Okay. And, to your knowledge, during the time you were involved, there wasn't anything better that came up, correct?

MS. NGUYEN: Objection. Mr. Wright is not an engineer. He's not a gunsmith.

MR. GRIFFIN: That's not what anybody said. Would you please read the question back for me?

(Whereupon, the Court Reporter read back the previous question.)

THE WITNESS: Not to my knowledge, there's nothing on the market that's better. But once again, I have not done what you would call a continued search to find out if there's something

CERTIFICATION OF SHORTHAND REPORTER - NOTARY PUBLIC

I, Sandy Medford Nelson, the officer before whom the foregoing deposition was taken, do hereby certify that the foregoing transcript is a true, correct record of the testimony given; that said testimony was taken by me stenographically and therefore reduced to typewriting under my supervision, and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS THEREOF, I have hereunto set my hand and affixed my notarial seal this 4th day of February 2003.

My commission expires:

March 14, 2006

_____

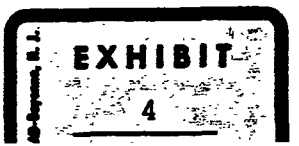
SANDY MEDFORD NELSON

NOTARY PUBLIC IN AND FOR

THE STATE OF MARYLAND

EXHIBIT 4

(Exhibit 3 to Mr. Reichel's Deposition)



MEMO RECORD

TO : Jay DeMarco, CECA June 5, 1995
FROM : Ronald T. Reichel, ESE

SUBJECT: Field Test of "Multi-pump, Pneumatic, Power Line, 4.5mm, Model 880" Air Gun, Daisy Manufacturing Co., Inc., Rogers, AR 72757, No PSA Number, No Sample Number

SUMMARY: This air gun is designed to fire both 4.5mm B-Bs and lead pellets (.177 caliber). Pellets are loaded one at a time and B-Bs can be loaded one at a time or gravity fed from an internal magazine. There is no visual way to check this internal magazine to see if it contains up to 100 B-Bs. Shaking the gun usually reveals if the magazine is loaded or not, but a single B-B can remain stuck in the magazine and not move when the gun is being shaken. In this case the gun magazine appears to be empty when it is NOT empty.

Firing Tests: These tests were performed without reading the instruction manual in order to simulate the circumstances of the gun being handed down without the manual. The firing sequence is outlined in raised letters on the receiver of the gun. The steps are: Open bolt, Put "ON" safety, Pump, Load, Close bolt, Aim, Take "OFF" safety, and Fire. The following observations were made during these firing tests:

The open bolt position allows a visual check of the B-B loaded from the magazine or a pellet manually loaded. A B-B loaded from the magazine is held in position by a magnet on the bolt face. The gun must be pointed upward to allow gravity to feed a B-B onto the bolt face. If the barrel of the gun remains pointed toward the ground during the firing sequence a B-B will not feed from the magazine and the magazine may be thought to be empty. Pointing the gun upward quickly confirmed that the magazine was still loaded as the B-Bs rattled around.

About 25 B-Bs were in the magazine of the gun (as received for testing). These were fire with 4 pumps each at the ground. The magazine was reloaded with 25 more B-Bs and these were fired at the ground. The barrel of the gun was pointed upward and a visual confirmation of the presence of a B-B on the face of the bolt was made every time the bolt was closed. The magazine fed the B-Bs accurately and there were no miss feeds during the firing of all 50 shots. It was noted that the gun cannot be pumped if the bolt is not initially opened (the first step).

Another 50 B-Bs were loaded into the magazine and fired with just one pump. As I fired more shots, I did not find it necessary to visually check for the presence of a B-B on the bolt face. There were no miss feeds during any of these 50 shots.

NOTE: If the B-Bs were oily, they might stick to the sides of the magazine like rice sticks to a moist measuring cup. When no B-B fed from the magazine on to the magnetic tip of the bolt, the butt of the gun was bumped against the ground in an attempt to make sure that no more B-Bs remained in the magazine.

FOR OFFICIAL USE ONLY

EXHIBIT 3

EXHIBIT 5

(Exhibit 4 to Mr. Reichel's Deposition)



MEMO RECORD

TO : Jay DeMarco, CCA
FROM : Ronald T. Reichel, ESEE

July 10, 1995

SUBJECT: PSA 0614-95, "Power Line 880", High Power, Multi-pump Pneumatic, .177 caliber pellet and BB air rifle, Daisy Manufacturing Co., Inc., Rogers, Arkansas, 72757, Sample No. S-793-0063

SUMMARY: In several hours of attempting to have a BB hang up in the magazine and not be detected by either shaking the gun or opening the bolt, no attempts were successful. There were no design faults found with the air gun. The gravity feed design of the rifle requires that the muzzle be raised in order to load a BB from the magazine into the chamber. Whenever the bolt is moved forward a BB is visible on the magnetic tip of the bolt. Pulling the bolt backward even after the gun is loaded and ready to fire will expose the BB on the tip of the bolt.

If the bolt is moved to a slightly forward position with the muzzle down, the magnetic tip of the bolt will lock a single BB so that it will not be detected when the gun is shaken. Continuing to move the bolt forward will not load the BB into the camber and the rifle will dry fire. Pulling the bolt back with the muzzle elevated will cause the gun to load the next time the gun is fired.

DRAFT

FOR OFFICIAL USE ONLY

EXHIBIT 4 REICHEL

EXHIBIT 6

(Deposition of James A. DeMarco)



In The Matter Of:

DAISY MANUFACTURING COMPANY, INC.
d/b/a DAISY OUTDOOR PRODUCTS

JAMES A. DEMARCO
Vol. 1, August 6, 2002

BETA REPORTING & VIDEOGRAPHY SERVICES
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Original File AADEMARC.TXT, 133 Pages
Min-U-Script® File ID: 2850869438

Word Index included with this Min-U-Script®

mission on [12] Section 15 on product defects and hazards.

[13] I certainly believe it's a team [14] position and, certainly, you're not a [15] separate entity. You work closely — I've [16] worked with Bill over the years and many of [17] the attorneys at the Commission.

[18] I've worked with technical staff [19] and certainly close to Richard's supervisor, [20] who, you know, over the years I have had a [21] few, and kind of directs you and makes sure [22] your work is progressing and so forth.

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[1] **Q:** I got the idea from looking at [2] some of the prior studies that have been [3] done on Daisy air guns that you put together [4] teams of engineers, Human factors, maybe [5] someone from legal, to examine, at least, as [6] Daisy products over the years. Would that [7] be fair to say?

[8] **A:** I don't think I put the teams [9] together. It would be a supervisory [10] position to do so. But I worked on it, if [11] that's what you're asking.

[12] **Q:** Would you be the one that kind of [13] rode herd over them? Is that a wrong word [14] to use?

[15] **A:** Yes.

[16] **Q:** Who issued the PSA?

[17] **A:** I issued PSA's. Correct.

[18] **Q:** What was your role in these [19] evaluations? Because I see that you [20] requested a lot of evaluations, but I don't [21] know how that all works.

[22] **A:** I guess compliance officers are

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[1] given product areas, and non-powdered air [2] guns was my product area.

[3] Before it was my area, it was Marc [4] Schoem's. Marc kind of tutored me. He was [5] my supervisor. And, I guess, for lack of a [6] better term, I guess you could say that the [7] compliance officer is a coordinator.

[8] I wouldn't say that I make [9] ultimate decisions of any kind.

[10] **Q:** But going back to 1987, you were [11] the compliance officer over non-powdered air [12] guns. Correct?

[13] **A:** Yes.

[14] **Q:** What year did you start?

[15] **A:** Late '84, early '85. [16] December 25, 1984 was my date.

[17] **Q:** When did you start at the as the [18] air gun guy, if I can use that term?

[19] **A:** I'd guess maybe a year after.

[20] **Q:** How long did you remain the [21] compliance officer for air guns or [22] non-powdered air guns?

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[1] **A:** I think I still am.

[2] **Q:** I'm curious because somewhere [3] around the year 2000, you no longer show up. [4] Why is that?

[5] **A:** I'm not sure I understand the [6] question. Meaning I don't show up how?

[7] **Q:** Everything seemed to be have been [8] routed through you through 1999. After that [9] point, everything as far as non-powdered air [10] guns, PSA requests, Human Factors, [11] evaluations. I think you even put together [12] a mini project at one time as to air guns. [13] Correct?

[14] **A:** Correct.

[15] **Q:** Sometime in 2000, or sometime [16] shortly around in that area, nothing goes to [17] you anymore that I can find. Why is that?

[18] **MR. MOORE:** Objection. You can [19] answer.

[20] **BY MR. GRIFFIN:**

[21] **Q:** Why is that?

[22] **A:** I was taken from the case by my

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[1] supervisor, who is Carlos Perez. I was [2] asked not to work on this case.

[3] **Q:** This case? The Daisy case?

[4] **A:** Yes.

[5] **Q:** Did he give you a reason why?

[6] **A:** I believe the reason I was given, [7] as I recall, was they wanted to take a new [8] look at it. The problem, I guess.

[9] **Q:** Was there any other reason that [10] you knew of or that you were told?

[11] **MR. MOORE:** Objection. Asked and [12] answered.

[13] **THE WITNESS:** I was told no other [14] reason.

[15] **BY MR. GRIFFIN:**

[16] **Q:** Did you hear another reason from [17] any other source?

[18] **A:** Well, can I ask Bill a question?

[19] **MR. MOORE:** Yes. You may.

[20] (Witness conferred with counsel)

[21] **THE WITNESS:** Okay. All right. [22] Based on my personal knowledge, it was,

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[1] guess, because supervisory staff didn't feel [2] that the outcomes of the past were or the [3] outcomes that were what they wanted.

[4] **BY MR. GRIFFIN:**

[5] **Q:** In the past for almost, I [6] guess, 13, 14 years, you had coordinated [7] reviews of air guns, worked with both the [8] ASTM and manufacturers in attempting to have [9] some changes made that you thought were [10] appropriate and try to handle all your [11] investigations in a fair manner, both for [12] consumers and for the companies. Correct?

[13] **A:** Yes.

[14] **MR. MOORE:** Objection. [15] Foundation.

[16] **BY MR. GRIFFIN:**

[17] **Q:** Over those 13, 14 years, the [18] consensus opinion of your groups that you [19] worked with was that there was no necessity [20] of recalling the Daisy power line air [21] rifles. Correct?

[22] **MR. MOORE:** Objection.

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[1] **THE WITNESS:** Yes.

[2] **BY MR. GRIFFIN:**

[3] **Q:** Sometime — was it in the [4] year 2000 — your supervisors decided to [5] take those cases away from you?

[6] **A:** That one case.

[7] **Q:** Daisy or all air guns?

[8] **A:** Initially, Daisy.

[9] **Q:** Did they ultimately take all air [10] guns?

[11] **A:** I don't believe so. I know one [12] other company was. Should I repeat it?

[13] **MR. MOORE:** You can't use the [14] names.

[15] **BY MR. GRIFFIN:**

[16] **Q:** Did you retain any air gun cases?

[17] **A:** I have none now.

[18] **Q:** You attended a number of ASTM [19] meetings over the years. Correct?

[20] **A:** Two, maybe three.

[21] **Q:** You knew people within the ASTM [22] that you could call? You had open access

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[1] with a number of the companies and the [2] people at ASTM. Correct?

[3] **MR. MOORE:** Objection. Open [4] access.

[5] **BY MR. GRIFFIN:**

[6] **Q:** Correct?

[7] **A:** Yes.

[8] **Q:** It's my understanding that you [9] always run your office that way. You want [10] to be fair, and you listen to all parties. [11] It is that fair to say?

[12] **A:** Absolutely. On every product [13] there.

[14] **Q:** I mean not limited to air guns?

[15] **A:** Absolutely.

[16] **Q:** But you've looked at a number of [17] consumer products over the years?

[18] **A:** Absolutely.

[19] **Q:** You believe one of your [20] responsibilities is to be fair to all sides. [21] Correct?

[22] A: Yes.

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[1] Q: Did you maintain a file related to [2] Daisy?

[3] MR. MOORE: Objection. That's [4] very broad.

[5] BY MR. GRIFFIN:

[6] Q: Go ahead.

[7] A: Do you mean to any specific Daisy [8] cases? Or Daisy in general?

[9] Q: Did you maintain something [10] regarding Daisy power line air rifles?

[11] A: Yes.

[12] Q: How big was that file?

[13] A: It was pretty sizeable. [14] Thousand, 2000 pages.

[15] Q: Do you still have it in your [16] office?

[17] A: I was instructed to give it to the [18] new compliance officer. My supervisor had [19] it removed.

[20] Q: They removed it from your office?

[21] A: Which was fine. I was reassigned [22] off my case, so my supervisor said, " Where

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[1] is it?" And he had a student intern remove [2] the file from my office.

[3] Q: Were you in the office when they [4] came in to remove it?

[5] A: I think so.

[6] Q: Who was reassigned this?

[7] A: Richard Wright.

[8] Q: Richard Wright was reassigned to [9] Daisy?

[10] A: Yes.

[11] Q: I think Mr. Wright told us he was [12] assigned cross bows as well. Is that true?

[13] MR. MOORE: Objection.

[14] THE WITNESS: I don't know.

[15] BY MR. GRIFFIN:

[16] Q: Before the year 2000, had Richard [17] Wright ever been involved in any of the [18] studies, discussion groups or anything [19] involving air guns that you are aware of?

[20] A: Not that I am aware.

[21] Q: You would have been aware of that, [22] though. Correct?

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[1] MR. MOORE: Objection.

[2] THE WITNESS: I would if I were [3] working the cases, and they assigned him to [4] work with me. I can, you know —

[5] BY MR. GRIFFIN:

[6] Q: But you worked all the Daisy cases [7] from 1987 forward. Didn't you?

[8] A: I don't think all. I think Marc [9] Schoem worked some.

[10] Q: All power line cases?

[11] A: Oh.

[12] Q: From 1987 until the year 2000, you [13] worked —

[14] A: I don't know for sure if I did. I [15] mean, I did work them, but I don't know if I [16] looked everywhere.

[17] Q: But you worked most of them. [18] Correct?

[19] MR. MOORE: Objection. That's not [20] what he answered.

[21] BY MR. GRIFFIN:

[22] Q: Go ahead. You can answer.

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[1] A: I guess.

[2] Q: I don't want to get you in some [3] kind of trouble or something like that.

[4] But what I'm trying to understand, [5] you go along for 13 years looking at air [6] rifle cases. And different companies from [7] time to time have made changes at your [8] suggestions. ASTM has had you come to their [9] meetings.

[10] You have probably had much [11] knowledge as anyone in the Commission at [12] that time. Correct?

[13] MR. MOORE: Objection.

[14] THE WITNESS: I would think so.

[15] BY MR. GRIFFIN:

[16] Q: You're just pulled off the case?

[17] MR. MOORE: Is that a question?

[18] BY MR. GRIFFIN:

[19] Q: Is that correct?

[20] A: Yes. I was taken off the case.

[21] Q: They said they wanted to take a [22] fresh look at it?

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[1] A: I don't know if those are the [2] exact words.

[3] Q: Did you make any further inquiry [4] of anybody else, other than your supervisor, [5] as to why you were being taken off the case?

[6] A: I don't think I did.

[7] Q: What did you hear from other [8] people about why you were taken off the [9] case?

[10] MR. MOORE: Objection. He can [11] answer.

[12] THE WITNESS: I think it was [13] because it was my belief that the position [14] that we came out at was not the one that the [15] chairman wanted.

[16] BY MR. GRIFFIN:

[17] Q: Chairman Anne Brown wanted Daisy [18] air rifles recalled. Is that correct?

[19] MR. MOORE: Objection. [20] Foundation. Speculation as to what was in [21] your mind.

[22] THE WITNESS: I think you'd have

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[1] to ask the attorneys that worked the case. [2] She never said it directly to me.

[3] BY MR. GRIFFIN:

[4] Q: No. But that's what you felt [5] personally and that's what others around you [6] felt as far as the Daisy project was [7] concerned. Correct?

[8] MR. MOORE: Objection as to what [9] others around you may have felt.

[10] BY MR. GRIFFIN:

[11] Q: Is that correct?

[12] A: Yes.

[13] Q: As far as you could tell, they [14] assigned people to the air gun project that [15] it had no prior experience with air guns. [16] Correct?

[17] MR. MOORE: Objection.

[18] THE WITNESS: I don't know. I [19] mean, I don't know if they did. Who made [20] the assignments. I didn't know it was —

[21] BY MR. GRIFFIN:

[22] Q: Well, you had good in-house

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[1] engineers here. Correct?

[2] A: I thought so.

[3] Q: Ron Reichel?

[4] A: Yes.

[5] Q: Experienced. Knowledgeable. Had [6] done PSA's for you over many years? [7] Correct?

[8] A: Yes.

[9] Q: Mr. Snyder had done PSA's for you. [10] Correct?

[11] A: Yes.

[12] Q: Mr. Caton did at least one PSA for [13] you. Correct?

[14] A: Yes.

[15] Q: You thought they were qualified to [16] determine whether these products were [17] defective and needed to be recalled? [18] Correct?

[19] MR. MOORE: Objection. That's a [20] legal decision. They don't make that [21] decision in engineering.

[22] THE WITNESS: I'd probably say

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[1] that, as well as myself that supervisory [2] staff, would think that they were qualified [3] in the past.

[4] BY MR. GRIFFIN:

[5] Q: Well, nothing happened —

[6] A: I mean, I don't assign them to the [7] case. If Tom or these other people were

[8] assigned or someone else who knows their [9] capability and product abilities.

[10] **Q:** From your experience in working [11] with them, they seemed well qualified to [12] work with you on these cases. Didn't they? [13] The air guns cases?

[14] **A:** Yes. I was happy with their work.

[15] **Q:** Did you feel any need any at time [16] you were working the air guns investigations [17] to go to outside — not air gun experts — [18] but just gunsmiths to look at the products?

[19] **MR. MOORE:** Objection. How many [20] products are we talking about?

[21] **MR. GRIFFIN:** We're talking about [22] air guns.

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[1] **MR. MOORE:** Well, BB guns?

[2] **MR. GRIFFIN:** We're talking about [3] air rifles. He knows what I'm talking [4] about. Let's go.

[5] **MR. MOORE:** Well, let's clarify it [6] for the record. We talking about Daisy [7] power line rifles.

[8] **BY MR. GRIFFIN:**

[9] **Q:** Did you feel any need to go to [10] some gunsmith in the State of Washington to [11] look at these air rifles to determine [12] whether they were defective or not?

[13] **A:** I never did, not that I recall.

[14] **BY MR. GRIFFIN:**

[15] **Q:** Did anyone at the Commission over [16] the 13, 14 years you were looking at air [17] rifles, did they ever suggest up until the [18] day they pulled the cases from you that you [19] were incompetent in handling these?

[20] **MR. MOORE:** Objection.

[21] **THE WITNESS:** No.

[22] **BY MR. GRIFFIN:**

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[1] **Q:** Did anyone suggest that the [2] research done by Mr. Caton, Mr. Reichel and [3] Mr. Snyder was flawed?

[4] **A:** No. Not to my knowledge.

[5] **Q:** Why do you believe that the recall [6] was motivated by Anne Brown?

[7] **A:** I don't know why.

[8] **Q:** No. Why, in your mind, do you [9] believe it was a politically-motivated [10] decision to seek a recall against —

[11] **MR. MOORE:** Objection.

[12] **THE WITNESS:** I didn't say it was [13] political.

[14] **BY MR. GRIFFIN:**

[15] **Q:** Well, you were aware Anne Brown [16] had tried to get jurisdiction over firearms. [17] Correct?

[18] **MR. MOORE:** Objection.

[19] **THE WITNESS:** No. I didn't know [20] that.

[21] **BY MR. GRIFFIN:**

[22] **Q:** You felt that the supervisors

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[1] wanted to have the Daisy product recalled, [2] that someone above you wanted to have the [3] Daisy products recalled. Correct?

[4] **MR. MOORE:** Objection. He [5] answered that question.

[6] **BY MR. GRIFFIN:**

[7] **Q:** In the year 2000?

[8] **A:** What did you say, Bill? I [9] thought — I don't know if I even thought [10] that I said that she wanted to get any [11] recall.

[12] I think my impression was that [13] they wanted to take a different look because [14] they didn't like the outcomes of the past [15] they had received with regard to examining [16] these air guns.

[17] **Q:** They didn't like the outcome that [18] they had received was that there was no call [19] for a recall of these products?

[20] **A:** Yes.

[21] **Q:** It was your impression that [22] someone or some people above you wanted to

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[1] turn that around so that there would be a [2] recall of the Daisy power line products. [3] Correct?

[4] **MR. MOORE:** Objection. You can [5] answer.

[6] **THE WITNESS:** Yes. That was the [7] impression of a lot of people, yes.

[8] **BY MR. GRIFFIN:**

[9] **Q:** It wasn't just you. It was pretty [10] much common knowledge here at the [11] Commission? Wasn't it?

[12] **A:** Yes.

[13] **MR. MOORE:** Objection. What is [14] common knowledge?

[15] **BY MR. GRIFFIN:**

[16] **Q:** In fact, it was common knowledge [17] that Anne Brown wanted Daisy air rifles [18] recalled. Correct?

[19] **MR. MOORE:** Objection. And I'm [20] going to direct him to stop answering [21] anything about Anne Brown.

[22] You've already filed a motion to

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[1] dismiss. The judge had said there was none. [2] And it's not an issue in this case anymore.

[3] **MR. LOCKER:** He said there was no [4] evidence, Bill, or insufficient evidence. [5] That doesn't mean we can't look for it.

[6] **MR. GRIFFIN:** That's right.

[7] **BY MR. GRIFFIN:**

[8] **Q:** Was it common knowledge here at [9] the Commission that Anne Brown wanted Daisy [10] air rifles recalled?

[11] **MR. MOORE:** Objection to the use [12] of the word common knowledge.

[13] **THE WITNESS:** There were rumors.

[14] **BY MR. GRIFFIN:**

[15] **Q:** October 30th, 2001, wasn't it [16] pretty much an open secret here at the [17] Commission that Anne Brown in the Spring [18] of 2001 had made the decision she wanted [19] Daisy air rifles recalled?

[20] **MR. MOORE:** Objection.

[21] **THE WITNESS:** I think there were [22] rumors to that.

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[1] **BY MR. GRIFFIN:**

[2] **Q:** Well, was that not the general [3] belief within the people that you worked [4] with?

[5] **MR. MOORE:** Objection. General [6] believe? What time period are we talking [7] about?

[8] **MR. GRIFFIN:** The Spring of 2001.

[9] **THE WITNESS:** I'm not sure. I [10] couldn't answer that accurately.

[11] **BY MR. GRIFFIN:**

[12] **Q:** Sometime in August of 2001, Anne [13] Brown made a statement that she wanted to [14] have a recall of product that kills and [15] maims children.

[16] Was it pretty common knowledge [17] here at the Commission that she was [18] referring to Daisy air rifles?

[19] **MR. MOORE:** Objection to common [20] knowledge around here.

[21] **BY MR. GRIFFIN:**

[22] **Q:** Was it your knowledge?

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[1] **MR. MOORE:** Are you asking of his [2] personal knowledge?

[3] **THE WITNESS:** Yeah. It was my [4] personal belief.

[5] **BY MR. GRIFFIN:**

[6] **Q:** Was it, in fact, your personal [7] belief that she made that decision, [8] prejudged this entire case —

[9] **A:** I don't know. I don't know what [10] decisions she was making. You would have to [11] ask her.

[12] **MR. MOORE:** Objection.

[13] **MR. LOCKER:** We'll ask her. We [14] will.

[15] **BY MR. GRIFFIN:**

[16] **Q:** We'll ask her. Don't worry. Was [17] it your belief that a decision had been made [18] to do a recall or try to get this product [19] recalled before the evidence

was even [20] reviewed over all these years?

[21] MR. MOORE: Objection.

[22] THE WITNESS: I don't know. I

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[1] don't know that.

[2] BY MR. GRIFFIN:

[3] Q: Mr. Wright, to your knowledge, had [4] no background whatsoever in air guns. Did [5] he?

[6] MR. MOORE: Objection. Asked and [7] answered. He didn't know what Mr. Wright's [8] qualifications were.

[9] THE WITNESS: I'm not sure if he [10] had any. You'd have to ask him.

[11] BY MR. GRIFFIN:

[12] Q: He didn't have any here at the [13] Commission here. Did he?

[14] A: Not as far as I knew. You'd have [15] to ask him or his supervisor.

[16] Q: Were you ever given any directives [17] that you better find a way to recall or that [18] you should find a way to recall the Daisy [19] product?

[20] A: No. I was not.

[21] Q: Your basic job, as you understood [22] it, was to be fair and to make a fair and

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[1] just determination one way or the other?

[2] A: Yes, sir.

[3] Q: That's what you thought you'd been [4] doing for 13, 14 years in reviewing Daisy [5] products?

[6] A: Yes, sir.

[7] Q: Even today looking back over [8] what's happened to Daisy in the last couple [9] of years, you believe it's a [10] politically-motivated thing. Don't you?

[11] MR. MOORE: Objection.

[12] THE WITNESS: I can't answer that. [13] I've not seen everything. I don't know what [14] their decision is, what they are basing it [15] on.

[16] BY MR. GRIFFIN:

[17] Q: Are you aware of the existence of [18] automatic safeties?

[19] A: In general? Or on your specific [20] products?

[21] Q: On any product.

[22] A: I know what an automatic safety

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[1] is, yes.

[2] Q: What is your firearms background?

[3] A: I'm an NRA certified instructor in [4] four disciplines, range safety officer, and [5] I'm a firearm safety instructor for the [6] State of Maryland for the DNR, Department of [7] Natural Resources.

[8] And I'm a hunter. I'm a life [9] member of the NRA.

[10] Q: Do you know own any rifles with an [11] automatic safety on them?

[12] A: I do not.

[13] Q: Have you ever shot a single rifle [14] that had an automatic safety on it?

[15] A: I have not.

[16] Q: Have you ever shot a pistol with [17] an automatic safety on it?

[18] A: Something close.

[19] Q: A single action?

[20] A: Yes.

[21] Q: But that's not truly a safety. Is [22] it?

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[1] A: That's not truly a safety, but [2] it's pretty automatic. You don't have to [3] set anything.

[4] Q: A single action revolver, though.

[5] A: Correct. A single 6 Rougan.

[6] Q: But as far as a true safety, [7] there's no automatic safety on any of these [8] guns that you're aware of?

[9] MR. MOORE: Objection as to what a [10] true safety is.

[11] THE WITNESS: Just to my [12] knowledge. I'm not an expert.

[13] BY MR. GRIFFIN:

[14] Q: Well, in fact, many of the pistols [15] that you have had over the years have had no [16] safety whatsoever on them. Correct?

[17] A: I don't know what you're asking.

[18] Q: Revolvers.

[19] A: Revolvers that I've personally [20] owned?

[21] Q: Well, did you have a service [22] revolver when you were with the state

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[1] police?

[2] A: I sure did.

[3] Q: Did it have a manual safety or an [4] automatic safety?

[5] A: No. It did.

[6] Q: Did you have a block?

[7] A: No. I had a Colt Detective's [8] Special 38.

[9] Q: Revolver?

[10] A: Yes.

[11] Q: Were you there during the days [12] when they switched over to the [13] semi-automatics?

[14] A: No.

[15] Q: Do you use a semi-automatic?

[16] A: Yes. I do.

[17] Q: Does it have a safety on it?

[18] A: Yes. It does.

[19] Q: What kind is that?

[20] A: Several different. Some have [21] levers. One has a trigger safety.

[22] Q: Some have decocking levers.

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[1] A: Decocking levers. I have one that [2] has more than one safety.

[3] Q: A decocking lever is not what you [4] consider a safety, though. Is it?

[5] A: Correct.

[6] Q: Do you have some that don't have a [7] manual safety or an automatic safety?

[8] A: Could you ask the question again, [9] please?

[10] Q: Do some of your handguns not have [11] any safety on them? Other than the Colt 38 [12] Special?

[13] A: No.

[14] Q: Other than some break barrel [15] shotguns, are you aware of any firearm that [16] has an automatic safety on it?

[17] MR. MOORE: Objection. [18] Foundation. Foundation. He's already said [19] he's not an expert.

[20] THE WITNESS: I'm not aware.

[21] BY MR. GRIFFIN:

[22] Q: You've instructed, I take it, a

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[1] number of people in safe gun handling?

[2] A: I have.

[3] Q: One of the things you've always [4] told them is never rely on a safety? It's a [5] mechanical device?

[6] MR. MOORE: Objection. You can [7] answer.

[8] THE WITNESS: I think it's one of [9] the things, yes. Not primarily. But it's [10] one of the important things.

[11] BY MR. GRIFFIN:

[12] Q: Well, the number one thing you [13] tell them is muzzle control. Correct?

[14] A: Point it in a safe direction.

[15] Q: If you follow that instruction, [16] you should be able to avoid literally all [17] accidents. Correct?

[18] MR. MOORE: Objection.

[19] THE WITNESS: I don't know that [20] for a fact.

[21] BY MR. GRIFFIN:

[22] Q: That's what you believe, though,

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[1] based on your training. Correct?

[2] MR. MOORE: He said he doesn't [3] know for a fact. Do you want to ask him a [4] different question?

[5] MR. GRIFFIN: We've reserved all [6] objections except as to form of the [7] question. If you want to do that fine, [8]

Bill. But there's no reason to try to coach [9] the witness during the course of this [10] deposition.

[11] **MR. MOORE:** You don't like his [12] answer. Please stop asking it over and [13] over. Move on.

[14] **MR. GRIFFIN:** Would you read my [15] question back, please?

[16] (The reporter read the record as [17] requested.)

[18] **MR. MOORE:** Could you read back [19] the one before that? His question and his [20] answer?

[21] (The reporter read the record as [22] requested.)

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[1] **MR. MOORE:** Would you read back [2] the question again, please?

[3] **MR. GRIFFIN:** No. I'll do it. [4] Thank you.

[5] **BY MR. GRIFFIN:**

[6] **Q:** If you followed the admonishment, [7] keep your firearm or air gun, point it in a [8] safe direction, you should be able to avoid [9] literally all accidents that you're aware [10] of. Correct?

[11] **MR. MOORE:** Objection.

[12] **THE WITNESS:** I'm not sure that's [13] exactly true, but hopefully, let's say.

[14] I mean, I'm thinking in my mind is [15] ricochets or not knowing what is one of the [16] other rules is know what is beyond your [17] target.

[18] So, keeping a gun pointed in a [19] safe direction may not always mean that a [20] propellant will strike someone if you don't [21] know that other one about what's beyond.

[22] **BY MR. GRIFFIN:**

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[1] **Q:** Tell me: You've looked at a [2] number of Daisy IDI's over the years. [3] Correct?

[4] **A:** Yes. I have.

[5] **Q:** Can you think of a single one, as [6] we sit here today, that did not involve a [7] violation of the rule keep the muzzle [8] pointed in a safe direction?

[9] **MR. MOORE:** Objection.

[10] **THE WITNESS:** I don't know [11] because, like I say, I'm not familiar with a [12] lot of stuff over the past couple of years.

[13] I have not seen everything. But [14] to what I have seen, many of them were [15] pointed and shot at people, yes.

[16] **BY MR. GRIFFIN:**

[17] **Q:** That's a violation of the No. 1 [18] safety rule that you give out. Is that [19] correct?

[20] **A:** Yes. It would be.

[21] **Q:** It's a violation of the No. 1 rule [22] in the Daisy manual, too. Isn't it?

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[1] **A:** Yes.

[2] **MR. MOORE:** Objection.

[3] **BY MR. GRIFFIN:**

[4] **Q:** As far as you're concerned, it's a [5] violation of the No. 1 rule of common sense [6] when handling an air gun. Correct?

[7] **MR. MOORE:** Objection is to what [8] common sense is.

[9] **THE WITNESS:** In my opinion, in my [10] common sense, it is, yes.

[11] **BY MR. GRIFFIN:**

[12] **Q:** If those consumers had simply [13] followed common sense or proper safe gun [14] handling, there never would have been any of [15] these tragic accidents that you're aware of. [16] Correct? Up until the year 2000?

[17] **MR. MOORE:** Objection. Those [18] consumers. Those 200 consumers with [19] injuries and deaths.

[20] **THE WITNESS:** I don't know. I [21] don't know if that's accurate.

[22] **BY MR. GRIFFIN:**

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[1] **Q:** Based on the IDI's up until the [2] year 2000, whenever you were taken off the [3] case, and your knowledge of the cases and [4] your knowledge of the reviews over these [5] some 14 years, if the shooter had followed [6] the No. 1 rule of gun safety, common sense, [7] and the warning in the Daisy manual, there [8] would not have been any IDI or any tragic [9] accident. Is that correct?

[10] **MR. MOORE:** Objection.

[11] **THE WITNESS:** I don't know if [12] that's exactly true. But in some cases that [13] I reviewed, there was misuse.

[14] And I know that the people on the [15] team that I worked with felt similarly in [16] reviewing the same things, that there was [17] consumer misuse in pointing the gun.

[18] **BY MR. GRIFFIN:**

[19] **Q:** In fact, you cannot think of a [20] single case that you ever looked at or can't [21] remember a single case that didn't involve [22] consumer misuse. Can you?

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[1] **MR. MOORE:** Objection.

[2] **THE WITNESS:** I don't have all the [3] information, but from what I recall, no.

[4] **BY MR. GRIFFIN:**

[5] **Q:** Over the years that you examined [6] Daisy products, you had them evaluated and [7] re-evaluated a number of times. Correct?

[8] **A:** I'm not sure. Could you be more [9] specific?

[10] **Q:** You had the 880, the 990 evaluated [11] and re-evaluated by others from time to [12] time. Correct?

[13] **A:** I believe we did.

[14] **Q:** In fact, you were so serious about [15] running this program, you were actually part [16] of a mini air gun project. Correct?

[17] **A:** Myself and Mr. Snyder.

[18] **Q:** Were you the one who called for [19] that?

[20] **A:** Well, I think it was based on [21] having looked at a lot of cases and not [22] coming to a clear understanding on problems,

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[1] you know, recalls whatever.

[2] We thought that maybe all air guns [3] needed to be looked at, and I think it was [4] instigated by compliance. It may have come [5] from a supervisor above me, and then Scott [6] was assigned in engineering.

[7] **Q:** But this was an attempt in 1997 to [8] go back over the things you've learned, [9] re-evaluate to see if you're missing [10] anything, and come up with some type of [11] idea, brainstorm some ideas, on what could [12] be done to avoid these types of accidents. [13] Correct?

[14] **MR. MOORE:** Objection.

[15] **THE WITNESS:** I think that was the [16] objective, yes. Not just the one product, [17] but all.

[18] **BY MR. GRIFFIN:**

[19] **Q:** All air guns?

[20] **A:** Yes.

[21] **Q:** Would it be fair to say that in [22] your examination and knowledge of air guns

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[1] if you point any of them in an unsafe [2] direction loaded with the safety off, [3] cocked, and pull the trigger, you can have [4] an accident or injury?

[5] **A:** Yes. That's safe to say.

[6] **Q:** You functioned a number of these [7] air rifles. Correct?

[8] **A:** Yes.

[9] **Q:** Is that correct?

[10] **A:** Yes. You mean operated?

[11] **Q:** Sure.

[12] **A:** Yes.

[13] **Q:** Well, the cross from 2001, 1760 [14] cross one, they operate fairly similarly to [15] the Daisy power line series. Correct?

[16] **MR. MOORE:** Objection and instruct [17] you not to answer.

[18] **THE WITNESS:** I don't know.

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A: No. That's what I would say.

Q: So, sometimes there's no problem with the product and the CPSC asks for —

A: Well, what do you mean by an action? Are you talking about an action like writing an inquiry letter and investigating and so forth.

Q: That's fair. That's fair. In any event, what I'm getting at —

A: Maybe I'm getting a little rattled here. I'm answering too quick.

MR. MOORE: No. You're fine.

BY MR. GRIFFIN:

Q: By the time the letters were issued by Cathy Downs, and then there's the statement on the CPSC investigation, the Commission was aware. Those two authors were aware, specifically Marc Schoem and Cathy Downs, would have been familiar with Ron Reichel's report of June 5, 1995. Correct?

MR. MOORE: Objection. It has not

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been established.

THE WITNESS: Yeah. I think, you know, yeah. I don't know. I couldn't answer for sure in the sense that you would have to ask the people who signed these or issued these in regards to what was this stuff incorporated in the decision or answer.

BY MR. GRIFFIN:

Q: Well, it says in the letter there's an evaluation done?

A: We don't know if it's this evaluation was done.

Q: Well, it's a two-year evaluation. Surely, the author —

A: I see your point.

Q: That's correct. Isn't it? It's part of the two-year evaluation?

A: Let me read that. Is there a sheet missing from this?

MR. LOCKER: That's the statement.

THE WITNESS: Marc faxed three

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sheets.

MR. LOCKER: Well, I have something from public affairs, but that's what was faxed to me by Marc. Those were the two documents faxed to me by Marc.

MR. MOORE: For the record, Exhibit 4, we are missing a page.

MR. LOCKER: That's what Marc faxed to me.

MR. MOORE: Well, again, for the record, it says on the fax printer one of three and three of three. That was created only by the fax printer.

MR. GRIFFIN: But produce the rest of the documents, please. Do you have the rest of the documents here?

MR. MOORE: I thought you might. You have so many goods ones.

MR. GRIFFIN: Do you have the document?

MR. LOCKER: That's the way I got it.

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MR. MOORE: Well, if you say so.

MR. GRIFFIN: Okay. Let's go.

BY MR. GRIFFIN:

Q: As of June 5, 1995, the Commission staff was made aware that BBs could stick inside the magazine if they were oily and lodged in the magazine. Correct?

A: That's what it says there.

Q: In spite of that knowledge, the Commission determined through its staff that that did not necessitate a recall and did not necessitate a finding of defectiveness? Correct?

MR. MOORE: Object. The information that reflects the answer you seek —

MR. GRIFFIN: Listen. If you want to object to the form of the question, just do it. You're not here to testify, Mr. Moore.

MR. MOORE: Well, it says what it says.

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BY MR. GRIFFIN:

Q: Go ahead. Go ahead. Can you answer the question, Mr. DeMarco?

A: I'm not sure. I guess what I would say is I don't feel that I can answer that. It maybe a more appropriate question for the people who did the documents. I mean, I'm reading this here as you're reading it, Bill's reading it, we're all reading it. But what was written by Ms. Downs for Mr. Schoem and what was faxed to Mr. Locker by Marc, I don't know.

MR. MOORE: And you can say it came from us, but there's no Bates number on it. So, I don't know.

BY MR. GRIFFIN:

Q: Let me ask it this way: The Commission staff had the letter from Ron Reichel explaining how BBs could lodge in a magazine. Correct? As of June of 1995? Correct?

A: Yes.

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Q: The Commission's technical staff in November of 1995 concluded that the Daisy model 880 BB gun was not defective?

A: November of 1995? That's the state thing?

MR. MOORE: Is there a question?

BY MR. GRIFFIN:

Q: Is that true?

A: I don't know.

MR. MOORE: Objection.

BY MR. GRIFFIN:

Q: Hand me No. 7. They concluded, the Commission staff, concluded in 1995 in a letter from Marc Schoem signed by Catherine Downs that "we do not believe the problem necessitated action by the Commission." Correct?

A: That's what that says, yeah.

Q: They wanted to close the file. Correct?

A: I believe it says it's closing the file. "We are closing the file and

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forwarding it." Correct. "Closing it forwarding it to Standards Committee."

Q: So, what we have here in the documents before you is a report in June of 1995 that BBs can lodge in the magazine. Basically, two statements, one stating that it's not defective and another stating that no action necessitated. Correct?

MR. MOORE: Objection. He can answer.

THE WITNESS: I guess that's how I read it.

BY MR. GRIFFIN:

Q: As someone who has handled air guns, BB guns, firearms, the reason that that would never be a defect, BBs lodging in the magazine, is because they cannot be fired without other affirmative steps taken by the user. Correct?

MR. MOORE: Objection. Never means what?

THE WITNESS: I think that's on a

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case-by-case basis. I mean, if you are asking one specific firearm or PA that I've used. If you say it's general.

BY MR. GRIFFIN:

Q: Daisy 990, Daisy 880, Daisy 856. The reason it's not a defect that BBs lodge in the magazine as reflected in these statements by the Commission is because they cannot be fired unless someone affirmatively loads it into the chamber. Correct?

MR. MOORE: Objection. You can

answer.

THE WITNESS: Well, I guess that's what was implied here.

BY MR. GRIFFIN:

Q: That's what you read into it. Correct?

A: Yeah.

Q: What we've got is although BBs can lodge in the magazine of an 880 possibly, that's not a defect. That's what the Commission staff says in 1995. Correct?

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MR. MOORE: Objection.

THE WITNESS: I guess only if you can relate all these documents connected in that one was used to make this final determination.

BY MR. GRIFFIN:

Q: They do seem to be connected. Don't they?

MR. MOORE: Objection.

THE WITNESS: I guess.

BY MR. GRIFFIN:

Q: So, despite the Commission's knowledge in 1995 that there was a possibility of BBs lodging in the magazine of a Daisy power line rifle, there was a conclusion reached that that did not necessitate any action by the Commission under Section 15. The files would be closed. Correct?

A: Yep. I guess that's what that says.

Q: If we established that that

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statement, that is Exhibit 4 to Mr. Caton's deposition, is, in fact, issued out of Marc Schoem's office, which I think we'll be able to establish, the Commission also concluded that the Daisy 880 is not defective, although the Commission staff had available to it a report from Marc Schoem stating a way that BBs could lodge in the magazine? Correct?

MR. MOORE: Objection.

BY MR. GRIFFIN:

Q: Correct?

A: I mean, again, I guess I just refer to these documents. If these documents are all verifiable and actual documents — and I don't see anything with my signature on them.

You know, where I could say, " Yeah. I wrote this document." You know, then and they speak for themselves.

And I guess — I guess you're going to have to get Marc to say that he

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wrote this. You don't know that he wrote this. He just faxed it.

Q: Let's assume that Caton Exhibit 4 is, in fact, a true statement issued out by the Commission staff?

A: Yeah.

Q: If that statement is, in fact, the statement of the Commission, that the Daisy 880 is non-defective, except that premise here? Can you accept that as a hypothetical here?

A: As a hypothetical.

Q: If that proves to be true, the Commission had knowledge in June of 1995 that BBs could lodge in the magazine of an 880 based on Ron Reichel's study and the Commission still concluded that the Daisy 880 was non-detective? Correct?

MR. MOORE: Objection.

THE WITNESS: That's how it appears.

Last question.

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BY MR. GRIFFIN:

Q: I'll let you right out of here. Let me just close this. Now, you've got me all off track.

A: All right. I'll answer this last question.

Q: Let me make it a good one. Let me just stop there. I'll try to remember. You got me all off track there and just discombobulated me.

(Whereupon, at 4:29 p.m., the deposition of JAMES A. DEMARCO was continued.)

In The Matter Of:

DAISY MANUFACTURING COMPANY, INC.
d/b/a DAISY OUTDOOR PRODUCTS

JAMES A. DEMARCO
Vol. 2, August 7, 2002

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[17] their files and that no further action would [18] be taken. Is that correct?

[19] **A:** No. There was action to be taken.

[20] **Q:** What was that?

[21] **A:** That was to forward them to the [22] Director of Hazard Analysis to follow up

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[1] with ATM.

[2] **Q:** We also looked at a fax, copy of a [3] fax, that has a statement of the CPSC made [4] in 1996 where no defect where they said the [5] Daisy model 880 gun not detective. Staff [6] evaluated this BB gun, included experts in [7] mechanical engineering and Human Factors. [8] Correct?

[9] **MR. MOORE:** You're referring to [10] the Exhibit 4?

[11] **MR. GRIFFIN:** Yes.

[12] **BY MR. GRIFFIN:**

[13] **Q:** Correct?

[14] **A:** I guess that document does speak [15] for itself. It's what's there. I didn't [16] prepare that document.

[17] **Q:** I understand that. But it does, [18] in fact, represent the conclusions of the [19] group that you found?

[20] **MR. MOORE:** Objection. Lack of [21] foundation.

[22] **THE WITNESS:** I think you would

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[1] have to ask that person.

[2] **BY MR. GRIFFIN:**

[3] **Q:** All I'm asking is if your staff [4] came to the conclusion and the groups you [5] worked with that the Daisy 880 was not [6] defective as of the year 1995, 1996. [7] Correct?

[8] **MR. MOORE:** Objection. Asked and [9] answered.

[10] **THE WITNESS:** Yeah. Like I said, [11] before this letter said that and that was [12] the conclusion of our investigation at that [13] time.

[14] **BY MR. GRIFFIN:**

[15] **Q:** You had involved Kate Sedney in [16] your Human Factors evaluation of power line [17] rifles. Correct?

[18] **A:** Yeah. I believe Kate was part of [19] the team.

[20] **Q:** You all would meet from time to [21] time to go over the findings. Correct? Of [22] each group, engineering, Human Factors,

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[1] things that like that?

[2] **MR. MOORE:** Objection.

[3] **THE WITNESS:** I think I would meet [4] with Kate, sure, before she wrote a report.

[5] **BY MR. GRIFFIN:**

[6] **Q:** Her opinions would be taken into [7] consideration. Then a consensus opinion [8] would be reached by your group as to what [9] further action or recommendation needed to [10] be made. Correct?

[11] **A:** Yes.

[12] **Q:** This was forwarded up to Marc [13] Schoem, or he would be a part of that as [14] of 1995. Correct?

[15] **MR. MOORE:** Objection. Mp [16] foundation.

[17] **THE WITNESS:** He would be a part [18] of it. He's my supervisor.

[19] **MR. MOORE:** Let the record show [20] that the counsel has approached the witness.

[21] **MR. GRIFFIN:** I assume that's not [22] a problem, is it, Mr. DeMarco?

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[1] **MR. MOORE:** Well, what is it?

[2] **MR. GRIFFIN:** It's a document from [3] Kate Sedney to Jay DeMarco through George [4] Rutherford and PSA 0337 Daisy manufacturing [5] power line 880 air guns?

[6] **MR. MOORE:** Are you going to mark [7] it?

[8] **MR. GRIFFIN:** I don't think we [9] need to. We both have copies in our files.

[10] **MR. MOORE:** So, it's not an [11] exhibit?

[12] **BY MR. GRIFFIN:**

[13] **Q:** You remember Kate Sedney did a [14] full Human Factors examination of the rifle. [15] Correct? It was in July of 1995. Correct?

[16] **A:** Yep. Yes.

[17] **Q:** At that time in her report, she [18] indicated the visible portion of the loading [19] port and the chamber, silver in color, as [20] are the BBs recommended for use by the firm. [21] The lack of contrast between the two lessens [22] the likelihood the BB will noticed if the

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[1] user is not looking for it.

[2] **MR. MOORE:** Well, I'm going to [3] object. I'd rather you not stand over the [4] witness. If you want to ask questions [5] across the table, I think that's the more [6] proper way.

[7] **BY MR. GRIFFIN:**

[8] **Q:** Mr. DeMarco, is it bothering you [9] if I stand here? I can't read it and have [10] it next to him.

[11] **MR. MOORE:** Then have a copy made.

[12] **BY MR. GRIFFIN:**

[13] **Q:** Go ahead. Is that what it says, [14] sir?

[15] **A:** Yes.

[16] **Q:** So as of July 1995, the Commission [17] had considered that the feed port and [18] chamber were silver in color, as were the [19] BBs. Correct?

[20] **A:** Correct. Correct.

[21] **Q:** Even with that consideration, the [22] Commission still in a letter to Aaron Locker

Page 155

[1] and in a statement by the Commission [2] determined that the 880 was not defective [3] and would not be the subject of a complaint [4] for a recall. Correct?

[5] **MR. MOORE:** Objection. And I'll [6] note for the record that the document's been [7] taken away from the witness.

[8] **BY MR. GRIFFIN:**

[9] **Q:** Is that correct?

[10] **A:** Well, I guess this letter does [11] speak for itself. If it followed that [12] subsequent evaluation, that would be [13] accurate.

[14] **Q:** Well, this was July 21, 1995?

[15] **A:** Right.

[16] **Q:** The statement from the Commission [17] was sent to Aaron Locker by Marc Schoem. [18] What is the date on that fax?

[19] **A:** Oh, the fax? Is 02-13-96.

[20] **Q:** So at the time, the Commission [21] found no defect, a consideration had been [22] given of the color of the loading part.

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[1] Correct?

[2] **A:** That document speaks to that, yes.

[3] **Q:** So it's true. Correct?

[4] **MR. MOORE:** Objection.

[5] **THE WITNESS:** I'm not sure. I [6] mean, maybe you ought to ask Ms. Sedney.

[7] **BY MR. GRIFFIN:**

[8] **Q:** Well, what I'm asking you is: [9] Kate Sedney considered that?

[10] **A:** Um hum. Yes. She did.

[11] **Q:** Even with that consideration, the [12] consensus of the opinion of the staff who [13] worked on the 880 cases was that the rifle [14] was not defective. Correct?

[15] **MR. MOORE:** Objection.

[16] **THE WITNESS:** Yes.

[17] **BY MR. GRIFFIN:**

[18] **Q:** Are you aware that's one of the [19] complaints that the Commission has made [20] against Daisy now?

[21] A: I'm not aware of it now. I was [22] aware back then. I'm not familiar with the

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[1] case when I gave it to Mr. Wright. What's [2] happened since, no one's asked or told me.

[3] Q: Have you ever seen the complaint [4] that was filed against Daisy?

[5] A: I've not read it, no. I've not [6] read it.

[7] Q: If you will look at Page 6 of the [8] report of Catherine Sedney.

[9] MR. MOORE: For the record, this [10] is a report draft dated 07-21-95. It does [11] not have an Exhibit Number.

[12] MR. GRIFFIN: Page 6. I think [13] both counsel have this, and it's been [14] produced.

[15] BY MR. GRIFFIN:

[16] Q: It appears that Catherine Sedney [17] considered in 1975 information from return [18] registration cards from periods ranging [19] from '75 to '80. Correct?

[20] MR. MOORE: Objection. Why don't [21] you let him read it?

[22] THE WITNESS: Yes. That's what it

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[1] says.

[2] BY MR. GRIFFIN:

[3] Q: Kate Sedney also considered and [4] stated that BB guns are traditionally [5] considered a children's product and more [6] similar to a toy than a lethal weapon.

[7] And the firm's name, likewise, has [8] been associated with toys and low powered BB [9] guns suitable for children. Correct?

[10] MR. MOORE: Objection. The [11] document says what it says.

[12] THE WITNESS: Yeah. It says that.

[13] BY MR. GRIFFIN:

[14] Q: She also considered the warnings [15] that the Daisy BB gun is dangerous, and she [16] stated that recommended for ages 16 with [17] adult supervision are counter intuitive and [18] lack credibility. Correct?

[19] MR. MOORE: Where are you, please?

[20] MR. GRIFFIN: Same paragraph.

[21] THE WITNESS: That's what it says. [22] Yes.

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[1] BY MR. GRIFFIN:

[2] Q: So, again, in 1975, the Commission [3] considered registration cards, considered [4] warnings, related to the Daisy 880 and still [5] came to a consensus opinion that the product [6] was not

[8] MR. MOORE: Objection.

[9] THE WITNESS: I guess I don't know [10] how this document played into a decision. I [11] don't know how it is related to a particular [12] case or if it is related to say the case we [13] looked at yesterday. But if it were, that's [14] what it says.

[15] BY MR. GRIFFIN:

[16] Q: What I'm asking you is: As of [17] July 1995, Kate Sedney had sent you a report [18] and also send it to Mr. Yelnick, who's [19] legal. Right?

[20] A: That's right.

[21] Q: So, it was sent to compliance, and [22] I take it, to you forward it up to Marc

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[1] Schoem?

[2] A: Not necessarily. It's a draft if [3] Ron and I both saw it, it may say in the [4] file until that time that we were to make a [5] decision with all of the information we had.

[6] Q: So the legal staff of the [7] Commission and you, along with whoever was [8] on the team, made a decision that the [9] product was non-defective, even though Kate [10] Sedney had considered those issues of [11] registration cards and warnings and manuals. [12] Correct?

[13] MR. MOORE: I'll object and [14] instruct him not to answer as to legal [15] staff.

[16] THE WITNESS: I can't speak for [17] them or Kate Sedney, but I think that the [18] document speaks for itself.

[19] BY MR. GRIFFIN:

[20] Q: What was the team? Who was on the [21] team? Mr. Yelnick, you, Kate Sedney, Ron [22] Reichel?

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[1] A: He could have been. Maybe.

[2] Q: We know for sure Mr. Yelnick and [3] you were on the team. Correct?

[4] MR. MOORE: Objection.

[5] THE WITNESS: Yes.

[6] BY MR. GRIFFIN:

[7] Q: You know Kate Sedney was on the [8] team. Correct?

[9] A: Yes.

[10] Q: We also know a consensus opinion [11] was reached that the Daisy power line rifle [12] was non-defective and would not be the [13] subject of a complaint for a recall within a [14] few months after Kate Sedney specifically [15] considered advertising and registration [16] cards and manuals. Correct?

[17] MR. MOORE: Objection. Vague and [18] ambiguous.

[19] THE WITNESS: That's how I read [20] it

[21] BY MR. GRIFFIN:

[22] Q: Could I have that?

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[1] MR. MOORE: Do you wish to make [2] that an exhibit Mr. Griffin.

[3] MR. GRIFFIN: I'll identify it for [4] reference for all counsel. It's a letter to [5] Ronald G. Yelnick and Jay DeMarco report [6] dated by Kate Sedney 7-21-95. And I think [7] all counsel have copies of that.

[8] THE WITNESS: And for the record, [9] it's marked draft.

[10] BY MR. GRIFFIN:

[11] Q: It's also marked that it was [12] signed? Correct?

[13] MR. MOORE: You took it away from [14] the witness.

[15] BY MR. GRIFFIN:

[16] Q: It also showed it was signed by [17] Kate Sedney. Does it not?

[18] A: It says signed by two people, [19] actually.

[20] Q: Who signed it?

[21] A: Rutherford and Sidney, or their [22] initials. I'm sorry. It has initials.

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[1] Q: The legal staff is represented by [2] Ron Yelnick. Correct?

[3] A: Yes. He is.

[4] Q: Mr. Yelnick never expressed the [5] opinion that the rifles should be recalled [6] in 1995. Did he?

[7] MR. MOORE: Objection. Lack of [8] foundation. Expressed to whom?

[9] THE WITNESS: I don't recall, but [10] you can ask him.

[11] BY MR. GRIFFIN:

[12] Q: He never expressed it to you?

[13] A: He never expressed it to me, no.

[14] Q: The legal staff of the Commission [15] would have no this very same document that [16] you had regarding Kate Sedney's evaluation. [17] Correct?

[18] MR. MOORE: Objection.

[19] THE WITNESS: I would say so, yes.

[20] BY MR. GRIFFIN:

[21] Q: So, both compliance and legal were [22] in agreement as of 1996 that the Daisy 880

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[1] and, apparently, the 856 did not need to be [2] the subject of a recall, despite having [3] evaluated the color of the chamber, whether [4] BBs lodge, advertising, manuals and [5] registration cards. Is that correct?

[6] MR. MOORE: I'll object as to and [7]

COPY

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
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Respondent	)	
	)	

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Third Order on Claimed Privileges

In response to the Court's Second Order on Claimed Privileges, issued on January 29, 2003, Complaint Counsel has sought reconsideration of the privilege rulings pertaining to certain Bates numbered documents within the grouping identified as **P000299 through P001589**. With the benefit of the supplemental information supplied in Complaint Counsel's February 10, 2003 letter, the Court has reconsidered its rulings, and has determined that each of the Bates numbered pages identified in that letter are privileged on one or more of the bases asserted.

So Ordered.

William B. Moran
William B. Moran
United States Administrative Law Judge

Dated: February 28, 2003

In the Matter of Daisy Manufacturing Company, Inc.
d/b/a Daisy Outdoor Products, Respondent
Docket No. CPSC Docket No.: 02-2

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Third Order on Claimed Privileges** dated February 28, 2003, was sent this day in the following manner:

Sent by Regular Mail to:

William Moore, Esq.
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Todd Stevenson, Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

William M. Griffin III, Esq.
Friday Eldredge & Clark
200 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esq.
Daisy Manufacturing Company, Inc.
400 W. Stribling Avenue
Rogers, AR 72756

Aaron Locker, Esq.
Jeffrey M. Locker, Esq.
LOCKER, GREENBERG & BRAININ
420 Fifth Avenue, 26th Floor
New York, NY 10018

Nelida Torres
Legal Staff Assistant

Dated: February 28, 2003

COPY

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
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Respondent	)	
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Fourth Order on Claimed Privileges

The Court has made an *in camera* review of the latest grouping of documents from Complaint Counsel for which it has claimed privileges apply and consequently that the documents should not be released to Daisy. They are identified as Bates numbered pages **P001590 through P001951**. The Court has determined that each of these documents are privileged on one or more of the bases asserted.

So Ordered.

William B. Moran
William B. Moran
United States Administrative Law Judge

Dated: February 28, 2003

In the Matter of Daisy Manufacturing Company, Inc.
d/b/a Daisy Outdoor Products, Respondent
Docket No. CPSC Docket No.: 02-2

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Fourth Order on Claimed Privileges** dated February 28, 2003, was sent this day in the following manner:

Sent by Regular Mail to:

William Moore, Esq.
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Todd Stevenson, Secretary
U.S. Consumer Product Safety Commission
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Aaron Locker, Esq.
Jeffrey M. Locker, Esq.
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420 Fifth Avenue, 26th Floor
New York, NY 10018

Nelida Torres
Legal Staff Assistant

Dated: February 28, 2003

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

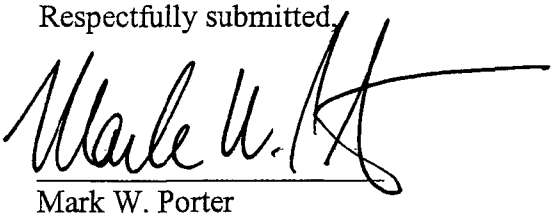
COMPLAINT COUNSEL'S RESPONSE TO ORDER DIRECTING BRIEFING ON ISSUES OF SIGNIFICANCE

ERRATA

Complaint Counsel's Response to Order Directing Briefing on Issues of Significance (filed February 27, 2003) contained an inadvertent error in citation. The citation to "**16 C.F.R. § 1115.13(g)(1)(iii)(2002)**" at pages 5, 9 and 12 should read "**16 C.F.R. § 1115.12(g)(1)(iii)(2002).**" Complaint Counsel apologizes to the Court and Respondent's Counsel for this error.

Dated: March 5, 2003

Respectfully submitted,



Mark W. Porter

Complaint Counsel

U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814
301-504-7732

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2003, I caused a copy of the foregoing **Errata to Complaint Counsel's Response to Order Directing Briefing on Issues of Significance** to be served upon all parties of record in these proceedings, as follows:

By facsimile and first class mail, postage prepaid to:

The Honorable William B. Moran, Administrative Law Judge
and Presiding Officer

By facsimile and first class mail, postage prepaid to:

Aaron Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

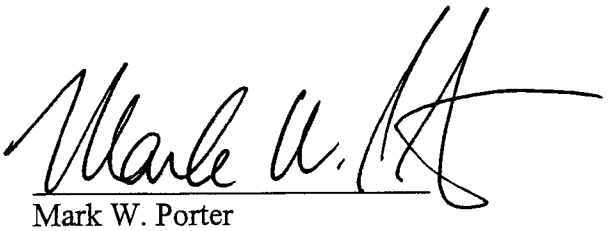
William M. Griffin, III, Esq.
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Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
Rogers, AR 72756

Attorneys for Daisy Manufacturing Company

By hand delivery to:

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408



Mark W. Porter
Office of Compliance, Legal Division
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814-4408

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
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	)	
DAISY MANUFACTURING COMPANY, INC.	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
Respondent	)	
	)	

SUPPLEMENTAL NOTICE OF HEARING

As previously announced, the first week of the hearing will be held in Washington, D.C. starting Monday, May 19, 2003 at 9:30 a.m. at the following location:

Environmental Protection Agency
Courtroom
Room 1152
1201 Constitution Avenue, N.W.
Washington, D.C. 20460

The second week of the hearing will start on Tuesday, May 27, 2003 at 9:30 a.m. in Fayetteville, Arkansas at the following location:

John Paul Hammerschmidt Federal Courthouse
35 East Mountain 4th Floor, Room 416
Fayetteville, Arkansas 72701

The hearing in Fayetteville will continue, as necessary, through Monday, June 2, 2003.

William B. Moran
William B. Moran
United States Administrative Law Judge

In the Matter of Daisy Manufacturing Company, Inc.
d/b/a Daisy Outdoor Products, Respondent
Docket No. CPSC Docket No.: 02-2

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Supplemental Notice of Hearing**, dated March 5, 2003, was sent this day in the following manner:

Sent by Facsimile and Regular Mail to:

William Moore, Esq.
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Todd Stevenson, Secretary
U.S. Consumer Product Safety Commission
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Aaron Locker, Esq.
Jeffrey M. Locker, Esq.
Locker, Greenberg & Brainin
420 Fifth Avenue, 26th Floor
New York, NY 10018

Nelida Torres
Legal Staff Assistant

Dated: March 6, 2003

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
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	)	
DAISY MANUFACTURING COMPANY, INC.	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
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William B. Moran
William B. Moran
United States Administrative Law Judge

In the Matter of Daisy Manufacturing Company, Inc.
d/b/a Daisy Outdoor Products, Respondent
Docket No. CPSC Docket No.: 02-2

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Supplemental Notice of Hearing**, dated March 5, 2003, was sent this day in the following manner:

Sent by Facsimile and Regular Mail to:

William Moore, Esq.
Complaint Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Todd Stevenson, Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
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420 Fifth Avenue, 26th Floor
New York, NY 10018

Nelida Torres
Legal Staff Assistant

Dated: March 6, 2003

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

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SECRETARY
3:59

Mark W. Porter
Trial Attorney
Legal Division
Office of Compliance

Tel: (301) 504-7732
Fax: (301) 504-0359
Email: mporter@cpsc.gov

March 14, 2003

Via Hand Delivery

Todd A. Stevenson, Secretary
Office of the Secretary
Consumer Product Safety Commission
4330 East-West Highway, Room 502
Bethesda, MD 20814

Re: ***In the Matter of Daisy Manufacturing Company***
CPSC Docket No. 02-02

Dear Mr. Stevenson:

Enclosed for filing please find an original and three (3) copies of the following document in the above-referenced matter: **Reply to Daisy's Response to Order Directing Briefing on Issues of Significance along with the following attachments:**

A) CPSC Press Release # 94-046: Ann Brown Sworn In As New Chairman of U.S. Consumer Product Safety Commission, March 10, 1994.

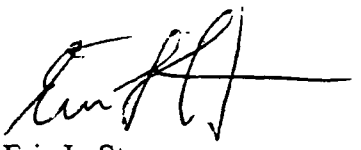
B) Excerpts from deposition transcript of Ronald Thomas Reichel In the Matter of Daisy Manufacturing Co. (dated February 7, 2003).

C) Excerpts from deposition transcript of Ronald W. Joyce In the Matter of Daisy Manufacturing Co. (dated December 19, 2002).

D) Excerpts from deposition transcript of Richard I. Daniel In the Matter of Daisy Manufacturing Co. (dated December 18, 2002).

If the Court would like full copies of the transcripts listed above, Complaint Counsel will provide them. Please do not hesitate to contact me if you have any questions or concerns.

Very truly yours,



Eric L. Stone

Enclosures

cc: Aaron Locker, Esq. (via first class mail, postage prepaid, and facsimile)
William Griffin, III, Esq. (via first class mail, postage prepaid, and facsimile)
Marianne McBeth, Esq. (via first class mail, postage prepaid, and facsimile)

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, Inc., doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

COMPLAINT COUNSEL'S REPLY TO DAISY'S RESPONSE TO ORDER DIRECTING BRIEFING ON ISSUES OF SIGNIFICANCE

I. PRELIMINARY STATEMENT

Respondent Daisy Manufacturing Company's extensive briefing allegedly aimed at the issues of significance identified by the Presiding Officer, did not merely miss the bullseye—it seemed aimed at a wholly different target. Daisy used the excuse of the Judge's Order to present—once more—Daisy's defenses to this case supported by a series of suppositions,[1] highly

[1] For example, Daisy strings together a series of suppositions and characterizations in an attempt to build the case that former Chairman Ann Brown had improper motives and influenced the outcome of the current investigation. For example, they refer to "a feeling at the Commission that the new Commissioner, Ann Brown was upset with the staff for not finding that the Daisy 880 and 856" were defective. (Daisy Brief at 10). This statement suggests that the previous staff investigations were on someone else's watch. In fact, Ann Brown became Chairman on March 10, 1994, and several of the investigations and public statements referred to by Daisy occurred when she was Chairman and chief executive of the agency. However, Respondent fails to mention that Mr. Reichel testified that he heard that Ms. Brown "had it in for BB guns" from David Schmeltzer, an attorney who retired from the Commission in October 1997. Mr. Schmeltzer retired several years before the initiation of the investigation leading to the filing of this case. Mr. Reichel also testified that Mr. Schmeltzer is a personal friend of Mr. Locker's and that Mr. Schmeltzer initially told Mr. Reichel that he would be deposed in this case. (Reichel Tr. at 140-142). In a further attempt to ascribe evil motives, Respondent mischaracterizes the testimony of witnesses such as Mr. Reichel to suggest that he was taken off an ongoing investigation of BB guns in order to achieve a different result. Mr. Reichel, an electrical technician, had by his own testimony, a very limited role in earlier investigations of BB guns.

selective quotes and partial quotes[2] from deposition transcripts. The staff will resist the urge to spend pages and pages deconstructing Respondent's fanciful funhouse "facts" or to argue about every one of Daisy's defenses.[3] We will have an opportunity in the course of this proceeding to set forth a more complete and realistic view of this case. Instead, we will focus our attention in this brief response on a few matters that relate directly to the Presiding Officer's queries.

II. ARGUMENT

A. Incident Information is Relevant to Whether the Powerline Airguns Present A Defect That Creates A Substantial Hazard

Section 15 of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2064, gives the Commission broad authority to seek remedies--including public notice and recall--for "substantial product hazards." A product presents a substantial hazard if it contains a "product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the

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He testified he was brought into those primarily because of his ability to use a piece of equipment called a chronograph that measured BB velocity and not because he was "[T]he Commission's own in house airgun expert." Daisy Brief at 2. (Reichel Tr. at 143). The evidence will show he simply had a very limited role and was not involved in the investigation that led to the filing of this case. The evidence will also show that Mr. Reichel was asked to "turn over [his papers]" [Daisy Brief at 9-10] for the purpose of responding to Respondent's discovery in this case. (Reichel Tr. at 154).

[2] For example, on page 6 of its brief, Daisy says that Mr. Wright, a CPSC Compliance Officer, "has admitted that there is no better safety design on the market than Daisy's". They provide an excerpt from his deposition which ends at page 110, in the middle of his response. At the bottom of 110, Mr. Wright stated: "Not to my knowledge, there's nothing on the market that's better, but once again, I have not done what you would call a continued search to find out if there's something. . ." Respondent's deposition excerpt ends there. However, on the next page, 111, he continued: "better. Nor would I claim to be, like was said, a gun expert because even going inside CPSC, the people that you mentioned—Jay Demarco, Reichel, and so forth—they might look at it in a period of time and say, you know, we should do 'X' which doesn't really cost any more and makes this gun 100 percent safer."

[3] Daisy cites numerous gun cases to support its positions. However, the Powerline Airguns are not expensive weapons sold to serious hobbyists and law enforcement or military personnel. They are cheap BB guns mass marketed through mass retailers to children and young adults. Cases involving adult law enforcement personnel with gun training, such as Wasylow v. Glock, Inc. 975 F. Supp. 370 (D. Mass. 1996), are plainly inapposite.

public."[4] Unlike product liability law, which addresses the harm to individual consumers from individual injury incidents, the Commission's authority allows the agency to address risks present across an entire product line by taking proactive measures to avoid or mitigate a "substantial risk of injury to the public."

Much of Respondent's response to the Presiding Officer's issues appears premised on the assumption that they are defending a product liability case. That assumption is mistaken. In a product liability case, it makes good sense not to examine other incidents unless they are probative of the particular incident at issue in that case. This substantial hazard case is under the Commission's laws. In this case, the history of the product's use is relevant not only to the existence of a defect, but also to the severity of the risk of injury. As we noted in our earlier brief, the Commission explained its position about the relevance of injury incidents in its interpretative rules governing Substantial Hazard Reports, 16 CFR 1115. 12(g)(1)(iii):

> A risk is severe if the injury which might occur is serious and/or if the injury is likely to occur. In considering the likelihood of any injury the Commission and the staff will consider the number of injuries reported to have occurred, the intended or reasonably foreseeable use or misuse of the product, and the population group exposed to the product (e.g. children, elderly, handicapped).

Daisy would like to reduce this case to a clean, unthreatening, and antiseptic battle of the experts devoid of any connection to the real world. However, the real world is what the Commission is all about. In the real world, children and "young adults" are the primary users of Daisy Powerline Airguns. They handle these Airguns based on their own frame of reference, not the frame of reference of experienced adult shooters or gun designers. In the real world, children believe that if a gun is not loaded it presents no risk to them. Real world users do not believe

[4] Section 15 of the Federal Hazardous Substances Act (FHSA), 15 U.S.C. § 1274, parallels this formulation except that it does not use the words "substantial product hazard" and applies to toys and other articles intended for use by children.

that a gun is loaded if every indication (dry firing, shaking the gun and hearing no BBs) shows that the gun is not loaded.

In the real world, parents and children do not perceive the level of risk presented by these high powered Powerline BB guns. (Reichel Tr. at 125-127). In the real world, BB guns are sold in discount and sporting goods stores. The Powerline Airguns are given to unsupervised, untrained children, not used in well-supervised shooting programs where the users can be taught about the internal workings of guns and given an adult perspective on the potential risks. In the real world, kids make mistakes handling guns and if the safety is not on, someone can *unintentionally* be shot. In the real world, many children have been crippled, brain damaged, or killed.

It is obvious why Daisy would ***not*** want this proceeding to focus on the real world of real child knowledge about guns and conduct and real incidents. Daisy's favored world is a chimerical world of perfect users, armed with perfect knowledge making intentional decisions to do something that is unsafe. To create that world, Daisy must exclude the facts and rely on an antiseptic parade of experts arguing in a vague and general way about whether amorphous shooters must have behaved recklessly. In Daisy's world, devoid of real people and real incidents, you can pretend that a bunch of aberrant children and young adults are intentionally shooting each other. In the real world, that is not the case. The real world ***puts the lie*** to all those arguments, because in the real world kids only know what they know, they shoot guns they truly believe are not loaded because of the lodging defects, they stumble, they unintentionally fire loaded and cocked guns, and they die or suffer serious and often permanent injury because of the design of the Powerline Airguns. Is it surprising that Daisy would like the Commission not to be able to introduce any real world evidence?

As we have stated, the staff understands the logistic issues of re-litigating every individual case and has no intent to burden the Court by doing so. However, the staff does intend to introduce evidence of what happened in real life cases in the course of presenting its case. This evidence is directly relevant both to the Respondent's assertions regarding the conduct of the users and to the likelihood and the severity of the risk.

Respondent argues that the intervening conduct of the user will "prohibit liability for a defendant unless the intervening cause could have been reasonably anticipated." (Daisy Brief at 12). In the real world, Daisy has seen hundreds of examples of children misunderstanding the risks of certain conduct and making mistakes through inadvertence and pure klutziness. In the real world, children are not trained, experienced, adult firearms users. In the real world, a child who has every indication that a gun is not loaded may not handle the gun with the same care as if he believed the gun were loaded.[5] That behavior can be anticipated particularly with untrained children. Not surprisingly, when Ron Joyce, Daisy's gun designer and expert, saw a demonstration that a BB could lodge in the Model 856, he immediately went to Teresa Wrazel and worked with her to eliminate BB lodging through design changes. (Joyce Tr. at 81-92). Daisy has redesigned the 856 guns twice to prevent the BB lodging and then acted to eliminate BBs completely. These actions are not consistent with a firm who believes you cannot reasonably anticipate that children will be misled by lodged BBs into believing a gun is not loaded.

All consumer product injuries relate in some way to the use of the product. A user who does not use the product is never in any danger. However, every user has his own frame of

[5] Daisy's reliance on Sherk v. Daisy-Heddon, 450 A.2d 615 (1982) is misplaced. That case did not involve allegations of BB lodging. It was a failure to warn case. Further, at the time, nobody had demonstrated that BBs could lodge in the Powerline Airguns.

reference, his own maturity level, and the particularized context in which he uses the product. That consumers frequently do not use the product the way a designer intended it be used, often reveals more about the myopia of the designer rather than the unreasonableness or unforeseeability of the consumer's behavior.

B. The Evidence Regarding Prior Testing Does Not Support Daisy's Positions

As noted in our previous brief, Complaint Counsel does not object to properly admissible evidence[6] of previous testing by the Commission staff of Daisy airguns. No matter how many times Respondent repeats its mantra that those tests showed there was no defect in the guns, the facts are otherwise. Our technical staff did limited analysis of the limited material available to them. They also did only what they were asked to do. (Reichel Tr. 105-108). As Mr. Snyder and Mr. Reichel testified, they typically tested the guns to an ASTM standard that had no provisions regarding BB lodging or automatic safeties. They did not x-ray or disassemble the guns looking for potential BB lodging areas. Nor did they create cutaway versions of the guns, make internal measurements of parts, or do any other significant forensic analysis aimed at identifying how BBs could lodge. In fact, the only real attempt to learn anything about ways BBs could lodge in the history of these investigations was that Mr. Reichel put excess oil in the Model 880 because, in his experience, people often over-oil their guns. (Reichel Tr. 102). He found that BBs did stick when he did so. (Reichel Tr. 109-112).[7]

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[6] We do believe that documents which cannot be authenticated are not admissible. The staff does not intend to contest authenticity merely as a formality and will stipulate to the authenticity of documents we know are authentic. However, we note that Daisy has several documents which we are unable to authenticate. Daisy has continued to resist accounting for how they obtained those documents. The staff believes that Daisy should not be able to use such documents without providing such discovery. However, at minimum, the burden will be upon Daisy to authenticate those documents.

[7] In recent discovery, Daisy provided copies of documents dated in 1990 suggesting that in testing an 880 gun to the voluntary standard, CPSC technical staff expressed concern that "the presence of only one BB in the chamber could present a safety hazard because it is possible to fire the rifle several times without the BB being

As to testing of other guns, Respondent suggests it would not intend to introduce testing of other airguns regarding the lack of an automatic safety, however, it wants to show the industry standard. The staff believes the industry standard, which demonstrates a minimal level of safety acceptable to all the major members of the industry, is of no probative value in determining the existence of a defect. However, rather than objecting to such evidence, Complaint Counsel would respond by showing not only that the automatic safety was an inexpensive and feasible alternative, but in addition—despite Respondent's frequent protestations to the contrary—are common in airguns, including very popular models sold by Respondent. All of Respondent's anti-automatic safety rhetoric amounts to nothing but post hoc rationalization. Their own former President has confirmed the feasibility and cost effectiveness of an automatic safety for the Powerline Airguns. (Daniel Transcript at pages 116-118.). Further, the continued marketing of airguns with automatic safeties by Daisy and many of its competitors undercuts Daisy's arguments that such safeties will create unsafe shooting habits.

Complaint Counsel does not believe the court should hear evidence of previous testing by the Commission staff of competitor's guns.[8] First, while such testing may be relevant to whether other guns meet ASTM requirements or have defects, they are not relevant to whether Daisy Powerline Airguns are defective any more than evidence that other people are speeding is relevant to the trial of a particular individual who is caught speeding. Second, those other parties are not part of this proceeding and have no opportunity to protect their interests. Third, putting other manufacturer's products on trial is likely to divert significant time and attention from the

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discharged. It is also hard to hear only one BB rattling around in the chamber." The lab did not do further work and identify a lodging issue.

[8] Daisy has provided us with records they apparently obtained through sources other than Complaint Counsel or the Commission's FOIA office regarding such testing. Section 6(b) of the CPSA prohibits the release of such

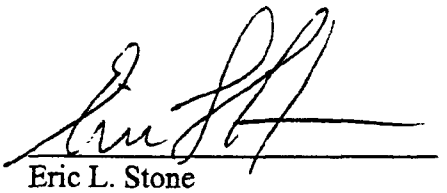
real issue in this case: Daisy's Powerline Airguns. Fourth, the Commission's staff is not in a position because of protections for firms in our statute to discuss or rebut Daisy's interpretations of those reports.

While it might be in Daisy's interests to throw out enough chaff to prevent the Presiding Officer's radar from locking on to the real issues in this case, it is apparent that this is a diversionary tactic and the Court's resources should not be diverted for that purpose.

III. CONCLUSION

This case is about the real world, not the "Dream World" Daisy would have the Court relocate to. In the real world, children and "young adults" behave as children and "young adults." Providing badly designed guns for such users creates a defect and substantial risk of injury. The Court should resist Daisy's efforts to remove this case from the real world.

Dated this 14th day of March, 2003



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information without first seeking comment from the firms involved on the fairness of the release and the accuracy of the information. We will ask Daisy to account for the source of these documents.

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2003, I caused a copy of the foregoing **Reply to Daisu's Response to Order Directing Briefing on Issues of Significance** to be served upon all parties of record in these proceedings, as follows:

By facsimile and first class mail, postage prepaid to:

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and Presiding Officer

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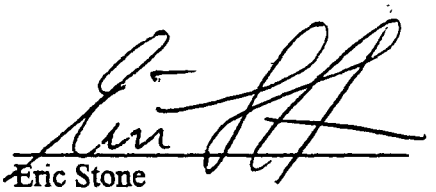
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NEWS from CPSC

U.S. Consumer Product Safety Commission

Office of Information and Public Affairs Washington, DC 20207

FOR IMMEDIATE RELEASE
March 10, 1994
Release # 94-046

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Ann Brown Sworn In As New Chairman Of U.S. Consumer Product Safety Commission

WASHINGTON, DC – Ann Brown was sworn in today as the new Chairman of the U.S. Consumer Product Safety Commission (CPSC). Ms Brown was nominated to head the Commission by President Clinton in October 1993.

Brown said, "I am thrilled to accept this responsibility as Chairman of the CPSC. My background in toy safety and other consumer issues gives me the knowledge needed for this position. As a grandmother, I am dedicated to protecting children and other vulnerable groups from unreasonable risks of injury and death associated with consumer products. I look forward to working with the Commission's excellent staff and my fellow Commissioners to enforce safety standards and make sure consumer products are as safe as possible." She added, "This agency should be on the cutting edge of consumer safety."

She said she has three major goals for the agency. "First, we need to make the agency more proactive." She said, "This means becoming highly visible, innovative, and not afraid to take risks." She also said, "Being proactive means to enforce the law aggressively." She said the agency will be "action-oriented."

Second, Brown said she wants the agency to be "highly visible, not an underdog but an aggressive watchdog."

Third, she said, "I want the agency to become more user friendly and accessible to consumers. Consumers should know who we are, what we do, and that we care."

Brown served as a consumer advocate for two decades, directing several product studies and price surveys, including the nationally recognized "Toy and Children's Products Quality, Safety and Price Survey." This survey provided an annual update on unsafe toys and helped consumers make safer choices in the marketplace. Brown helped form the Washington, DC Office of Consumer Protection and served since 1980 as vice president of the Consumer Federation of America. Since 1983, she has been chairman of the board of Public Voice, a consumer advocacy group focusing on health and nutrition issues, and since 1988 she has been a member of the Coalition for Consumer Health and Safety. In 1991, she joined the Institute for Injury Reduction.

Ann Brown earned her BA from The George Washington University in 1959 and previously attended Smith College. She is married to Donald Brown, a Harvard Business School professor and attorney. The couple has two children and three grandchildren.

CPSC's mission is to protect the public from unreasonable risks of injury and death associated with consumer products. The Commission's objective is to reduce the estimated 28.6 million injuries and 21,700 deaths associated each year with the 15,000 different types of consumer products under CPSC's jurisdiction.

Send the link for this page to a friend! The U.S. Consumer Product Safety Commission protects the public from unreasonable risks of injury or death from 15,000 types of consumer products under the agency's jurisdiction. To report a dangerous product or a product-related injury, call CPSC's hotline at (800) 638-2772 or CPSC's teletypewriter at (800) 638-8270, or visit CPSC's web site at www.cpsc.gov/talk.html Consumers can obtain this release and recall information at CPSC's web site at www.cpsc.gov.

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Q. So I'm having trouble distinguishing what's good about the Daisy models that have force feed and a force feed as, perhaps, could have been added to the 880.

MR. GRIFFIN: Object to the form.

A. Well, as I told you before, when you hold the gun to pump, you've got the muzzle up, and the BBs, being little, round, cylindrical objects, always go toward the center of the earth. And they line up in that feed track. So why complicate the gun. It makes it less reliable when you add more parts to it.

Q. (Mr. Moore continued.) All right. Are you aware of any reason why the -- why the gravity feed mechanism in the Daisy 880 design can get hung up?

A. Well, let's put it this way. I've never seen one get hung up. I suppose it could, but I've never seen one do it.

Q. Have you heard of them getting hung up in an 880?

A. No.

Q. Well, as I read your testimony in Wild, you indicated you were aware of BBs can be lodged in the 880 and consumer complaints and allegations of BB lodging, but you had not been aware of the same with respect to the 856.

MR. GRIFFIN: Object. It's not a question, so I object to that.

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MR. MOORE. So --

THE WITNESS: Well, now --

MR. GRIFFIN: Wait.

Q. (Mr. Moore continued.) Is that right?

MR. GRIFFIN: Wait. Wait.

Q. (Mr. Moore continued.) Did you say that in the deposition?

MR. GRIFFIN: Wait. Wait.

THE WITNESS: I don't remember.

MR. GRIFFIN: Wait. Object to the form of the question. Further, it's a misuse of a deposition. You may now answer, Mr. Joyce.

Q. (Mr. Moore continued.) I thank you for my indulgence. My sticky fell out, but I will find it before the end of the day. I really will.

MR. GRIFFIN: You've got a good ten days to look for it.

Q. (Mr. Moore continued.) Mr. Joyce, are you aware of any testing done by Daisy to determine whether BB lodging can occur in the 880 family of BB guns?

A. Any specific testing for that regard?

Q. Any testing.

A. We tested these things ever since we started making them, and except for the initial problems with pellets getting back in the loading -- or the BB track, I'm just

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not aware of any BB loading problems except in the case if you would get a misshapened BB.

Q. And what -- can you explain what you mean by any problems in the loading track?

A. Sir?

MR. GRIFFIN: Object to the form.

Q. (Mr. Moore continued.) You mentioned the loading track as the potential --

A. If pellets got back into the loading -- BB loading track.

Q. Oh, pellets. Are you aware of any specific tests --

A. No.

Q. -- to that end?

A. Just -- just ongoing daily and life tests that we did.

MR. GRIFFIN: I would like the record to reflect that we've now spent 15 minutes watching counsel do a deposition.

MR. MOORE: I'd like for the record to show that Mr. Griffin exaggerates by about 11 minutes, and I do appreciate your indulgence, and I apologize for holding you up. Kind of like me waiting for you to get off your cell phone.

Q. (Mr. Moore continued.) My question had to do with the 880 testing for BB lodging. I have the same question

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about the 856, whether you're aware of any Daisy -- your testing by or for Daisy to determine whether a BB may be lodged in the 856 family of PowerLine BB guns?

A. After the wild gun examination, we got, as I recall, four guns, four 856s, at the office, and by slamming the gun hard on the side and slapping it around, we managed to get a BB to stick in one of the four guns.

Q. And what did you do then?

A. We proceeded to lay out the magazine area on the computer, and as it was designed, there was more than adequate room for a BB. In the Wild case, I could not determine exactly where the BB was hung because when I discovered the BB was hung, I laid the gun carefully on the table and announced to Mr. Townsend that there was a BB in the magazine. And he proceeded to grab it up and turn it upside down, and the BB fell out. So I never did get to determine -- and we couldn't replicate with that gun that condition. So I never did determine exactly where it was held. At first, I had a theory that somehow it got lodged between the inner shooting barrel and the upper corner of the ear on the baffle.

Q. Well, that's what you said.

A. That's what I thought.

Q. That's what you said in your report.

A. That's what I thought in the report, but the only

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way to me that it could get in that region would be for somebody to force it in there with a -- an instrument of some kind. And...
Q. But in your report you said -- a moment ago, you couldn't -- you were unable to have time to see where it was stuck. That's not so, was it? You could see exactly where it was stuck.
A. No. Immediately when I saw it stuck, I wanted him to know that there was a BB in there, so I laid the gun down carefully with the intentions of he and I looking very closely to see where it was. But instead, he grabbed it up and turned it outside down and dumped the BB out before I had a chance to stop him.
Q. Well, you had -- you were looking at it as long as you needed to look at it before you laid it down, didn't you?
A. Well, I just saw it, and I said, "There's a BB in there," and carefully laid it down, assuming that we could both look at it and figure out what it -- what the deal was.
Q. And did you ask him to do that?
A. But he just immediately reached over and grabbed the gun and turned it up, and the BB fell out.
Q. Uh-huh.
A. So I didn't get to determine exactly. I thought I

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knew where it was, but after -- later on, I decided that it probably did not get stuck between the ear and the outer barrel.
Q. And where did that conclusion -- where was that recorded?
A. Where was that recorded?
Q. Yeah.
A. I didn't record it anywhere. That's just my opinion.
Q. Oh, so your observations as recorded in the videotape deposition were inaccurate?
A. In the videotape deposition? No, this is before the deposition.
Q. Oh, this is the examination?
A. This is the examination.
Q. The videotape examination?
A. No, he and I did not have a videotape gun examination.
Q. Oh, at that time. Okay?
A. At that time.
Q. Forgive me.
A. It's when we went to the deposition that Mr. Kerley had a cut-away gun that he demonstrated that a BB would stick in it.
Q. Uh-huh.

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A. Now, I didn't do any further -- I mean, I didn't do any disassembly or looking at the gun. I don't know if anything was done to the gun besides cutting out the top or not. I just assumed that that's all they did. But -- and I saw it stick between the inner and outer barrel in that gun --
Q. So that's --
A. -- where there -- where there certainly should have been adequate space to not do that. But for some reason, it did it.
Q. So that would make two places --
A. Two guns.
Q. -- where you saw the BBs stick?
MR. GRIFFIN: Object to the form of the question.
Q. (Mr. Moore continued.) Isn't that right?
MR. GRIFFIN: Object to the form of the question. Misstatement of the testimony.
Q. (Mr. Moore continued.) Isn't that right?
A. I thought in one case it was stuck between the ear and the barrel, and then that other gun, it stuck between the inner and outer barrel, not between the ear and the barrel.
Q. Uh-huh. And so you're recanting your report generated, I think, in July of '93?

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A. I'm just saying I may have been in error as to thinking it was stuck between the ear and the inner barrel because there -- without having forced it in there some way, there's no room for it to get in there.
Q. Well, did you make any measurements?
A. I wasn't -- didn't have the proper tools to make a measurement at that point.
Q. Well, did you ask for an opportunity to do that?
A. No.
Q. Why not, if you had doubts?
A. I went back and looked at it with the girl in the engineering department, and it -- there should have been adequate room, but there wasn't in that gun, apparently.
Q. And there wasn't.
A. Something ate up the room that was supposed to be in there for BBs.
Q. You said you looked at a computer layout of a magazine. Tell me about that.
A. Well, I had her to construct --
Q. Mrs. Razel?
A. Razel. With the appropriate drawings. I had her to put all that out on the computer and looked at the spaces that we had. And something, obviously, changed somewhere.
Q. I don't understand. Can you explain that, please? Something changed?

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A. Well, I never did figure out what changed, but if the BB would stick, there obviously wasn't as much room in there as the drawings indicated there should have been. Yet, we could not determine a dimensional problem with the parts that we were looking at.
Q. Well, you were looking -- you were looking at the dimensions, the nominal dimensions, called out on the blueprint parts and drawings?
A. Yes.
Q. And did you stop there or did you do any further analysis?
A. Well, I said we got those four guns and tried to simulate what he did down there and did, in fact, get a BB to stick in one gun and never could get it to come loose.
Q. Where did it stick for you?
A. Between the inner and outer barrel.
Q. All right. Did your dimensions say it should have been able to do that?
A. No, it should have not been able to do that.
Q. And did you figure out why it was able to do that?
A. Never did figure out why.
Q. Did you figure out the tolerances that would be involved if all the piece parts --
A. No, we didn't make a tolerance analysis, a dimensional tolerance analysis of the bullet.

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Q. Why is that?
A. Well, we just thought and we decided to turn the baffle around and get rid of the problem.
Q. And that was in 1999. Yes?
A. Yes.
Q. In 1998, you initiated steps to address the problem that you saw earlier that year when you and Mr. Townsend examined --
A. Right.
Q. -- the Wild gun. Right?
MR. GRIFFIN: Object to the form.
Q. (Mr. Moore continued.) And what steps did you take there?
A. We -- we lowered the ears on the baffle first.
Q. When you say "we" --
A. Well, Mrs. Razel and I designed a new baffle to lower the ears.
Q. And did you conduct any tests to see whether that would solve the problem?
A. I can't be certain. I think we did, but I can't be certain of that.
Q. Do you know where those tests would be right now?
A. No. No.
Q. Did you --
A. I don't know if we even recorded anything.

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Q. What was the nature of the test you ran?
A. I don't remember. I don't remember. We just knew we put the ears down to where that couldn't possibly be a problem with the ears if that's where this stuck.
Q. And at that time you were addressing the space between the outer barrel and upper left corner of the --
A. Ear.
Q. -- out -- ear?
A. Yes.
Q. And early the next year, you found out that lodged in a different area --
A. (Witness nods head.)
Q. -- and you took steps to flip the baffle?
A. Yes. Well, we didn't -- that wasn't the next step we tried. We decided to try to move the baffle to the rear where we wouldn't have the outer barrel/inner barrel space to worry about. We got behind the outer barrel -- or to the rear of the outer barrel, and we were going to design a part that would fit that area. But it entailed changing the ears again on the baffle.
So when she submitted that new drawing to the Sun Manufacturing Company, that guy decided -- he said, "Hey, how about we just turn it around the other direction?" Well, I thought that would make it difficult to spot weld in there, but he must know a lot more about spot welding

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than I do, because he had no trouble doing it. And he turned it around, give us some samples. It worked perfect, so that's the way it stayed.
Q. When he turned it around, did he spot weld it in the same position that it had been at before?
A. It was close, but -- but we'd moved the baffle back about three tenths of an inch so that there would be no space for the BBs to get in between the outer and inner barrel. There was less than a half a BB diameter that could get in there, so that obviated the problem.
Q. And did you test that fix?
A. Yeah, we looked at some guns and no problem at all.
Q. When you say you looked at some guns, will you explain, please?
A. Well, she got some of the guns that had the baffle to the rear and reversed, and we put them together, and no problem.
Q. Some that had been flipped and rewelded by the outsource people?
A. Yes.
Q. Okay. What's the purpose of the baffle in the first place?
A. To keep BBs from going far enough down the outer barrel to lodge between it and the inner barrel.
Q. Is it safe to say to form the forward --

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A. Forward wall --
Q. -- wall?
A. -- of the magazine area.
Q. Okay. I had seen drawings that talk about the baffle and the bulkhead. What's the difference?
A. The baffle is the forward end of the magazine. The bulkhead is on farther forward in the lower portion where the pump system is that stops you from pulling the pump head out of the tube.
Q. Oh, right.
A. And it also positions the pump tube so it can't move in its correct position in the gun.
Q. Thank you. I'll call it the second fix involving the baffle occurred in 1999, the one you just described that went into effect in production of the 856 shortly after you designed it, I presume.
A. Now, back up just a minute.
Q. I'm sorry. The flipping and welding of the baffle, which you say --
A. You said '89. Did you mean '99?
Q. Oh, I'm sorry. Yes, I did.
A. Yes, that's true.
Q. I'm sorry. Do you know when it went into production?
A. I do not know the exact date, no.

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Q. Do you know the date that the 856 was converted to a pellet-only gun?
A. No, I don't know when that happened. I just recently learned about it, but I don't know when it happened.
Q. Why was the 856 -- first it was the 860, I believe.
A. With die cast receivers and Monte Carlo stock and fancier.
Q. Now, that was your design.
A. That was my design.
Q. I mean, that was your baby.
A. Right.
Q. And that was in what year, please?
A. Went into production 1984. About mid year, 1984.
Q. Okay. And why was it introduced? I mean, what was the goal?
A. It was -- it was a -- it didn't have the sleek, neat styling of the 880. It was more boxy.
Q. Uh-huh.
A. They decided if they wanted to buy boxy-looking Crosman guns, we would give them a boxy-looking gun to buy. Further competition --
Q. Yeah.
A. -- against the 760. But it also ate into some of our 880 sales, I'm sure. Let me elaborate on that just a

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minute --
Q. Thank you.
A. -- if I can. The 860 was supposed to be a design that would do very nearly what the 880 did using a different, less expensive, valve system and making it a less expensive gun than the 880 was.
Q. Less expensive to make, and then, of course --
A. Less expensive to manufacture than the 880 was.
Q. Okay. And you were going up against still the 760 or the 766 by that time?
A. Probably both of them.
Q. And how was it different from the 880, besides the look?
A. Primarily in the -- it's called a knock-off valve system where when you open the bolt, you're cocking a hammer onto the sear. And, of course, when you fire it, the hammer goes forward and impacts the stem on the rear end of the valve and discharges the air. The 880 had a claw that pulled the valve open and held it open. And you couldn't pump it until you recocked it again to reset the valve. But this one, it -- you could pump it without cocking it, if you wanted to.
Q. Okay. So we don't make this a memory test, I know that you've already generated documents that explain some of the differences between the 856 and the -- the 860 and

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the 880.
MR. MOORE: Would you mark this please?
(Wherein Exhibit 11 was marked.)
Q. Mr. Joyce I'm going to show you what's been marked as your Deposition Exhibit No. 11, which is that planning meeting involving Model 860 dated March 24th, 1983.
MR. GRIFFIN: Show the same objection to Deposition Exhibit No. 11. Like some of the others, it's not a document produced in this litigation. At least this one is not. So I don't know the -- this look like it's produced in some other --
MR. MOORE: It should have been.
MR. GRIFFIN: It's got a different --
MR. MOORE: It doesn't --
MR. GRIFFIN: It's got a different Bates number.
A. Well, that says I sat in on the meeting, but I sure don't remember seeing the minutes published. Maybe I did.
Q. (Mr. Moore continued.) I just had some questions. This is when the 860 was being developed. Is that right?
A. Yes.
Q. Okay. It says on -- on No. 5, "Replacing 880 as direct competition with 760. Previous" -- period. "Previous concept was to fill void between 840 and 880." Do you know what is meant by that?

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

In The Matter Of

DAISY MANUFACTURING COMPANY, INC.
CPSC Docket No. 02-2
doing business as Daisy Outdoor Products
400 West Stribling Drive
Rogers, Arkansas 72756

Respondent

Bethesda, Maryland
Friday, February 7, 2003

Deposition of

RONALD THOMAS REICHEL

a witness called for examination by counsel for Defendant pursuant to notice and agreement of counsel, beginning at approximately 10:15 a.m. at Consumer Products Safety Division, 4330 East West Highway, Room 711, Bethesda, Maryland, before Sandy Medford Nelson, Notary Public in and for the State of Maryland, when were present on behalf of the respective parties:

APPEARANCES:

On behalf of Plaintiff:

ERIC LEWIS STONE, ESQUIRE
CPSC
Litigation Division
Washington, D.C. 20207
(301) 504-0626

On behalf of Defendant:

WILLIAM M. GRIFFIN, III, ESQUIRE
Friday Eldredge & Clark
400 West Capitol
Little Rock, Arkansas 72201
(501) 370-1515

ALSO APPEARING:

The Honorable William Moran

* * * *

COPY

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* * * * * *

Whereupon,

RONALD THOMAS REICHEL

was called as a witness and, having been first sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE DEFENDANT

BY MR GRIFFIN:

Q Mr. Reichel, my name is Will Griffin, and we were introduced earlier. I represent Daisy in this matter brought by the CPSC against Daisy. If you don't understand anything I ask for any reason whatsoever, could you please ask me to repeat it, rephrase it, do whatever it takes so that you do understand it?

A I sure will.

Q Okay. Could you give me your full name?

A Ronald Thomas Reichel

Q And your address?

A 9400 Wishbone Terrace, Cabin John, Maryland

Q And the zip code?

A 20818.

Q And could you tell us what your job is?

the chamber; isn't that correct?

A True.

Q And so, to put a visible feed track, it can sometimes be misleading, correct?

A Yes

Q And do you find any fault with Daisy for not putting a visible feed track on here?

A No. But it's never been -- I didn't find any fault over the years with Daisy

(Brief recess.)

BY MR. STONE:

Q Just as a preliminary matter, in 1995 and 1996 when you did these studies and when that statement -- do you have that statement?

A Which one?

Q The statement that's marked -- it's marked as Exhibit No. 1 -- were issued -- who was the Chairman of the agency?

A I don't know. I'm totally unaware. Before Anne Brown, it was Jacqueline Jones Smith

Q And she was the Chairman during the Bush Administration, wasn't she?

A I believe so.

Q And Anne Brown became Chairman during the Clinton Administration?

A I believe so

Q I'm not asking you to do computations. Do you remember whether this was the Clinton Administration in 1995 and '96?

A I can't recall

Q Okay.

A I'm unaware of this statement being issued

Q I understand. And Mark Schoem, whose name is on this document in 1996 --

A Yeah

Q -- was he Director of the Recalls Division back in 1996?

A I believe so

Q And is he still the Director of the Recalls Division and Compliance in 1996?

A I'm not sure

Q I mean currently

A I'm not sure of that.

Q Allan Schoem, do you know who Allan Schoem is?

A Yes, I know who Allan Schoem is

Q In 1996, do you remember what his position was?

A That's Deputy of Compliance under Dave Smeltzer

Q Do you know if Allan Schoem is now --

A Allan has taken over where Dave Smeltzer was

Q Okay. Are there any changes that you're aware of in the management of the Agency that have occurred since 1995 and '96 until the present administration?

A Well, the retirement of Dave Smeltzer

Q And do you recall --

A And Carlos Perez.

Q When did Mr. Perez retire?

A Just recently. I'd say within the last six months

Q Since this Complaint was issued?

A Yeah. And Smeltzer was over a year ago.

Q Was it possible it was as many as four or five or six years ago?

A Yes. I can't be sure. Yeah, maybe four years ago

Q In your handling of BB guns, have you noticed the warnings on the boxes of other BB guns?

A Yes

Q Does that include the Daisy youth line gun, such as the Red Ryder?

A I can't remember. There are warnings, though, that are less strict on lower-velocity guns like Red Ryder. But I haven't seen a single BB gun that I know of that doesn't have a warning on the box of some kind

Q And do you know back when you were shooting BB guns whether there were warnings about risks of injury with BB guns?

A I sure can't remember ever reading any

Q But you indicated that you wore goggles because --

A We wore eye goggles, and we tested them before to make sure the BB would not penetrate

them.

Q In your experience with BB guns over the years, do children treat BB guns the way they would treat a .22?

A Not at all.

Q How were they treated differently?

A Well, I would think parked in the kitchen, you know, in the corner, and they are left loaded The magazine may be very loaded

Q Do kids handle the BB guns the way you'd handle the .22?

A My kids never had a BB gun They just had real guns so I can't say that. But I taught them, you know, the fun of plinking It was most interesting for my wife to learn about that! My wife is a child psychiatrist, and for her to see how kids could be fascinated by plinking and shooting was quite educational for her

Q In your experience with BB guns, is it unusual for kids to take risks, such as shooting BB guns at each other, that you would not take with a .22 or other firearm?

A You never try that with a .22 I don't think any kid would conceive of it.

Q But children do that with BB guns?

A With BB guns, yes

Q In your experience with children, do they take the same precautions and have the same ability to perceive risks as adults?

A No

Q Have you ever seen kids dry fire guns BB guns?

A Yes

Q When they dry fire – well why don't you describe what you've seen

A Well, kids dry fire BB guns all the time One of the things we used to do is put oil down the barrel and get a little puff of smoke This is how oil can get in the gun and be excessive and cause BB's to clump But that would be dry firing You didn't want to have any BB's in it, you just wanted a puff of smoke to come out. But air guns make quite a bit of noise when you fire them without a pellet a BB, in there, so people like to just to

hear the noise Kids very often will pump it up and fire it with nothing in the chamber

Q And your experience in dealing with the BB0 when you were out shooting this gun to see if it functioned –

A Right.

Q – which is, I believe, the work you said you did in 1995 –

A Yeah.

Q – did you look each time into the chamber to see –

A No. It fed so reliably, you would not look.

Q Do you think in your perception of other users, is that what people do with these guns?

MR. GRIFFIN Object to the form of the question.

THE WITNESS I think generally if they were plinking, that's what they would do

BY MR. STONE:

Q Are you saying that the focus is not on looking into the chamber, that the focus is on

cocking and pumping?

A Cocking and pumping

Q You've looked at the warnings and instructions on the guns themselves?

A Yes

MR. STONE. Could you hand the gun over, please?

MR. GRIFFIN Do you want the box?

MR. STONE. No That's not necessary

BY MR. STONE.

Q If you could look at that, do you see an instruction telling people to look into the chamber or loading port to see if a BB is loaded or loading?

A Well, it says, read the operational manual before using, misuse or careless use may cause injury or death. There's nothing to look at in there

Q What about the instructions for use?

A I'd have to look at a copy of it. I've never seen anything instructing – or recall anything instructing – from looking at the chamber

to make sure.

Q If you would look at the instructions on the side of the gun itself on operations –

A Open bolt, put on safe, pump, load, close bolt, aim, take off safe, and fire

Q So, you don't see anything there that says to look into loading port?

A No But the sequence of aim and take off safety, you usually would take off the safety before you aim.

Q So, if you were writing the instructions, is it safe to say you wouldn't write them that way?

A Yeah, yeah

Q Now, when you did the work back in 1995 that is summarized in Exhibit No 4 and Exhibit No 3, did anybody demonstrate for you how BB's could lodge in the gun before you did the work?

A No

Q Did anybody ask you to disassemble the gun or to do cutaways of the gun to look for places –

A No

Q – where BB's could lodge?

A No That was not requested.

Q Did anybody give you product liability lawsuits or any other information to review so that you could see more about the scenarios in those?

A Well, I did read a series of ID's, you know, on accidents and reported mishaps with the rifle

Q Did you look at any engineering drawings?

A Yes

Q Do you remember which engineering drawings?

A For the 880, I saw a series of evolutions where they exposed the areas and the port for examination got larger and larger That's all

Q And do you have an opinion as to why those changes were made?

A Well, just it was more desirable to be able – more visible to see it. It's better to be able to have the chamber more visible to be able to check. Because if there is a BB in the gun. If you pull back the bolt, it should move forward with gravity down to the magnet.

Q Are you aware whether this gun can be used with a scope?

A Yes, it can There's tracks on it.

Q Have you looked at the gun with the scope on?

A No I've never seen one with it on.

Q Does the scope overlap over the loading port area?

A Always The scope always blocks the loading port area

Q We've been talking a lot about the work you did on the 880 Do you remember doing any similar analysis on the B56?

A Yeah. I recall a very similar gun.

Q In the firing test that you did as part of the main project in 1997, you did tested velocity and tested it to the voluntary standards, is that correct?

A Correct.

Q Were you aware as to whether anybody had ever come in and demonstrated for Jay Demarco how a BB could lodge in the B56?

A I was not aware of that.

Q Mr. Demarco never told you that?

A Never told me that, no

Q Did Mr Demarco ever show you how that could happen?

A No

Q Did Mr. Demarco ever ask you to disassemble the gun or to do cutaways, or anything else, to try to determine how BB's could lodge in the B56?

A No

Q You've done work on the Red Ryder gun, haven't you?

A Yes.

Q And in examining the Red Ryder gun, did you find design characteristics that you found not to be ideal?

A Yes, I –

MR GRIFFIN Wait a second Object to the form of the question, and also irrelevant and not likely to lead to the discovery of admissible evidence.

THE WITNESS Yes, I did find what I would call a design fault that I tried to bring to the attention of the Commission in the Daisy Red Ryder.

BY MR STONE:

Q And who did you bring that to the attention of?

A I wrote a PSA on it, and that should have been, you know, Mark and anybody involved

Q Was that directed to Mr Demarco?

A It would have gone through Mr. Demarco

Q And did Mr. Demarco ever do a recall of the Red Ryder based on that?

A Not that I know of

Q Do you know if he ever issued for corrective action?

A No I don't know

MR GRIFFIN They were, for the record That was taken care of, for the record

BY MR STONE

Q When you looked at the 880, why did you – am I correct in understanding that you put extra oil in the gun to see if BB's would stick together?

A Yes.

Q Why did you do that?

A Well, to see if that could cause BB's to hang up in the chamber and give a false sense of the gun being unloaded when, actually, it was loaded with BB's in the chamber Oil in guns is a quite common problem.

Q Um hum And you were aware that the – did it, in fact, cause –

A It caused them to be, yeah, undetectable They were in the chamber, but not loose so you couldn't rattle them or pour them out.

Q And because you had done this intentionally, you knew that those BB's were actually lodged in there, right?

A Correct.

Q And to get them out, you knew to hit the heel on the gun on the ground, didn't you?

A Yeah, force the gravity feed

MR GRIFFIN Can we make it clear? He's talking about the magazine, and I think he said chamber

THE WITNESS Well, the magazine They were in the magazine You pumped it down so they would gravity feed and pull the bolt back and the chamber –

BY MR STONE:

Q And you were able to do that and know to do that because you had intentionally created that condition –

A Yeah. But I knew how many BB's were in there, too, and I wanted to get them out to make sure that they

Q And do you have any opinion about whether a child using the gun, for example, would have necessarily perceived that BB's might be lodging or hanging up in that situation?

MR. GRIFFIN Object to the form of the question

THE WITNESS I don't believe that a child would – if the gun was over-oiled, and they had some BB's lodged in there with oil, they would not be aware of it.

BY MR. STONE:

Q Um hum. Now, if there were places in the gun where a BB could hang up –

A Yeah

Q – would you, as an engineer, prefer as a corrective measure telling people to be careful not to point guns at each other or eliminating that lodging problem?

A Well, telling them isn't going to solve the problem. Eliminating the problem is ideal, but can you do it is the question. You still have this oil thing were it could hang up

Q Are you aware of redesigns made in the B56 guns to –

A I went over and saw them enlarging and making the visible port larger and larger. I think this was done to make it easier to load pellets.

Q Are we talking about the 880 –

A The 880 will take pellets

Q And the B56 gun, are you aware of any design changes made to eliminate areas where BB's would lodge?

A I'm not aware of any

Q Are you aware that this gun is now a pellet-only gun?

A No, I'm not aware of that. Which is? The 856?

Q The 856.

A No. I'm not aware of that.

Q Is one of the values of making the gun a pellet-only gun that the individual who's loading the gun loads pellets one at a time and knows --

A You have to know whether it's loaded. Well, it could have been loaded previously, but as a positive action, loading a pellet into the chamber.

Q Now, you indicated -- you told, actually, a couple of stories, which were amusing to people who are not cat lovers perhaps. But in your experience, do users of these guns recognize that these guns are powerful weapons and distinguish them from the BB guns they grew up with?

MR. GRIFFIN: I object to the form of the question.

THE WITNESS: I don't think people are

aware these newer, high-velocity guns are as powerful as they are. I mean, when a grandfather gives his grandson one of these, he is not taking it out and comparing it and looking. Numbers don't mean that much to velocity.

BY MR. STONE:

Q Now, you've made measures of both the velocity of the BB projectiles of leaving both the 860 and 856?

A Right.

Q And is it also correct that you calculated force of the projectiles or the energy of the projectiles?

A One time, I think I calculated for some purpose the energy of the projectiles.

Q Based on your evaluation of these guns and the energy and the velocity of the projectile, do you have any opinion as to whether or not these guns can cause serious injury or death?

A I'd say both models can cause death if the shot was directed in the right place. The velocity and energy are potent enough to do that.

Q Um hum. Is that different than the Red Ryder and the other lower-velocity guns?

A Red Ryder is a much lower velocity, and I don't think it's possible with a lower velocity.

Q So, is it safe to say that the consequences of the kind of child play that you engaged in with this gun --

A I don't think we ever would have done it.

Q But the consequences of that kind of child play would have been potentially fatal in this case?

A Yeah.

Q And you don't think that users or buyers of these guns necessarily realize that added air is dangerous?

MR. GRIFFIN: Object to the form of the question.

THE WITNESS: I don't feel they are aware of the dangers.

BY MR. STONE:

Q Now, let me ask you a couple of questions about this automatic safety question. Let me first

ask you about your observations. In your observations of kids handling guns, do they always understand when they first start to handle a gun that their fingers shouldn't be inside the trigger guard?

A No. They don't understand that.

Q That's something you would teach a child, right?

A Yes. Don't put your finger in the trigger guard until you intend to shoot. But the other thing that kids do that was very upsetting is they get very hazardous when they try to make a shot and the safety has been left on. They seem to panic when the weapon doesn't fire right. That's when they pick it up and swing it around, and this is what happens with the automatic safety. If it's on and they try to pull the trigger and it won't go off, they are wondering what's wrong. Then they bring the gun around, it sweeps, and it's not treated like it's loaded. They know it's not working.

Q Now, this is based on your observation of

children with a manual safety or an automatic safety?

A This is children and adults with the automatic safety.

Q Which since –

A There was only one RB gun that had it.

Q Um hum.

A This is my observation of some people using it. They got frustrated by its presence.

Q And who are the people who were using that gun frustrated by its presence?

A Mark and Scott.

Q Mark who?

A Mark Demarco – not Mark. Jay Demarco.

Q Jay Demarco.

A Yes. Jay Demarco and Scott Snyder.

Q Have you observed children or young adults using this gun?

A No.

Q So, the people that you found most frustrated and who handled the gun with the automatic safety in a hazardous manner were the

people who had a lot of experience with guns without automatic safeties?

A (Nodding.)

Q A child receiving their first gun would not have that experience, is that right?

A I don't know. That would be interesting to see. I know I was very frustrated when I first ran into the automatic safety.

Q And, in your experience, military weapons typically don't have automatic safeties?

A You never want automatic safeties.

Q And do you want to tell us in the reason why?

A Well, I mean, it's life and death. When you go to fire, you don't want it – you just reload it and the automatic safety comes on, and then you see somebody coming over the hill aiming at you. You don't want that automatic safety to prevent you from taking a life-saving shot.

Q Would you agree with me that it is a trade-off between the need to fire quickly and whatever safety benefits the automatic safety might

provide that causes you to not have automatic safeties on the military weapon?

MR. GRIFFIN: Object to the form of the question.

THE WITNESS: You'll have to rephrase that again.

BY MR. STONE:

Q If you had an automatic safety on the gun, you might get shot before you were able to shoot somebody else, is that correct?

A Yeah.

Q And are there people who accidentally shoot themselves with guns?

A Yes.

Q And does that sometimes happen because they are handling the gun, and the safety is not on and it goes off?

A That could be a possibility.

Q And in a military – with military weapons, have you ever heard of such cases?

A We haven't really studied many military cases. I'm trying to think. The son of a friend

of mine once got shot in the leg, and it was caused by quotas, not a safety device, but the fact that a clip was removed from the gun. And people don't realize there's a bullet left in the chamber.

Q Now, you said you liked that on the revolver – you liked the design because it is inherently safe. Is that what you said?

A You can check the condition of it. There's no safety on a revolver. Usually, six bullets in a cylinder, and you have to manually – they are double action, but they are fired most accurately by pulling the hammer back.

Q And why is that?

A Because it requires much less trigger pull. Double action, you have to rotate the cylinder.

Q And if you attempted to pull the trigger, would you feel a significant difference?

A Oh, yeah. There's a big force difference.

Q Does that, in a sense, perform a safety kind of function?

A Yeah. The increased trigger pull makes it

more difficult to fire. I'm trying to think of the other reasons. It's inherently safe because you can open the cylinder and have the cylinder exposed and you know it's not going to -- It's not like taking a clip out where one can remain in the chamber. When you open the revolver and have the cylinder exposed, the gun is not going to fire.

Q. Um hum. The Glock that you discussed earlier with Mr. Griffin, what are some of the uses of that Glock and some of the people who use the Glock?

A. Primarily, it's a military weapon or a police weapon.

Q. Um hum.

A. I've fired it many times. It's very nice to fire, nicer than you'd expect.

Q. That's not a gun that's designed for children 16 years old, is it?

A. No, absolutely not.

Q. And that is a gun that is designed to use for self-defense?

A. Yes.

Q. Mr. Griffin showed you the size of this gun and asked you questions about whether this is a size for a child or whatever. In your experiences as both a child and in teaching your own children, what age did you give them a real gun, a .22?

A. I never gave them a real gun. I let them fire a real gun, but they must have got been, oh, maybe nine.

Q. And at what age were -- well, give me an idea, roughly, what's the size of the .22 compared to this and the weight compared to this gun.

A. Well, the model 94 that I have, the .22, is a little smaller than this. It's very short, about that short.

MR. GRIFFIN: Showing, for the record, about 12 inches shorter than the 880.

THE WITNESS: Yeah. The barrel is about 18 inches.

MR. STONE: I would probably disagree on the characterization of the inches, but --

THE WITNESS: It's a much shorter action, and it separates the two pieces.

BY MR. STONE:

Q. Um hum. Does that gun have plastic stocks or wood stocks?

A. No. It's wood stocks. It's an old design.

Q. Are the wood stocks heavier than the plastic stocks on this gun?

A. No. It would be about the same.

Q. And, in your experience, in shooting programs, 11 and 12-years olds in .22 caliber shooting programs --

A. The shooting programs, you always use a bolt action. You never use a weapon like that. I started my kids with a bolt action.

Q. But in terms of release size and weight, how do they compare?

A. They are a little wider and heavier than .22's that I started with.

Q. The shooting programs that you've been involved in, what age did you start teaching kids to shoot .22's?

A. I'm trying to remember. Isaac Walton in

Loudoun County. It was .22's, and I'm trying to think what was the age of the kids. I can't remember the age group. It was a rural community. It was much younger than...

Q. Twelve-year-olds possibly?

A. Younger than that.

Q. Okay. Generally speaking, do you think most BB guns are fired in shooting programs, or do parents get a BB gun and give it to the kids and let them go off and play?

MR. GRIFFIN: Object to the form.

THE WITNESS: From my experience, they let them go off and play. What I did is I trained my kids, you know, to be aware of, you know, looking so they didn't fire at our cabin in West Virginia.

BY MR. STONE:

Q. And your father, who was an expert marksman, taught you safe handling and procedures for handling a gun?

A. Right.

Q. Nevertheless, you took the gun out, you and your friends, and shot them at each other.

right?

A We never did anything with BB guns We only handled real guns.

Q But you had been taught how to handle a gun properly, right?

A Right.

Q Never point it at anybody, always assume it was loaded?

A . BB guns are not the same You don't think of them as real guns, or we didn't.

Q And you think that's still true today?

A What?

Q And you believe that's still true today?

A Well, I treat it like a real gun with much more reverence than I did when I was a kid

Q You would, but what about your experience with other users of the gun, with BB guns?

A Well now, the BB guns I had at the cabin were not regular BB guns They were different. They were single-shot air guns that you broke, so you could always tell if they were unloaded because they were always in that position They put

pellets in them one at a time They were not BB guns, they were pellet guns They had short stocks They were special guns for kids

Q Mr Griffin asked you earlier if you believe it was misuse by an adult who buys a gun – one of these BB guns – for a kid who is younger than 16

A I wouldn't want to put one of those in the hands of a kid younger than 16.

Q Do you have any experience on whether, in fact, that's what people do, though?

A Other than I can see, if I remember reading some cases, I was shocked that a grandfather had given – it was a fatality And the gun had been given by a grandfather to his grandchildren

Q Is it safe to say the reason you wouldn't do it is because, as an engineer and somebody with a great deal of experience who's seen injuries and deaths caused by these guns you recognize the risk inherent in these guns, isn't that correct?

A I wouldn't realize it by just looking at

the package The warning is there, but I would be dubious of it. When I got it out and tried it on things I had shot with the Red Ryder, and I found out how much more powerful it was I'd be shocked, and I'd say, hey, this is too much

Q Is it safe to say that you have significantly more background and experience with guns than a lot of parents?

A Oh, yes, a lot more

Q In your experience working at the Commission over the years –

A Yeah.

Q – do you have an opinion on whether children have the level of attentiveness and are as careful and precise in the way they do things as adults?

A Well, I haven't learned it through the Commission, but I've learned it through my kids No, they don't have the same.

Q Mr. Griffin asked you a number of questions that were based on – where he asked you about whether something was defective What

exactly do you mean by defective?

A When I think of defective, it's something in the manufacturing process or in the design of the weapon that makes it hazardous A defect would be like a broken firing pin. It fires down the middle, and you get – a regular firearm, it fires one time And the next time you load it, it doesn't. This unreliability creates a situation that may be very hazardous

Q Now, in your time at the Commission, you've looked at a lot of electrical products, for example, haven't you?

A Yes.

Q And you've seen things like Christmas lights or extension cords with very narrow-gauge wires?

A Yes

Q And is it fair to say, as an engineer, you found that to be defective?

A Yes Normal use of the wire was not large enough to carry safely the current requirements.

Q Now, have we run into situations with

those very same kinds of products where people try to warn people not to, for example, plug more than a certain load into those extension cords, or not to plug too many Christmas lights in together?

A Yeah. We've tried to do that. The public doesn't want to learn too much about electrical safety

Q And the reason you found those electrical products to be defective is because you really didn't expect people would be able to follow those instructions or, as a practical matter, would be following those instructions, correct?

A No I didn't work on any lights This is not the situation Sometimes, the instructions are not adequate They don't make sense And very often with electrical products, you find the warning there, but with no rationale for why not to do it

Q Um hum

A So, maybe you need to repeat the question so I can answer it better

Q Let me ask you the question in a different

way If you could design the hazard out of a product, would you rather do that or warn people and try to change their behavior?

A You'd rather design the danger out of a product It's not always possible A knife cuts, and there's always going to be a danger of cutting yourself with a knife There's no way to get around that

Q Um hum.

A People are continually burning themselves with curling irons, and they say can't you put a guard on it If you put a guard on it, it can't be used to curl hair

Q And in the case of the knife, would you agree that you wouldn't design the knife with a slippery handle or a handle that could cause your hands to slip down to the blade?

A That would be a design flaw

Q In the discussion with Mr Griffin, he asked about the utility of this gun, and you said you felt it had some utility for plinking and target shooting, is that correct?

A And chasing cats away, yeah

Q Is it necessary to have a gun of this velocity for those purposes?

A For plinking?

Q Um hum

A It just makes it more fun It would teach you something, particularly if you had, you know, an old Red Ryder and you compared it with this It would teach you something about trajectory and aiming

Q Um hum.

A Plinking is taking cans out, soda cans My kids used to plink at little water bugs in the pond we had It's just shooting at little targets, or putting a hole in a leaf, shooting at a leaf, putting a BB hole in it, and then aiming again at the BB hole to see how close you come to it But it's just sort of free shooting as you're in the woods or shooting at tin cans, soda cans

BY MR. STONE:

Q Do you believe that that kind of plinking is the primary purpose for BB guns?

A That's what you find kids enjoy My wife was surprised that her daughters enjoyed plinking so much

Q Um hum. Now, in your experience with other guns, such as .22's or 45's or whatever else, is plinking –

A You don't do as much plinking It costs too much.

Q Are there any differences in perception of potential risks from going out in the woods and plinking things with a 45 or .22?

A Yeah. The range is so much greater on a .22 You plink with the .22. You don't plink with the larger. People are always trying to devise fun things for shooting My brother's range up in West Virginia where he teaches counter-terrorism and everything, they have special tree firing courses And they have a tree which has an arm with a target about the size of a hand on it, and it's pivoted around a post. You put three on one side and three down the other. I shoot and I hit it, and it swings around on the other side, and it's a target

for hitting. He and I will shoot against each other. This is plinking. You know, the object is to get them all over on the other guy's side.

Q. Generally speaking, kids don't have access to those courses with BB guns. Is that fair to say?

A. No, not plinking targets. So, I mean, they've got the ultimate plinking courses up there. That's where you use the larger caliber handguns.

Q. Again, in your experience with BB guns, are these guns, these high-powered guns, particularly accurate?

A. They are much more accurate than the lower-velocity guns.

Q. If you were looking for accuracy for plinking or target shooting purposes in a normal BB gun setting, would you be more interested in power or in consistency?

A. For accuracy in shooting, I'm going to figure out how many pumps gives me the most consistent velocity. If you look at these, they vary. The velocity varies, and there's an average.

There was -- I forget how many -- ten pumps was on this one. You try them at, say, maybe at four pumps, the velocities would be more consistent. You learn that very quickly. So, you would start using four pumps for your target shooting and zero in on that. Fastest isn't necessarily the most accurate.

Q. In your comments earlier, you made a reference to, I believe, the term "horsepower race." What did you mean by that?

A. Well, at times in looking at these guns, they would look at velocity listed by the manufacturer, BB here at 650, BB at 685. And then Crosman and all the other manufacturers would list their velocity, and it's like trying to see who has the highest velocity. It's a number that doesn't mean that much, but prospective buyers might think it meant a lot.

Q. So, the utility of that velocity in and of itself is in your -- let me ask you a question. Is it your opinion that the utility of that velocity is less than the marketing value of that velocity?

MR. GRIFFIN: Object to the form of the question.

THE WITNESS: The thing that was interesting on both of these is how they differed from the listed velocity. On the 880, the manufacturer's listed velocity was less than what we measured on both cases for the BB's and the bullets. And the same thing, it was less for the BB's with the 856, but the velocity of the pellets were listed as greater than what we measured. But that could be because of different weights and pellets and stuff like that.

BY MR. GRIFFIN:

Q. Now, let me make sure I'm understanding what you've said, and please stop me and either recharacterize or retranslate as necessary. As I understand it, for accuracy purposes, consistency is more important than velocity?

A. Yeah, that's true.

Q. And these guns, unlike other lower-powered guns, will cause injury and deaths, serious injuries and deaths?

A. They have the potential to cause more serious injuries and possibly death.

Q. All right. And the actual utility of the additional velocity is, in your opinion, more a marketing factor?

MR. GRIFFIN: Object to the form of the question.

BY MR. STONE:

Q. What you called the horsepower race?

A. I saw in looking at the boxes, you know, they were getting more and more -- the interesting thing is that Daisy was understating it from the looks of things, unless they use different -- I don't know where they got it. Just reading off the box, what they stated the velocity was. That was unusual, and that's what we were trying to see when we tested all these, how accurate were they in their claims.

Q. Um hum. How many guns are those that you actually tested?

A. I can't remember.

Q. Do those results show testing of one gun

or more guns?

A Let me see. I think it's – this would be one gun.

Q Would it be surprising in a production that one particular gun might have either a higher or lower velocity than the average –

A No, that's possible They could have taken them over much greater runs, and that's where they got it. Each of these are single samples

Q Okay Let me show you what was marked as Exhibit 4 That particular document that has the word "draft" embossed across it or watermarked on it –

A Yes

Q – did you put the word "draft" on there?

A No, I didn't.

Q And is it your normal practice when you do a final memo to sign the memo or initial it?

A That's normally what I do

Q And is that memo initialed or signed?

A This is not initialed

Q Do you have any independent recollection

of whether that is, in fact, a memo that you prepared or a final memo at all?

A No, I don't. But I do remember having – I mean, I don't doubt that I wrote this, but I don't think I ever forwarded it on.

Q Now, the memo marked as Exhibit 3 of June 8th 1995, that does not have the word "draft" on that, and you did initial that, right?

A Right. But I did not put "draft" on this I've never seen it, except for here, the word "draft" or that watermark.

Q Um hum. Now this – let me just ask you a couple more questions You indicated that in response to some of the Mr Griffin's questions that you were upset, as were others, that you had been taken off BB guns Were you actively working on BB guns from 1997 to 2000?

A No But, I mean, it had been one thing that came up continually You know, it wasn't an active quote project.

Q Um hum Mr. Griffin asked you about whether the most competent people to deal with gun

issues had been taken off Do you know what the gun backgrounds of Mr Wright, for example, are?

A No I have no idea what his background is, but I am aware of Scott and Tom Caton's background

Q Do you know if Mr Wright, for a sample, took over BB guns for Mr Demarco was in the military?

A Yes, he was I knew that.

Q Do you know if in addition to having that background with guns whether they had any other background with guns?

A I don't know of any other

Q Do you know whether he has a background in engineering?

A No, I don't know that.

Q Mr. Demarco doesn't have a background in engineering, does he?

A No, he doesn't.

Q Did you ever talk to Mr. Perez? Do you understand first that Mr Perez was the supervisor both for Jay and for Richard Wright?

A I knew he supervised Jay, but I didn't know Mr Wright I was gone I was back at the lab when that took place

Q Did you ever talk on the phone or via emails to Mr Perez about why he took Mr. Demarco off BB guns, as you put it?

A No.

Q Did you ever talk to Mark Schoem about that?

A No

Q So, where did you form the impression that they were taken off BB guns either at the instigation of the Chairman or to get a different result?

A I think through my conversations with Dave Smeltzer

Q And could you tell us who Dave Smeltzer is?

A Dave Smeltzer was former head of Compliance. His wife and my wife are very close friends, and we see each other socially a great deal, even today

Q Do you know whether Mr Smeltzer is a personal friend of Aaron Locker's?

A I know that he knows him.

Q Didn't Mr Smeltzer, in fact, tell you long before we had your deposition notice that you were going to be deposed?

A Yes, that's true.

Q Okay And did that information go to Mr. Smeltzer from Mr. Locker?

A I have no idea, but I presume that.

Q Do you remember anybody else giving you the impression that Anne Brown in some way was trying to change up on what had been done with BB guns and that she was out to get BB guns?

A Only through Dave Smeltzer He said, we didn't give her the answer she wanted Ron. You know, statements like that.

Q And, in your experience, Mr Smeltzer has been gone from the Commission for – is it safe to say, several years?

A Oh, I'd say, yes

Q Would it surprise you to know that he

retired in '97 or thereabouts?

A No, that wouldn't surprise me But he keeps close contact with the Commission.

Q As does Mr. Locker; is that correct?

A I guess so

Q And, in fact, Mr Smeltzer practices law in the private sector?

A Yes, that's true

Q And he represents companies before the Commission?

A Well, what surprised me is that I think one of the attorneys from your group called me and said they'd been informed by Locker that I was back at work. Out at the lab, you didn't know I was back at work.

Q Right.

A So, I figured the only way it could have been is that Dave told Aaron that I was back at work.

Q Um hum

A Because I was only working, at that time, part time

Q When in 2002, 2001 you were not asked to work on these air guns – do you need a break? Are you fine?

A No, I'm fine I can't remember the dates But, again, I get involved, even now, in helping other people out at the lab that are doing the work in setting up the chronograph It's just that I have experience on how to do it.

Q Could you just explain for the record what a chronograph is?

A A chronograph is a device that measures the velocity of bullets or BB's from guns, and we got a new one that's very nice It's got three screens, so it measures the time of the BB when it goes through them The light hits the BB – and/or a shadow of it – over a photocell, and they time the amount of time it takes the BB to go a certain distance On the new chronograph It's got three screens so there's a check. There's two screens that are timed that have checks differently So, there's a verification to make sure it is a valid reading

Q Um hum Do you know anything about the qualifications of the – I think Mr. Griffin made reference to – outside people who did work on BB guns?

A I have no idea I haven't heard any reports or seen any evidence or anything

Q So, you're not in a position to judge whether they are as qualified or more qualified than other people who worked here in the Commission?

A No I have no feeling for it, if that's even what they said.

Q Um hum. Are you a gunsmith?

A I consider myself one I've done a lot of work.

Q Do you have a gunsmith certification –

A No

Q – from the Bureau of Alcohol, Tobacco & Firearms?

A No I had a firearms license one time, but I did mounting of scopes and repairs to guns

Q Um hum. Is Mr Caton a gunsmith?

A Not that I know of.
Q Mr. Snyder?
A No.
Q Mr. Demarco?
A No.
Q Is Mr. Caton's background in mechanical engineering or in materials engineering?
A Materials engineering, as far as I know, metallurgy.
Q Um hum.
A I forgot to mention one of the things I did when I worked over at the Center for Naval Analyses. I was in the Marine Corps Operations Analysis Group and worked on a study concerning the choice of an optimum caliber for the Marine Corps.
Q Now, this was when you were an editor?
A No. I was Editor of Science on that one.
Q Um hum.
A It was a study I was doing.
Q That didn't involve BB guns?
A No. It involved M16's and, you know, military machinery. I'm trying to find an optimum

caliber -- what caliber might be ideal, if you choose one caliber, it might be interchangeable between machine guns and rifles.
Q In your experience M16's, don't have any safeties, right?
A They have a safety on.
Q They don't have an automatic safety?
A No, no automatic safety.
Q Are you aware of any repeater rifles that have automatic safeties?
A I'm not aware of any, but I understand that there are some.
Q Are you aware of any break barrel guns that have automatic safeties?
A I'm not aware of any.
Q Are you aware of whether there are any?
A No.
Q Are you aware of, other than the Marksman gun, whether there are other BB guns with automatic safeties?
A I've never seen one.
Q Would it surprise you -- never mind. Are

you aware of any Daisy BB guns with automatic safeties?
A Again, I'm not aware of any.
Q Are Crosman guns with automatic safeties?
A No.
Q Any Benjamin Sheridan guns with automatic safeties?
A Not aware of any.
Q The only ones you have personally seen are Marksman guns with automatic safeties?
A Yes.
Q Mr. Griffin asked you about backing screws out of the 880. If you had information indicating that screws sometimes loosen in 880's during normal use, would it be an appropriate test to loosen the screws as that might occur and to see if BB's would lodge?
A If the screws being loose -- and, see, very often in many of these incidents cases, we were never allowed to see the actual incident sample. We were given brand new weapons that were the same brand, but we never saw the incident

report. So, the idea of the screws being loose just was not in the concept of...
Q And you were never shown by Mr. Demarco copies of Daisy documents of their own testing that showed screws coming loose?
A No, no.
Q So, would you consider it an appropriate test to back out a screw to see if BB's lodged, if that was, in fact, happening?
A If, in an incident sample, that had happened.
Q If you saw it in a test report from Daisy indicating that that happened --
A You asked why were they backing the screws out. You know, usually there's a reason why they would do a test like that.
Q Um hum. Do you do testing of products to simulate what you understand to be normal or --
A Sometimes we run tests on things, but we have an indication of why we might.
Q And if somebody had told you that screws backing out was a problem, is it conceivable you

would have done that test?

A I would have done some more measurements to see how conceivable for the screws to loosen up, what was the removal torque, you know, and maybe doing a test and firing it many times to see if they do, under normal circumstances, loosen up.

Q And if somebody had already done those tests for you, for example, somebody at Daisy, would that influence your need to do those further tests?

A We'd have to see those test results Usually, there's questions, you know

Q But, in this case, nobody showed you those test results?

A No I never saw any tests like that.

Q And if, indeed, screws were backing out during normal use of guns and somebody created that test condition to see if lodging would occur, would you consider that to be unethical?

MR GRIFFIN Object to the form of the question

THE WITNESS It's hard for me to judge

the ethics of it. It's something much more difficult.

BY MR. STONE

Q Well, do you do tests, for example, like on a fan, just install the rotor of the fan to see if it would catch on fire?

A That would be considered an abnormal test, but it would just be explained that way Any testing you do I don't think is a matter of ethics It's just explaining or defining what you've done is, you know, not a normal, you know, an abnormal test.

Q Right. So, for you, the deciding point would be whether there's a good reason to do that test?

A Yeah I mean, first, you have to justify why you're doing that in a normal test I'm getting very tired

Q I'm not sure I have any other questions If you'll just give me one moment. I have one or two more questions if you want to take a break, if that's all right with everybody

(Brief recess.)

BY MR. STONE

Q Ron, earlier you said something about people reusing BB's What do you mean?

A Very often, people will have a basement range and have a BB trap, and they will fire BB's into it, and they will get a large selection of BB's that have been fired that, very often, are dented So, they are not perfectly round, and they will be in the trap in the basement floor, and people will sweep them up in an attempt to use them again. Bad practice

Q You also talked about there are standards for BB's and size of BB's; is that correct?

A Yeah

Q And in the manufacturing process, is it your experience that products are always made perfectly?

A No There's much variation.

Q And if somebody, for example, opened a box of BB's off the shelf and found several BB's that, it turned out, were slightly out of round, would

that shock you?

A No

Q And if somebody, a typical user, used those BB's in their BB gun, would that shock you?

A No Nobody measures BB's before they use them.

Q So, if a BB that could lodge in an BB0 because it was slightly misshapen was put into one of those guns, that wouldn't shock you?

A Well, any sphere that is out of round has the potential to lodge in a space more than if it's perfectly round because it changes its dimension it has a possibility of lodging itself

Q I guess what I'm asking you is would you be –

A I wouldn't be surprised They wouldn't know that they used it –

Q Right.

A – because these are not measured before they are put it.

Q And the average user wouldn't understand that using a BB that had previously been used would

change the dimension and create a potential for
lodging, would they?
A If they would look at it, they would see
that they have gotten a dent, but they don't even
think about it. They just say, let's try this
Q In 2000 and 2001 when you heard other
people were working on BB guns and that you were
knew you weren't, who did you hear from that there
were other people working on BB guns?
A Well, there was an announcement one time
I don't remember the date, but they wanted our
records
Q Do you know if that's when you provided
some of these documents?
A That's when I went through everything
Q Was that done in November of '95 for the
discovery purposes in this case?
A I can't remember when it was done but I
know that some of the documents printed the wrong
date because they were filled in with the current
date and not the date of the document.
Q And do you recall whether you learned

about that in a memo from Jimmy Williams asking for
your records?
A I believe that's how I did
Q So, when you testified earlier about
people taking your records, were you referring to
this process when Jimmy Williams asked for the
records?
A No There was an announcement before, and
I collected some of them But there was an
announcement to definitely take the time go through
absolutely everything
Q Um hum
A So, I went through all of my hard drives
to make sure that every document I had related to
BB guns was transferred
Q And you sent those to?
A Lawyers There were quite a bit of
documents
Q And when you say quite a bit of documents,
did that include documents about other guns and
other products, other than these Powerline air
guns?

A Basically, I think I sent everything on
BB's I think there were a stack of drawings, too,
on the 880's
MR STONE I have no further questions
(Defendant's Deposition Exhibit
No. 7 was marked for
identification.)
BY MR GRIFFIN
Q Other than the documents which we have
here – we have about six or seven or eight pages
of documents in Exhibits 5, 6, 3, and 4 – did you
have other documents regarding testing on Daisy
Powerline –
A I'm sure there were I don't know about
Daisy, but I submitted everything
Q No But as far as Daisy 880 or 856 –
A I can't answer that.
Q I'm going to show you Exhibit 7. Does
this appear to be a copy of Exhibit 4 without the
"draft" on it, without the word "draft" on it?
A It appears that way to me Let me look at
it a little closer Well, yeah. It's not

initialed That's surprising, which tells me it
came off a computer It's not the copy that I
forwarded to Jay Yeah That's a copy without the
word "draft" on it.
MR. GRIFFIN. I'd like to mark this as
Exhibit 8.
(Defendant's Deposition Exhibit
No. 8 was marked for
identification.)
BY MR. GRIFFIN.
Q I'm going to show you what's been marked
as Exhibit 8 Does that appear to be a Daisy
Powerline 880 Series manual?
A It appears to be.
Q And the very first warning, could you read
that out loud?
A Warning, this gun can cause death. Read
and follow the instructions carefully Do not load
a BB or pellet into the chamber until you are ready
to shoot. If you do load a BB or pellet and decide
not to shoot, remove either manually or by shooting
it in a safe direction. An uncocked, unloaded gun

is safest. Accidents happen fast, and accidentally injuring or killing someone is a terrible thing. Shoot safely.

Q Does that seem pretty clear to you that this rifle could kill somebody?

A There's no mention of death there.

Q This gun could cause death.

A Oh, okay. It's not emphasized quite enough.

Q And accidents happen fast. Accidentally injuring or killing someone –

A Is a terrible thing.

Q Does that get the point across?

A It's mentioned, but it's not as forceful. The same people have been killed.

Q This one: not a toy; supervision required; misuse or careless use may cause serious injury or death?

A Well, *has caused*.

Q Has caused?

A It could be more potent in a statement like that.

Q Tell me this –

A Caution.

Q Could you read that caution?

A Caution, always view the BB or pellet when closing the bolt and loading.

Q And the rifle tells you to read the manual before using the product?

A Yeah.

Q And the manual explains that and actually has the pictures of it, don't they?

A Yeah.

Q I want to read to you from the affidavit of Jess Galan who writes for Air Gun Digest. I'm going on read you a quote, and tell me whether this is true. The pointing of any firearm or rifle at another individual and intentionally discharging it, whether one thinks it's empty or loaded, is reckless in the extreme. To sanction such actions as expected human behavior makes a mockery of the rules that we as firearms instructors, parents, and adults try to pass on to our students, youth, and readers. No matter what safety system is utilized,

what feed system is implemented, or how the particular firearm or air gun is designed, no guarantee can ever be given that an injury will not occur if an individual points an air rifle or firearm at an individual and pulls the trigger.

A I would agree with that statement.

MR. GRIFFIN: I don't have any other questions.

MR. STONE: I have just a couple of follow-ups.

BY MR. STONE:

Q Mr. Griffin showed you something he marked as Exhibit No. 8. Do you know the date of that document or anything about that document?

A That's the instruction?

MR. GRIFFIN: The instruction manual.

THE WITNESS: I don't know anything about that. I hadn't looked at that before.

BY MR. STONE:

Q In your experience, do consumers read manuals from cover to cover?

A Very seldom, very seldom, do they read a

manual. They pick them up later to find out something, in my experience, myself being one example. I don't always read manuals.

MR. STONE: No further questions.

MR. GRIFFIN: No questions.

(WHEREUPON, at 1:18 p.m. and signature not being waived, the deposition of RONALD THOMAS REICHEL was concluded.)

ACKNOWLEDGEMENT OF DEPONENT

I, RONALD THOMAS REICHEL, do hereby acknowledge that I have read and examined pages 4 through 160, inclusive, of the transcript of my deposition and that:

(Check appropriate box.)

( ) the same is a true, correct and complete transcript of the answers given by me to the questions therein recorded.

( ) except for the changes noted in the attached Errata sheet, the same is a true, correct and complete transcript of the answers given by me to the questions therein recorded.

_____ _____

Date Witness Signature

CERTIFICATION OF NOTARY PUBLIC

14th day of February, 2003

_____

NOTARY PUBLIC

MY COMMISSION EXPIRES: 03-14-2006

CASE: CPSC V DAISY OUTDOOR PRODUCTS

DEPOSITION OF: Ronald Thomas Reichel

TAKEN: February 7, 2003

PAGE	LINE	ERROR	CORRECTION	REASON

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Witness

CERTIFICATION OF SHORTHAND REPORTER - NOTARY PUBLIC

I, Sandy Medford Nelson, the officer before whom the foregoing deposition was taken, do hereby certify that the foregoing transcript is a true, correct record of the testimony given; that said testimony was taken by me stenographically and therefore reduced to typewriting under my supervision, and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS THEREOF, I have hereunto set my hand and affixed my notarial seal this 14th day of February 2003.

My commission expires:

March 14, 2006

_____

SANDY MEDFORD NELSON

NOTARY PUBLIC IN AND FOR

THE STATE OF MARYLAND

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A. We put them on some Youth Line guns at one point in time. When you cock the gun, the safety went on automatically. We eventually took those off those guns. We found from experience that it created a very bad habit of training-wise with regard to the use of the product, that it was just universally the practice of users to cock the gun, close the lever, take the safety off, and proceed. And that they -- the safety became a -- an inconvenience.

The shooting education people insisted that their guns be built without safeties, without automatic safeties, because they found that in training young people, they might have ten people standing on a firing line, and they're there trying to instruct them, and they're telling them to cock the gun and to close the lever, and, you know, move the safety and fire the gun down range and handle it safety, that one of the things that happened with an automatic safety is that a beginner, particularly, unfamiliar with the automatic safety, would try to pull the trigger and find the safety was still on. And then became befuddled, did not know what was wrong, why didn't the gun fire?

And now you've got a person who is reckless with the gun, and you've got ten shooters there. And the shooting education people were very insistent that guns for

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educational purposes be built without safeties. And I believe the standards provide for that.

That -- what was happening is that we were teaching young people bad habits with regard to the use of the product and a habit that wouldn't be transferable into firearms because most firearms don't have automatic safeties.

Q. What type of an automatic safety was used on those Youth Line guns?

A. It was a knob on the side of the gun, and it was activated by the lever that -- as I remember. It was a long time ago. This would be sometime in the mid '60s -- where you cocked the gun, you automatically blocked the trigger from being pulled. And it stayed back when you closed the lever. And you had to remove the safety in order to pull the trigger.

Q. Could an automatic safety mechanism like that have been incorporated into the design of the 880?

A. Almost everything is possible.

Q. So it would have been possible to have incorporated an automatic safety into the design of the 880?

A. We did incorporate an automatic safety --

Q. Well --

A. -- into the design of the gun. We -- if you have a gun and pull the bolt back and try to fire it, you cannot

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fire it. It will not fire. The trigger is blocked. And it prevents the gun from operating.

Q. But it's possible to cock the gun, the 880 that is, after you -- after you've -- I'm sorry. Strike that.

It's possible, isn't it, with respect to the 880 to pump the gun -- strike that.

It's possible, isn't it, to -- on the 880 to open the bolt, close the bolt, and then pump up the gun. Correct?

A. It is possible to do that, yes.

Q. I understand that you -- that it's your belief that that is not best practice.

A. That is not best practice.

Q. But it's possible to do?

A. It's possible to do it, yes.

Q. Was it possible to have an automatic safety other than the open bolt incorporated into the 880?

A. Probably was. As I say, almost everything's possible.

Q. And what would -- in your view, what would have been the incremental cost to -- of incorporating automatic safety into the 880?

A. It would just be a wild guess. I do not know.

Q. Okay. Do you recall having testified in a litigation, Charles W. Smith, Guardian of Jordan Smith

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versus Daisy? And that was action number 93 dash 1098 in the Circuit Court of Pulaski County, Arkansas?

A. No, I don't recall.

Q. That testimony was August 20th, 1993, and I'll let you see this transcript when I'm --

A. Okay. In Pulaski County? '93 testify or a deposition?

Q. I'm sorry. It was a deposition. You were testifying in a deposition.

A. Okay.

Q. It wasn't at trial.

A. Okay, it wasn't at trial.

Q. No, it wasn't at trial.

A. Okay.

Q. At least what I'm looking at here wasn't at trial.

A. Okay.

Q. August 20th, 1993. And you were being questioned by an attorney by the name of Robert Clear -- Cearley, C-E-A-R-L-E-Y. And Mr. Cearley, at page 159 of the deposition transcript, asks you, "Mr. Braughler suggests in this memorandum that this gun ought to have an automatic safety, does he not?"

Answer, "He suggested an automatic safety for it, yes."

Question, "At the time he made that suggestion, was

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it feasible to put an automatic safety on this gun?"
Answer, "Yes, it was."
Question, "And what would the incremental cost have been, if any?"
Answer, "Nickel or dime. Small."
And I'm just going to let you take a look at that and your counsel.
A. Okay.
Q. I -- there are my -- my notations are on this transcript. Just ignore those. On page 159.
A. Okay. I'll cover them up.
Q. You can look at them, I just don't want them to obstruct your view.
A. Okay.
(Wherein witness looks at document.)
Q. Have you read that passage?
A. Okay.
Q. Having reviewed your prior sworn testimony in the Smith case, do you have any reason now to retract that testimony relating to --
A. No.
Q. -- the automatic safety and incremental cost?
A. No, I don't.
Q. So you stand by that statement?
A. Well, yeah. It was a guess then and it's a guess

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now.
Q. Well, it didn't indicate in the transcript that it was a guess, did it?
A. No, it didn't.
Q. You didn't say --
A. But that's 1993, 21 years after the fact. Been out of the employment of Daisy for 11 years -- or ten years, you know. Simply trying to be as helpful in the deposition as I possibly can.
Q. But you didn't indicate in the deposition that you were speculating or guessing, did you, with respect to the subject that I just brought up?
A. Twenty years after the fact, you are speculating in many comments.
Q. But you didn't -- you didn't indicate you were in this transcript. Right?
A. I haven't read the whole transcript, but it doesn't say that in that paragraph.
Q. Okay. Thank you. Now, you testified that shooting education people had insisted that the guns that they use in their shooting programs be built without the automatic safeties, referring to the BB guns. Correct?
A. Without safeties, period.
Q. Without safeties.
A. Period.

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Q. Without any safeties.
A. Without any safeties, yes.
Q. Okay. Now, who are these shooter education people that you're talking about?
A. We're talking about the people at NRA, we're talking about the Jaycees, groups that are -- we're talking about our own people that go out and teach shooting education to clubs and groups. You know, there are a number of firearm hunter safety instructors in the country, and some of them get involved in youth programs --
Q. Sure.
A. -- and shooter education programs with Daisy.
Q. Has that ever -- was that request from shooting education people ever put in writing to Daisy or -- to your knowledge?
A. Not that I can recall, no.
Q. Did you have an opportunity to speak to these folks --
A. Yes.
Q. -- about that?
A. Yes.
Q. And that's what they conveyed to you?
A. Yes.
Q. Did you --
A. And to our -- and to our shooting education

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department.
Q. Who in your shooting education department did you talk to about that subject?
A. Oh, I can't tell you back then.
Q. Okay.
A. There were a number -- Bob Goss was one. And I don't know whether he was there at that time or not. But we've had -- we had a number of shooting education people from time to time.
Q. Okay. Now, I think that you testified that on at least some of these areas of disagreement that you had with Mr. Braughler's memorandum, which is Exhibit 3, that -- and I'm paraphrasing here. I'm not using your language, but that he, basically, had come around to your way of thinking eventually. Is that a fair statement?
A. I think he has. And from depositions that he's given in the past, I think that's true, yeah.
Q. Have you had occasion to read his deposition transcripts from past litigation?
A. I have some but not all.
Q. And have you had discussions with Mr. Braughler about this subject matter?
A. Yes.
Q. When were those discussions?
A. Oh, I mean, he lives in Rogers. I see him, you

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

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3:59

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March 14, 2003

Via Hand Delivery

Todd A. Stevenson, Secretary
Office of the Secretary
Consumer Product Safety Commission
4330 East-West Highway, Room 502
Bethesda, MD 20814

Re: ***In the Matter of Daisy Manufacturing Company***
CPSC Docket No. 02-02

Dear Mr. Stevenson:

Enclosed for filing please find an original and three (3) copies of the following document in the above-referenced matter: **Reply to Daisy's Response to Order Directing Briefing on Issues of Significance along with the following attachments:**

A) CPSC Press Release # 94-046: Ann Brown Sworn In As New Chairman of U.S. Consumer Product Safety Commission, March 10, 1994.

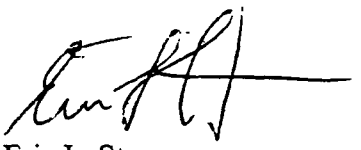
B) Excerpts from deposition transcript of Ronald Thomas Reichel In the Matter of Daisy Manufacturing Co. (dated February 7, 2003).

C) Excerpts from deposition transcript of Ronald W. Joyce In the Matter of Daisy Manufacturing Co. (dated December 19, 2002).

D) Excerpts from deposition transcript of Richard I. Daniel In the Matter of Daisy Manufacturing Co. (dated December 18, 2002).

If the Court would like full copies of the transcripts listed above, Complaint Counsel will provide them. Please do not hesitate to contact me if you have any questions or concerns.

Very truly yours,



Eric L. Stone

Enclosures

cc: Aaron Locker, Esq. (via first class mail, postage prepaid, and facsimile)
William Griffin, III, Esq. (via first class mail, postage prepaid, and facsimile)
Marianne McBeth, Esq. (via first class mail, postage prepaid, and facsimile)

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, Inc., doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

COMPLAINT COUNSEL'S REPLY TO DAISY'S RESPONSE TO ORDER DIRECTING BRIEFING ON ISSUES OF SIGNIFICANCE

I. PRELIMINARY STATEMENT

Respondent Daisy Manufacturing Company's extensive briefing allegedly aimed at the issues of significance identified by the Presiding Officer, did not merely miss the bullseye—it seemed aimed at a wholly different target. Daisy used the excuse of the Judge's Order to present—once more—Daisy's defenses to this case supported by a series of suppositions,[1] highly

[1] For example, Daisy strings together a series of suppositions and characterizations in an attempt to build the case that former Chairman Ann Brown had improper motives and influenced the outcome of the current investigation. For example, they refer to "a feeling at the Commission that the new Commissioner, Ann Brown was upset with the staff for not finding that the Daisy 880 and 856" were defective. (Daisy Brief at 10). This statement suggests that the previous staff investigations were on someone else's watch. In fact, Ann Brown became Chairman on March 10, 1994, and several of the investigations and public statements referred to by Daisy occurred when she was Chairman and chief executive of the agency. However, Respondent fails to mention that Mr. Reichel testified that he heard that Ms. Brown "had it in for BB guns" from David Schmeltzer, an attorney who retired from the Commission in October 1997. Mr. Schmeltzer retired several years before the initiation of the investigation leading to the filing of this case. Mr. Reichel also testified that Mr. Schmeltzer is a personal friend of Mr. Locker's and that Mr. Schmeltzer initially told Mr. Reichel that he would be deposed in this case. (Reichel Tr. at 140-142). In a further attempt to ascribe evil motives, Respondent mischaracterizes the testimony of witnesses such as Mr. Reichel to suggest that he was taken off an ongoing investigation of BB guns in order to achieve a different result. Mr. Reichel, an electrical technician, had by his own testimony, a very limited role in earlier investigations of BB guns.

selective quotes and partial quotes[2] from deposition transcripts. The staff will resist the urge to spend pages and pages deconstructing Respondent's fanciful funhouse "facts" or to argue about every one of Daisy's defenses.[3] We will have an opportunity in the course of this proceeding to set forth a more complete and realistic view of this case. Instead, we will focus our attention in this brief response on a few matters that relate directly to the Presiding Officer's queries.

II. ARGUMENT

A. Incident Information is Relevant to Whether the Powerline Airguns Present A Defect That Creates A Substantial Hazard

Section 15 of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2064, gives the Commission broad authority to seek remedies--including public notice and recall--for "substantial product hazards." A product presents a substantial hazard if it contains a "product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the

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He testified he was brought into those primarily because of his ability to use a piece of equipment called a chronograph that measured BB velocity and not because he was "[T]he Commission's own in house airgun expert." Daisy Brief at 2. (Reichel Tr. at 143). The evidence will show he simply had a very limited role and was not involved in the investigation that led to the filing of this case. The evidence will also show that Mr. Reichel was asked to "turn over [his papers]" [Daisy Brief at 9-10] for the purpose of responding to Respondent's discovery in this case. (Reichel Tr. at 154).

[2] For example, on page 6 of its brief, Daisy says that Mr. Wright, a CPSC Compliance Officer, "has admitted that there is no better safety design on the market than Daisy's". They provide an excerpt from his deposition which ends at page 110, in the middle of his response. At the bottom of 110, Mr. Wright stated: "Not to my knowledge, there's nothing on the market that's better, but once again, I have not done what you would call a continued search to find out if there's something. . ." Respondent's deposition excerpt ends there. However, on the next page, 111, he continued: "better. Nor would I claim to be, like was said, a gun expert because even going inside CPSC, the people that you mentioned—Jay Demarco, Reichel, and so forth—they might look at it in a period of time and say, you know, we should do 'X' which doesn't really cost any more and makes this gun 100 percent safer."

[3] Daisy cites numerous gun cases to support its positions. However, the Powerline Airguns are not expensive weapons sold to serious hobbyists and law enforcement or military personnel. They are cheap BB guns mass marketed through mass retailers to children and young adults. Cases involving adult law enforcement personnel with gun training, such as Wasylow v. Glock, Inc. 975 F. Supp. 370 (D. Mass. 1996), are plainly inapposite.

public."[4] Unlike product liability law, which addresses the harm to individual consumers from individual injury incidents, the Commission's authority allows the agency to address risks present across an entire product line by taking proactive measures to avoid or mitigate a "substantial risk of injury to the public."

Much of Respondent's response to the Presiding Officer's issues appears premised on the assumption that they are defending a product liability case. That assumption is mistaken. In a product liability case, it makes good sense not to examine other incidents unless they are probative of the particular incident at issue in that case. This substantial hazard case is under the Commission's laws. In this case, the history of the product's use is relevant not only to the existence of a defect, but also to the severity of the risk of injury. As we noted in our earlier brief, the Commission explained its position about the relevance of injury incidents in its interpretative rules governing Substantial Hazard Reports, 16 CFR 1115. 12(g)(1)(iii):

> A risk is severe if the injury which might occur is serious and/or if the injury is likely to occur. In considering the likelihood of any injury the Commission and the staff will consider the number of injuries reported to have occurred, the intended or reasonably foreseeable use or misuse of the product, and the population group exposed to the product (e.g. children, elderly, handicapped).

Daisy would like to reduce this case to a clean, unthreatening, and antiseptic battle of the experts devoid of any connection to the real world. However, the real world is what the Commission is all about. In the real world, children and "young adults" are the primary users of Daisy Powerline Airguns. They handle these Airguns based on their own frame of reference, not the frame of reference of experienced adult shooters or gun designers. In the real world, children believe that if a gun is not loaded it presents no risk to them. Real world users do not believe

[4] Section 15 of the Federal Hazardous Substances Act (FHSA), 15 U.S.C. § 1274, parallels this formulation except that it does not use the words "substantial product hazard" and applies to toys and other articles intended for use by children.

that a gun is loaded if every indication (dry firing, shaking the gun and hearing no BBs) shows that the gun is not loaded.

In the real world, parents and children do not perceive the level of risk presented by these high powered Powerline BB guns. (Reichel Tr. at 125-127). In the real world, BB guns are sold in discount and sporting goods stores. The Powerline Airguns are given to unsupervised, untrained children, not used in well-supervised shooting programs where the users can be taught about the internal workings of guns and given an adult perspective on the potential risks. In the real world, kids make mistakes handling guns and if the safety is not on, someone can *unintentionally* be shot. In the real world, many children have been crippled, brain damaged, or killed.

It is obvious why Daisy would ***not*** want this proceeding to focus on the real world of real child knowledge about guns and conduct and real incidents. Daisy's favored world is a chimerical world of perfect users, armed with perfect knowledge making intentional decisions to do something that is unsafe. To create that world, Daisy must exclude the facts and rely on an antiseptic parade of experts arguing in a vague and general way about whether amorphous shooters must have behaved recklessly. In Daisy's world, devoid of real people and real incidents, you can pretend that a bunch of aberrant children and young adults are intentionally shooting each other. In the real world, that is not the case. The real world ***puts the lie*** to all those arguments, because in the real world kids only know what they know, they shoot guns they truly believe are not loaded because of the lodging defects, they stumble, they unintentionally fire loaded and cocked guns, and they die or suffer serious and often permanent injury because of the design of the Powerline Airguns. Is it surprising that Daisy would like the Commission not to be able to introduce any real world evidence?

As we have stated, the staff understands the logistic issues of re-litigating every individual case and has no intent to burden the Court by doing so. However, the staff does intend to introduce evidence of what happened in real life cases in the course of presenting its case. This evidence is directly relevant both to the Respondent's assertions regarding the conduct of the users and to the likelihood and the severity of the risk.

Respondent argues that the intervening conduct of the user will "prohibit liability for a defendant unless the intervening cause could have been reasonably anticipated." (Daisy Brief at 12). In the real world, Daisy has seen hundreds of examples of children misunderstanding the risks of certain conduct and making mistakes through inadvertence and pure klutziness. In the real world, children are not trained, experienced, adult firearms users. In the real world, a child who has every indication that a gun is not loaded may not handle the gun with the same care as if he believed the gun were loaded.[5] That behavior can be anticipated particularly with untrained children. Not surprisingly, when Ron Joyce, Daisy's gun designer and expert, saw a demonstration that a BB could lodge in the Model 856, he immediately went to Teresa Wrazel and worked with her to eliminate BB lodging through design changes. (Joyce Tr. at 81-92). Daisy has redesigned the 856 guns twice to prevent the BB lodging and then acted to eliminate BBs completely. These actions are not consistent with a firm who believes you cannot reasonably anticipate that children will be misled by lodged BBs into believing a gun is not loaded.

All consumer product injuries relate in some way to the use of the product. A user who does not use the product is never in any danger. However, every user has his own frame of

[5] Daisy's reliance on Sherk v. Daisy-Heddon, 450 A.2d 615 (1982) is misplaced. That case did not involve allegations of BB lodging. It was a failure to warn case. Further, at the time, nobody had demonstrated that BBs could lodge in the Powerline Airguns.

reference, his own maturity level, and the particularized context in which he uses the product. That consumers frequently do not use the product the way a designer intended it be used, often reveals more about the myopia of the designer rather than the unreasonableness or unforeseeability of the consumer's behavior.

B. The Evidence Regarding Prior Testing Does Not Support Daisy's Positions

As noted in our previous brief, Complaint Counsel does not object to properly admissible evidence[6] of previous testing by the Commission staff of Daisy airguns. No matter how many times Respondent repeats its mantra that those tests showed there was no defect in the guns, the facts are otherwise. Our technical staff did limited analysis of the limited material available to them. They also did only what they were asked to do. (Reichel Tr. 105-108). As Mr. Snyder and Mr. Reichel testified, they typically tested the guns to an ASTM standard that had no provisions regarding BB lodging or automatic safeties. They did not x-ray or disassemble the guns looking for potential BB lodging areas. Nor did they create cutaway versions of the guns, make internal measurements of parts, or do any other significant forensic analysis aimed at identifying how BBs could lodge. In fact, the only real attempt to learn anything about ways BBs could lodge in the history of these investigations was that Mr. Reichel put excess oil in the Model 880 because, in his experience, people often over-oil their guns. (Reichel Tr. 102). He found that BBs did stick when he did so. (Reichel Tr. 109-112).[7]

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[6] We do believe that documents which cannot be authenticated are not admissible. The staff does not intend to contest authenticity merely as a formality and will stipulate to the authenticity of documents we know are authentic. However, we note that Daisy has several documents which we are unable to authenticate. Daisy has continued to resist accounting for how they obtained those documents. The staff believes that Daisy should not be able to use such documents without providing such discovery. However, at minimum, the burden will be upon Daisy to authenticate those documents.

[7] In recent discovery, Daisy provided copies of documents dated in 1990 suggesting that in testing an 880 gun to the voluntary standard, CPSC technical staff expressed concern that "the presence of only one BB in the chamber could present a safety hazard because it is possible to fire the rifle several times without the BB being

As to testing of other guns, Respondent suggests it would not intend to introduce testing of other airguns regarding the lack of an automatic safety, however, it wants to show the industry standard. The staff believes the industry standard, which demonstrates a minimal level of safety acceptable to all the major members of the industry, is of no probative value in determining the existence of a defect. However, rather than objecting to such evidence, Complaint Counsel would respond by showing not only that the automatic safety was an inexpensive and feasible alternative, but in addition—despite Respondent's frequent protestations to the contrary—are common in airguns, including very popular models sold by Respondent. All of Respondent's anti-automatic safety rhetoric amounts to nothing but post hoc rationalization. Their own former President has confirmed the feasibility and cost effectiveness of an automatic safety for the Powerline Airguns. (Daniel Transcript at pages 116-118.). Further, the continued marketing of airguns with automatic safeties by Daisy and many of its competitors undercuts Daisy's arguments that such safeties will create unsafe shooting habits.

Complaint Counsel does not believe the court should hear evidence of previous testing by the Commission staff of competitor's guns.[8] First, while such testing may be relevant to whether other guns meet ASTM requirements or have defects, they are not relevant to whether Daisy Powerline Airguns are defective any more than evidence that other people are speeding is relevant to the trial of a particular individual who is caught speeding. Second, those other parties are not part of this proceeding and have no opportunity to protect their interests. Third, putting other manufacturer's products on trial is likely to divert significant time and attention from the

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discharged. It is also hard to hear only one BB rattling around in the chamber." The lab did not do further work and identify a lodging issue.

[8] Daisy has provided us with records they apparently obtained through sources other than Complaint Counsel or the Commission's FOIA office regarding such testing. Section 6(b) of the CPSA prohibits the release of such

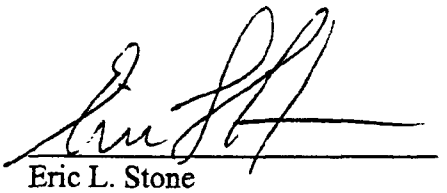
real issue in this case: Daisy's Powerline Airguns. Fourth, the Commission's staff is not in a position because of protections for firms in our statute to discuss or rebut Daisy's interpretations of those reports.

While it might be in Daisy's interests to throw out enough chaff to prevent the Presiding Officer's radar from locking on to the real issues in this case, it is apparent that this is a diversionary tactic and the Court's resources should not be diverted for that purpose.

III. CONCLUSION

This case is about the real world, not the "Dream World" Daisy would have the Court relocate to. In the real world, children and "young adults" behave as children and "young adults." Providing badly designed guns for such users creates a defect and substantial risk of injury. The Court should resist Daisy's efforts to remove this case from the real world.

Dated this 14th day of March, 2003



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Consumer Product Safety Commission

information without first seeking comment from the firms involved on the fairness of the release and the accuracy of the information. We will ask Daisy to account for the source of these documents.

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2003, I caused a copy of the foregoing **Reply to Daisu's Response to Order Directing Briefing on Issues of Significance** to be served upon all parties of record in these proceedings, as follows:

By facsimile and first class mail, postage prepaid to:

The Honorable William B. Moran, Administrative Law Judge
and Presiding Officer

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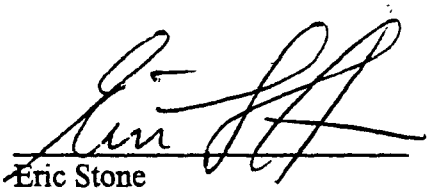
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NEWS from CPSC

U.S. Consumer Product Safety Commission

Office of Information and Public Affairs Washington, DC 20207

FOR IMMEDIATE RELEASE
March 10, 1994
Release # 94-046

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Ann Brown Sworn In As New Chairman Of U.S. Consumer Product Safety Commission

WASHINGTON, DC – Ann Brown was sworn in today as the new Chairman of the U.S. Consumer Product Safety Commission (CPSC). Ms Brown was nominated to head the Commission by President Clinton in October 1993.

Brown said, "I am thrilled to accept this responsibility as Chairman of the CPSC. My background in toy safety and other consumer issues gives me the knowledge needed for this position. As a grandmother, I am dedicated to protecting children and other vulnerable groups from unreasonable risks of injury and death associated with consumer products. I look forward to working with the Commission's excellent staff and my fellow Commissioners to enforce safety standards and make sure consumer products are as safe as possible." She added, "This agency should be on the cutting edge of consumer safety."

She said she has three major goals for the agency. "First, we need to make the agency more proactive." She said, "This means becoming highly visible, innovative, and not afraid to take risks." She also said, "Being proactive means to enforce the law aggressively." She said the agency will be "action-oriented."

Second, Brown said she wants the agency to be "highly visible, not an underdog but an aggressive watchdog."

Third, she said, "I want the agency to become more user friendly and accessible to consumers. Consumers should know who we are, what we do, and that we care."

Brown served as a consumer advocate for two decades, directing several product studies and price surveys, including the nationally recognized "Toy and Children's Products Quality, Safety and Price Survey." This survey provided an annual update on unsafe toys and helped consumers make safer choices in the marketplace. Brown helped form the Washington, DC Office of Consumer Protection and served since 1980 as vice president of the Consumer Federation of America. Since 1983, she has been chairman of the board of Public Voice, a consumer advocacy group focusing on health and nutrition issues, and since 1988 she has been a member of the Coalition for Consumer Health and Safety. In 1991, she joined the Institute for Injury Reduction.

Ann Brown earned her BA from The George Washington University in 1959 and previously attended Smith College. She is married to Donald Brown, a Harvard Business School professor and attorney. The couple has two children and three grandchildren.

CPSC's mission is to protect the public from unreasonable risks of injury and death associated with consumer products. The Commission's objective is to reduce the estimated 28.6 million injuries and 21,700 deaths associated each year with the 15,000 different types of consumer products under CPSC's jurisdiction.

Send the link for this page to a friend! The U.S. Consumer Product Safety Commission protects the public from unreasonable risks of injury or death from 15,000 types of consumer products under the agency's jurisdiction. To report a dangerous product or a product-related injury, call CPSC's hotline at (800) 638-2772 or CPSC's teletypewriter at (800) 638-8270, or visit CPSC's web site at www.cpsc.gov/talk.html Consumers can obtain this release and recall information at CPSC's web site at www.cpsc.gov.

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Q. So I'm having trouble distinguishing what's good about the Daisy models that have force feed and a force feed as, perhaps, could have been added to the 880.

MR. GRIFFIN: Object to the form.

A. Well, as I told you before, when you hold the gun to pump, you've got the muzzle up, and the BBs, being little, round, cylindrical objects, always go toward the center of the earth. And they line up in that feed track. So why complicate the gun. It makes it less reliable when you add more parts to it.

Q. (Mr. Moore continued.) All right. Are you aware of any reason why the -- why the gravity feed mechanism in the Daisy 880 design can get hung up?

A. Well, let's put it this way. I've never seen one get hung up. I suppose it could, but I've never seen one do it.

Q. Have you heard of them getting hung up in an 880?

A. No.

Q. Well, as I read your testimony in Wild, you indicated you were aware of BBs can be lodged in the 880 and consumer complaints and allegations of BB lodging, but you had not been aware of the same with respect to the 856.

MR. GRIFFIN: Object. It's not a question, so I object to that.

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MR. MOORE. So --

THE WITNESS: Well, now --

MR. GRIFFIN: Wait.

Q. (Mr. Moore continued.) Is that right?

MR. GRIFFIN: Wait. Wait.

Q. (Mr. Moore continued.) Did you say that in the deposition?

MR. GRIFFIN: Wait. Wait.

THE WITNESS: I don't remember.

MR. GRIFFIN: Wait. Object to the form of the question. Further, it's a misuse of a deposition. You may now answer, Mr. Joyce.

Q. (Mr. Moore continued.) I thank you for my indulgence. My sticky fell out, but I will find it before the end of the day. I really will.

MR. GRIFFIN: You've got a good ten days to look for it.

Q. (Mr. Moore continued.) Mr. Joyce, are you aware of any testing done by Daisy to determine whether BB lodging can occur in the 880 family of BB guns?

A. Any specific testing for that regard?

Q. Any testing.

A. We tested these things ever since we started making them, and except for the initial problems with pellets getting back in the loading -- or the BB track, I'm just

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not aware of any BB loading problems except in the case if you would get a misshapened BB.

Q. And what -- can you explain what you mean by any problems in the loading track?

A. Sir?

MR. GRIFFIN: Object to the form.

Q. (Mr. Moore continued.) You mentioned the loading track as the potential --

A. If pellets got back into the loading -- BB loading track.

Q. Oh, pellets. Are you aware of any specific tests --

A. No.

Q. -- to that end?

A. Just -- just ongoing daily and life tests that we did.

MR. GRIFFIN: I would like the record to reflect that we've now spent 15 minutes watching counsel do a deposition.

MR. MOORE: I'd like for the record to show that Mr. Griffin exaggerates by about 11 minutes, and I do appreciate your indulgence, and I apologize for holding you up. Kind of like me waiting for you to get off your cell phone.

Q. (Mr. Moore continued.) My question had to do with the 880 testing for BB lodging. I have the same question

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about the 856, whether you're aware of any Daisy -- your testing by or for Daisy to determine whether a BB may be lodged in the 856 family of PowerLine BB guns?

A. After the wild gun examination, we got, as I recall, four guns, four 856s, at the office, and by slamming the gun hard on the side and slapping it around, we managed to get a BB to stick in one of the four guns.

Q. And what did you do then?

A. We proceeded to lay out the magazine area on the computer, and as it was designed, there was more than adequate room for a BB. In the Wild case, I could not determine exactly where the BB was hung because when I discovered the BB was hung, I laid the gun carefully on the table and announced to Mr. Townsend that there was a BB in the magazine. And he proceeded to grab it up and turn it upside down, and the BB fell out. So I never did get to determine -- and we couldn't replicate with that gun that condition. So I never did determine exactly where it was held. At first, I had a theory that somehow it got lodged between the inner shooting barrel and the upper corner of the ear on the baffle.

Q. Well, that's what you said.

A. That's what I thought.

Q. That's what you said in your report.

A. That's what I thought in the report, but the only

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way to me that it could get in that region would be for somebody to force it in there with a -- an instrument of some kind. And...
Q. But in your report you said -- a moment ago, you couldn't -- you were unable to have time to see where it was stuck. That's not so, was it? You could see exactly where it was stuck.
A. No. Immediately when I saw it stuck, I wanted him to know that there was a BB in there, so I laid the gun down carefully with the intentions of he and I looking very closely to see where it was. But instead, he grabbed it up and turned it outside down and dumped the BB out before I had a chance to stop him.
Q. Well, you had -- you were looking at it as long as you needed to look at it before you laid it down, didn't you?
A. Well, I just saw it, and I said, "There's a BB in there," and carefully laid it down, assuming that we could both look at it and figure out what it -- what the deal was.
Q. And did you ask him to do that?
A. But he just immediately reached over and grabbed the gun and turned it up, and the BB fell out.
Q. Uh-huh.
A. So I didn't get to determine exactly. I thought I

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knew where it was, but after -- later on, I decided that it probably did not get stuck between the ear and the outer barrel.
Q. And where did that conclusion -- where was that recorded?
A. Where was that recorded?
Q. Yeah.
A. I didn't record it anywhere. That's just my opinion.
Q. Oh, so your observations as recorded in the videotape deposition were inaccurate?
A. In the videotape deposition? No, this is before the deposition.
Q. Oh, this is the examination?
A. This is the examination.
Q. The videotape examination?
A. No, he and I did not have a videotape gun examination.
Q. Oh, at that time. Okay?
A. At that time.
Q. Forgive me.
A. It's when we went to the deposition that Mr. Kerley had a cut-away gun that he demonstrated that a BB would stick in it.
Q. Uh-huh.

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A. Now, I didn't do any further -- I mean, I didn't do any disassembly or looking at the gun. I don't know if anything was done to the gun besides cutting out the top or not. I just assumed that that's all they did. But -- and I saw it stick between the inner and outer barrel in that gun --
Q. So that's --
A. -- where there -- where there certainly should have been adequate space to not do that. But for some reason, it did it.
Q. So that would make two places --
A. Two guns.
Q. -- where you saw the BBs stick?
MR. GRIFFIN: Object to the form of the question.
Q. (Mr. Moore continued.) Isn't that right?
MR. GRIFFIN: Object to the form of the question. Misstatement of the testimony.
Q. (Mr. Moore continued.) Isn't that right?
A. I thought in one case it was stuck between the ear and the barrel, and then that other gun, it stuck between the inner and outer barrel, not between the ear and the barrel.
Q. Uh-huh. And so you're recanting your report generated, I think, in July of '93?

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A. I'm just saying I may have been in error as to thinking it was stuck between the ear and the inner barrel because there -- without having forced it in there some way, there's no room for it to get in there.
Q. Well, did you make any measurements?
A. I wasn't -- didn't have the proper tools to make a measurement at that point.
Q. Well, did you ask for an opportunity to do that?
A. No.
Q. Why not, if you had doubts?
A. I went back and looked at it with the girl in the engineering department, and it -- there should have been adequate room, but there wasn't in that gun, apparently.
Q. And there wasn't.
A. Something ate up the room that was supposed to be in there for BBs.
Q. You said you looked at a computer layout of a magazine. Tell me about that.
A. Well, I had her to construct --
Q. Mrs. Razel?
A. Razel. With the appropriate drawings. I had her to put all that out on the computer and looked at the spaces that we had. And something, obviously, changed somewhere.
Q. I don't understand. Can you explain that, please? Something changed?

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A. Well, I never did figure out what changed, but if the BB would stick, there obviously wasn't as much room in there as the drawings indicated there should have been. Yet, we could not determine a dimensional problem with the parts that we were looking at.
Q. Well, you were looking -- you were looking at the dimensions, the nominal dimensions, called out on the blueprint parts and drawings?
A. Yes.
Q. And did you stop there or did you do any further analysis?
A. Well, I said we got those four guns and tried to simulate what he did down there and did, in fact, get a BB to stick in one gun and never could get it to come loose.
Q. Where did it stick for you?
A. Between the inner and outer barrel.
Q. All right. Did your dimensions say it should have been able to do that?
A. No, it should have not been able to do that.
Q. And did you figure out why it was able to do that?
A. Never did figure out why.
Q. Did you figure out the tolerances that would be involved if all the piece parts --
A. No, we didn't make a tolerance analysis, a dimensional tolerance analysis of the bullet.

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Q. Why is that?
A. Well, we just thought and we decided to turn the baffle around and get rid of the problem.
Q. And that was in 1999. Yes?
A. Yes.
Q. In 1998, you initiated steps to address the problem that you saw earlier that year when you and Mr. Townsend examined --
A. Right.
Q. -- the Wild gun. Right?
MR. GRIFFIN: Object to the form.
Q. (Mr. Moore continued.) And what steps did you take there?
A. We -- we lowered the ears on the baffle first.
Q. When you say "we" --
A. Well, Mrs. Razel and I designed a new baffle to lower the ears.
Q. And did you conduct any tests to see whether that would solve the problem?
A. I can't be certain. I think we did, but I can't be certain of that.
Q. Do you know where those tests would be right now?
A. No. No.
Q. Did you --
A. I don't know if we even recorded anything.

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Q. What was the nature of the test you ran?
A. I don't remember. I don't remember. We just knew we put the ears down to where that couldn't possibly be a problem with the ears if that's where this stuck.
Q. And at that time you were addressing the space between the outer barrel and upper left corner of the --
A. Ear.
Q. -- out -- ear?
A. Yes.
Q. And early the next year, you found out that lodged in a different area --
A. (Witness nods head.)
Q. -- and you took steps to flip the baffle?
A. Yes. Well, we didn't -- that wasn't the next step we tried. We decided to try to move the baffle to the rear where we wouldn't have the outer barrel/inner barrel space to worry about. We got behind the outer barrel -- or to the rear of the outer barrel, and we were going to design a part that would fit that area. But it entailed changing the ears again on the baffle.
So when she submitted that new drawing to the Sun Manufacturing Company, that guy decided -- he said, "Hey, how about we just turn it around the other direction?" Well, I thought that would make it difficult to spot weld in there, but he must know a lot more about spot welding

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than I do, because he had no trouble doing it. And he turned it around, give us some samples. It worked perfect, so that's the way it stayed.
Q. When he turned it around, did he spot weld it in the same position that it had been at before?
A. It was close, but -- but we'd moved the baffle back about three tenths of an inch so that there would be no space for the BBs to get in between the outer and inner barrel. There was less than a half a BB diameter that could get in there, so that obviated the problem.
Q. And did you test that fix?
A. Yeah, we looked at some guns and no problem at all.
Q. When you say you looked at some guns, will you explain, please?
A. Well, she got some of the guns that had the baffle to the rear and reversed, and we put them together, and no problem.
Q. Some that had been flipped and rewelded by the outsource people?
A. Yes.
Q. Okay. What's the purpose of the baffle in the first place?
A. To keep BBs from going far enough down the outer barrel to lodge between it and the inner barrel.
Q. Is it safe to say to form the forward --

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A. Forward wall --
Q. -- wall?
A. -- of the magazine area.
Q. Okay. I had seen drawings that talk about the baffle and the bulkhead. What's the difference?
A. The baffle is the forward end of the magazine. The bulkhead is on farther forward in the lower portion where the pump system is that stops you from pulling the pump head out of the tube.
Q. Oh, right.
A. And it also positions the pump tube so it can't move in its correct position in the gun.
Q. Thank you. I'll call it the second fix involving the baffle occurred in 1999, the one you just described that went into effect in production of the 856 shortly after you designed it, I presume.
A. Now, back up just a minute.
Q. I'm sorry. The flipping and welding of the baffle, which you say --
A. You said '89. Did you mean '99?
Q. Oh, I'm sorry. Yes, I did.
A. Yes, that's true.
Q. I'm sorry. Do you know when it went into production?
A. I do not know the exact date, no.

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Q. Do you know the date that the 856 was converted to a pellet-only gun?
A. No, I don't know when that happened. I just recently learned about it, but I don't know when it happened.
Q. Why was the 856 -- first it was the 860, I believe.
A. With die cast receivers and Monte Carlo stock and fancier.
Q. Now, that was your design.
A. That was my design.
Q. I mean, that was your baby.
A. Right.
Q. And that was in what year, please?
A. Went into production 1984. About mid year, 1984.
Q. Okay. And why was it introduced? I mean, what was the goal?
A. It was -- it was a -- it didn't have the sleek, neat styling of the 880. It was more boxy.
Q. Uh-huh.
A. They decided if they wanted to buy boxy-looking Crosman guns, we would give them a boxy-looking gun to buy. Further competition --
Q. Yeah.
A. -- against the 760. But it also ate into some of our 880 sales, I'm sure. Let me elaborate on that just a

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minute --
Q. Thank you.
A. -- if I can. The 860 was supposed to be a design that would do very nearly what the 880 did using a different, less expensive, valve system and making it a less expensive gun than the 880 was.
Q. Less expensive to make, and then, of course --
A. Less expensive to manufacture than the 880 was.
Q. Okay. And you were going up against still the 760 or the 766 by that time?
A. Probably both of them.
Q. And how was it different from the 880, besides the look?
A. Primarily in the -- it's called a knock-off valve system where when you open the bolt, you're cocking a hammer onto the sear. And, of course, when you fire it, the hammer goes forward and impacts the stem on the rear end of the valve and discharges the air. The 880 had a claw that pulled the valve open and held it open. And you couldn't pump it until you recocked it again to reset the valve. But this one, it -- you could pump it without cocking it, if you wanted to.
Q. Okay. So we don't make this a memory test, I know that you've already generated documents that explain some of the differences between the 856 and the -- the 860 and

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the 880.
MR. MOORE: Would you mark this please?
(Wherein Exhibit 11 was marked.)
Q. Mr. Joyce I'm going to show you what's been marked as your Deposition Exhibit No. 11, which is that planning meeting involving Model 860 dated March 24th, 1983.
MR. GRIFFIN: Show the same objection to Deposition Exhibit No. 11. Like some of the others, it's not a document produced in this litigation. At least this one is not. So I don't know the -- this look like it's produced in some other --
MR. MOORE: It should have been.
MR. GRIFFIN: It's got a different --
MR. MOORE: It doesn't --
MR. GRIFFIN: It's got a different Bates number.
A. Well, that says I sat in on the meeting, but I sure don't remember seeing the minutes published. Maybe I did.
Q. (Mr. Moore continued.) I just had some questions. This is when the 860 was being developed. Is that right?
A. Yes.
Q. Okay. It says on -- on No. 5, "Replacing 880 as direct competition with 760. Previous" -- period. "Previous concept was to fill void between 840 and 880." Do you know what is meant by that?

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

In The Matter Of

DAISY MANUFACTURING COMPANY, INC.
CPSC Docket No. 02-2
doing business as Daisy Outdoor Products
400 West Stribling Drive
Rogers, Arkansas 72756

Respondent

Bethesda, Maryland
Friday, February 7, 2003

Deposition of

RONALD THOMAS REICHEL

a witness called for examination by counsel for Defendant pursuant to notice and agreement of counsel, beginning at approximately 10:15 a.m. at Consumer Products Safety Division, 4330 East West Highway, Room 711, Bethesda, Maryland, before Sandy Medford Nelson, Notary Public in and for the State of Maryland, when were present on behalf of the respective parties:

APPEARANCES:

On behalf of Plaintiff:

ERIC LEWIS STONE, ESQUIRE
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Litigation Division
Washington, D.C. 20207
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On behalf of Defendant:

WILLIAM M. GRIFFIN, III, ESQUIRE
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(501) 370-1515

ALSO APPEARING:

The Honorable William Moran

* * * *

COPY

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* * * * * *

Whereupon,

RONALD THOMAS REICHEL

was called as a witness and, having been first sworn, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE DEFENDANT

BY MR GRIFFIN:

Q Mr. Reichel, my name is Will Griffin, and we were introduced earlier. I represent Daisy in this matter brought by the CPSC against Daisy. If you don't understand anything I ask for any reason whatsoever, could you please ask me to repeat it, rephrase it, do whatever it takes so that you do understand it?

A I sure will.

Q Okay. Could you give me your full name?

A Ronald Thomas Reichel

Q And your address?

A 9400 Wishbone Terrace, Cabin John, Maryland

Q And the zip code?

A 20818.

Q And could you tell us what your job is?

the chamber; isn't that correct?

A True.

Q And so, to put a visible feed track, it can sometimes be misleading, correct?

A Yes

Q And do you find any fault with Daisy for not putting a visible feed track on here?

A No. But it's never been -- I didn't find any fault over the years with Daisy

(Brief recess.)

BY MR. STONE:

Q Just as a preliminary matter, in 1995 and 1996 when you did these studies and when that statement -- do you have that statement?

A Which one?

Q The statement that's marked -- it's marked as Exhibit No. 1 -- were issued -- who was the Chairman of the agency?

A I don't know. I'm totally unaware. Before Anne Brown, it was Jacqueline Jones Smith

Q And she was the Chairman during the Bush Administration, wasn't she?

A I believe so.

Q And Anne Brown became Chairman during the Clinton Administration?

A I believe so

Q I'm not asking you to do computations. Do you remember whether this was the Clinton Administration in 1995 and '96?

A I can't recall

Q Okay.

A I'm unaware of this statement being issued

Q I understand. And Mark Schoem, whose name is on this document in 1996 --

A Yeah

Q -- was he Director of the Recalls Division back in 1996?

A I believe so

Q And is he still the Director of the Recalls Division and Compliance in 1996?

A I'm not sure

Q I mean currently

A I'm not sure of that.

Q Allan Schoem, do you know who Allan Schoem is?

A Yes, I know who Allan Schoem is

Q In 1996, do you remember what his position was?

A That's Deputy of Compliance under Dave Smeltzer

Q Do you know if Allan Schoem is now --

A Allan has taken over where Dave Smeltzer was

Q Okay. Are there any changes that you're aware of in the management of the Agency that have occurred since 1995 and '96 until the present administration?

A Well, the retirement of Dave Smeltzer

Q And do you recall --

A And Carlos Perez.

Q When did Mr. Perez retire?

A Just recently. I'd say within the last six months

Q Since this Complaint was issued?

A Yeah. And Smeltzer was over a year ago.

Q Was it possible it was as many as four or five or six years ago?

A Yes. I can't be sure. Yeah, maybe four years ago

Q In your handling of BB guns, have you noticed the warnings on the boxes of other BB guns?

A Yes

Q Does that include the Daisy youth line gun, such as the Red Ryder?

A I can't remember. There are warnings, though, that are less strict on lower-velocity guns like Red Ryder. But I haven't seen a single BB gun that I know of that doesn't have a warning on the box of some kind

Q And do you know back when you were shooting BB guns whether there were warnings about risks of injury with BB guns?

A I sure can't remember ever reading any

Q But you indicated that you wore goggles because --

A We wore eye goggles, and we tested them before to make sure the BB would not penetrate

them.

Q In your experience with BB guns over the years, do children treat BB guns the way they would treat a .22?

A Not at all.

Q How were they treated differently?

A Well, I would think parked in the kitchen, you know, in the corner, and they are left loaded The magazine may be very loaded

Q Do kids handle the BB guns the way you'd handle the .22?

A My kids never had a BB gun They just had real guns so I can't say that. But I taught them, you know, the fun of plinking It was most interesting for my wife to learn about that! My wife is a child psychiatrist, and for her to see how kids could be fascinated by plinking and shooting was quite educational for her

Q In your experience with BB guns, is it unusual for kids to take risks, such as shooting BB guns at each other, that you would not take with a .22 or other firearm?

A You never try that with a .22 I don't think any kid would conceive of it.

Q But children do that with BB guns?

A With BB guns, yes

Q In your experience with children, do they take the same precautions and have the same ability to perceive risks as adults?

A No

Q Have you ever seen kids dry fire guns BB guns?

A Yes

Q When they dry fire – well why don't you describe what you've seen

A Well, kids dry fire BB guns all the time One of the things we used to do is put oil down the barrel and get a little puff of smoke This is how oil can get in the gun and be excessive and cause BB's to clump But that would be dry firing You didn't want to have any BB's in it, you just wanted a puff of smoke to come out. But air guns make quite a bit of noise when you fire them without a pellet a BB, in there, so people like to just to

hear the noise Kids very often will pump it up and fire it with nothing in the chamber

Q And your experience in dealing with the BB0 when you were out shooting this gun to see if it functioned –

A Right.

Q – which is, I believe, the work you said you did in 1995 –

A Yeah.

Q – did you look each time into the chamber to see –

A No. It fed so reliably, you would not look.

Q Do you think in your perception of other users, is that what people do with these guns?

MR. GRIFFIN Object to the form of the question.

THE WITNESS I think generally if they were plinking, that's what they would do

BY MR. STONE:

Q Are you saying that the focus is not on looking into the chamber, that the focus is on

cocking and pumping?

A Cocking and pumping

Q You've looked at the warnings and instructions on the guns themselves?

A Yes

MR. STONE. Could you hand the gun over, please?

MR. GRIFFIN Do you want the box?

MR. STONE. No That's not necessary

BY MR. STONE.

Q If you could look at that, do you see an instruction telling people to look into the chamber or loading port to see if a BB is loaded or loading?

A Well, it says, read the operational manual before using, misuse or careless use may cause injury or death. There's nothing to look at in there

Q What about the instructions for use?

A I'd have to look at a copy of it. I've never seen anything instructing – or recall anything instructing – from looking at the chamber

to make sure.

Q If you would look at the instructions on the side of the gun itself on operations –

A Open bolt, put on safe, pump, load, close bolt, aim, take off safe, and fire

Q So, you don't see anything there that says to look into loading port?

A No But the sequence of aim and take off safety, you usually would take off the safety before you aim.

Q So, if you were writing the instructions, is it safe to say you wouldn't write them that way?

A Yeah, yeah

Q Now, when you did the work back in 1995 that is summarized in Exhibit No 4 and Exhibit No 3, did anybody demonstrate for you how BB's could lodge in the gun before you did the work?

A No

Q Did anybody ask you to disassemble the gun or to do cutaways of the gun to look for places –

A No

Q – where BB's could lodge?

A No That was not requested.

Q Did anybody give you product liability lawsuits or any other information to review so that you could see more about the scenarios in those?

A Well, I did read a series of ID's, you know, on accidents and reported mishaps with the rifle

Q Did you look at any engineering drawings?

A Yes

Q Do you remember which engineering drawings?

A For the 880, I saw a series of evolutions where they exposed the areas and the port for examination got larger and larger That's all

Q And do you have an opinion as to why those changes were made?

A Well, just it was more desirable to be able – more visible to see it. It's better to be able to have the chamber more visible to be able to check. Because if there is a BB in the gun. If you pull back the bolt, it should move forward with gravity down to the magnet.

Q Are you aware whether this gun can be used with a scope?

A Yes, it can There's tracks on it.

Q Have you looked at the gun with the scope on?

A No I've never seen one with it on.

Q Does the scope overlap over the loading port area?

A Always The scope always blocks the loading port area

Q We've been talking a lot about the work you did on the 880 Do you remember doing any similar analysis on the B56?

A Yeah. I recall a very similar gun.

Q In the firing test that you did as part of the main project in 1997, you did tested velocity and tested it to the voluntary standards, is that correct?

A Correct.

Q Were you aware as to whether anybody had ever come in and demonstrated for Jay Demarco how a BB could lodge in the B56?

A I was not aware of that.

Q Mr. Demarco never told you that?

A Never told me that, no

Q Did Mr Demarco ever show you how that could happen?

A No

Q Did Mr. Demarco ever ask you to disassemble the gun or to do cutaways, or anything else, to try to determine how BB's could lodge in the B56?

A No

Q You've done work on the Red Ryder gun, haven't you?

A Yes.

Q And in examining the Red Ryder gun, did you find design characteristics that you found not to be ideal?

A Yes, I –

MR GRIFFIN Wait a second Object to the form of the question, and also irrelevant and not likely to lead to the discovery of admissible evidence.

THE WITNESS Yes, I did find what I would call a design fault that I tried to bring to the attention of the Commission in the Daisy Red Ryder.

BY MR STONE:

Q And who did you bring that to the attention of?

A I wrote a PSA on it, and that should have been, you know, Mark and anybody involved

Q Was that directed to Mr Demarco?

A It would have gone through Mr. Demarco

Q And did Mr. Demarco ever do a recall of the Red Ryder based on that?

A Not that I know of

Q Do you know if he ever issued for corrective action?

A No I don't know

MR GRIFFIN They were, for the record That was taken care of, for the record

BY MR STONE

Q When you looked at the 880, why did you – am I correct in understanding that you put extra oil in the gun to see if BB's would stick together?

A Yes.

Q Why did you do that?

A Well, to see if that could cause BB's to hang up in the chamber and give a false sense of the gun being unloaded when, actually, it was loaded with BB's in the chamber Oil in guns is a quite common problem.

Q Um hum And you were aware that the – did it, in fact, cause –

A It caused them to be, yeah, undetectable They were in the chamber, but not loose so you couldn't rattle them or pour them out.

Q And because you had done this intentionally, you knew that those BB's were actually lodged in there, right?

A Correct.

Q And to get them out, you knew to hit the heel on the gun on the ground, didn't you?

A Yeah, force the gravity feed

MR GRIFFIN Can we make it clear? He's talking about the magazine, and I think he said chamber

THE WITNESS Well, the magazine They were in the magazine You pumped it down so they would gravity feed and pull the bolt back and the chamber –

BY MR STONE:

Q And you were able to do that and know to do that because you had intentionally created that condition –

A Yeah. But I knew how many BB's were in there, too, and I wanted to get them out to make sure that they

Q And do you have any opinion about whether a child using the gun, for example, would have necessarily perceived that BB's might be lodging or hanging up in that situation?

MR. GRIFFIN Object to the form of the question

THE WITNESS I don't believe that a child would – if the gun was over-oiled, and they had some BB's lodged in there with oil, they would not be aware of it.

BY MR. STONE:

Q Um hum. Now, if there were places in the gun where a BB could hang up –

A Yeah

Q – would you, as an engineer, prefer as a corrective measure telling people to be careful not to point guns at each other or eliminating that lodging problem?

A Well, telling them isn't going to solve the problem. Eliminating the problem is ideal, but can you do it is the question. You still have this oil thing were it could hang up

Q Are you aware of redesigns made in the B56 guns to –

A I went over and saw them enlarging and making the visible port larger and larger. I think this was done to make it easier to load pellets.

Q Are we talking about the 880 –

A The 880 will take pellets

Q And the B56 gun, are you aware of any design changes made to eliminate areas where BB's would lodge?

A I'm not aware of any

Q Are you aware that this gun is now a pellet-only gun?

A No, I'm not aware of that. Which is? The 856?

Q The 856.

A No. I'm not aware of that.

Q Is one of the values of making the gun a pellet-only gun that the individual who's loading the gun loads pellets one at a time and knows --

A You have to know whether it's loaded. Well, it could have been loaded previously, but as a positive action, loading a pellet into the chamber.

Q Now, you indicated -- you told, actually, a couple of stories, which were amusing to people who are not cat lovers perhaps. But in your experience, do users of these guns recognize that these guns are powerful weapons and distinguish them from the BB guns they grew up with?

MR. GRIFFIN: I object to the form of the question.

THE WITNESS: I don't think people are

aware these newer, high-velocity guns are as powerful as they are. I mean, when a grandfather gives his grandson one of these, he is not taking it out and comparing it and looking. Numbers don't mean that much to velocity.

BY MR. STONE:

Q Now, you've made measures of both the velocity of the BB projectiles of leaving both the 860 and 856?

A Right.

Q And is it also correct that you calculated force of the projectiles or the energy of the projectiles?

A One time, I think I calculated for some purpose the energy of the projectiles.

Q Based on your evaluation of these guns and the energy and the velocity of the projectile, do you have any opinion as to whether or not these guns can cause serious injury or death?

A I'd say both models can cause death if the shot was directed in the right place. The velocity and energy are potent enough to do that.

Q Um hum. Is that different than the Red Ryder and the other lower-velocity guns?

A Red Ryder is a much lower velocity, and I don't think it's possible with a lower velocity.

Q So, is it safe to say that the consequences of the kind of child play that you engaged in with this gun --

A I don't think we ever would have done it.

Q But the consequences of that kind of child play would have been potentially fatal in this case?

A Yeah.

Q And you don't think that users or buyers of these guns necessarily realize that added air is dangerous?

MR. GRIFFIN: Object to the form of the question.

THE WITNESS: I don't feel they are aware of the dangers.

BY MR. STONE:

Q Now, let me ask you a couple of questions about this automatic safety question. Let me first

ask you about your observations. In your observations of kids handling guns, do they always understand when they first start to handle a gun that their fingers shouldn't be inside the trigger guard?

A No. They don't understand that.

Q That's something you would teach a child, right?

A Yes. Don't put your finger in the trigger guard until you intend to shoot. But the other thing that kids do that was very upsetting is they get very hazardous when they try to make a shot and the safety has been left on. They seem to panic when the weapon doesn't fire right. That's when they pick it up and swing it around, and this is what happens with the automatic safety. If it's on and they try to pull the trigger and it won't go off, they are wondering what's wrong. Then they bring the gun around, it sweeps, and it's not treated like it's loaded. They know it's not working.

Q Now, this is based on your observation of

children with a manual safety or an automatic safety?

A This is children and adults with the automatic safety.

Q Which since –

A There was only one RB gun that had it.

Q Um hum.

A This is my observation of some people using it. They got frustrated by its presence.

Q And who are the people who were using that gun frustrated by its presence?

A Mark and Scott.

Q Mark who?

A Mark Demarco – not Mark. Jay Demarco.

Q Jay Demarco.

A Yes. Jay Demarco and Scott Snyder.

Q Have you observed children or young adults using this gun?

A No.

Q So, the people that you found most frustrated and who handled the gun with the automatic safety in a hazardous manner were the

people who had a lot of experience with guns without automatic safeties?

A (Nodding.)

Q A child receiving their first gun would not have that experience, is that right?

A I don't know. That would be interesting to see. I know I was very frustrated when I first ran into the automatic safety.

Q And, in your experience, military weapons typically don't have automatic safeties?

A You never want automatic safeties.

Q And do you want to tell us in the reason why?

A Well, I mean, it's life and death. When you go to fire, you don't want it – you just reload it and the automatic safety comes on, and then you see somebody coming over the hill aiming at you. You don't want that automatic safety to prevent you from taking a life-saving shot.

Q Would you agree with me that it is a trade-off between the need to fire quickly and whatever safety benefits the automatic safety might

provide that causes you to not have automatic safeties on the military weapon?

MR. GRIFFIN: Object to the form of the question.

THE WITNESS: You'll have to rephrase that again.

BY MR. STONE:

Q If you had an automatic safety on the gun, you might get shot before you were able to shoot somebody else, is that correct?

A Yeah.

Q And are there people who accidentally shoot themselves with guns?

A Yes.

Q And does that sometimes happen because they are handling the gun, and the safety is not on and it goes off?

A That could be a possibility.

Q And in a military – with military weapons, have you ever heard of such cases?

A We haven't really studied many military cases. I'm trying to think. The son of a friend

of mine once got shot in the leg, and it was caused by quotas, not a safety device, but the fact that a clip was removed from the gun. And people don't realize there's a bullet left in the chamber.

Q Now, you said you liked that on the revolver – you liked the design because it is inherently safe. Is that what you said?

A You can check the condition of it. There's no safety on a revolver. Usually, six bullets in a cylinder, and you have to manually – they are double action, but they are fired most accurately by pulling the hammer back.

Q And why is that?

A Because it requires much less trigger pull. Double action, you have to rotate the cylinder.

Q And if you attempted to pull the trigger, would you feel a significant difference?

A Oh, yeah. There's a big force difference.

Q Does that, in a sense, perform a safety kind of function?

A Yeah. The increased trigger pull makes it

more difficult to fire. I'm trying to think of the other reasons. It's inherently safe because you can open the cylinder and have the cylinder exposed and you know it's not going to -- It's not like taking a clip out where one can remain in the chamber. When you open the revolver and have the cylinder exposed, the gun is not going to fire.

Q. Um hum. The Glock that you discussed earlier with Mr. Griffin, what are some of the uses of that Glock and some of the people who use the Glock?

A. Primarily, it's a military weapon or a police weapon.

Q. Um hum.

A. I've fired it many times. It's very nice to fire, nicer than you'd expect.

Q. That's not a gun that's designed for children 16 years old, is it?

A. No, absolutely not.

Q. And that is a gun that is designed to use for self-defense?

A. Yes.

Q. Mr. Griffin showed you the size of this gun and asked you questions about whether this is a size for a child or whatever. In your experiences as both a child and in teaching your own children, what age did you give them a real gun, a .22?

A. I never gave them a real gun. I let them fire a real gun, but they must have got been, oh, maybe nine.

Q. And at what age were -- well, give me an idea, roughly, what's the size of the .22 compared to this and the weight compared to this gun.

A. Well, the model 94 that I have, the .22, is a little smaller than this. It's very short, about that short.

MR. GRIFFIN: Showing, for the record, about 12 inches shorter than the 880.

THE WITNESS: Yeah. The barrel is about 18 inches.

MR. STONE: I would probably disagree on the characterization of the inches, but --

THE WITNESS: It's a much shorter action, and it separates the two pieces.

BY MR. STONE:

Q. Um hum. Does that gun have plastic stocks or wood stocks?

A. No. It's wood stocks. It's an old design.

Q. Are the wood stocks heavier than the plastic stocks on this gun?

A. No. It would be about the same.

Q. And, in your experience, in shooting programs, 11 and 12-years olds in .22 caliber shooting programs --

A. The shooting programs, you always use a bolt action. You never use a weapon like that. I started my kids with a bolt action.

Q. But in terms of release size and weight, how do they compare?

A. They are a little wider and heavier than .22's that I started with.

Q. The shooting programs that you've been involved in, what age did you start teaching kids to shoot .22's?

A. I'm trying to remember. Isaac Walton in

Loudoun County. It was .22's, and I'm trying to think what was the age of the kids. I can't remember the age group. It was a rural community. It was much younger than...

Q. Twelve-year-olds possibly?

A. Younger than that.

Q. Okay. Generally speaking, do you think most BB guns are fired in shooting programs, or do parents get a BB gun and give it to the kids and let them go off and play?

MR. GRIFFIN: Object to the form.

THE WITNESS: From my experience, they let them go off and play. What I did is I trained my kids, you know, to be aware of, you know, looking so they didn't fire at our cabin in West Virginia.

BY MR. STONE:

Q. And your father, who was an expert marksman, taught you safe handling and procedures for handling a gun?

A. Right.

Q. Nevertheless, you took the gun out, you and your friends, and shot them at each other.

right?

A We never did anything with BB guns We only handled real guns.

Q But you had been taught how to handle a gun properly, right?

A Right.

Q Never point it at anybody, always assume it was loaded?

A . BB guns are not the same You don't think of them as real guns, or we didn't.

Q And you think that's still true today?

A What?

Q And you believe that's still true today?

A Well, I treat it like a real gun with much more reverence than I did when I was a kid

Q You would, but what about your experience with other users of the gun, with BB guns?

A Well now, the BB guns I had at the cabin were not regular BB guns They were different. They were single-shot air guns that you broke, so you could always tell if they were unloaded because they were always in that position They put

pellets in them one at a time They were not BB guns, they were pellet guns They had short stocks They were special guns for kids

Q Mr Griffin asked you earlier if you believe it was misuse by an adult who buys a gun – one of these BB guns – for a kid who is younger than 16

A I wouldn't want to put one of those in the hands of a kid younger than 16.

Q Do you have any experience on whether, in fact, that's what people do, though?

A Other than I can see, if I remember reading some cases, I was shocked that a grandfather had given – it was a fatality And the gun had been given by a grandfather to his grandchildren

Q Is it safe to say the reason you wouldn't do it is because, as an engineer and somebody with a great deal of experience who's seen injuries and deaths caused by these guns you recognize the risk inherent in these guns, isn't that correct?

A I wouldn't realize it by just looking at

the package The warning is there, but I would be dubious of it. When I got it out and tried it on things I had shot with the Red Ryder, and I found out how much more powerful it was I'd be shocked, and I'd say, hey, this is too much

Q Is it safe to say that you have significantly more background and experience with guns than a lot of parents?

A Oh, yes, a lot more

Q In your experience working at the Commission over the years –

A Yeah.

Q – do you have an opinion on whether children have the level of attentiveness and are as careful and precise in the way they do things as adults?

A Well, I haven't learned it through the Commission, but I've learned it through my kids No, they don't have the same.

Q Mr. Griffin asked you a number of questions that were based on – where he asked you about whether something was defective What

exactly do you mean by defective?

A When I think of defective, it's something in the manufacturing process or in the design of the weapon that makes it hazardous A defect would be like a broken firing pin. It fires down the middle, and you get – a regular firearm, it fires one time And the next time you load it, it doesn't. This unreliability creates a situation that may be very hazardous

Q Now, in your time at the Commission, you've looked at a lot of electrical products, for example, haven't you?

A Yes.

Q And you've seen things like Christmas lights or extension cords with very narrow-gauge wires?

A Yes

Q And is it fair to say, as an engineer, you found that to be defective?

A Yes Normal use of the wire was not large enough to carry safely the current requirements.

Q Now, have we run into situations with

those very same kinds of products where people try to warn people not to, for example, plug more than a certain load into those extension cords, or not to plug too many Christmas lights in together?

A Yeah. We've tried to do that. The public doesn't want to learn too much about electrical safety

Q And the reason you found those electrical products to be defective is because you really didn't expect people would be able to follow those instructions or, as a practical matter, would be following those instructions, correct?

A No I didn't work on any lights This is not the situation Sometimes, the instructions are not adequate They don't make sense And very often with electrical products, you find the warning there, but with no rationale for why not to do it

Q Um hum

A So, maybe you need to repeat the question so I can answer it better

Q Let me ask you the question in a different

way If you could design the hazard out of a product, would you rather do that or warn people and try to change their behavior?

A You'd rather design the danger out of a product It's not always possible A knife cuts, and there's always going to be a danger of cutting yourself with a knife There's no way to get around that

Q Um hum.

A People are continually burning themselves with curling irons, and they say can't you put a guard on it If you put a guard on it, it can't be used to curl hair

Q And in the case of the knife, would you agree that you wouldn't design the knife with a slippery handle or a handle that could cause your hands to slip down to the blade?

A That would be a design flaw

Q In the discussion with Mr Griffin, he asked about the utility of this gun, and you said you felt it had some utility for plinking and target shooting, is that correct?

A And chasing cats away, yeah

Q Is it necessary to have a gun of this velocity for those purposes?

A For plinking?

Q Um hum

A It just makes it more fun It would teach you something, particularly if you had, you know, an old Red Ryder and you compared it with this It would teach you something about trajectory and aiming

Q Um hum.

A Plinking is taking cans out, soda cans My kids used to plink at little water bugs in the pond we had It's just shooting at little targets, or putting a hole in a leaf, shooting at a leaf, putting a BB hole in it, and then aiming again at the BB hole to see how close you come to it But it's just sort of free shooting as you're in the woods or shooting at tin cans, soda cans

BY MR. STONE:

Q Do you believe that that kind of plinking is the primary purpose for BB guns?

A That's what you find kids enjoy My wife was surprised that her daughters enjoyed plinking so much

Q Um hum. Now, in your experience with other guns, such as .22's or 45's or whatever else, is plinking –

A You don't do as much plinking It costs too much.

Q Are there any differences in perception of potential risks from going out in the woods and plinking things with a 45 or .22?

A Yeah. The range is so much greater on a .22 You plink with the .22. You don't plink with the larger. People are always trying to devise fun things for shooting My brother's range up in West Virginia where he teaches counter-terrorism and everything, they have special tree firing courses And they have a tree which has an arm with a target about the size of a hand on it, and it's pivoted around a post. You put three on one side and three down the other. I shoot and I hit it, and it swings around on the other side, and it's a target

for hitting. He and I will shoot against each other. This is plinking. You know, the object is to get them all over on the other guy's side.

Q. Generally speaking, kids don't have access to those courses with BB guns. Is that fair to say?

A. No, not plinking targets. So, I mean, they've got the ultimate plinking courses up there. That's where you use the larger caliber handguns.

Q. Again, in your experience with BB guns, are these guns, these high-powered guns, particularly accurate?

A. They are much more accurate than the lower-velocity guns.

Q. If you were looking for accuracy for plinking or target shooting purposes in a normal BB gun setting, would you be more interested in power or in consistency?

A. For accuracy in shooting, I'm going to figure out how many pumps gives me the most consistent velocity. If you look at these, they vary. The velocity varies, and there's an average.

There was -- I forget how many -- ten pumps was on this one. You try them at, say, maybe at four pumps, the velocities would be more consistent. You learn that very quickly. So, you would start using four pumps for your target shooting and zero in on that. Fastest isn't necessarily the most accurate.

Q. In your comments earlier, you made a reference to, I believe, the term "horsepower race." What did you mean by that?

A. Well, at times in looking at these guns, they would look at velocity listed by the manufacturer, BB here at 650, BB at 685. And then Crosman and all the other manufacturers would list their velocity, and it's like trying to see who has the highest velocity. It's a number that doesn't mean that much, but prospective buyers might think it meant a lot.

Q. So, the utility of that velocity in and of itself is in your -- let me ask you a question. Is it your opinion that the utility of that velocity is less than the marketing value of that velocity?

MR. GRIFFIN: Object to the form of the question.

THE WITNESS: The thing that was interesting on both of these is how they differed from the listed velocity. On the 880, the manufacturer's listed velocity was less than what we measured on both cases for the BB's and the bullets. And the same thing, it was less for the BB's with the 856, but the velocity of the pellets were listed as greater than what we measured. But that could be because of different weights and pellets and stuff like that.

BY MR. GRIFFIN:

Q. Now, let me make sure I'm understanding what you've said, and please stop me and either recharacterize or retranslate as necessary. As I understand it, for accuracy purposes, consistency is more important than velocity?

A. Yeah, that's true.

Q. And these guns, unlike other lower-powered guns, will cause injury and deaths, serious injuries and deaths?

A. They have the potential to cause more serious injuries and possibly death.

Q. All right. And the actual utility of the additional velocity is, in your opinion, more a marketing factor?

MR. GRIFFIN: Object to the form of the question.

BY MR. STONE:

Q. What you called the horsepower race?

A. I saw in looking at the boxes, you know, they were getting more and more -- the interesting thing is that Daisy was understating it from the looks of things, unless they use different -- I don't know where they got it. Just reading off the box, what they stated the velocity was. That was unusual, and that's what we were trying to see when we tested all these, how accurate were they in their claims.

Q. Um hum. How many guns are those that you actually tested?

A. I can't remember.

Q. Do those results show testing of one gun

or more guns?

A Let me see. I think it's – this would be one gun.

Q Would it be surprising in a production that one particular gun might have either a higher or lower velocity than the average –

A No, that's possible They could have taken them over much greater runs, and that's where they got it. Each of these are single samples

Q Okay Let me show you what was marked as Exhibit 4 That particular document that has the word "draft" embossed across it or watermarked on it –

A Yes

Q – did you put the word "draft" on there?

A No, I didn't.

Q And is it your normal practice when you do a final memo to sign the memo or initial it?

A That's normally what I do

Q And is that memo initialed or signed?

A This is not initialed

Q Do you have any independent recollection

of whether that is, in fact, a memo that you prepared or a final memo at all?

A No, I don't. But I do remember having – I mean, I don't doubt that I wrote this, but I don't think I ever forwarded it on.

Q Now, the memo marked as Exhibit 3 of June 8th 1995, that does not have the word "draft" on that, and you did initial that, right?

A Right. But I did not put "draft" on this I've never seen it, except for here, the word "draft" or that watermark.

Q Um hum. Now this – let me just ask you a couple more questions You indicated that in response to some of the Mr Griffin's questions that you were upset, as were others, that you had been taken off BB guns Were you actively working on BB guns from 1997 to 2000?

A No But, I mean, it had been one thing that came up continually You know, it wasn't an active quote project.

Q Um hum Mr. Griffin asked you about whether the most competent people to deal with gun

issues had been taken off Do you know what the gun backgrounds of Mr Wright, for example, are?

A No I have no idea what his background is, but I am aware of Scott and Tom Caton's background

Q Do you know if Mr Wright, for a sample, took over BB guns for Mr Demarco was in the military?

A Yes, he was I knew that.

Q Do you know if in addition to having that background with guns whether they had any other background with guns?

A I don't know of any other

Q Do you know whether he has a background in engineering?

A No, I don't know that.

Q Mr. Demarco doesn't have a background in engineering, does he?

A No, he doesn't.

Q Did you ever talk to Mr. Perez? Do you understand first that Mr Perez was the supervisor both for Jay and for Richard Wright?

A I knew he supervised Jay, but I didn't know Mr Wright I was gone I was back at the lab when that took place

Q Did you ever talk on the phone or via emails to Mr Perez about why he took Mr. Demarco off BB guns, as you put it?

A No.

Q Did you ever talk to Mark Schoem about that?

A No

Q So, where did you form the impression that they were taken off BB guns either at the instigation of the Chairman or to get a different result?

A I think through my conversations with Dave Smeltzer

Q And could you tell us who Dave Smeltzer is?

A Dave Smeltzer was former head of Compliance. His wife and my wife are very close friends, and we see each other socially a great deal, even today

Q Do you know whether Mr Smeltzer is a personal friend of Aaron Locker's?

A I know that he knows him.

Q Didn't Mr Smeltzer, in fact, tell you long before we had your deposition notice that you were going to be deposed?

A Yes, that's true.

Q Okay And did that information go to Mr. Smeltzer from Mr. Locker?

A I have no idea, but I presume that.

Q Do you remember anybody else giving you the impression that Anne Brown in some way was trying to change up on what had been done with BB guns and that she was out to get BB guns?

A Only through Dave Smeltzer He said, we didn't give her the answer she wanted Ron. You know, statements like that.

Q And, in your experience, Mr Smeltzer has been gone from the Commission for – is it safe to say, several years?

A Oh, I'd say, yes

Q Would it surprise you to know that he

retired in '97 or thereabouts?

A No, that wouldn't surprise me But he keeps close contact with the Commission.

Q As does Mr. Locker; is that correct?

A I guess so

Q And, in fact, Mr Smeltzer practices law in the private sector?

A Yes, that's true

Q And he represents companies before the Commission?

A Well, what surprised me is that I think one of the attorneys from your group called me and said they'd been informed by Locker that I was back at work. Out at the lab, you didn't know I was back at work.

Q Right.

A So, I figured the only way it could have been is that Dave told Aaron that I was back at work.

Q Um hum

A Because I was only working, at that time, part time

Q When in 2002, 2001 you were not asked to work on these air guns – do you need a break? Are you fine?

A No, I'm fine I can't remember the dates But, again, I get involved, even now, in helping other people out at the lab that are doing the work in setting up the chronograph It's just that I have experience on how to do it.

Q Could you just explain for the record what a chronograph is?

A A chronograph is a device that measures the velocity of bullets or BB's from guns, and we got a new one that's very nice It's got three screens, so it measures the time of the BB when it goes through them The light hits the BB – and/or a shadow of it – over a photocell, and they time the amount of time it takes the BB to go a certain distance On the new chronograph It's got three screens so there's a check. There's two screens that are timed that have checks differently So, there's a verification to make sure it is a valid reading

Q Um hum Do you know anything about the qualifications of the – I think Mr. Griffin made reference to – outside people who did work on BB guns?

A I have no idea I haven't heard any reports or seen any evidence or anything

Q So, you're not in a position to judge whether they are as qualified or more qualified than other people who worked here in the Commission?

A No I have no feeling for it, if that's even what they said.

Q Um hum. Are you a gunsmith?

A I consider myself one I've done a lot of work.

Q Do you have a gunsmith certification –

A No

Q – from the Bureau of Alcohol, Tobacco & Firearms?

A No I had a firearms license one time, but I did mounting of scopes and repairs to guns

Q Um hum. Is Mr Caton a gunsmith?

A Not that I know of.
Q Mr. Snyder?
A No.
Q Mr. Demarco?
A No.
Q Is Mr. Caton's background in mechanical engineering or in materials engineering?
A Materials engineering, as far as I know, metallurgy.
Q Um hum.
A I forgot to mention one of the things I did when I worked over at the Center for Naval Analyses. I was in the Marine Corps Operations Analysis Group and worked on a study concerning the choice of an optimum caliber for the Marine Corps.
Q Now, this was when you were an editor?
A No. I was Editor of Science on that one.
Q Um hum.
A It was a study I was doing.
Q That didn't involve BB guns?
A No. It involved M16's and, you know, military machinery. I'm trying to find an optimum

caliber -- what caliber might be ideal, if you choose one caliber, it might be interchangeable between machine guns and rifles.
Q In your experience M16's, don't have any safeties, right?
A They have a safety on.
Q They don't have an automatic safety?
A No, no automatic safety.
Q Are you aware of any repeater rifles that have automatic safeties?
A I'm not aware of any, but I understand that there are some.
Q Are you aware of any break barrel guns that have automatic safeties?
A I'm not aware of any.
Q Are you aware of whether there are any?
A No.
Q Are you aware of, other than the Marksman gun, whether there are other BB guns with automatic safeties?
A I've never seen one.
Q Would it surprise you -- never mind. Are

you aware of any Daisy BB guns with automatic safeties?
A Again, I'm not aware of any.
Q Are Crosman guns with automatic safeties?
A No.
Q Any Benjamin Sheridan guns with automatic safeties?
A Not aware of any.
Q The only ones you have personally seen are Marksman guns with automatic safeties?
A Yes.
Q Mr. Griffin asked you about backing screws out of the 880. If you had information indicating that screws sometimes loosen in 880's during normal use, would it be an appropriate test to loosen the screws as that might occur and to see if BB's would lodge?
A If the screws being loose -- and, see, very often in many of these incidents cases, we were never allowed to see the actual incident sample. We were given brand new weapons that were the same brand, but we never saw the incident

report. So, the idea of the screws being loose just was not in the concept of...
Q And you were never shown by Mr. Demarco copies of Daisy documents of their own testing that showed screws coming loose?
A No, no.
Q So, would you consider it an appropriate test to back out a screw to see if BB's lodged, if that was, in fact, happening?
A If, in an incident sample, that had happened.
Q If you saw it in a test report from Daisy indicating that that happened --
A You asked why were they backing the screws out. You know, usually there's a reason why they would do a test like that.
Q Um hum. Do you do testing of products to simulate what you understand to be normal or --
A Sometimes we run tests on things, but we have an indication of why we might.
Q And if somebody had told you that screws backing out was a problem, is it conceivable you

would have done that test?

A I would have done some more measurements to see how conceivable for the screws to loosen up, what was the removal torque, you know, and maybe doing a test and firing it many times to see if they do, under normal circumstances, loosen up.

Q And if somebody had already done those tests for you, for example, somebody at Daisy, would that influence your need to do those further tests?

A We'd have to see those test results Usually, there's questions, you know

Q But, in this case, nobody showed you those test results?

A No I never saw any tests like that.

Q And if, indeed, screws were backing out during normal use of guns and somebody created that test condition to see if lodging would occur, would you consider that to be unethical?

MR GRIFFIN Object to the form of the question

THE WITNESS It's hard for me to judge

the ethics of it. It's something much more difficult.

BY MR. STONE

Q Well, do you do tests, for example, like on a fan, just install the rotor of the fan to see if it would catch on fire?

A That would be considered an abnormal test, but it would just be explained that way Any testing you do I don't think is a matter of ethics It's just explaining or defining what you've done is, you know, not a normal, you know, an abnormal test.

Q Right. So, for you, the deciding point would be whether there's a good reason to do that test?

A Yeah I mean, first, you have to justify why you're doing that in a normal test I'm getting very tired

Q I'm not sure I have any other questions If you'll just give me one moment. I have one or two more questions if you want to take a break, if that's all right with everybody

(Brief recess.)

BY MR. STONE

Q Ron, earlier you said something about people reusing BB's What do you mean?

A Very often, people will have a basement range and have a BB trap, and they will fire BB's into it, and they will get a large selection of BB's that have been fired that, very often, are dented So, they are not perfectly round, and they will be in the trap in the basement floor, and people will sweep them up in an attempt to use them again. Bad practice

Q You also talked about there are standards for BB's and size of BB's; is that correct?

A Yeah

Q And in the manufacturing process, is it your experience that products are always made perfectly?

A No There's much variation.

Q And if somebody, for example, opened a box of BB's off the shelf and found several BB's that, it turned out, were slightly out of round, would

that shock you?

A No

Q And if somebody, a typical user, used those BB's in their BB gun, would that shock you?

A No Nobody measures BB's before they use them.

Q So, if a BB that could lodge in an BB0 because it was slightly misshapen was put into one of those guns, that wouldn't shock you?

A Well, any sphere that is out of round has the potential to lodge in a space more than if it's perfectly round because it changes its dimension it has a possibility of lodging itself

Q I guess what I'm asking you is would you be –

A I wouldn't be surprised They wouldn't know that they used it –

Q Right.

A – because these are not measured before they are put it.

Q And the average user wouldn't understand that using a BB that had previously been used would

change the dimension and create a potential for
lodging, would they?
A If they would look at it, they would see
that they have gotten a dent, but they don't even
think about it. They just say, let's try this
Q In 2000 and 2001 when you heard other
people were working on BB guns and that you were
knew you weren't, who did you hear from that there
were other people working on BB guns?
A Well, there was an announcement one time
I don't remember the date, but they wanted our
records
Q Do you know if that's when you provided
some of these documents?
A That's when I went through everything
Q Was that done in November of '95 for the
discovery purposes in this case?
A I can't remember when it was done but I
know that some of the documents printed the wrong
date because they were filled in with the current
date and not the date of the document.
Q And do you recall whether you learned

about that in a memo from Jimmy Williams asking for
your records?
A I believe that's how I did
Q So, when you testified earlier about
people taking your records, were you referring to
this process when Jimmy Williams asked for the
records?
A No There was an announcement before, and
I collected some of them But there was an
announcement to definitely take the time go through
absolutely everything
Q Um hum
A So, I went through all of my hard drives
to make sure that every document I had related to
BB guns was transferred
Q And you sent those to?
A Lawyers There were quite a bit of
documents
Q And when you say quite a bit of documents,
did that include documents about other guns and
other products, other than these Powerline air
guns?

A Basically, I think I sent everything on
BB's I think there were a stack of drawings, too,
on the 880's
MR STONE I have no further questions
(Defendant's Deposition Exhibit
No. 7 was marked for
identification.)
BY MR GRIFFIN
Q Other than the documents which we have
here – we have about six or seven or eight pages
of documents in Exhibits 5, 6, 3, and 4 – did you
have other documents regarding testing on Daisy
Powerline –
A I'm sure there were I don't know about
Daisy, but I submitted everything
Q No But as far as Daisy 880 or 856 –
A I can't answer that.
Q I'm going to show you Exhibit 7. Does
this appear to be a copy of Exhibit 4 without the
"draft" on it, without the word "draft" on it?
A It appears that way to me Let me look at
it a little closer Well, yeah. It's not

initialed That's surprising, which tells me it
came off a computer It's not the copy that I
forwarded to Jay Yeah That's a copy without the
word "draft" on it.
MR. GRIFFIN. I'd like to mark this as
Exhibit 8.
(Defendant's Deposition Exhibit
No. 8 was marked for
identification.)
BY MR. GRIFFIN.
Q I'm going to show you what's been marked
as Exhibit 8 Does that appear to be a Daisy
Powerline 880 Series manual?
A It appears to be.
Q And the very first warning, could you read
that out loud?
A Warning, this gun can cause death. Read
and follow the instructions carefully Do not load
a BB or pellet into the chamber until you are ready
to shoot. If you do load a BB or pellet and decide
not to shoot, remove either manually or by shooting
it in a safe direction. An uncocked, unloaded gun

is safest. Accidents happen fast, and accidentally injuring or killing someone is a terrible thing. Shoot safely.

Q Does that seem pretty clear to you that this rifle could kill somebody?

A There's no mention of death there.

Q This gun could cause death.

A Oh, okay. It's not emphasized quite enough.

Q And accidents happen fast. Accidentally injuring or killing someone –

A Is a terrible thing.

Q Does that get the point across?

A It's mentioned, but it's not as forceful. The same people have been killed.

Q This one: not a toy; supervision required; misuse or careless use may cause serious injury or death?

A Well, *has caused*.

Q Has caused?

A It could be more potent in a statement like that.

Q Tell me this –

A Caution.

Q Could you read that caution?

A Caution, always view the BB or pellet when closing the bolt and loading.

Q And the rifle tells you to read the manual before using the product?

A Yeah.

Q And the manual explains that and actually has the pictures of it, don't they?

A Yeah.

Q I want to read to you from the affidavit of Jess Galan who writes for Air Gun Digest. I'm going on read you a quote, and tell me whether this is true. The pointing of any firearm or rifle at another individual and intentionally discharging it, whether one thinks it's empty or loaded, is reckless in the extreme. To sanction such actions as expected human behavior makes a mockery of the rules that we as firearms instructors, parents, and adults try to pass on to our students, youth, and readers. No matter what safety system is utilized,

what feed system is implemented, or how the particular firearm or air gun is designed, no guarantee can ever be given that an injury will not occur if an individual points an air rifle or firearm at an individual and pulls the trigger.

A I would agree with that statement.

MR. GRIFFIN: I don't have any other questions.

MR. STONE: I have just a couple of follow-ups.

BY MR. STONE:

Q Mr. Griffin showed you something he marked as Exhibit No. 8. Do you know the date of that document or anything about that document?

A That's the instruction?

MR. GRIFFIN: The instruction manual.

THE WITNESS: I don't know anything about that. I hadn't looked at that before.

BY MR. STONE:

Q In your experience, do consumers read manuals from cover to cover?

A Very seldom, very seldom, do they read a

manual. They pick them up later to find out something, in my experience, myself being one example. I don't always read manuals.

MR. STONE: No further questions.

MR. GRIFFIN: No questions.

(WHEREUPON, at 1:18 p.m. and signature not being waived, the deposition of RONALD THOMAS REICHEL was concluded.)

ACKNOWLEDGEMENT OF DEPONENT

I, RONALD THOMAS REICHEL, do hereby acknowledge that I have read and examined pages 4 through 160, inclusive, of the transcript of my deposition and that:

(Check appropriate box.)

( ) the same is a true, correct and complete transcript of the answers given by me to the questions therein recorded.

( ) except for the changes noted in the attached Errata sheet, the same is a true, correct and complete transcript of the answers given by me to the questions therein recorded.

_____ _____

Date Witness Signature

CERTIFICATION OF NOTARY PUBLIC

14th day of February, 2003

_____

NOTARY PUBLIC

MY COMMISSION EXPIRES: 03-14-2006

CASE: CPSC V DAISY OUTDOOR PRODUCTS

DEPOSITION OF: Ronald Thomas Reichel

TAKEN: February 7, 2003

PAGE	LINE	ERROR	CORRECTION	REASON

_____

Witness

CERTIFICATION OF SHORTHAND REPORTER - NOTARY PUBLIC

I, Sandy Medford Nelson, the officer before whom the foregoing deposition was taken, do hereby certify that the foregoing transcript is a true, correct record of the testimony given; that said testimony was taken by me stenographically and therefore reduced to typewriting under my supervision, and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS THEREOF, I have hereunto set my hand and affixed my notarial seal this 14th day of February 2003.

My commission expires:

March 14, 2006

_____

SANDY MEDFORD NELSON

NOTARY PUBLIC IN AND FOR

THE STATE OF MARYLAND

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A. We put them on some Youth Line guns at one point in time. When you cock the gun, the safety went on automatically. We eventually took those off those guns. We found from experience that it created a very bad habit of training-wise with regard to the use of the product, that it was just universally the practice of users to cock the gun, close the lever, take the safety off, and proceed. And that they -- the safety became a -- an inconvenience.

The shooting education people insisted that their guns be built without safeties, without automatic safeties, because they found that in training young people, they might have ten people standing on a firing line, and they're there trying to instruct them, and they're telling them to cock the gun and to close the lever, and, you know, move the safety and fire the gun down range and handle it safety, that one of the things that happened with an automatic safety is that a beginner, particularly, unfamiliar with the automatic safety, would try to pull the trigger and find the safety was still on. And then became befuddled, did not know what was wrong, why didn't the gun fire?

And now you've got a person who is reckless with the gun, and you've got ten shooters there. And the shooting education people were very insistent that guns for

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educational purposes be built without safeties. And I believe the standards provide for that.

That -- what was happening is that we were teaching young people bad habits with regard to the use of the product and a habit that wouldn't be transferable into firearms because most firearms don't have automatic safeties.

Q. What type of an automatic safety was used on those Youth Line guns?

A. It was a knob on the side of the gun, and it was activated by the lever that -- as I remember. It was a long time ago. This would be sometime in the mid '60s -- where you cocked the gun, you automatically blocked the trigger from being pulled. And it stayed back when you closed the lever. And you had to remove the safety in order to pull the trigger.

Q. Could an automatic safety mechanism like that have been incorporated into the design of the 880?

A. Almost everything is possible.

Q. So it would have been possible to have incorporated an automatic safety into the design of the 880?

A. We did incorporate an automatic safety --

Q. Well --

A. -- into the design of the gun. We -- if you have a gun and pull the bolt back and try to fire it, you cannot

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fire it. It will not fire. The trigger is blocked. And it prevents the gun from operating.

Q. But it's possible to cock the gun, the 880 that is, after you -- after you've -- I'm sorry. Strike that.

It's possible, isn't it, with respect to the 880 to pump the gun -- strike that.

It's possible, isn't it, to -- on the 880 to open the bolt, close the bolt, and then pump up the gun. Correct?

A. It is possible to do that, yes.

Q. I understand that you -- that it's your belief that that is not best practice.

A. That is not best practice.

Q. But it's possible to do?

A. It's possible to do it, yes.

Q. Was it possible to have an automatic safety other than the open bolt incorporated into the 880?

A. Probably was. As I say, almost everything's possible.

Q. And what would -- in your view, what would have been the incremental cost to -- of incorporating automatic safety into the 880?

A. It would just be a wild guess. I do not know.

Q. Okay. Do you recall having testified in a litigation, Charles W. Smith, Guardian of Jordan Smith

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versus Daisy? And that was action number 93 dash 1098 in the Circuit Court of Pulaski County, Arkansas?

A. No, I don't recall.

Q. That testimony was August 20th, 1993, and I'll let you see this transcript when I'm --

A. Okay. In Pulaski County? '93 testify or a deposition?

Q. I'm sorry. It was a deposition. You were testifying in a deposition.

A. Okay.

Q. It wasn't at trial.

A. Okay, it wasn't at trial.

Q. No, it wasn't at trial.

A. Okay.

Q. At least what I'm looking at here wasn't at trial.

A. Okay.

Q. August 20th, 1993. And you were being questioned by an attorney by the name of Robert Clear -- Cearley, C-E-A-R-L-E-Y. And Mr. Cearley, at page 159 of the deposition transcript, asks you, "Mr. Braughler suggests in this memorandum that this gun ought to have an automatic safety, does he not?"

Answer, "He suggested an automatic safety for it, yes."

Question, "At the time he made that suggestion, was

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it feasible to put an automatic safety on this gun?"
Answer, "Yes, it was."
Question, "And what would the incremental cost have been, if any?"
Answer, "Nickel or dime. Small."
And I'm just going to let you take a look at that and your counsel.
A. Okay.
Q. I -- there are my -- my notations are on this transcript. Just ignore those. On page 159.
A. Okay. I'll cover them up.
Q. You can look at them, I just don't want them to obstruct your view.
A. Okay.
(Wherein witness looks at document.)
Q. Have you read that passage?
A. Okay.
Q. Having reviewed your prior sworn testimony in the Smith case, do you have any reason now to retract that testimony relating to --
A. No.
Q. -- the automatic safety and incremental cost?
A. No, I don't.
Q. So you stand by that statement?
A. Well, yeah. It was a guess then and it's a guess

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now.
Q. Well, it didn't indicate in the transcript that it was a guess, did it?
A. No, it didn't.
Q. You didn't say --
A. But that's 1993, 21 years after the fact. Been out of the employment of Daisy for 11 years -- or ten years, you know. Simply trying to be as helpful in the deposition as I possibly can.
Q. But you didn't indicate in the deposition that you were speculating or guessing, did you, with respect to the subject that I just brought up?
A. Twenty years after the fact, you are speculating in many comments.
Q. But you didn't -- you didn't indicate you were in this transcript. Right?
A. I haven't read the whole transcript, but it doesn't say that in that paragraph.
Q. Okay. Thank you. Now, you testified that shooting education people had insisted that the guns that they use in their shooting programs be built without the automatic safeties, referring to the BB guns. Correct?
A. Without safeties, period.
Q. Without safeties.
A. Period.

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Q. Without any safeties.
A. Without any safeties, yes.
Q. Okay. Now, who are these shooter education people that you're talking about?
A. We're talking about the people at NRA, we're talking about the Jaycees, groups that are -- we're talking about our own people that go out and teach shooting education to clubs and groups. You know, there are a number of firearm hunter safety instructors in the country, and some of them get involved in youth programs --
Q. Sure.
A. -- and shooter education programs with Daisy.
Q. Has that ever -- was that request from shooting education people ever put in writing to Daisy or -- to your knowledge?
A. Not that I can recall, no.
Q. Did you have an opportunity to speak to these folks --
A. Yes.
Q. -- about that?
A. Yes.
Q. And that's what they conveyed to you?
A. Yes.
Q. Did you --
A. And to our -- and to our shooting education

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department.
Q. Who in your shooting education department did you talk to about that subject?
A. Oh, I can't tell you back then.
Q. Okay.
A. There were a number -- Bob Goss was one. And I don't know whether he was there at that time or not. But we've had -- we had a number of shooting education people from time to time.
Q. Okay. Now, I think that you testified that on at least some of these areas of disagreement that you had with Mr. Braughler's memorandum, which is Exhibit 3, that -- and I'm paraphrasing here. I'm not using your language, but that he, basically, had come around to your way of thinking eventually. Is that a fair statement?
A. I think he has. And from depositions that he's given in the past, I think that's true, yeah.
Q. Have you had occasion to read his deposition transcripts from past litigation?
A. I have some but not all.
Q. And have you had discussions with Mr. Braughler about this subject matter?
A. Yes.
Q. When were those discussions?
A. Oh, I mean, he lives in Rogers. I see him, you

Packet + its progeny

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products	)	
400 West Stribling Drive	)	
Rogers, AR 72756	)	
	)	
Respondent	)	
	)	

MOTION IN LIMINE TO EXCLUDE TESTIMONY OF STANTON BERG

Comes now respondent, Daisy Manufacturing Company, and for its Motion in Limine to Exclude Testimony of Stanton Berg, states:

The Commission has identified Stanton Berg as an "expert" witness in this matter to offer his opinions that the Daisy Model 880 and 856 air guns are defective. The opinions to which the Commission intends to have him testify are:

(a) All air rifles without automatic safeties are defective, including the Daisy 880 and 856, and

(b) All air rifles with a gravity feed loading system are defective, including the Daisy 880 and 856.

Even though projectile velocity has never been raised as a claim against Daisy by the CPSC in this matter, the Commission would also desire Mr. Berg to testify that the velocity of the Daisy 880 and 856 somehow "contribute" to the "defectiveness" of these models. However, Mr. Berg testified that his opinions on automatic safeties and gravity feed systems are the same, regardless of velocity. Mr. Berg testified:

Q. Would you agree with me that your opinions regarding the defectiveness of the Daisy 880 and 856 primarily center around the lack of an automatic safety and the gravity feed system, would that be fair to say?

A. Well, I think basically those would be the two main things. I feel the velocity of the 880, it has no utility value for young people, but that also impacts why I think it should have an automatic safety.

* * * * *

Q. You think any BB gun or air rifle should have an automatic safety; correct?

A. I do, yes. I'm just saying that in this case I think the velocity is an aggravating factor.

Q. Well, whether or not the velocity is 250 feet per second or 1200 feet per second, you still think it needs to be an automatic safety; correct?

A. Yes, I do.

Q. And you think an air rifle is defective if it doesn't have an automatic safety, whether it shoots at 250 feet per second or at 1200 or 1400 feet per second; correct?

A. That is correct.

Q. And whether an air rifle shoots at 250 feet per second or 1200 or 1400 feet per second, you would find if it had a gravity feed system that it was defective; correct?

A. That is correct.

(see pp. 79, 90-91, excerpts of deposition of Stanton Berg, attached as Exhibit "1").

I. DAUBERT REQUIREMENTS

1. THE COURT IS THE GATEKEEPER

As explained in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Court must act as a gatekeeper to insure that any and all expert testimony admitted in federal court satisfies the requirements of Rule 702 for the Federal Rules of Evidence. *See also,* Wheeling

Pittsburgh Steel Corp. v. Beelman River Terminals, Inc., 254 F.3d 706, 714-5 (8th Cir. 2001) ("When it comes to the admission of expert testimony under the Federal Rules of Evidence, a trial judge has a gatekeeping responsibility to 'insure that an expert's testimony rests on a reliable foundation and is relevant to the task at hand.'" *citing* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999); General Electric Co. v. Joiner, 522 U.S. 136 (1997). Indeed, the Supreme Court emphatically held that under Rule 702 "the trial judge must insure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert, 509 U.S. at 589. In doing so, as several courts of appeal have recognized, the trial court must be convinced that jurors will be exposed to real science-based testimony. *See, e.g.*, Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir.1996) ("an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process"), *cert. den.*, 117 S.Ct. 73 (1996).

2. DAUBERT APPLIES TO ALL EXPERT TESTIMONY

The court in Kumho Tire clarified that the gatekeeping function established in Daubert applies to all expert testimony, not just testimony based on science. Rule 702 has been amended in response to Daubert and to the many cases applying Daubert, including Kumho Tire. As a result of the 2000 amendment to Fed. R. Evid. 702, the rule now reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles or methods, or (3) the witness has applied the principles and methods reliably to the facts of the case.

The amendment to Rule 702 affirms the trial court's role as gatekeeper and provides general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistent with Kumho, the rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See* Bourjaily v. United States, 483 U.S. 171 (1987).

The language of Rule 702 itself makes no relevant distinction between scientific knowledge or other specialized knowledge. It makes clear that such knowledge might become the subject of expert testimony. Kumho at 147. The court in Kumho Tire concluded that there is not a convincing need to make distinctions between scientific knowledge and technical or other specialized knowledge. Id. In Kumho Tire, the court explained that:

> [T]his language makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. It makes clear that any such knowledge might become the subject of expert testimony. ... Hence, as a matter of language, the rule applies as its reliability standards to all "scientific," "technical," or "other specialized" matters within its scope. We concede that the court in Daubert referred only to "scientific" knowledge. But as the court there said, it referred to "scientific" testimony "because that was the nature of the expertise" at issue.

Id. (citations omitted). Accordingly, the Courts have repeatedly applied the Daubert standard to experts whose testimony is based on technical and specialized knowledge. *See, e.g.*, Concord Boat Corp. v. Brunswick Corp., 207 F.3rd 1039 (8th Cir. 2000) (economic expert); Blue Dane Simmental Corp. v. American Simmental Association, 178 F.3d 1035 (8th Cir. 1999) (agricultural economist);

Peitzmeier v. Hennessy Industries, Inc., 97 F.3rd 293, 297 (8th Cir. 1996). Daubert has been applied in the context of observers attempting to testify as experts. *See* Rice v. Cincinnati, New Orleans & Pacific Railroad Co., 920 F. Supp. 732 (E.D. Ky. 1996) (district court granted motion in limine excluding expert testimony by railroad employees regarding safety of engine cab), *accd*, Thirkill v. J.B. Hunt Transport, Inc., 950 F. Supp. 1105 (N.D. Ala. 1996) (neither plaintiff train engineer nor fellow crewmen were qualified to testify as design experts).

3. THE FACTORS TO CONSIDER

In Daubert, the Court set forth a number of factors that "will bear on the inquiry,... [but do not] set out a defenitive checklist or test." Id. at 593. The factors established by Daubert include:

> 1) whether it [the theory or technique] can be (and has been) tested;
> 2) whether the theory or technique has been subjected to peer review and publication;
> 3) the known or potential rate of error; and
> 4) the "general acceptance" of the theory or technique.

Id. at 593-4. The Court in Kumho held that the Daubert factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending on "the particular circumstances of the particular case at issue." Kumho at 1175.

The standards set forth in the amendment to Rule 702 are broad enough to require consideration of any or all of the specific Daubert factors where appropriate. Courts have found other factors relevant to determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. The factors include:

> (1) whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of litigation, or whether they have developed their opinions expressly for the purpose of testifying. Daubert at 1317.

(2) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997).

(3) whether the expert has adequately accounted for obvious alternative explanations. *See* Claar v. Burlington Northern Railroad, 29 F.3d 499 (9th Cir. 1994);

(4) whether the expert is "being as careful as he would be in his regular professional work outside his paid litigation consulting." Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997); *see* Kumho Tire at 1176 (Daubert requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigors that characterizes the practice of an expert in the relevant field");

(5) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. Kumho Tire at 1175 (Daubert's general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy").

In Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000) the court held that "even a theory that might meet certain Daubert factors, such as peer review and publication, testing, known or potential error rate, and general acceptance, should not be admitted if it does not apply to the specific facts of the case." Id. at 1056 *citing* Kumho Tire, 526 U.S. at 154; Joiner, 522 U.S. at 146. "A court must focus on the 'reasonableness of using such an approach, along with the expert's particular method of analyzing the data thereby obtained, to draw a conclusion regarding the particular matter to which the expert's testimony was directly relevant.'" Concord Boat at 1055 *citing* Kumho Tire. *See also* Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the court in Daubert do not neatly apply to expert testimony from a sociologist); Kannakeril v. Terminix International, Inc., 128 F.3d 802, 809 (3rd Cir. 1997) (holding

that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge").

4. ANALYSIS UNDER RULE 702 - QUALIFICATIONS

A witness can be qualified as an expert under Fed. R. Evid. 702 by knowledge, skill, experience, training, or education, and it is the responsibility of the trial judge to determine whether a particular expert has sufficient specialized knowledge to assist jurors in deciding the specific issues in the case. *See* Kumho Tire, 526 U.S. at 156. "Once initial expert qualifications and usefulness to the jury are established, however, a district court must continue to perform its gatekeeping role by insuring that the actual testimony does not exceed the scope of the expert's expertise, which if not done can render expert testimony unreliable under 702, Kumho Tire and related precedents." Wheeling Pittsburgh Steel, 254 F.3d at 715. *See* Weisgram v. Marley Co., 169 F.3d 514, 515-21 (8th Cir. 1999) (holding that portions of the testimony from three different expert witnesses each lacked a sufficient foundation because they had exceeded the scope of the witness' expertise and thus were unreliable); Redman v. John D. Brush & Co., 111 F.3rd 1174, 1179 (4th Cir. 1997) (holding it was error for metallurgical engineer to give opinion testimony where the expert had no personal knowledge about or experience with the industry in question).

5. ANALYSIS UNDER RULE 702 - RELIABILITY

Rule 702(2) requires that the "testimony is the product of reliable principles or methods" based in the "knowledge and experience of his discipline". With regard to reliability, the Supreme Court explained that under the terms of Rule 702, "[t]he subject of an expert's testimony must be 'scientific ...,'" a phrase that both "implies a grounding in the methods and procedures of science"

and "connotes more than subjective belief or unsupported speculation." 509 U.S. at 589-90. The court elaborated:

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – *i.e.*, "good grounds," based on what is known.

Id. at 590. "In short, the requirement that an expert's testimony pertains to 'scientific knowledge' establishes a standard of evidentiary reliability." Id. Under Rule 702, then, an expert's opinion must "have a reliable basis in the knowledge and experience of his discipline." Id. at 592. The trial judge is given considerable leeway in determining what is reliable. Kumho Tire, 526 U.S. at 152. Additionally, the trial judge should consider a variety of factors, including the factors specified by Daubert when appropriate, when determining reliability of an expert's opinion. Id.

6. ANALYSIS UNDER RULE 702 - RELEVANCE

Rule 702(3) requires that the "witness has applied the principles and methods reliably to the facts of the case." The court in Daubert also elaborated on the relevancy requirement, which it derived from Rule 702's admonition that expert testimony must "assist the trier of fact to understand the evidence or determine a fact in issue." That consideration, the Court noted, "has been aptly described as one of 'fit.'" 509 U.S. at 591 (emphasis added). The court continued:

> "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes ... The study of phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is in fact an issue, the knowledge will assist the trier of fact. However (absent credible grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness" standard

> requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

Id. at 591-92 (citations omitted). The Supreme Court has indicated that it would strictly enforce the "fit" requirement. *See* General Electric v. Joiner, 118 S.Ct. 512, 518 (1997) (upholding district court's exclusion of studies on infant mice to show chemical caused cancer in plaintiff on grounds that the "studies were so dissimilar to the facts present in this litigation"); Id at 518-19 (same for various other studies with only tenuous connection to facts of case). In Concord Boat, the Eighth Circuit focused on the recent Supreme Court emphasis on the importance of "fit":

> Conclusions and methodology are not entirely distinct from one another... [N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Concord Boat, 207 F.3d at 1055. *Quoting* Joiner, 522 U.S. 136, 146 (1997); Jaurequi v. Carter Mfg. Co., 173 F.3d 1076, 1082 n. 3 (8th Cir. 1999).

II. AUTOMATIC SAFETIES

After his career as a State Farm Insurance Company adjuster and supervisor, Mr. Berg has researched information about guns. Mr. Berg also has a personal preference for that automatic safeties rather than manual safeties. While Mr. Berg is certainly entitled to his own personal opinions and preferences, personal opinions and preferences are of course an insufficient basis for admissible expert testimony under Rule 702, Fed. R. Evid. and Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993). Only a "qualified witness" may give his opinion as an expert, and only then if that witness can testify as to "scientific, technical, or other specialized knowledge."

As to his qualifications, Mr. Berg testified:

Q. You were a claims adjuster for what, 20 years?

A. Probably about 10, 15 at the most.

Q. For State Farm; correct?

A. State Farm Mutual Auto Insurance Company, yeah.

Q. Personal line?

A. Well, everything. Commercial and personal.

(p. 21, Exhibit "1").

Q. Do you have any college degree?

A. I have a bachelor of science and law from LaSalle Extension University.

Q. Did you have to take any courses to get that? Did you have to go to a classroom? Go to lectures?

A. No. It was all extension.

Q. Any classroom work whatsoever for this law degree from LaSalle?

A. No. The final exam was taken under the judge at the general's department in the Army.

Q. You mean, you were proctored there?

A. Yes.

Q. They didn't have anything to do with vouching for your degree from LaSalle, did they?

A. No, they did not.

(pp. 19-20, Exhibit "1").

Q. It shows you enrolled on July 31, 1950; is that correct?

A. Yes.

Q. And by November 27, 1951, you had graduated?

A. Yes.

(p. 107, Exhibit "1").

Q. Did you sit for the bar exam?

A. No, I have not.

(pp. 24-25, Exhibit "1").

Q. The only classroom-type classes you've had since you got out of high school would they have been CPCU exams?

A. Yes, and some preparatory classes at the University of Minnesota.

Q. For?

A. For that same designation.

Q. And that designation is what?

A. Certified Property and Casualty Underwriter.

(p. 22, Exhibit "1").

Q. You've never designed any firearms, have you?

A. No, I have not.

Q. You've never designed any air rifle, have you?

A. No, I have not.

Q. You've never designed any component of an air rifle; correct?

A. That's correct.

Q. You've never designed any safety system for an air rifle; correct?

A. That's correct.

(pp. 11-12, Exhibit "1").

Q. Do you have an engineering degree?

A. No, I don't.

(p. 19, Exhibit "1").

Q. Have you any formal training in design or manufacture of air guns?

A. No, I haven't.

Q. Have you had and hands-on experience in design or manufacture of air guns?

A. No.

Q. Have you ever designed a safety for any air gun?

A. Only what I did while waiting to testify in a case.

Q. Was it ever implemented by any manufacturer?

A. No.

Q. Did you take engineering classes at any university that's accredited?

A. No, I did not.

Q. Have you ever been in an air gun facility, a manufacturing facility?

A. No, I haven't.

(p. 22, Exhibit "1").

Q. You have no experience in the manufacturing process for air guns, is that true?

A. Now that is true.

Q. You have no experience in live testing of air guns; is that true?

A. That is true.

Q. And you have no experience in the quality control processes for air guns; correct?

A. That is true.

(p. 23, Exhibit "1").

Q. Have you ever taught firearms safety instruction?

A. I'm certified as a safety instructor by the NRA, but I don't teach classes as such.

Q. Have you ever?

A. No, I haven't.

Q. Have you taught air gun safety courses anywhere?

A. No, I haven't.

(pp. 26-27, Exhibit "1").

Q. Would you agree with me that you are not an expert in marketing?

A. That's true.

Q. And you're not an expert in the actual wording that goes in the manuals or advertising?

A. That's true.

Q. You never drafted an owner's manual?

A. That's true.

Q. You've never assisted in the drafting of an owner's manual?

A. That's true.

* * * * *

Q. So as far as actually designing a safety, you are not an expert in that; correct?

A. I can't sit down and design one on a piece of paper, no.

(pp. 41-42, Exhibit "1").

Q. You've never designed an automatic safety for a firearm or air cock, right?

A. No, I haven't.

(p. 54, Exhibit "1").

Q. Have you ever observed youth shooting with automatic safeties, rifles equipped with automatic safeties, and seen how they handle air rifles with automatic safeties?

A. I can't recall any time that I would have been observing someone using them, no.

* * * * *

Q. You've never instructed youth on air gun safety shooting; correct?

A. That's correct.

* * * * *

Q. Have you ever gone to any air gun competitive events?

A. No, I have not.

Q. Have you gone to any classes where youth are taught how to shoot air guns?

A. No, I have not.

* * * * *

Q. Have you ever interviewed or talked to air gun instructors?

A. No.

(pp. 69-71, Exhibit "1").

Q. Well, you've never really been involved in the design process of a firearm or air gun, have you?

A. That's right.

(p. 79, Exhibit "1").

Q. Is it fair to say that you have no special experience, training, education, or expertise in human factors engineering?

A. That is true.

Q. And you have no special experience, training, education, or expertise in how people interact with air rifles with or without automatic safeties; correct?

A. That is true.

Q. You have no expertise or training in statistics; correct?

A. That's true.

Q. You have no experience in conducting, assessing or analyzing surveys; correct?

A. That's true.

Q. You've had no training or expertise in lifecycle testing or durability testing for air gun loading and unloading mechanisms, have you?

A. That's true.

(pp. 81-82, Exhibit "1").

Q. None of the special courses or seminars that you've attended addressed why you should or shouldn't necessarily put an automatic safety on an air rifle; correct?

A. You mean the ones that I gave or what?

Q. The ones you attended that other people taught?

A. Well, I don't think I've heard anyone talk about the subject of automatic safeties period.

Q. Other than you giving these talks, you've never heard it come up from anyone else, would that be fair to say?

A. I can't recall anyone talking about automatic safety, as such.

(p. 102, Exhibit "1").

Q. Do you know any actual designers of air guns, someone who actually designs air guns, that adheres to the theories that you espouse that all guns have to have a positive feed system and have to have an automatic safety?

A. I haven't interviewed them. I don't know.

Q. Well, do you know of any real air gun designer that follows you and agrees with you?

A. Well, I haven't interviewed them. If I had all the air gun designers and I interviewed them all, and we could see what they really believed, but I haven't done that and neither have you and no one knows what they agree with.

(p. 128, Exhibit "1").

Q. Have you done any type of research to determine whether automatic safeties are generally desired in the marketplace versus firearms or air guns without automatic safeties?

A. Any research in the marketplace?

Q. No.

(p. 141, Exhibit "1").

Q. Would it be fair to say that, at least as far as your adult life is concerned, your relationship with air guns is derived from litigation-related activities?

A. Well, I'm a collector of air guns, but a collection is what I call a reference collection, to that extent it would be related to litigation. I collect certain types of air guns because I have an interest in them.

* * * * *

Q. And other than your litigation-related activities, you don't have any real reason to own air guns, do you?

A. I don't, although, like I say, I am a collector and I'm interested in the collection now as a collection.

(pp. 30-31, Exhibit "1").

In Redman v. John D. Brush & Co., 111 F.3rd 1174, 1179 (4th Cir. 1997), the Court held that it was error for metallurgical engineer to give opinion testimony where the expert had no personal knowledge about or experience with the industry in question. Clearly, Mr. Berg has neither professional or personal knowledge or experience with an facet of the air gun industry. As a result of these "qualifications," Mr. Berg has many times been excluded from testifying and giving opinions on issues of gun design.

For example, in Shields v. Strum, Ruger & Co., Inc., the United States District Court for the Southern District of Mississippi, the Honorable William H. Barbour, Jr., ruled that Mr. Berg would not be allowed to testify as an expert in firearms design. In reaching this conclusion, the court relied upon the fact that Mr. Berg is not a firearms designer, and went on to state:

> The court is convinced Mr. Berg is not an expert in firearms design, functioning and defects; that he is not an expert in design analysis of state-of-the-art matters. He is not an engineer, he is not qualified in designing a gun to be safe, and specifically a single-action revolver.

(Trial Transcript, September 11, 1987, pp. 2-3, attached as Exhibit "2").

In Small v. Strum, Ruger & Co., Inc., the Superior Court of California, County of San Diego, the Honorable Gilbert Harelson, ruled that Mr. Berg could properly testify as a "firearms researcher," but could not expand his testimony beyond that area because "he is not involved in design or manufacture of guns; he is not a metallurgist; he is not an engineer." (Trial Transcript, Volume III, August 18, 1983, p. 911, attached as Exhibit "3").

In Sikes v. Mossberg & Sons, Inc., the United States District Court for the Northern District of Oklahoma, the Honorable James O. Elllison, noted that because Mr. Berg has never designed or

had any training in the design of firearms safety mechanisms, he was not qualified to testify regarding design criteria for a proper safety mechanism. (Trial Transcript, October 29, 1985, p. 17, attached as Exhibit "4").

In Lowe v. Glock, Inc., the United States District Court, District of New Mexico ruled that on the issue of a firearm safety device, Mr. Berg was not qualified to offer expert opinion. The court stated:

> Defendant contends that plaintiff's proposed expert witness, Stanton Berg, is not qualified to offer an expert opinion that all handguns without a magazine disconnect are unsafe because the gun user may be unaware that a bullet could remain in the gun's chamber. Defendant argues that Mr. Berg's opinion is not based on reliable scientific evidence, is an untested theory, and is not widely accepted in the relevant field of study. After conducting a Rule 104(a) hearing, I determined that the plaintiff failed to establish by a preponderance of the evidence that Mr. Berg's testimony was reliable as to the relevant issues in the case. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993).

(See Summary Judgment and Order of Dismissal, Lowe v. Glock, Inc., #CIV-94-0385 (Dist. N.M. June 30, 1995, attached as Exhibit "5").

In Wasylow v. Glock, Inc., U.S. District Court, District of Massachusetts, judgment was entered in favor of the defendant, in a case in which the lack of a firearm safety device was opined by Mr. Berg to cause the gun to be "defective." In addressing Mr. Berg in footnote 20 of its April 4, 1996 Memorandum and Order, the Honorable Douglas P. Woodlock, U.S. District Judge, stated:

> The Berg report establishes several propositions ... that in Berg's opinion, the lack of a manual safety, as well as a magazine disconnect, are design defects. ... I do not find Berg's conclusion to be based on any particular scientific qualification; rather it expresses what is essentially a preference for the advantages of additional safety devices. ... Moreover, as other courts have observed, Berg lacks the specialized scientific qualifications to justify admitting his testimony as expertise under Federal Rule of Evidence 702. I consider it likely that I would not permit Berg to testify even if this case were to survive the instant summary judgment motion. [Emphasis added]

(See April 4, 1996 Memorandum and Order, Wasylow v. Glock, Inc., U.S. District Court, District of Massachusetts, No. CIV-94-11073, attached as Exhibit "6").

III. GRAVITY FEED LOADING SYSTEM

While Mr. Berg opines that the gravity feed loading system found in BB guns is a "defective design," he admits that he is unable to connect his criticisms of the design with any risk of harm that would render the Daisy 880 or 856 "unreasonably dangerous." Mr. Berg finds that the gravity feed loading system design used by any BB gun is "defective" because he believes on occasion the system might become "hung up" and prevent a BB from loading, which of course causes no risk of harm. Even though Mr. Berg has "tested" the 880's gravity feed system, he has never been able to get a BB to "hang up." Mr. Berg opines, however, that if a BB is "hung up," it may at some point become "un-hung up" and the user may load a BB into the chamber, but believe the gun in empty, then point the gun at someone and pull the trigger. Yet, Mr. Berg concedes that if the user looks at the gun as he is loading it, he should see the BB as it is loaded, regardless of whether at one time it had previously been "hung up."

Q. Mr. Berg, what opinions do you have in this case?

A. Well, basically that the Daisy 880 and other members of the power line group are defective because they don't have automatic safeties and that the feed system is defective in that it allows users to think the gun is unloaded when, in fact, it may have a BB that's hung up in the magazine somewhere and is not carried along the line and eventually fed into the chamber. The individual thinks the gun is unloaded, and that happens in just able all the power line configurations.

* * * * *

Q. You actually tested the Daisy 880 gravity feed system, didn't you?

A. I have, yes.

* * * * *

Q. As we sit here today, can you remember any occasion where you've been able to lodge a BB in an 880 or an 856 such that you couldn't get it to feed?

A. Well, I'm sure if you shake it enough, you're going to get it to dislodge eventually.

Q. That's been your experience anyway, correct?

A. Yes.

* * * * *

Q. Tell me, in the Model 880 and 856, do you have any difficulty visualizing the BB in the loading area?

A. I'm not sure that I understand your question.

Q. Well, a BB in an 880 and 856 travels from a magazine across a visible loading area into the chamber, doesn't it?

A. Yes.

Q. And if the BB is in that area, do you ever have any trouble visualizing it or seeing it, if you look?

A. I don't.

* * * * *

Q. And one of the things that you have said about the Daisy 880 and 856, for that matter, and the 990, is that a BB is visible to the user in that loading area, if they chose to look?

A. If it's in the loading area and one looks, one should be able to see it, yes.

* * * * *

Q. A BB, in order to get into the chamber where it can be fired, has to be manually fed in there by a human being; correct?

A. An 880?

Q. 880, 856, 990?

A. Yes.

Q. So the user actually has to manually load the BB into the magazine or from the magazine into the chamber; correct?

A. Well, he manually operates the bolt mechanism of which is intended to feed the BB into the chamber, yes.

Q. And before it goes into the chamber, it is visible as it crosses that feed track area?

A. It would be visible if one looked in that area.

(see pp. 89-90, 93, 94-95, 42, 43, 44, 131-132, Exhibit "1"). In addition to being unqualified to give such an "expert opinion" on gravity feed system design, such an "opinion" is absolutely irrelevant. Even more importantly, Mr. Berg's testimony fails to meet the floor imposed by Daubert and its progeny to "that an expert's testimony rests on a reliable foundation and is relevant to the task at hand." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999); General Electric Co. v. Joiner, 522 U.S. 136 (1997).

Mr. Berg cannot claim that his "testimony is the product of reliable principles or methods" based in the "knowledge and experience of his discipline" as required by Rule 702(2). Mr. Berg admits that he has no engineering degree, no formal training or hands on experience related to air gun design or manufacture, and has never designed any part of an air gun. In fact, Mr. Berg admits that he has never even been in a facility where air guns are made. Mr. Berg's testimony does not expose the Court to real science-based testimony, and, as several courts of appeal have recognized, the testimony does not satisfy the requirements of Rule 702, Daubert and Kumho Tire. *See, e.g.*, Rosen

v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996) ("an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process"), *cert. den.*, 117 S.Ct. 73 (1996).

Under 15 U.S.C. § 2064(a)(2), the CPSC must prove that because the Daisy 880 and 856 has a gravity feed system, those BB guns contain a "product defect" that "creates a substantial risk of injury to the public." Mr. Berg concedes that a gravity feed design on a BB gun makes the gun no more "dangerous" than any other gun, since a BB gun can only cause harm if it is loaded, pointed at another person, and fired. The function of the gravity feed system does not cause a BB gun to be loaded, aimed or fired any more "dangerously" than a BB gun without a gravity feed system. On any gun, if the user loads the gun without looking then pulls the trigger while pointing the gun at another person, the result is the same, regardless of the loading system. Since Mr. Berg concedes that the gravity feed design of the 880 and 856 cannot create a "substantial risk of injury to the public" within the meaning of 15 U.S.C. § 2064(a)(2), his testimony and personal criticisms of the gravity feed loading system of the Daisy Model 880 and 856 should be excluded from evidence at the hearing on this matter pursuant to Rules 402, 403 and 702, Fed. R. Evid.

Respectfully submitted,

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Attorneys for Defendant

By: _____ FOR:
William M. Griffin III #82069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by U. S mail, postage prepaid and addressed as follows, this 7 day of ~~March~~ April, 2003.

The Honorable William B. Moran,
Administrative Law Judge
and Presiding Officer

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FOR:
William M. Griffin III

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

DAISY MANUFACTURING COMPANY,

d/b/a Daisy Outdoor Products
400 West Stribling Drive
Rogers, AR 72756,

CPSC Docket No.:02-2

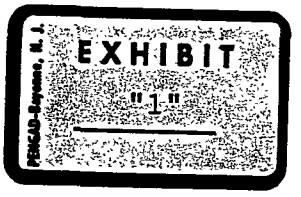
Respondent.

DEPOSITION

The following is the deposition of STANTON BERG, taken before Kelly E. Hanna, Court Reporter, Notary Public, pursuant to Notice of Taking Deposition, at 7901 24th Avenue South, Room 312, Bloomington, Minnesota, commencing at approximately 12:06 p.m., March 3rd, 2003.

ORIGINAL

* * * * *



shotguns, isn't it?

A. Yes, it is.

Q. Designed by the greatest gun designer the world has ever known; isn't that correct?

A. That is true.

Q. And you found that product to be defective; isn't that correct?

A. I believe I have, yes.

Q. You found the Model 1911 -- no, you found the Browning High Power to be defective as well; correct?

A. Yes, I have.

Q. That was also designed by the greatest gun designer the world has ever known; correct?

A. Well, in my opinion he's one of the greatest ones, yes, but that doesn't mean that he didn't make mistakes or that the others that continued his product did not make mistakes in the further design of that product.

Q. You've never designed any firearms, have you?

A. No, I have not.

Q. You've never designed any air rifle, have you?

A. No, I have not.

Q. You've never designed any component of an air rifle; correct?

A. That's correct.

Q. You've never designed any safety system for an air rifle; correct?

A. That's correct.

Q. Now, you have testified that the Browning High Power is defective; correct?

A. Are you talking about the pistol or the --

Q. The pistol.

A. Yes, I have.

Q. And you would agree with me that was designed by John M. Browning; correct?

A. The initial design was by Browning, but the continuation was actually by another designer.

Q. By a Frenchman?

A. Yes. In fact, much of his original design was not incorporated into that gun.

Q. You have found almost every John Browning design to be defective, haven't you, in testimony on one occasion or another?

A. No, I don't think so.

Q. Tell me one you found not to be defective?

against firearms manufacturers and air gun companies?

A. I really don't know.

Q. Have you ever testified that any firearm, where you've taken the case for the plaintiff, that that gun was nondefective?

A. Well, I have a number of cases I've taken that I found to be nondefective, although, I wouldn't necessarily be testifying to that extent because probably if I found it nondefective, I would not be utilized.

Q. Do you have an engineering degree?

A. No, I don't.

Q. Do you have any college degree?

A. I have a bachelor of science and law from LaSalle Extension University.

Q. Did you have to take any classes to get that? Did you have to go to a classroom, go to lectures?

A. No. It was all extension.

Q. Any classroom work whatsoever for this law degree from LaSalle?

A. No. The final exam was taken under the Judge at the General's department in the Army.

Q. You mean, you were proctored there?

A. Yes.

Q. They didn't have anything to do with vouching for your degree from LaSalle, did they?

A. No, they did not.

Q. Do you know whether LaSalle is even accredited?

A. Well, it has been accredited, I think, by two or three organizations.

Q. And where does LaSalle advertise? Have you ever seen them advertised?

A. They're not in business at the present time.

Q. When did they go out of business?

A. Probably about ten years ago.

Q. Where did they advertise?

A. Originally?

Q. Yeah.

A. I think they were in Chicago.

Q. Where were their advertisements? Were they in magazines and things?

A. I don't recall that I really know that. They were founded in 1908, when they actually -- where they actually advertised, I don't know. Many of the large companies, they utilized them for training their staff. A lot of the large insurance companies retained them for training their staff.

Q. You were a claims adjustor for what, twenty years?

A. Probably about ten, fifteen at the most.

Q. For State Farm; correct?

A. State Farm Mutual Auto Insurance Company, yeah.

Q. Personal lines?

A. Well, everything. Commercial and personal.

Q. Were you property or were you personal entry as well?

A. I'm sorry?

Q. Did you do property only, or did you do personal injury as well?

A. I did everything. In fact, for a while I was what they called an attorney negotiator on certain injury claims, that sort of thing. I later, then, became a claims superintendent.

Q. Have you had any formal training in design or manufacture of air guns?

A. No, I haven't.

Q. Have you had any hands-on experience in design or manufacture of air guns?

A. No.

Q. Have you ever designed a safety for any air gun?

A. Only what I did while waiting to testify in a case.

Q. Was it ever implemented by any manufacturer?

A. No.

Q. Did you take engineering classes at any university that's accredited?

A. No, I did not.

Q. Have you ever been in an air gun facility, a manufacturing facility?

A. No, I haven't.

Q. The only classroom type classes you've had since you got out of high school would they have been CPCU exams?

A. Yes, and some preparatory classes at the University of Minnesota.

Q. For?

A. For that same designation.

Q. And that designation is what?

A. Certified Property and Casualty Underwriter.

Q. And did you obtain that?

A. Yes, I did.

Q. You have no experience in the manufacturing process for air guns, is that true?

A. Now that is true.

Q. You have no experience in life testing of air guns, is that true?

A. That is true.

Q. And you have no experience in the quality control processes for air guns; correct?

A. That is true.

Q. Did any of the seminars that you've taken over the years ever relate to firearm design or safety?

A. I go to special seminars every year that relate to firearms, but I don't believe any of them relate to design or safety, other than presentations that I made at those conferences.

Q. Other than the presentations you made, do you recall at any of the special seminars which you've taken over the years, relate specifically to firearm design or safety?

A. I don't recall that, no.

Q. In fact, they would not; correct?

A. Normally they would not be.

Q. And even abnormally they would not, that you know of; correct?

A. Well, there may be individual presentations by members that relate to a safety of a certain gun at those conferences, but the main thrust of the conference was not on that subject.

Q. And you are not an expert in quality control; correct?

A. No, but I received training in quality control.

Q. And where did you receive this training?

A. At Hennepin Technical College.

Q. What year was that?

A. 1987.

Q. Did you take a class there?

A. Yes.

Q. How long did the class last?

A. I think it was a one-quarter long class.

Q. Would you agree that based on that single course, you would not hold yourself out as an expert in the area of manufacturing and quality control?

A. I would not claim to be an expert. I would claim to be well versed in that area.

Q. Did you sit for the bar exam?

A. No, I have not.

Q. Are you a gunsmith?

A. No, but I've been an apprentice gunsmith.

Q. Have you written articles for magazines outside of litigation that are reviews of air guns?

A. Outside of litigation? I think everything I've published is outside of litigation. It's published by periodicals that don't necessarily deal with litigation.

Q. The articles arose out of something that was involved in litigation, though; correct?

A. No. I don't think that's true. There might be one or two individual cases that I would write about a specific case, but the work was done based on the research, because I had an interest in that area, and that interest could be related to litigation work. However, the research I did didn't bear on any particular case.

Q. Have you published articles on air guns?

A. Yes, I have.

Q. And where did they appear?

A. There was an article that was published in the AFTE Journal, April 1992 called "Airgun Safety

Designs." There was also an article published in the Journal of Forensic Identification, September-October, 1992, on "Airgun Loading Feeding Safety System Designs." I also had an article published on trigger pull that related to -- had areas in it that related to air gun trigger pull. That was published in the Journal of Forensic Identification in July-August, 1991. Those would be the ones.

Q. Would it be fair to say that by 1991 you had handled twenty air gun cases against manufacturers, including both Daisy and Crosman?

A. I just don't know.

Q. Well, isn't it true that at the time you published the work in AFTE and the other one in the Journal in 1992, that you had been handling cases against air gun manufacturers for at least ten years?

A. Oh, I'm sure that's true.

Q. Have you ever taught firearm safety instruction?

A. I'm certified as a safety instructor by the NRA, but I don't teach classes as such.

Q. Have you ever?

A. No, I haven't.

Q. Have you taught air gun safety courses anywhere?

A. No, I haven't.

Q. Do you think the rules of safety would be markedly different between the rules for firearm safety and the rules for air gun safety?

A. I think they would be very close.

Q. What are the top rules?

A. Controlling the muzzle of the gun, treating every gun as if they're loaded, that sort of thing.

Q. And isn't it true that if you followed those two rules, almost all of the accidents can be avoided?

A. I think that's generally true. Accidents happen, however, because someone makes a mistake. If everyone followed all the rules throughout life, we would never have accidents in any area.

Q. But you would agree with me, if you followed the rule about muzzle control and the rule to treat every gun as if it's loaded, you can generally avoid almost all accidents with which you're familiar in terms of air guns; correct?

A. I think that's true.

Q. As a young man or a young boy, did you shoot air guns?

purposes.

Q. Have you ever shot air guns competitively?

A. No.

Q. Would it be fair to say that you are not experienced in writing warnings or manuals for air guns or firearms?

A. That is true. I am not involved in writing warnings for any firearm or air gun.

Q. And you have testified before, and I assume you agree, that you do not consider yourself an expert in labeling or warnings?

A. That is true.

Q. Have you ever worked designing an air gun?

A. No, I have not.

Q. Have you ever worked in air gun competitions, either as a competitor or judge?

A. No.

Q. Have you ever worked as a gunsmith on air guns?

A. No, I haven't.

Q. Would it be fair to say that, at least as far as your adult life is concerned, your relationship with air guns is derived from

litigation-related activities?

A. Well, I'm a collector of air guns, but a collection is what I call a reference collection, to that extent it would be related to litigation. I collect certain types of air guns because I have an interest in them.

Q. Which type do you collect?

A. I collect air guns that have automatic safeties.

Q. Would it be fair to say that your relationship with air guns, at least as an adult, is derived from litigation-related activities?

A. Well, certainly a relationship to it, yes.

Q. You don't use air guns for pleasure or for hunting, do you?

A. That is true.

Q. And other than your litigation-related activities, you don't have any real reason to own air guns, do you?

A. I don't, although, like I say, I am a collector and I'm interested in the collection now as a collection.

Q. Would it be fair to say that in the last several years, or over the last ten to twelve

A. I think you covered all of them.

Q. You don't remember any others?

A. That I've been excluded or limited?

Q. Right.

A. There was a case in Virginia involving a burst firearm, and I was not allowed to talk about the metallurgical aspects of that particular gun or the gas containment qualities of that gun.

Q. Any other cases that you remember?

A. I don't recall any.

Q. So other than the ones that I referred to and the case in Virginia, you do not know of any other cases where your testimony has been limited or excluded?

A. I can't recall any. Most cases my testimony is accepted.

Q. Would you agree with me that you are not an expert in marketing?

A. That is true.

Q. And you're not an expert in the actual wording that goes into manuals or advertising?

A. That is true.

Q. You have never drafted an owner's manual?

A. That is true.

Q. You've never assisted in the drafting of an owner's manual?

A. That is true.

Q. And you're not an expert in actually designing a safety; is that correct?

A. I'm not an expert as it comes to the layout and dimensioning of a safety. I consider myself to be an expert on safety design, but I'm not a designer.

Q. Is it fair to say you are not an expert in actually designing a safety?

A. Well, I would repeat what I just said. I can't sit down and lay out a safety in dimension and property. I'm not a draftsman. I'm an expert on safety design, but not a designer.

Q. So as far as actually designing a safety, you are not an expert in that; correct?

A. I can't sit down and design one on a piece of paper, no.

Q. Tell me, in the Model 880 and 856, do you have any difficulty visualizing the BB in the loading area?

A. I'm not sure that I understand your question.

Q. Well, a BB in an 880 and 856 travels

from a magazine across a visible loading area into the chamber, doesn't it?

A. Yes.

Q. And if the BB is in that area, do you ever have any trouble visualizing it or seeing it, if you look?

A. I don't.

Q. You never told the Consumer Product Safety Commission that Daisy's BB's were the wrong color, did you?

A. No. I've seen that said. I don't think I said that.

Q. And you're not here to support such an allegation; correct?

A. That they're the wrong color?

Q. Yes.

A. Oh, I can see how a different color might have more contrast, but that has never been one of my criticisms.

Q. And, in fact, in twenty years of looking at Daisy products and Crosman's products, you've never been critical of either the copper colored BB or the silver colored BB, the color itself; correct?

A. That's correct.

Q. And one of the things that you have said about the Daisy 880 and 856, for that matter, and the 990 is that a BB is visible to the user in that loading area, if they chose to look?

A. If it's in the loading area and one looks, one should be able to see it, yes.

Q. And another one of the things that you like about, or that you've indicated is positive about the Daisy 880 and for that matter the 856 --

A. I don't think I'd describe those as positive or that I liked them, I just said that that was the facts.

Q. Another fact that you've testified to about the 880, the 856, and the 990 is that a user can, at any time they want to, know whether it's loaded or unloaded, that is a round in the chamber, they can simply pull the bolt back?

A. Well, if you're talking about BB's. If you're talking about pellets, that's not the case.

Q. I'm talking about BB's.

A. You should be able to do that.

Q. It's always done that in your experience in testing 880 and 856's; correct?

A. I can't recall any cases that they did not, other than where it rolled off the end of the tip

A. No. Well, theirs is on every one they produce and they say if you don't want one, we will take it off.

Q. Beretta is the same way. They offer to take it off for you or put it on certain models, they go both ways.

A. Beretta has probably one of the widest lines of imported over/under and double side-by-sides. It's on all of them.

Q. You think it's on all of them?

A. All of them, except for a few that they have that they call the competition skeet and trap, but all their hunting and sporting ones all have it on them.

Q. Do you know why that offer to take it off for you?

A. I assume there's some people that maybe desire to have it off, but the fact that they put it on shows that they obviously feel it should be on there.

Q. You've never designed an automatic safety for a firearm or air cock, right?

A. No, I haven't.

Q. Do you know why European designed break barrel shotguns are more likely to an automatic safety

not skeet?

A. I guess I assumed it was.

Q. Do you know --

A. What is it?

Q. Do you know what their position is? That organization?

A. I don't know anything about their position.

Q. Has anyone advised you that the position of that organization is that automatic safeties are more unsafe than no safety at all?

A. That's obviously a silly statement, but I haven't been advised of that, no.

Q. Well, it's a silly statement to you, isn't it?

A. I think it's a silly statement to any thinking person that automatic safeties are dangerous.

Q. And apparently -- Have you ever been out and watched youth using automatic safeties and how they treat automatic safeties?

A. Do you want to pass that one by again?

Q. Have you ever observed youth shooting with automatic safeties, rifles equipped with automatic safeties, and seen how they handle air rifles with automatic safeties?

A. No, I have not.

Q. Have you contributed money or time or anything to any courses or classes that teach youth how to shoot air guns?

A. No.

Q. Have you ever interviewed or talked to air gun instructors?

A. No.

Q. Do you know that the Consumer Product Safety Commission actually had an air gun instructor and a firearms instructor as one of the people in charge of air gun investigations?

A. I don't know who they had in charge. I would have no way of knowing that.

Q. That would be the type of person you'd want examining air guns; correct?

A. I think I would want someone who knows something about air gun accidents and how they happen.

Q. You would want someone who's actually involved in shooting sports and knows how the products are used, wouldn't you?

A. I think the most important person they could have is someone who had dealt with firearms and air gun accidents.

Q. Would you agree with me that BB's are

management. They just don't go off on their own and whip up something.

Q. Well, you've never really been involved in the design process of a firearm or an air gun, have you?

A. That's right.

Q. You've never sat down and analyzed why certain users may or may not want automatic safeties on an air gun, have you?

A. I have heard the various reasonings for some of the decisions, but I haven't been involved in that process as we've covered chapter and verse already.

Q. Would you agree with me that your opinions regarding the defectiveness of the Daisy 880 and 856 primarily center around the lack of an automatic safety and the gravity feed system, would that be fair to say?

A. Well, I think basically those would be the two main things. I feel the velocity of the 880, it has no utility value for young people, but that also impacts why I think it should have an automatic safety.

Q. You understand that the Consumer Product Safety Commission is making no claim against

Q. This is a case out of the State of Wisconsin, Circuit Court in Dane County, Buddy Bill's, do you remember that case?

A. Well, sure. We already talked about it.

Q. That's the case where the judge found that you are not an expert in the area of air gun design or safety; correct?

A. That is correct.

Q. Now, in that case that was a Crosman Air 17, wasn't it?

A. Yes, it was.

Q. Is it fair to say that you have no special experience, training, education, or expertise in human factors engineering?

A. That is true.

Q. And you have no special experience, training, education, or expertise in how people interact with air rifles with or without automatic safeties; correct?

A. That is true.

Q. You have no expertise or training in statistics; correct?

A. That's true.

Q. You have no experience in conducting,

assessing, or analyzing surveys; correct?

A. That's true.

Q. You've had no training or expertise in life cycle testing or durability testing for air gun loading and unloading mechanisms, have you?

A. That's true.

Q. In the cases in which you've testified on Crosman's multi-pump air rifles, you have found that BB's do not necessarily readily feed into the firing chamber when the bolt is manipulated; correct?

A. Probably has been in some particular cases, but as I'm sitting here without seeing the case, I'm not sure.

Q. Well, would it be fair to say that the Crosman and the Daisy multi-pump air rifles have basically the same defects as you've identified them in your review of these products?

A. Well, they both have the defects of not having an automatic safety, and they have problems with their gravity feed system, but it's not the same as the Daisy because they place a little magazine in between their reservoir, so you're dealing in most cases with a limited number of BB's. They also put a slot in the top so you can see most of them. That's probably why I see very few cases from Crosman as

A. How that safety would what?

Q. Would fail?

A. I don't think it would fail. I've seen the discussions of so-called defects and including warnings, and everything I've seen had been erroneous because the only indications I have had as to the possible failure have not been true.

Q. Do you know what Guy Brawler's own opinion is after evaluating that automatic safety design?

A. His what?

Q. Do you know what his own opinion is regarding the safety of this design?

A. You mean since that time?

Q. Yes.

A. No, I don't.

MR. WARD: Should we take a quick break?

MR. GRIFFIN: Sure.

(Recess taken at 1:57 p.m.)

BY MR. GRIFFIN:

Q. Mr. Berg, what opinions do you have in this case?

A. Well, basically that the Daisy 880 and the other members of the powerline group are defective

because they don't have automatic safeties and that the feed system is defective in that it allows users to think the gun is unloaded when, in fact, it may have a BB that's hung up in the magazine somewhere and is not carried along the line and eventually fed into the chamber. The individual thinks the gun is unloaded, and that happens in just about all of the powerline configurations. They all have a little different magazine setup, and that I think that the velocity is one of the reasons that I feel they also should have an automatic safety, because of the danger posed by the higher velocities.

Q. Well, you think the Red Ryder should have an automatic safety, don't you?

A. Well, sure, I think they all should.

Q. You think any BB gun or air rifle should have an automatic safety; correct?

A. I do, yes. I'm just saying that in this case I think the velocity is an aggravating factor.

Q. Well, whether or not the velocity is 250 feet per second or 1,200 feet per second, you still think it needs an automatic safety; correct?

A. Yes, I do.

Q. And you think an air rifle is defective

if it doesn't have an automatic safety, whether it shoots at 250 feet per second or at 12 or 1,400 feet per second; correct?

A. That is correct.

Q. And whether an air rifle shoots at 250 per second or 12 or 1,400 feet per second, you would find if it had a gravity feed system that it was defective; correct?

A. That is correct.

Q. And you believe all the Crosman multi-pump air rifles are defective; correct?

A. Yes.

Q. And you believe every Daisy BB gun that does not include an automatic safety and has a gravity system that it is defective as well; correct?

A. Correct.

Q. You would agree with me that the external appearance of the Daisy 880 is that of a larger caliber sporting rifle and the stock dimensions are better suited to adults than to youths; correct?

A. Well, I agree that it has an appearance that is somewhat similar to firearms. I really hadn't analyzed the stock dimensions.

Q. The stock dimensions are better suited to adults than to youth. Do you agree with that or

A. I actually did what?

Q. You actually tested the Daisy 880 gravity feed system, didn't you?

A. I have, yes.

Q. And as long as you held the barrel with the barrel tilted up, you found the Daisy 880 fed rather reliably, didn't you?

A. I wouldn't say that.

Q. As late as 1997 you tested the Daisy 880 to determine how often it would load, how regularly it would load; correct?

A. Everyone that I've examined I've tested and ran through feed cycles. Some have more problems than others.

Q. For instance, if you hold the barrel tip down, it's never going to load; correct?

A. That's true.

Q. Likewise, if you hold a Crosman with the barrel up, it won't ever load either.

A. Well, they have reverse feed systems.

Q. One advantage that the Daisy system has of holding the barrel up, that's the most likely way you're going to hold the barrel when you're pumping; correct?

A. I would think it would be more inclined

to be at some angle up, it wouldn't necessarily be at 45 degrees.

Q. It would be upward though; correct?

A. In most cases, not always.

Q. You've never had a BB lodge in a Daisy 880 such as you couldn't shake it lose, have you?

A. I can't recall what the tests were in all of my cases. It's been frequent that they have not failed to feed. I don't -- I can't recall any that in some time in the cycle they didn't fail to feed at some point or another.

Q. That they failed to feed a BB?

A. Yes.

Q. You've never had one lodge in a magazine of an 880 or an 856 such that you couldn't shake it lose, have you?

A. That I couldn't shake it lose?.

Q. Right?

A. I don't know. I can't recall as I'm sitting here today.

Q. As we sit here today, can you remember any occasion where you've been able to lodge a BB in an 880 or an 856 such that you couldn't get it to feed?

A. Well, I'm sure if you shake it enough,

you're going to get it to dislodge eventually.

Q. That's been your experience anyway; correct?

A. Yes.

Q. When you do your testing of the Daisy 880's, you always use quality BB's that are in speck; correct?

A. Quality BB's that what?

Q. Are in specification?

A. I'm sorry, I didn't get that last part.

Q. You don't use out of speck or deformed BB's when you do your testing, do you?

A. Well, I use Daisy standard BB's out of a Daisy container. I don't check them all to see whether they're within specifications or not.

Q. But you don't think it would be a fair test of a manufacturer's product to go get out of speck or deformed BB's and stick them in a magazine of a gun?

A. Well, I certainly wouldn't do that intentionally, but if a manufacturer had a BB that was out of specks, I would have no way of knowing that beforehand. I don't go measuring all of them.

Q. No, but that's not something you would do intentionally, to test a manufacturer's product, is

A. -- you're expected to make contributions and give presentations from time to time.

Q. And these presentations are generally, what, ten to fifteen minutes?

A. No, they're a half-hour to an hour. Most of mine, I think, have been an hour. I take that back. Most of them have been a little over a half-hour.

Q. None of the special courses or seminars that you've attended addressed why you should or shouldn't necessarily put an automatic safety on an air rifle, correct?

A. You mean the ones that I gave or what?

Q. The ones you attended that other people taught.

A. Well, I don't think I've heard anyone talk about the subject of automatic safeties, period.

Q. Other than you giving these talks, you've never heard it come up from anyone else, would that be fair to say?

A. I can't recall anyone talking about automatic safety, as such.

Q. What type of handguns do you shoot?

A. What kind do I shoot?

Q. It shows you enrolled on July 31, 1950; is that correct?

A. Yes.

Q. And by November 27th, 1951, you had graduated?

A. Yes.

Q. Do you work for any referral services?

A. Do I work for what?

Q. Are you signed up with any referral services that refer you business?

A. I think very early in my consulting there was a firm that used me for a while and then I severed all relations with them. I don't think it happened for more than two, three, cases.

Q. You've given 235 depositions and 119 trials?

A. If that's what it says there, yes.

Q. When was the last time you testified for a manufacturer of a product?

A. On behalf of a manufacturer? It would have been a long time ago.

Q. Since 1980?

A. I don't even remember when it would have been. It would have been a long time ago. Once you start taking cases against them, they take you off

sure there are some people that believe that. To look at the history and what happens, I mean, I feel it's a foolish believe, but, yes, I'm sure there are people that believe that, really believe that.

Q. Do you know any actual designers of air guns, someone who actually designs air guns, that adheres to the theories that you expose that all guns have to have a positive feed system and have to have an automatic safety?

A. I haven't interviewed them. I don't know.

Q. Well, do you know of any real air gun designers that follows you and agrees with you?

A. Well, I haven't interviewed them. If I had all the air gun designers and I interviewed them all, then we could see what they really believed, but I haven't done that and neither have you and no one knows what they agree with.

Q. Do you know if your views are accepted by the majority of air gun designers?

A. Again, they're designing what management asks them to design. It doesn't really make any difference what personal belief they may have. They are following the direction of the management. That's what management is for.

BY MR. GRIFFIN:

Q. Mr. Berg, do you review cases involving products other than air guns, firearms, and the hilty type?

A. And what?

Q. And The hilty type guns? The charge nail guns?

A. Oh, stud guns?

Q. Yeah.

A. No. I think everything I've testified on have either been firearms or related items or air guns or ammunition.

Q. A BB, in order to get it into the chamber where it can be fired, it has to be manually fed in there by a human being; correct?

A. An 880?

Q. 880, 856, 990.

A. Yes.

Q. So the user actually has to manually load the BB into the magazine or from the magazine into the chamber; correct?

A. Well, he manually operates the bolt mechanism of which is intended to feed a BB into the chamber, yes.

Q. And before it goes to the chamber, it

is visible as it crosses that feed track area?

A. It would be visible if one looked into that area.

Q. Have you always found the Daisy safety to function appropriately, the manual safety?

A. Most of the time. I think there was a case involving one that there was a part missing from the safety and it wasn't functioning right.

Q. It was a broken --

A. Either the spring was missing or something. I'm not sure but it was defective.

Q. You mean either it came from the manufacturer that way or somebody removed it subsequently?

A. Yes.

Q. And therefore, what, the safety wouldn't go into the on position or wouldn't go into the off position?

A. Well, you could move it in but it would slide, because there was nothing to hold it there, it would slid back and forth.

Q. It would just flop back and forth?

A. Yeah.

Q. Did you find that to be a defect in the 880, that was the manufacturer's fault?

A. No. That still has problems, their old line of Model 94s.

Q. Would you guarantee that any feed system would feed a shell or a BB or a pellet on every occasion?

A. Would I guarantee that?

Q. Yes.

A. No, because things can break, things can wear out, and that sort of thing, but the important thing is that they would do it most of the time, and they would probably do it the time that it would have prevented an accident. To say something shouldn't be used because something might break or wear out at some time is kind of a silly argument as far as I can see.

Q. Well, any feed system can fail, we agree on that; correct?

A. Any mechanical system can have things happen to them, but the point is that most of the time they're going to be working right.

Q. Have you done any type of research to determine whether automatic safeties are generally desired in the marketplace versus firearms or air guns without automatic safeties?

A. Any research in the marketplace? No.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

FRED W. SHIELDS and
JOYCE SHIELDS

V. CIVIL ACTION NO. J85-0691(B)

STORN, ROGER & COMPANY, INC.

RULING OF THE COURT, RE, STANTON BERG

BEFORE: The Honorable William H. Barbour, Jr., United States District Judge, and a jury

DATE: September 11, 1987

PLACE: Jackson, Mississippi

APPEARANCES:

For the Plaintiffs:

Mr. Jim Nobles
Mr. H. Lanier B. Foote
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Mr. A. Kennon Goff III
Ruston, Louisiana

For the Defendant:

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Jackson, Mississippi

Mr. James P. Dorr
Mr. Brian W. Bell
Chicago, Illinois

DAVID A. SCOTT
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EXHIBIT "2"

THE COURT: All right. The court is going to sustain the majority of the objection of the defendant to qualification of this witness as an expert. The court is convinced Mr. Berg is not an expert in firearms design, functioning and defects; that he is not an expert in design analysis of state of the art matters. He is not an engineer, he is not qualified in designing a gun to be safe, and specifically a single action revolver.

Mr. Berg has accumulated knowledge of history of various safety devices over years of self study and what can best be termed as being personally interested in a firearm, including pistols. He may be qualified as an expert ballistics examiner, but we have no question of ballistics in this particular case. All of the equipment in his laboratory seems to be directed primarily toward examination of bullets, casings, and the court presumes, although it was not presented to me directly, that tool marks examination basically goes to what the witness testified as to marks on bullets made by hammers or marks made on -- marks made on shell casings made on hammers or bullets by rifling or other matters as being a matter of ballistics primarily rather than design of firearms.

The court does not think in a case like this that anybody can come in, even though he might know a lot about firearms, and qualify as an expert for design purposes. Otherwise we could have everybody that appeared at the local

gun show over the weekend as an expert under some circumstances.

Accordingly, the court will recognize Mr. Berg as an expert in the field of historical research in firearm safeties and will allow him to testify as to his opinion as to how historically safeties have been developed for single action revolvers. The court does not feel that he can go further than that and apply those particular safeties to this firearm in question, because he is not a designer. This will allow the plaintiffs to get Mr. Berg's research into evidence for the purpose of showing, according to the plaintiff, that Sturm Ruger had notice of these various devices.

Mr. Into has already testified as to the feasibility of devices. The plaintiffs have other experts who can then take the information Mr. Berg provides and testify as to whether or not those particular devices are adaptable to the pistol in question. This will prevent this witness from testifying as an expert in design, which the court finds that he is not, and that prohibits him from taking particular historical designs which were in existence and specifically applying them insofar as his testimony to the gun in question.

All right. The witness's testimony will be limited in that regard.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

DEPARTMENT NO. 27 BEFORE HON. GILBERT HARELSON, JUDGE

ERNEST W. SMALL,

Plaintiff,

vs.

No. 467485

STURM, RUGER & COMPANY, INC., a corporation; JIMMY COX, dba JIMMY COX SPORTING GOODS: and DOES I through XX, Inclusive,

Defendants.

REPORTERS' DAILY TRANSCRIPT

Volume III

August 18, 1983

Testimony of STANTON O. BERG

Pages 334 - 494, Inclusive

APPEARANCES: (See Volume I)

REPORTED BY: DONNA D. BEARD, CSR #1874
-and-
ANA L. REID, CSR # 3372
Official Reporters



MR. WHITING: Yes, sir, that's what the state of the art was, that the safeties were safe. There were safeties that were safe against accidental drops at that point in time. I mean, the whole industry was using them more or less.

MR. DORR: The witness has testified that he only does research. He does research with advertising, with catalogs. He has testified what that research has shown.

He is totally unqualified to offer any technical opinion concerning the application of the safeties in, for example, a double-action Ivers Johnson revolver, or a double-action Smith & Wesson revolver to a Colt-style single-action revolver. There is no -- this witness has no background or expertise to be able to make such an assumption or give any such testimony, and I believe that is the direction of the testimony which Mr. Whiting intends to --

THE COURT: You started out back on the 18th saying that he is not involved in design or manufacture of guns; he is not a metallurgist; he is not an engineer; he did not testing on the guns. He is here as a researcher, and that's why I thought he was here.

MR. WHITING: That's correct.

THE COURT: I think you are going further than that. I think you are trying to expand on his qualifications. And at this point, I'm going to sustain the objections, and you can write it up in writing and do it the way we said, but I thought that that's what he was here for, as a researcher. I think the question now is going beyond that scope.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRADLEY ALAN SIKES, Plaintiff,	)	
V.	)	No. 83-C-1017-E
MOSSBERG AND SONS, INC., a foreign corporation, Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HAD ON OCTOBER 29, 1985

TESTIMONY OF STANTON O. BERG

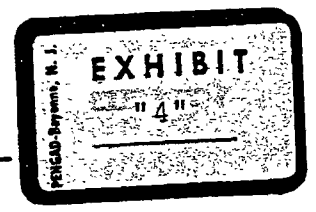
BEFORE THE HONORABLE JAMES O. ELLISON, Judge.

APPEARANCES:

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Glen R. Dorrough
UNITED STATES COURT REPORTER



the weight and sufficiency of his testimony rather than his ability to give such opinions under Rule 702. 702 doesn't really require very much other than an ability to testify in a way that will be of aid to the jury based upon his training. I understand your objection as to his engineering qualifications and his lack of engineering qualifications on the design function.

MR. ELDRIDGE: Your Honor, the intent of our objection, and we desire to limit the witness, relates to the — I have no problem with him testifying as to what he measured and found in that measurement, that's no problem. I have no problem with him testifying as to what he saw in the examination, but I do have a problem if he starts getting into a discussion of what design criteria exists for a proper safety mechanism because he is not so qualified.

THE COURT: Where have you qualified him in that area? He has never designed one. He has never had any training in the design.

MR. GRANT: I'll accept that. I'll accept that. I understand.

THE COURT: Okay.

MR. ELDRIDGE: And the other factor that I wanted to point out as well is I don't want to get into a situation where his testimony is that this did or did not happen at the accident because he's not an accident reconstructionist.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
U.S. DISTRICT COURT
ALBUQUERQUE, NEW MEXICO
JUN 30 1995
CLERK

KELLY LOWE,

Plaintiff,

vs.

No. CIV 94-0385 JP/LFG

GLOCK, INC., a foreign corporation,

Defendant.

SUMMARY JUDGMENT
AND
ORDER OF DISMISSAL

The subject of this order is defendant's motion for summary judgment (Doc. # 25) filed January 17, 1995. Defendant seeks summary judgment on plaintiff's claim that defendant defectively designed the handgun that injured plaintiff because the gun did not have a magazine disconnect safety feature. Defendant contends that plaintiff's proposed expert witness, Stanton Berg, is not qualified to offer an expert opinion that all handguns without a magazine disconnect are unsafe because the gun user may be unaware that a bullet could remain in the gun's chamber. Defendant argues that Mr. Berg's opinion is not based on reliable scientific evidence, is an untested theory, and is not widely accepted in the relevant field of study. After conducting a Rule 104(a) hearing, I determined that plaintiff failed to establish by a preponderance of the evidence that Mr. Berg's testimony was reliable as to the relevant issues in this case. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993). Mr. Berg's proposed expert opinion has not been tested, has not been subjected to peer review and publication, has an unknown potential for error, and has not been generally accepted in the relevant field. Daubert,

EXHIBIT "5"

113 S.Ct. at 2795-96. Therefore, I conclude that Mr. Berg's opinion is not sufficiently reliable to present to a jury.

Plaintiff must have the benefit of expert testimony to establish his prima facie case that defendant defectively designed the handgun without a magazine disconnect. Without an expert opinion in support of plaintiff's theory of recovery, plaintiff's evidence is critically flawed. Additionally, plaintiff did not comply with D.N.M. LR-Cv 56.1(b) in setting forth material facts that he alleges are in dispute. As such, plaintiff agrees with defendant's uncontroverted facts and, in effect, concedes that no material factual issues are in dispute. Therefore, a judgment as a matter of law is appropriate.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Glock, Inc.'s motion for summary judgment is GRANTED and plaintiff's complaint is hereby dismissed with prejudice.

UNITED STATES DISTRICT JUDGE

Received Time Jul. 20. 12:00PM Print Time Jul. 20. 12:01PM

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

PETER WASYLOW, Plaintiff, v. GLOCK, INC. and GLOCK Ges.m.b.H., Defendants.	)	CIVIL ACTION NO. 94-11073-DPW

JUDGMENT

WOODLOCK, District Judge

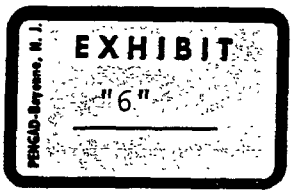
In accordance with this Court's Memorandum and Order issued on April 4, 1996, it is hereby ORDERED

Judgment for the defendants against the plaintiff.

BY THE COURT,

Deputy Clerk

DATED: April 4, 1996



APR 24 1996

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER WASYLOW, Plaintiff,	)	CIVIL ACTION NO. 94-11073-DPW
v.	)	
GLOCK, INC. and GLOCK Ges.m.b.H., Defendants.	)	

MEMORANDUM AND ORDER
April 4, 1996

A 23-year-old worker in a sheriff's office, while storing his weapon at home, pulled the trigger, and shot himself in the stomach. In this products liability lawsuit, he blames the gun and its manufacturer for his self-inflicted wounds. The defendant/manufacturers[1] move for summary judgment. Concluding that there were adequate warnings regarding the use of the weapon and that the gun did what it was designed and manufactured to do when someone pulled the trigger while the weapon was loaded, I will grant defendants' motion.

I. Background

A. The Accident

On September 18, 1993, Peter Wasylow sustained a gunshot wound to the abdomen after he intentionally depressed the trigger while pointing the gun toward his abdomen. (Defs.' Mem. Supp. Mot. Summ. J., Ex. B (hereinafter "Wasylow Dep.") at 171-72,

[1]The parties do not distinguish between the two named defendants against whom parallel and matching claims are made. Thus, Counts I, III, V and VII are asserted against the American Glock corporation, Glock Inc. and Counts II, IV, VI and VIII are asserted against the Austrian Glock entity, Glock Ges.m.b.H. The two defendants will be referred to collectively as Glock.

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254.) At the time, Wasylow was in his bedroom in his parents' house in Taunton, Massachusetts. During the relevant time period, Wasylow worked for the Bristol County Sheriff's Department, was a student in a correctional facilities program, and had recently completed a four-hour firearm safety class. (Defs.' Mem. Supp. Mot. Summ. J. at 3; Wasylow Dep. at 202.) Wasylow states that he did not intend to shoot himself. (Wasylow Dep. at 254.) He, however, concedes that he was "in a hurry" because friends were coming over. (Wasylow Dep. at 152, 164.)

Wasylow states that he thought the gun was unloaded at the time, and that he was preparing to store the gun in its case, the Glock box.[2] (Pl.'s Mem. Opp'n Mot. Summ. J. at 2; Wasylow Dep. at 171.) He asserts that because of the discharge, he sustained scarring on the abdomen and back, loss of a kidney, injury to the bowel necessitating a colostomy bag, injury to the liver, pain, loss of strength, and permanent disability. He reports $35,000 in medical bills. (Jt. Pre-Trial Mem. at 1.)

Police Sergeant Michael J. Silvia ("Silvia") responded to

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[2]I note that there is some discrepancy regarding what Wasylow was doing with the gun before it discharged and where the Glock box was located. His mother, Elaine Wasylow, stated that he had just returned from target practice and was preparing to clean the gun when it discharged. (Defs.' Mem. Supp. Mot. Summ. J., Ex. G (police report) at 2.) The police report makes no reference to a storage case being in Wasylow's bedroom. In any event, I find that this factual discrepancy is not material because Wasylow has admitted pulling the trigger before the gun was ever put inside the box. (Defs.' Mem. Supp. Mot. Summ. J., Ex. B (Wasylow Dep.) at 171-72.) I accept, however, for purposes of this motion, that Wasylow's intention was to pull the trigger because he was preparing to place the gun in the storage container.

the scene and reported a single gunshot wound to the abdomen; the wound appeared to be self-inflicted. (Defs.' Mem. Supp. Mot. Summ. J., Ex. G (police report) at 1-2.) Silvia investigated the premises with Detective Dykas and recovered the Glock Model 21, 45 ACP pistol serial number WC228US, on the floor at the foot of the bed.[3] Id. Sylvia reported one spent shell in the chamber and twelve rounds of similar ammunition in the magazine, which was still in place in the pistol.[4] (Defs.' Mem. Supp. Mot. Summ. J., Ex. G (police report) at 1; Ex. F (Silvia Dep.) at 46.)

B. The Handgun and the Warnings Regarding It

Wasylow purchased the handgun, a semi-automatic pistol, on January 16, 1992, from Foster's Gun Shop in Taunton, Massachusetts. (Defs.' Mem. Supp. Mot. Summ. J. at 3.) Wasylow had used the handgun for target shooting with no malfunction on at least two occasions prior to the incident; he agreed that he liked the "way it handled," and that it was "fine." (Wasylow Dep. at 125.) Wasylow's firearm consultant, Stanton O. Berg ("Berg") has since test fired the handgun and reported that all functions were normal. (Defs.' Mem. Supp. Mot. Summ. J., Ex. H *and* Pl.'s Mem. Opp'n Mot. Summ. J., Ex. E (hereinafter "Berg

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[3]The pistol was removed from the scene by Silvia. (Defs.' Mem. Supp. Mot. Summ. J., Ex. G at 2.) On November 10, 1994, this court granted a protective order directing that the pistol and storage case be retained in the exact condition they were in at the time of the commencement of this action. (Docket #12.)

[4]Viewing the facts in the light most favorable to the non-moving party, I must accept Wasylow's assertion the magazine was *not* in the pistol at the time of the discharge because he had previously removed it. (Pl.'s Mem. Opp'n Mot. Summ. J. at 3; Ex. C at 164.)

report") at 2, 12.)

At the time of purchase Wasylow received 1) an "Instructions for Use" manual ("Instructions manual"), 2) a "Basic Rules of Firearm Safety" booklet ("Basic Rules booklet"), and 3) a storage case with warning labels affixed. (Defs.' Mem. Supp. Mot. Summ. J., Exs. D, E.) The cover of the Instructions manual reads:

> **WARNING:** READ THIS MANUAL AND ANY ACCOMPANYING LITERATURE BEFORE REMOVING THIS FIREARM FROM ITS PACKAGE.
>
> **CAUTION:** THIS FIREARM LIKE MOST MODERN REVOLVERS, OR AUTO LOADING PISTOLS, IS DESIGNED WITHOUT AN EXTERNAL MANUAL SAFETY. THEREFORE IT SHOULD BE CONSIDERED AS LOADED AND READY TO FIRE, UNLESS FIRST THE MAGAZINE HAS BEEN REMOVED AND THEN THE CHAMBER CHECKED AND VERIFIED AS EMPTY-UNLOADED.

(bold and capitals in original). Additional warnings and cautions appear on the first page of the manual, including: "your safety and the safety of others (including your family) depends on your mature compliance . . . and constant employment of safe practices," and

> CAUTION: IT IS POSSIBLE THAT A ROUND MAY BE IN THE CHAMBER WHEN A LOADED OR EMPTY MAGAZINE IS BEING REMOVED OR INSERTED. ANY ROUND IN THE CHAMBER WILL DISCHARGE UPON PULLING THE TRIGGER WITH THE MAGAZINE INSERTED OR REMOVED.

(Instructions manual at 1) (capitals in original). Accordingly, the manual warns that the user should use "extreme caution after removing the magazine and personally must verify that the chamber is also empty." Id. Again, the manual instructs that a user should assume the firearm is loaded until he has "inspected the chamber and completed the unloading procedures." Id. Further

safety instructions appear on pages three and five of the Instructions manual:

> THE PISTOL HAS NO OUTSIDE LATERAL SAFETY LEVER AND NO GRIP SAFETY DEVICE. IT IS FIRED LIKE A DOUBLE-ACTION REVOLVER BY SIMPLY PRESSING THE TRIGGER FOR COMMERCIAL USE. ALWAYS KEEP THE GUN UNLOADED. WITH THE GUN LOADED DO NOT TOUCH THE TRIGGER UNLESS YOU INTEND TO FIRE.

(Instructions manual at 5) (emphasis in original).

Additional "General Precautions" admonish: "Handle your pistol as if it were loaded," "Never point your pistol at anything you do not intend to shoot," and "MAKE SURE that no round is in the chamber." (Instructions manual at 5, 9) (emphasis in original). Finally, the manual advises, "Always make sure your pistol is not loaded before cleaning [or] storing . . . ." (Instructions manual at 11.) This warning is repeated in the section describing "unloading" procedures (Instructions manual at 21), and again in the section describing cleaning procedures. (Instructions manual at 23.)

Wasylow also received the Basic Rules booklet, complete with pictures; it warns:

> 1. Handle all firearms as if they were loaded. . . .
> 2. Always keep the firearm pointed in a safe direction. . . . *Remember: You should never point a gun (whether loaded or unloaded) at another person or at yourself.* . . .
> 5. Whenever you handle a firearm, the first thing you should do (while keeping it pointed in a safe direction with your finger outside the trigger guard) is to open the action to determine whether or not the firearm is loaded.
> 6. Thoroughly read the instruction manual supplied with your firearm.

(Basic Rules booklet at 1-3) (emphasis in original).

In addition, bright yellow stickers affixed to the storage case read as follows:

a. **WARNING:** THIS BOX IS DESIGNED TO STORE AN UNLOADED WEAPON ONLY. DO NOT ATTEMPT TO STORE A LOADED WEAPON IN THIS BOX.

b. **DO NOT STORE LOADED PISTOL.** [This appears on two stickers, together with pictorials and the international symbol of "⊘"--for "no"--in red over the loaded chamber.]

c. **DANGER.** If the trigger is in the forward position STOP. The pistol may be loaded!
To unload the pistol, see the instructions on the back of this lid, or manual before proceeding, OR FOR HELP CALL GLOCK, INC. AT (404) 432-1202.
Placing, pushing or forcing the trigger of a loaded pistol against the center post of this container can cause the pistol to fire, causing injury or death. IF YOU ATTEMPT TO STORE A LOADED PISTOL IN THIS CONTAINER, OR PULL THE TRIGGER WITHOUT FIRST FOLLOWING THE UNLOADING PROCEDURES IN THE INSTRUCTION MANUAL, YOU CAN CAUSE INJURY OR DEATH TO YOURSELF OR ANOTHER.

d. **UNLOADING PROCEDURES**
1. Remove magazine by depressing MAGAZINE CATCH.
2. Pull slide back to eject the round which is in the chamber.
3. Check to ensure that there is no round in the chamber.
4. Allow the slide to spring forward by releasing it. Pull the trigger into the full pulled position with weapon pointing in a safe direction.
CAUTION: ALWAYS UNLOAD YOUR PISTOL IMMEDIATELY AFTER USE AND PRIOR TO CLEANING AND STORAGE TO MINIMIZE THE RISK OF ACCIDENTAL DISCHARGE.

e. **WARNING!! DO NOT USE RELOADED OR REMANUFACTURED AMMUNITION!**

(Defs.' Mem. Supp. Mot. Summ. J., Ex. C) (emphasis--capitals and bold--in original; differences in font size are *not* replicated here).

II. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In addition, I must view all facts in the light most favorable to the non-moving party. Woods v. Friction Materials, Inc., 30 F.3d 255, 259 (1st Cir. 1994). However, the existence of an alleged factual dispute will not defeat a motion for summary judgment unless it is related to genuine issue of material fact. Thomas v. Digital Equipment Corp., 880 F.2d 1486, 1489 (1st Cir. 1989) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). "When a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party bears the burden of proof at trial, there can no longer be a genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." Smith v. Stratus Computer, Inc., 40 F.3d 11, 12 (1st Cir. 1994), cert. denied, 115 S. Ct. 1958 (1995) (citation omitted). Thus, the purpose of summary judgment is to "pierce the pleadings" and determine "whether there is a genuine need for trial." Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990).

III. The Causes of Action

In this diversity action, the parties properly agree that Massachusetts law prevails. The complaint asserts four specific

causes of action within the products liability sphere. He contends that his Glock pistol and storage container (known as a "Glock box") were negligently designed, manufactured, tested, inspected, marketed, and distributed by defendants; that both the pistol and container were unreasonably dangerous; and that both failed to include adequate warnings and instructions.[5] Specifically, Wasylow alleges negligence (Counts I and II), breach of implied warranty of merchantability (Counts III and IV), breach of implied warranty of fitness for a particular purpose (Counts V and VI), and violation of Mass. Gen. L. ch. 93A (Counts VII and VIII).[6] Analytically, these causes of action are distinct yet overlap, and consequently are often confused by the parties as well as in caselaw.[7]

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[5]Wasylow argues that the handgun was negligently designed and unreasonably dangerous because it did not incorporate a manual safety (external device which must be switched off before firing), nor a magazine disconnect (i.e., a device designed to prevent the firearm from discharging when the magazine is not in the firearm).

[6]Wasylow is an individual residing in Taunton, Massachusetts. Glock, Inc. is a corporation with its principal place of business in Smyrna, Georgia. Glock Ges.m.b.H. is a foreign corporation with its principal place of business in Deutch-Wagram, Austria. Both Glock corporations regularly transact business in Massachusetts.

This court has jurisdiction under 28 U.S.C. § 1332(a)(i) and (ii). There is complete diversity and the amount in controversy, exclusive of interest and costs, exceeds $50,000.

[7]I note that both parties fail to discuss the specific causes of action asserted in the eight counts. Instead, Wasylow concentrates solely on the lack of a manual safety/magazine disconnect as alleged defects, cites no cases (other than four cases for the summary judgment standard), and advances essentially a policy argument. On the other hand, Glock concentrates on the pertinent warnings, repetitively citing failure to warn cases. Neither party identifies the elements of

First, as to Counts I and II, Wasylow alleges negligence in design, manufacturing, testing, inspection, distribution, marketing, *and* in failure to warn regarding both the Glock pistol and the storage case. Negligence, in general, requires a duty, breach of duty, cause-in-fact (or "but-for-cause"), and proximate cause (or "legal cause"). "The focus of the negligence inquiry is on the conduct of the defendant. We impose liability when a product's manufacturer or seller has failed to use reasonable care to eliminate foreseeable dangers which subject a user to an unreasonable risk of harm." Colter v. Barber-Greene Co., 403 Mass. 50, 61 (1988); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 96, at 683 (5th ed. 1984).

Second, Wasylow alleges breach of the implied warranty of merchantability in Counts III and IV. This cause of action stands on a different footing, focusing on the product rather than on the conduct of the manufacturer or the user. Colter, 403 Mass. at 61-62. In Massachusetts, the warranty of merchantability is governed by Mass. Gen. L. ch. 106, § 2-314 which provides, *inter alia*, that goods must be "fit for the ordinary purposes for which such goods are used" and must "conform to the promises or affirmations of fact made on the container or label if any." § 2-314(2)(c) and (f). In turn, Massachusetts warranty law has been interpreted as congruent in nearly all respects with the strict liability principles in the

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proof nor analyzes the differences among the four causes of action found in the complaint.

Restatement (Second) of Torts § 402A (1965).[8] Back v. Wickes Corp., 375 Mass. 633, 640 (1978). In other words, although not recognized by name, the Massachusetts products liability claim for breach of the warranty of merchantability "is basically the same as strict liability theory in tort" under Massachusetts law. Hayes v. Douglas Dynamics, 8 F.3d 88, 89 n.1 (1st Cir. 1993) (citation omitted). Therefore, a breach of warranty can occur, regardless of negligence, if either 1) the product is defectively designed, or 2) foreseeable users are not adequately warned. Kearney v. Philip Morris, Inc., 1996 WL 74180 at *2 (D. Mass. Feb. 16, 1996). As with negligence, Wasylow must also prove that Glock's products were--more likely than not--the cause-in-fact, as well as the proximate cause of the injury. Id. at *2, 8; Hayes, 8 F.3d at 89; Lubanski v. Coleco Industries, Inc., 929 F.2d 42, 48 (1st Cir. 1991).

Third, Wasylow alleges breach of the implied warranty of fitness for a particular purpose in Counts V and VI. This warranty is similar to the warranty of merchantability but more narrowly applies "where the seller at the time of contracting has

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[8] § 402A provides:

> Special Liability of Seller of Product for Physical Harm to User or Consumer.
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer . . . .
> (2) The rule stated in Subsection (1) applies although
> (3) The seller has exercised all possible care in the preparation and sale of his product . . . .

reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." Mass. Gen. L. ch. 106, § 2-315. A "particular purpose" differs from the "ordinary purpose" in that it "envisages a specific use by the buyer which is peculiar to the nature of his business." Id., Comment 2.[9]

Fourth, Wasylow alleges a violation of Mass. Gen. L. ch. 93A which declares unlawful unfair methods of competition and unfair or deceptive acts or practices. However, if Wasylow's claims of breach of warranty and negligence fail, the 93A claim fails as well. Kearney, 1996 WL 74180 at *3.

A. Negligence in Manufacturing, Inspection, Testing, Distribution and Marketing

Wasylow fails to set forth *any* facts to support his claim, as to which he bears the burden of proof, that the Glock pistol and the Glock box were negligently manufactured (*or* inspected, tested, distributed or marketed). In fact, Wasylow testified that he had used the handgun for target shooting on at least two occasions prior to the incident with no malfunction or mechanical problems; Wasylow agreed that it was "fine" and that he liked the "way it handled." (Wasylow Dep. at 125.) Moreover, Wasylow's firearm consultant, Berg has since test fired the handgun and reported that all functions were normal. (Berg report at 2, 12.)

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[9]For example, a seller may have knowledge that the ordinary purpose of a pair of shoes is for walking, but that the particular purpose for a certain pair of shoes is for climbing mountains. Mass. Gen. L. ch. 106, § 2-315, Comment 2.

A defect from manufacturing, as opposed to design, occurs when a product differs from identical products issued from the same manufacturer. Back, 378 Mass. at 641. However, the Glock pistol was manufactured exactly as intended, similar to all other "Glock 21" pistols; the same holds true for the Glock box.

Thus, there are no facts by which any reasonable juror could find negligence in the manufacturing and distribution process and thus summary judgment as a matter of law is appropriate.

B. Failure to Warn as Negligence and Breach of Warranty

A manufacturer of a product which the manufacturer "knows or should know is dangerous" is under a duty to give warning of such dangers to persons who foreseeably will come in contact with that product. MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 135 (1985) (citation omitted). Liability for failure to give such warnings may be imposed even if there is no negligent design or manufacture. Laaperi v. Sears Roebuck & Co., 787 F.2d 726, 729 (1st Cir. 1986); Schaeffer v. General Motors Corp., 372 Mass. 171, 173 (1977). The adequacy of the warning must by "comprehensible to the average user," conveying the danger "to the mind of a reasonably prudent person," MacDonald, 394 Mass. at 140, and its forcefulness must be "commensurate with the danger involved." Wolfe v. Ford Motor Co., 6 Mass. App. Ct. 346, 349 (1978). If an adequate warning is supplied, under Massachusetts law there is a presumption that it will be read. Knowlton v. Deseret Medical, Inc., 930 F.2d 116, 123 (1st Cir. 1991).

However, as with all negligence allegations, failure to warn will *not* constitute negligence if it is not the proximate cause of the plaintiff's injuries. Laaperi, 787 F.2d at 729.

Wasylow argues that "the instructions and warnings provided with the Glock pistol were inadequate and dangerous" (Jt. Pre-Trial Mem. at 1), and that "the Glock box warning provided by the Defendant are [sic] both dangerous, inadequate, and arrogantly used in the face of known hazards." (Pl.'s Mem. Opp'n Defs.' Mot. Summ. J. at 2.) However, given the quantitative and qualitative extent of the warnings as outlined above, I find such assertions not only insupportable but frivolous.[10]

For his part, Wasylow has admitted:

-seeing, but not reading the warnings on the Glock box; (Wasylow Dep. at 175, 240)

-intentionally never reading the Instructions manual *or* the Basic Rules booklet; (Wasylow Dep. at 86, 130, 250)

-never reading product literature in general, except when he needs to program his VCR; (Wasylow Dep. at 89)

-knowing the gun did not have a manual safety; (Wasylow Dep. at 106-7)

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[10]I am inclined to believe the warnings were greater than were required given the obviousness, as a matter or law, of the dangers inherent in guns. See generally Laaperi v. Sears Roebuck & Co., 787 F.2d 726, 730-32 (1st Cir. 1986). For example, a manufacturer is not required to warn that "placing one's hand into the blades of a potato chopper will cause injury" or that "firing a BB gun at another at close range can injure or kill." Id. at 731 (citations omitted). I find warnings such as "do not point a weapon at anything you do not want to shoot" and "always check to make sure there is no bullet in the chamber" to be similar. "If a manufacturer had to warn consumers against every such obvious danger inherent in a product, 'the list of obvious practices warned against would be so long, it would fill a volume.'" Id. (citation omitted).

-that upon reading the Instructions manual and other warnings--e.g., the admonitions: 1) always to check the chamber and 2) never to point the gun at anything you do not want to shoot--he understood the instructions and warnings; that he is able to follow the instructions and warnings; that they are good safety rules; *and that if he had followed the instructions and warnings the accident would not have occurred.* (Wasylow Dep. at 243-44, 250-56)

-not paying much attention in his four-hour firearm safety class; (Wasylow Dep. at 202).

Thus, although I recognize that the adequacy of warnings is "almost always an issue to be resolved by a jury," MacDonald, 394 Mass. at 140, I find that given the facts before me--especially Wasylow's admissions--no reasonable juror could find a failure to warn. Moreover, Wasylow's deliberate indifference to the warnings constituted the cause-in-fact as well as the proximate cause of his injuries.

For the same reasons, I find no implied breach of warranty for failure to warn.

C. Design Defects

Wasylow's complaint, although obscure, appears to assert both negligent design and defective design as a breach of warranty regarding both the Glock pistol (given no manual safety or magazine disconnect) and the Glock box (given that the trigger may be pushed before fitting the pistol in the box). In a negligence action, Wasylow has the burden to show that the manufacture failed to exercise reasonable care to eliminate avoidable or foreseeable dangers to the user, Uloth v. City Tank Corp., 376 Mass. 874, 880-81 (1978), but there is no duty to design a product that is "risk free" or "risk proof." Morrell v.

Precise Engineering, Inc., 36 Mass. App. Ct. 935, 936 (1994) (citation omitted). "[T]here is a case for the jury if the plaintiff can show an available design modification which would reduce the risk without undue cost or interference with the performance of the machinery." Uloth, 376 Mass. at 881.[11]

Alternatively, in order to prove defective design as a breach of warranty, Wasylow need not prove negligence, but must prove that the design was not "fit" for ordinary usage because of a defect making it "unreasonably dangerous." Colter, 403 Mass. at 61-62.[12]

Under either theory, the defect must have proximately caused the injuries. Lubanski, 929 F.2d at 48.

I find no merit in Wasylow's defective design claims. First, I cannot find that a reasonable juror could conclude that

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[11]Massachusetts law further holds that:

> In evaluating the adequacy of a product's design, the jury should consider, among other factors, 'the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.

Back v. Wickes Corp., 375 Mass. 633, 642 (1978) (citation omitted).

[12]In contrast, a product is "reasonably fit" if the design avoids the "reasonably foreseeable risks attending the product's use . . . ." Back, 375 Mass. at 640-41. For example, the risk that a vehicle may collide with a guardrail is foreseeable, but the risk that a user may drive 100 m.p.h. and crash head-on is not. Id.

it was foreseeable to Glock that, *despite all warnings*, a user would nevertheless fail to check the chamber and proceed to pull the trigger while pointing the gun at his own stomach, and, consequently, that a different design would be required. Thus, the element of proximate cause is lacking.[13]

Second, I note that while an alternative design for the Glock pistol (incorporating a manual safety or magazine disconnect), or for the Glock box (allowing for loaded storage) is economically feasible, the functional purpose of both products would be altered. Glock intentionally designed the Glock 21 pistol, a semi-automatic weapon, *without* a manual safety or magazine disconnect to allow "the best possibility [for] getting off a shot quickly and without having to operate external safety devices."[14] (Instructions manual at 5.) Similarly, the lack of a magazine disconnect allows for firing, if necessary, while in the process of loading or reloading. (Jt. Pre-Trial Mem. at 3.) Thus, unlike, for example, automobile airbags, manual safeties and magazine disconnects affect the *functional capabilities* and

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[13]I note Massachusetts' comparative negligence statute, Mass. Gen. L. ch. 231, § 85, applicable to negligence actions but not to breach of warranty actions, Correia v. Firestone Tire & Rubber Co., 388 Mass. 342 (1983), but conclude that any reasonable juror would find Wasylow *more* than fifty percent responsible, thus barring all recovery. Colter v. Barber-Greene Co., 403 Mass. 50, 62-63 (1988).

[14]Instead, the Glock 21 features three other safeties which function automatically: (1) the trigger safety (external); (2) the firing pin safety (internal); and (3) the drop safety (internal). (Instructions manual at 17; Jt. Pre-Trial Mem. at 2.)

not just the *safety* of the respective products.[15] See also DaRosa v. Remington Arms Co., Inc., 509 F. Supp. 762, 768 (E.D.N.Y. 1981) (finding light trigger tension, with inexpensive alternatives available, not design defect due to its functional purpose).

Third, even if, *arguendo*, the lack of either a manual safety or magazine disconnect constitutes a defect, Wasylow had *full knowledge of such defects* (Wasylow Dep. at 106-7), and "a plaintiff's knowing and unreasonable use of a defective product is an affirmative defense to a defendant's breach of warranty." Colter, 403 Mass. at 60 (citing Correia v. Firestone Tire & Rubber Co., 388 Mass. 342 (1983)); see also Knowlton, 930 F.2d at 120.[16]

Finally, carelessness and misuse cannot transform an obviously--and inherently--dangerous product into a defective, and "unreasonably dangerous" product. Thus, under Massachusetts law:

> Toothpicks, like pencils, pins, needles, knives, razor blades, nails, tools of most kinds, bottles and other objects made of

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[15]As for the Glock box, the present design and accompanying warnings, in fact, appear to address safety considerations by preventing *loaded* storage. I note that Wasylow has presented no safer, alternative designs--apart from the manual safety and magazine disconnect contentions--for the storage case itself. That is an element which is required in a design defect case. Kotler v. American Tobacco Co., 926 F.2d 1217, 1225 (1st Cir. 1990).

[16]Unlike comparative negligence, a user's unreasonable use of an obviously dangerous product *completely bars* recovery in a breach of warranty action. Correia v. Firestone Tire & Rubber Co., 388 Mass. 342, 356 (1983).

> glass, present obvious dangers to users, but they are not unreasonably dangerous, in part because the very obviousness of the danger puts the user on notice. It is foreseeable that some will be careless in using such items and will be injured, but the policy of our law in such cases is not to shift the loss from the careless user to a blameless manufacturer or supplier.

Killeen v. Harmon Grain Products, Inc., 11 Mass. App. Ct. 20, 23 (1980). See also Kearney, 1996 WL 74180 at *12 (discussing authoritative value of Killeen in light of Back and Uloth); Mavilia v. Stoeger Industries, 574 F. Supp. 107, 111 (D. Mass. 1983) ("[T]hat death may result from careless handling of firearms is known by all Americans from an early age"). In other words, Wasylow's misuse of the product, as undeniably established on this record, has been shown as a matter of law to be the proximate cause of his injuries.

The question of fitness for ordinary purposes "is largely one centering around reasonable consumer expectations." Venezia v. Miller Brewing Co., 626 F.2d 188, 190 (1st Cir. 1980). Here, the Glock pistol and Glock box were exactly what they were represented to be, "neither more nor less, with no hidden dangers or unpredictable propensities," Killeen, 11 Mass. App. Ct. at 23, and would fulfill any reasonable consumer's expectations. Thus, I find that Wasylow's design defect claims, whether grounded in negligence or breach of warranty, fail.[17]

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[17] But see LeMaster v. Glock, Inc., 610 So.2d 1336, 1339 (Fla. App. 1 Dist. 1992) (finding genuine issue of material fact existed whether lack of manual safety constituted defect where police officer accidentally fired at suspect).

Prescinding from the precise elements of Massachusetts law of products liability, Wasylow presses a normative argument advocating absolute liability: that the Glock 21 pistol, without a manual safety or magazine disconnect, is unreasonably dangerous as a matter of social policy, regardless of 1) the existence or extent of warnings, 2) Wasylow's failure to read the warnings, 3) the obviousness of the danger, or 4) Glock's intention to design the pistol specifically *without* the manual safety or magazine disconnect. I decline to embrace such an argument.

It is the province of legislative or authorized administrative bodies, and not the judicial branch, to advance through democratic channels policies that would directly or indirectly either 1) ban some classes of handguns or 2) transform firearm enterprises into insurers against misuse of their products.[18] Frustration at the failure of legislatures to enact laws sufficient to curb handgun injuries is not adequate reason to engage the judicial forum in efforts to implement a broad policy change. The reporters for the developing draft American Law Institute RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY have noted that:

> common and widely distributed products such as alcoholic beverages, tobacco, firearms,

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[18]It is similarly not the function of a jury to make and enforce such policy in individual cases. Regardless of Back's discussion on the proper factors for a jury to consider in design defect cases, see above n. 11, the Supreme Judicial Court of Massachusetts has not "totally surrendered to the jury the function of all policy-weighing on which the scope and limits of product design liability depend." Kearney v. Philip Morris, Inc., 1996 WL 74180 at *10 (D. Mass. Feb. 16, 1996).

> and above-ground swimming pools may be found to be defective only upon proof of the [standard elements of products liability claims discussed above]. . . . Absent proof of defect under [such legal principles], however, courts do not impose liability based on a conclusion that an entire product category should not have been distributed in the first instance. That is, courts have not imposed liability for categories of products that are generally available and widely used and consumed, solely on the ground that they are considered socially undesirable by some segments of society. Instead, courts have concluded that the issue is better suited to resolution by legislatures and administrative agencies that can more appropriately consider whether distribution of such product categories should be prohibited.[19]

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[19]I note that, to date, the majority of courts, both state and federal, have rejected the argument that manufacturers should be held absolutely liable for injuries--whether from accidents or criminal misuse--caused by guns. This includes claims based on the lack of manual safeties, distribution policies, the manufacture of inexpensive "Saturday Night Specials," or solely for manufacture of a dangerous product. Because guns are inherently ultrahazardous--designed to kill or wound--there is no safer alternative but elimination of the products altogether. This task, courts have routinely found, is not appropriate for the judiciary. See, under Massachusetts law, Mavilia v. Stoeger Industries, 574 F. Supp. 107 (D. Mass. 1983). See also Shipman v. Jennings Firearms, Inc., 791 F.2d 1532 (11th Cir. 1986); Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985); Martin v. Harrington and Richardson, Inc., 743 F.2d 1200 (7th Cir. 1984); Armijo v. Ex Cam, Inc., 656 F. Supp. 771 (D. N.M. 1987), aff'd, 843 F.2d 406 (1988); Delahanty v. Hinckley, 686 F. Supp. 920 (D.C. 1986), aff'd, 900 F.2d 368 (1990); Patterson v. Rohn Gesellschaft, 608 F. Supp. 1206 (N.D. Tex. 1985); Riordan v. International Armament Corp., 132 Ill. App. 3d 642 (1985); Rhodes v. R.G. Industries, Inc., 173 Ga. App. 51 (1984). See generally Note, Handguns and Products Liability, 97 Harv. L. Rev. 1912 (1984); Donald E. Santarelli and Nicholas E. Calio, Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit, 14 St. Mary's L.J. 471 (1983).

In fact, other than Kelly v. R.G. Industries, Inc., 304 Md. 124 (1985) (finding manufacturer strictly liable for "Saturday Night Special"), the contrary position has been advanced exclusively by law journal articles, which I note, but decline to follow. These articles argue that the manufacturing of handguns should be classified as an ultrahazardous activity, and the cost

§ 2 at c at 21 (Tort. Draft No. 2, 1995).

I find in this case, that as a matter of law Glock is entitled to summary judgment on all claims relating to defective or "inherently dangerous" design.[20]

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of handgun injuries should be imposed on the manufacturers, with the anticipated effect of dampening the market for their sales. See, e.g., Carl T. Bogus, Pistols, Politics and Products Liability, 59 U. Cinn. L. Rev. 1103 (1991); Andrew O. Smith, The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity, 54 U. Chi. L. Rev. 369 (1987); Paul R. Bonney, Manufactures' Strict Liability for Handgun Injuries: An Economic Analysis, 73 Geo. L.J. 1437 (1985); H. Todd Iveson, Manufacturers' Liability to Victims of Handgun Crime: A Common-Law Approach, 51 Fordham L. Rev. 771 (1983); Gerard M. Mackarevich, Manufacturers' Strict Liability for Injuries from a Well-Made Handgun, 24 Wm. & Mary L. Rev. 467 (1983).

[20]I need not conclusively determine the issue of the admissibility of the "expert" report (in non-affidavit form) submitted by Wasylow's firearm consultant, Stephen O. Berg. Rule 702 of the Federal Rules of Evidence requires that the testimony be from a qualified witness who will "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. See generally United States v. Shay, 57 F.3d 126, 133 (1st Cir. 1995) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)); In re Paoli Yard PCB, 35 F.3d 717, 741-52 (3d Cir. 1994), cert. denied, 115 S. Ct. 1253 (1995).

The Berg report establishes several propositions: 1) that an alternative pistol design which incorporates a manual safety and/or magazine disconnect is feasible, 2) the historical emergence of the manual safety (dating back to the Holy Roman Emperor Maximilian I in the fifteenth century), 3) that semi-automatic weapons are more dangerous than double action revolvers, necessitating the need for manual safeties, 4) that semi-automatic weapons have, in the past, incorporated manual safeties, 5) that another Glock model incorporates a manual safety, and 6) that in Berg's opinion, the lack of a manual safety, as well as a magazine disconnect, are design defects.

Glock does not contest any of these propositions, apart from Berg's conclusion. I do not find Berg's conclusion to be based on any particular scientific qualifications; rather it expresses what is essentially a preference for the advantages of additional safety devices. Nevertheless, despite its apparent disabilities and unsworn character, I have considered Berg's report in evaluating whether summary judgment should be allowed. I do not find its conclusory historical and policy based observations

D. Breach of the Implied Warranty of Fitness for a Particular Purpose

Because Wasylow has proffered no evidence to support his claim for breach of warranty for a particular purpose, the claim fails for the same reasons underlying the warranty of merchantability or "ordinary purpose." In fact, it was Glock who designed the Glock 21 pistol with a more narrow purpose in mind, thereby incorporating semi-automatic features. Wasylow cannot advance any particular purpose on which he relied, and for which the pistol was not "fit."

E. Mass. Gen. L. ch. 93A

Because Wasylow has advanced no facts in support of his ch. 93A claim, other than the facts underlying his warranty and negligence claims, the ch. 93A claim also fails. Kearney, 1996 WL 74180 at *3.

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sufficient to overcome the shortcomings in plaintiff's proof. It is barely relevant to the material issues, particularly the fundamental issue of causation. Moreover, as other courts have observed, Berg lacks the specialized scientific qualifications to justify admitting his testimony as expertise under Fed. R. Evid. 702. I consider it likely that I would not permit Berg to testify even if this case were to survive the instant summary judgment motion. But even considering Berg's observation in connection with this motion, I find no basis to conclude that Glock's motion for summary judgment is anything other than well-founded.

IV. Conclusion

For the reasons set forth more fully above, Glock's motion for summary judgement, on all counts, is GRANTED.

Douglas P. Woodlock

DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

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April 7, 2003

Office of the Secretary
Mr. Todd Stevenson
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Via Federal Express

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CPSC
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2003 APR -8 PM 12:47

Re: Daisy v. CPSC, Docket :02-2

Dear Mr. Stevenson:

Enclosed please find an original and one copy of a Motion in Limine to Exclude Testimony of Stanton Berg to be filed of record in the above-referenced matter. By copy of this letter this document has been served on all counsel of record.

If you have any questions or anything further is needed, please do not hesitate to call.

Sincerely,

William M Griffin III

William M. Griffin III

WMG:bcw
cc w/encl:
Judge William B. Moran
Mr. Eric Stone
Mr. Mark Porter
Mr. Sean Ward
Mr. Aaron Locker
Ms. Marianne McBeth

COPY

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products	)	
400 West Stribling Drive	)	
Rogers, AR 72756	)	
	)	
Respondent	)	
	)	

MOTION IN LIMINE TO EXCLUDE TESTIMONY OF STANTON BERG

Comes now respondent, Daisy Manufacturing Company, and for its Motion in Limine to Exclude Testimony of Stanton Berg, states:

The Commission has identified Stanton Berg as an "expert" witness in this matter to offer his opinions that the Daisy Model 880 and 856 air guns are defective. The opinions to which the Commission intends to have him testify are:

(a) All air rifles without automatic safeties are defective, including the Daisy 880 and 856, and

(b) All air rifles with a gravity feed loading system are defective, including the Daisy 880 and 856.

Even though projectile velocity has never been raised as a claim against Daisy by the CPSC in this matter, the Commission would also desire Mr. Berg to testify that the velocity of the Daisy 880 and 856 somehow "contribute" to the "defectiveness" of these models. However, Mr. Berg testified that his opinions on automatic safeties and gravity feed systems are the same, regardless of velocity. Mr. Berg testified:

Q. Would you agree with me that your opinions regarding the defectiveness of the Daisy 880 and 856 primarily center around the lack of an automatic safety and the gravity feed system, would that be fair to say?

A. Well, I think basically those would be the two main things. I feel the velocity of the 880, it has no utility value for young people, but that also impacts why I think it should have an automatic safety.

* * * * *

Q. You think any BB gun or air rifle should have an automatic safety; correct?

A. I do, yes. I'm just saying that in this case I think the velocity is an aggravating factor.

Q. Well, whether or not the velocity is 250 feet per second or 1200 feet per second, you still think it needs to be an automatic safety; correct?

A. Yes, I do.

Q. And you think an air rifle is defective if it doesn't have an automatic safety, whether it shoots at 250 feet per second or at 1200 or 1400 feet per second; correct?

A. That is correct.

Q. And whether an air rifle shoots at 250 feet per second or 1200 or 1400 feet per second, you would find if it had a gravity feed system that it was defective; correct?

A. That is correct.

(see pp. 79, 90-91, excerpts of deposition of Stanton Berg, attached as Exhibit "1").

I. DAUBERT REQUIREMENTS

1. THE COURT IS THE GATEKEEPER

As explained in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Court must act as a gatekeeper to insure that any and all expert testimony admitted in federal court satisfies the requirements of Rule 702 for the Federal Rules of Evidence. *See also,* Wheeling

Pittsburgh Steel Corp. v. Beelman River Terminals, Inc., 254 F.3d 706, 714-5 (8th Cir. 2001) ("When it comes to the admission of expert testimony under the Federal Rules of Evidence, a trial judge has a gatekeeping responsibility to 'insure that an expert's testimony rests on a reliable foundation and is relevant to the task at hand.'"*citing* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999); General Electric Co. v. Joiner, 522 U.S. 136 (1997). Indeed, the Supreme Court emphatically held that under Rule 702 "the trial judge must insure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert, 509 U.S. at 589. In doing so, as several courts of appeal have recognized, the trial court must be convinced that jurors will be exposed to real science-based testimony. *See, e.g.*, Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996) ("an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process"), *cert. den.*, 117 S.Ct. 73 (1996).

2. DAUBERT APPLIES TO ALL EXPERT TESTIMONY

The court in Kumho Tire clarified that the gatekeeping function established in Daubert applies to all expert testimony, not just testimony based on science. Rule 702 has been amended in response to Daubert and to the many cases applying Daubert, including Kumho Tire. As a result of the 2000 amendment to Fed. R. Evid. 702, the rule now reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles or methods, or (3) the witness has applied the principles and methods reliably to the facts of the case.

The amendment to Rule 702 affirms the trial court's role as gatekeeper and provides general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistent with Kumho, the rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See* Bourjaily v. United States, 483 U.S. 171 (1987).

The language of Rule 702 itself makes no relevant distinction between scientific knowledge or other specialized knowledge. It makes clear that such knowledge might become the subject of expert testimony. Kumho at 147. The court in Kumho Tire concluded that there is not a convincing need to make distinctions between scientific knowledge and technical or other specialized knowledge. Id. In Kumho Tire, the court explained that:

> [T]his language makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. It makes clear that any such knowledge might become the subject of expert testimony. ... Hence, as a matter of language, the rule applies as its reliability standards to all "scientific," "technical," or "other specialized" matters within its scope. We concede that the court in Daubert referred only to "scientific" knowledge. But as the court there said, it referred to "scientific" testimony "because that was the nature of the expertise" at issue.

Id. (citations omitted). Accordingly, the Courts have repeatedly applied the Daubert standard to experts whose testimony is based on technical and specialized knowledge. *See, e.g.*, Concord Boat Corp. v. Brunswick Corp., 207 F.3rd 1039 (8th Cir. 2000) (economic expert); Blue Dane Simmental Corp. v. American Simmental Association, 178 F.3d 1035 (8th Cir. 1999) (agricultural economist);

Peitzmeier v. Hennessy Industries, Inc., 97 F.3rd 293, 297 (8th Cir. 1996). Daubert has been applied in the context of observers attempting to testify as experts. *See* Rice v. Cincinnati, New Orleans & Pacific Railroad Co., 920 F. Supp. 732 (E.D. Ky. 1996) (district court granted motion in limine excluding expert testimony by railroad employees regarding safety of engine cab), *accd*, Thirkill v. J.B. Hunt Transport, Inc., 950 F. Supp. 1105 (N.D. Ala. 1996) (neither plaintiff train engineer nor fellow crewmen were qualified to testify as design experts).

3. THE FACTORS TO CONSIDER

In Daubert, the Court set forth a number of factors that "will bear on the inquiry,... [but do not] set out a defenitive checklist or test." Id. at 593. The factors established by Daubert include:

> 1) whether it [the theory or technique] can be (and has been) tested;
> 2) whether the theory or technique has been subjected to peer review and publication;
> 3) the known or potential rate of error; and
> 4) the "general acceptance" of the theory or technique.

Id. at 593-4. The Court in Kumho held that the Daubert factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending on "the particular circumstances of the particular case at issue." Kumho at 1175.

The standards set forth in the amendment to Rule 702 are broad enough to require consideration of any or all of the specific Daubert factors where appropriate. Courts have found other factors relevant to determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. The factors include:

> (1) whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of litigation, or whether they have developed their opinions expressly for the purpose of testifying. Daubert at 1317.

(2) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997).

(3) whether the expert has adequately accounted for obvious alternative explanations. *See* Claar v. Burlington Northern Railroad, 29 F.3d 499 (9th Cir. 1994);

(4) whether the expert is "being as careful as he would be in his regular professional work outside his paid litigation consulting." Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997); *see* Kumho Tire at 1176 (Daubert requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigors that characterizes the practice of an expert in the relevant field");

(5) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. Kumho Tire at 1175 (Daubert's general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy").

In Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000) the court held that "even a theory that might meet certain Daubert factors, such as peer review and publication, testing, known or potential error rate, and general acceptance, should not be admitted if it does not apply to the specific facts of the case." Id. at 1056 *citing* Kumho Tire, 526 U.S. at 154; Joiner, 522 U.S. at 146. "A court must focus on the 'reasonableness of using such an approach, along with the expert's particular method of analyzing the data thereby obtained, to draw a conclusion regarding the particular matter to which the expert's testimony was directly relevant.'" Concord Boat at 1055 *citing* Kumho Tire. *See also* Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the court in Daubert do not neatly apply to expert testimony from a sociologist); Kannakeril v. Terminix International, Inc., 128 F.3d 802, 809 (3rd Cir. 1997) (holding

that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge").

4. ANALYSIS UNDER RULE 702 - QUALIFICATIONS

A witness can be qualified as an expert under Fed. R. Evid. 702 by knowledge, skill, experience, training, or education, and it is the responsibility of the trial judge to determine whether a particular expert has sufficient specialized knowledge to assist jurors in deciding the specific issues in the case. *See* Kumho Tire, 526 U.S. at 156. "Once initial expert qualifications and usefulness to the jury are established, however, a district court must continue to perform its gatekeeping role by insuring that the actual testimony does not exceed the scope of the expert's expertise, which if not done can render expert testimony unreliable under 702, Kumho Tire and related precedents." Wheeling Pittsburgh Steel, 254 F.3d at 715. *See* Weisgram v. Marley Co., 169 F.3d 514, 515-21 (8th Cir. 1999) (holding that portions of the testimony from three different expert witnesses each lacked a sufficient foundation because they had exceeded the scope of the witness' expertise and thus were unreliable); Redman v. John D. Brush & Co., 111 F.3rd 1174, 1179 (4th Cir. 1997) (holding it was error for metallurgical engineer to give opinion testimony where the expert had no personal knowledge about or experience with the industry in question).

5. ANALYSIS UNDER RULE 702 - RELIABILITY

Rule 702(2) requires that the "testimony is the product of reliable principles or methods" based in the "knowledge and experience of his discipline". With regard to reliability, the Supreme Court explained that under the terms of Rule 702, "[t]he subject of an expert's testimony must be 'scientific ...,'" a phrase that both "implies a grounding in the methods and procedures of science"

and "connotes more than subjective belief or unsupported speculation." 509 U.S. at 589-90. The court elaborated:

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – *i.e.*, "good grounds," based on what is known.

Id. at 590. "In short, the requirement that an expert's testimony pertains to 'scientific knowledge' establishes a standard of evidentiary reliability." Id. Under Rule 702, then, an expert's opinion must "have a reliable basis in the knowledge and experience of his discipline." Id. at 592. The trial judge is given considerable leeway in determining what is reliable. Kumho Tire, 526 U.S. at 152. Additionally, the trial judge should consider a variety of factors, including the factors specified by Daubert when appropriate, when determining reliability of an expert's opinion. Id.

6. ANALYSIS UNDER RULE 702 - RELEVANCE

Rule 702(3) requires that the "witness has applied the principles and methods reliably to the facts of the case." The court in Daubert also elaborated on the relevancy requirement, which it derived from Rule 702's admonition that expert testimony must "assist the trier of fact to understand the evidence or determine a fact in issue." That consideration, the Court noted, "has been aptly described as one of 'fit.'" 509 U.S. at 591 (emphasis added). The court continued:

> "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes ... The study of phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is in fact an issue, the knowledge will assist the trier of fact. However (absent credible grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness" standard

> requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

Id. at 591-92 (citations omitted). The Supreme Court has indicated that it would strictly enforce the "fit" requirement. *See* General Electric v. Joiner, 118 S.Ct. 512, 518 (1997) (upholding district court's exclusion of studies on infant mice to show chemical caused cancer in plaintiff on grounds that the "studies were so dissimilar to the facts present in this litigation"); Id at 518-19 (same for various other studies with only tenuous connection to facts of case). In Concord Boat, the Eighth Circuit focused on the recent Supreme Court emphasis on the importance of "fit":

> Conclusions and methodology are not entirely distinct from one another... [N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Concord Boat, 207 F.3d at 1055. *Quoting* Joiner, 522 U.S. 136, 146 (1997); Jaurequi v. Carter Mfg. Co., 173 F.3d 1076, 1082 n. 3 (8th Cir. 1999).

II. AUTOMATIC SAFETIES

After his career as a State Farm Insurance Company adjuster and supervisor, Mr. Berg has researched information about guns. Mr. Berg also has a personal preference for that automatic safeties rather than manual safeties. While Mr. Berg is certainly entitled to his own personal opinions and preferences, personal opinions and preferences are of course an insufficient basis for admissible expert testimony under Rule 702, Fed. R. Evid. and Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993). Only a "qualified witness" may give his opinion as an expert, and only then if that witness can testify as to "scientific, technical, or other specialized knowledge."

As to his qualifications, Mr. Berg testified:

Q. You were a claims adjuster for what, 20 years?

A. Probably about 10, 15 at the most.

Q. For State Farm; correct?

A. State Farm Mutual Auto Insurance Company, yeah.

Q. Personal line?

A. Well, everything. Commercial and personal.

(p. 21, Exhibit "1").

Q. Do you have any college degree?

A. I have a bachelor of science and law from LaSalle Extension University.

Q. Did you have to take any courses to get that? Did you have to go to a classroom? Go to lectures?

A. No. It was all extension.

Q. Any classroom work whatsoever for this law degree from LaSalle?

A. No. The final exam was taken under the judge at the general's department in the Army.

Q. You mean, you were proctored there?

A. Yes.

Q. They didn't have anything to do with vouching for your degree from LaSalle, did they?

A. No, they did not.

(pp. 19-20, Exhibit "1").

Q. It shows you enrolled on July 31, 1950; is that correct?

A. Yes.

Q. And by November 27, 1951, you had graduated?

A. Yes.

(p. 107, Exhibit "1").

Q. Did you sit for the bar exam?

A. No, I have not.

(pp. 24-25, Exhibit "1").

Q. The only classroom-type classes you've had since you got out of high school would they have been CPCU exams?

A. Yes, and some preparatory classes at the University of Minnesota.

Q. For?

A. For that same designation.

Q. And that designation is what?

A. Certified Property and Casualty Underwriter.

(p. 22, Exhibit "1").

Q. You've never designed any firearms, have you?

A. No, I have not.

Q. You've never designed any air rifle, have you?

A. No, I have not.

Q. You've never designed any component of an air rifle; correct?

A. That's correct.

Q. You've never designed any safety system for an air rifle; correct?

A. That's correct.

(pp. 11-12, Exhibit "1").

Q. Do you have an engineering degree?

A. No, I don't.

(p. 19, Exhibit "1").

Q. Have you any formal training in design or manufacture of air guns?

A. No, I haven't.

Q. Have you had and hands-on experience in design or manufacture of air guns?

A. No.

Q. Have you ever designed a safety for any air gun?

A. Only what I did while waiting to testify in a case.

Q. Was it ever implemented by any manufacturer?

A. No.

Q. Did you take engineering classes at any university that's accredited?

A. No, I did not.

Q. Have you ever been in an air gun facility, a manufacturing facility?

A. No, I haven't.

(p. 22, Exhibit "1").

Q. You have no experience in the manufacturing process for air guns, is that true?

A. Now that is true.

Q. You have no experience in live testing of air guns; is that true?

A. That is true.

Q. And you have no experience in the quality control processes for air guns; correct?

A. That is true.

(p. 23, Exhibit "1").

Q. Have you ever taught firearms safety instruction?

A. I'm certified as a safety instructor by the NRA, but I don't teach classes as such.

Q. Have you ever?

A. No, I haven't.

Q. Have you taught air gun safety courses anywhere?

A. No, I haven't.

(pp. 26-27, Exhibit "1").

Q. Would you agree with me that you are not an expert in marketing?

A. That's true.

Q. And you're not an expert in the actual wording that goes in the manuals or advertising?

A. That's true.

Q. You never drafted an owner's manual?

A. That's true.

Q. You've never assisted in the drafting of an owner's manual?

A. That's true.

* * * * *

Q. So as far as actually designing a safety, you are not an expert in that; correct?

A. I can't sit down and design one on a piece of paper, no.

(pp. 41-42, Exhibit "1").

Q. You've never designed an automatic safety for a firearm or air cock, right?

A. No, I haven't.

(p. 54, Exhibit "1").

Q. Have you ever observed youth shooting with automatic safeties, rifles equipped with automatic safeties, and seen how they handle air rifles with automatic safeties?

A. I can't recall any time that I would have been observing someone using them, no.

* * * * *

Q. You've never instructed youth on air gun safety shooting; correct?

A. That's correct.

* * * * *

Q. Have you ever gone to any air gun competitive events?

A. No, I have not.

Q. Have you gone to any classes where youth are taught how to shoot air guns?

A. No, I have not.

* * * * *

Q. Have you ever interviewed or talked to air gun instructors?

A. No.

(pp. 69-71, Exhibit "1").

Q. Well, you've never really been involved in the design process of a firearm or air gun, have you?

A. That's right.

(p. 79, Exhibit "1").

Q. Is it fair to say that you have no special experience, training, education, or expertise in human factors engineering?

A. That is true.

Q. And you have no special experience, training, education, or expertise in how people interact with air rifles with or without automatic safeties; correct?

A. That is true.

Q. You have no expertise or training in statistics; correct?

A. That's true.

Q. You have no experience in conducting, assessing or analyzing surveys; correct?

A. That's true.

Q. You've had no training or expertise in lifecycle testing or durability testing for air gun loading and unloading mechanisms, have you?

A. That's true.

(pp. 81-82, Exhibit "1").

Q. None of the special courses or seminars that you've attended addressed why you should or shouldn't necessarily put an automatic safety on an air rifle; correct?

A. You mean the ones that I gave or what?

Q. The ones you attended that other people taught?

A. Well, I don't think I've heard anyone talk about the subject of automatic safeties period.

Q. Other than you giving these talks, you've never heard it come up from anyone else, would that be fair to say?

A. I can't recall anyone talking about automatic safety, as such.

(p. 102, Exhibit "1").

Q. Do you know any actual designers of air guns, someone who actually designs air guns, that adheres to the theories that you espouse that all guns have to have a positive feed system and have to have an automatic safety?

A. I haven't interviewed them. I don't know.

Q. Well, do you know of any real air gun designer that follows you and agrees with you?

A. Well, I haven't interviewed them. If I had all the air gun designers and I interviewed them all, and we could see what they really believed, but I haven't done that and neither have you and no one knows what they agree with.

(p. 128, Exhibit "1").

Q. Have you done any type of research to determine whether automatic safeties are generally desired in the marketplace versus firearms or air guns without automatic safeties?

A. Any research in the marketplace?

Q. No.

(p. 141, Exhibit "1").

Q. Would it be fair to say that, at least as far as your adult life is concerned, your relationship with air guns is derived from litigation-related activities?

A. Well, I'm a collector of air guns, but a collection is what I call a reference collection, to that extent it would be related to litigation. I collect certain types of air guns because I have an interest in them.

* * * * *

Q. And other than your litigation-related activities, you don't have any real reason to own air guns, do you?

A. I don't, although, like I say, I am a collector and I'm interested in the collection now as a collection.

(pp. 30-31, Exhibit "1").

In Redman v. John D. Brush & Co., 111 F.3rd 1174, 1179 (4th Cir. 1997), the Court held that it was error for metallurgical engineer to give opinion testimony where the expert had no personal knowledge about or experience with the industry in question. Clearly, Mr. Berg has neither professional or personal knowledge or experience with an facet of the air gun industry. As a result of these "qualifications," Mr. Berg has many times been excluded from testifying and giving opinions on issues of gun design.

For example, in Shields v. Strum, Ruger & Co., Inc., the United States District Court for the Southern District of Mississippi, the Honorable William H. Barbour, Jr., ruled that Mr. Berg would not be allowed to testify as an expert in firearms design. In reaching this conclusion, the court relied upon the fact that Mr. Berg is not a firearms designer, and went on to state:

> The court is convinced Mr. Berg is not an expert in firearms design, functioning and defects; that he is not an expert in design analysis of state-of-the-art matters. He is not an engineer, he is not qualified in designing a gun to be safe, and specifically a single-action revolver.

(Trial Transcript, September 11, 1987, pp. 2-3, attached as Exhibit "2").

In Small v. Strum, Ruger & Co., Inc., the Superior Court of California, County of San Diego, the Honorable Gilbert Harelson, ruled that Mr. Berg could properly testify as a "firearms researcher," but could not expand his testimony beyond that area because "he is not involved in design or manufacture of guns; he is not a metallurgist; he is not an engineer." (Trial Transcript, Volume III, August 18, 1983, p. 911, attached as Exhibit "3").

In Sikes v. Mossberg & Sons, Inc., the United States District Court for the Northern District of Oklahoma, the Honorable James O. Elllison, noted that because Mr. Berg has never designed or

had any training in the design of firearms safety mechanisms, he was not qualified to testify regarding design criteria for a proper safety mechanism. (Trial Transcript, October 29, 1985, p. 17, attached as Exhibit "4").

In Lowe v. Glock, Inc., the United States District Court, District of New Mexico ruled that on the issue of a firearm safety device, Mr. Berg was not qualified to offer expert opinion. The court stated:

> Defendant contends that plaintiff's proposed expert witness, Stanton Berg, is not qualified to offer an expert opinion that all handguns without a magazine disconnect are unsafe because the gun user may be unaware that a bullet could remain in the gun's chamber. Defendant argues that Mr. Berg's opinion is not based on reliable scientific evidence, is an untested theory, and is not widely accepted in the relevant field of study. After conducting a Rule 104(a) hearing, I determined that the plaintiff failed to establish by a preponderance of the evidence that Mr. Berg's testimony was reliable as to the relevant issues in the case. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993).

(See Summary Judgment and Order of Dismissal, Lowe v. Glock, Inc., #CIV-94-0385 (Dist. N.M. June 30, 1995, attached as Exhibit "5").

In Wasylow v. Glock, Inc., U.S. District Court, District of Massachusetts, judgment was entered in favor of the defendant, in a case in which the lack of a firearm safety device was opined by Mr. Berg to cause the gun to be "defective." In addressing Mr. Berg in footnote 20 of its April 4, 1996 Memorandum and Order, the Honorable Douglas P. Woodlock, U.S. District Judge, stated:

> The Berg report establishes several propositions ... that in Berg's opinion, the lack of a manual safety, as well as a magazine disconnect, are design defects. ... I do not find Berg's conclusion to be based on any particular scientific qualification; rather it expresses what is essentially a preference for the advantages of additional safety devices. ... Moreover, as other courts have observed, Berg lacks the specialized scientific qualifications to justify admitting his testimony as expertise under Federal Rule of Evidence 702. I consider it likely that I would not permit Berg to testify even if this case were to survive the instant summary judgment motion. [Emphasis added]

(See April 4, 1996 Memorandum and Order, Wasylow v. Glock, Inc., U.S. District Court, District of Massachusetts, No. CIV-94-11073, attached as Exhibit "6").

III. GRAVITY FEED LOADING SYSTEM

While Mr. Berg opines that the gravity feed loading system found in BB guns is a "defective design," he admits that he is unable to connect his criticisms of the design with any risk of harm that would render the Daisy 880 or 856 "unreasonably dangerous." Mr. Berg finds that the gravity feed loading system design used by any BB gun is "defective" because he believes on occasion the system might become "hung up" and prevent a BB from loading, which of course causes no risk of harm. Even though Mr. Berg has "tested" the 880's gravity feed system, he has never been able to get a BB to "hang up." Mr. Berg opines, however, that if a BB is "hung up," it may at some point become "un-hung up" and the user may load a BB into the chamber, but believe the gun in empty, then point the gun at someone and pull the trigger. Yet, Mr. Berg concedes that if the user looks at the gun as he is loading it, he should see the BB as it is loaded, regardless of whether at one time it had previously been "hung up."

Q. Mr. Berg, what opinions do you have in this case?

A. Well, basically that the Daisy 880 and other members of the power line group are defective because they don't have automatic safeties and that the feed system is defective in that it allows users to think the gun is unloaded when, in fact, it may have a BB that's hung up in the magazine somewhere and is not carried along the line and eventually fed into the chamber. The individual thinks the gun is unloaded, and that happens in just able all the power line configurations.

* * * * *

Q. You actually tested the Daisy 880 gravity feed system, didn't you?

A. I have, yes.

* * * * *

Q. As we sit here today, can you remember any occasion where you've been able to lodge a BB in an 880 or an 856 such that you couldn't get it to feed?

A. Well, I'm sure if you shake it enough, you're going to get it to dislodge eventually.

Q. That's been your experience anyway, correct?

A. Yes.

* * * * *

Q. Tell me, in the Model 880 and 856, do you have any difficulty visualizing the BB in the loading area?

A. I'm not sure that I understand your question.

Q. Well, a BB in an 880 and 856 travels from a magazine across a visible loading area into the chamber, doesn't it?

A. Yes.

Q. And if the BB is in that area, do you ever have any trouble visualizing it or seeing it, if you look?

A. I don't.

* * * * *

Q. And one of the things that you have said about the Daisy 880 and 856, for that matter, and the 990, is that a BB is visible to the user in that loading area, if they chose to look?

A. If it's in the loading area and one looks, one should be able to see it, yes.

* * * * *

Q. A BB, in order to get into the chamber where it can be fired, has to be manually fed in there by a human being; correct?

A. An 880?

Q. 880, 856, 990?

A. Yes.

Q. So the user actually has to manually load the BB into the magazine or from the magazine into the chamber; correct?

A. Well, he manually operates the bolt mechanism of which is intended to feed the BB into the chamber, yes.

Q. And before it goes into the chamber, it is visible as it crosses that feed track area?

A. It would be visible if one looked in that area.

(see pp. 89-90, 93, 94-95, 42, 43, 44, 131-132, Exhibit "1"). In addition to being unqualified to give such an "expert opinion" on gravity feed system design, such an "opinion" is absolutely irrelevant. Even more importantly, Mr. Berg's testimony fails to meet the floor imposed by Daubert and its progeny to "that an expert's testimony rests on a reliable foundation and is relevant to the task at hand." Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999); General Electric Co. v. Joiner, 522 U.S. 136 (1997).

Mr. Berg cannot claim that his "testimony is the product of reliable principles or methods" based in the "knowledge and experience of his discipline" as required by Rule 702(2). Mr. Berg admits that he has no engineering degree, no formal training or hands on experience related to air gun design or manufacture, and has never designed any part of an air gun. In fact, Mr. Berg admits that he has never even been in a facility where air guns are made. Mr. Berg's testimony does not expose the Court to real science-based testimony, and, as several courts of appeal have recognized, the testimony does not satisfy the requirements of Rule 702, Daubert and Kumho Tire. *See, e.g.*, Rosen

v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir.1996) ("an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process"), *cert. den.*, 117 S.Ct. 73 (1996).

Under 15 U.S.C. § 2064(a)(2), the CPSC must prove that because the Daisy 880 and 856 has a gravity feed system, those BB guns contain a "product defect" that "creates a substantial risk of injury to the public." Mr. Berg concedes that a gravity feed design on a BB gun makes the gun no more "dangerous" than any other gun, since a BB gun can only cause harm if it is loaded, pointed at another person, and fired. The function of the gravity feed system does not cause a BB gun to be loaded, aimed or fired any more "dangerously" than a BB gun without a gravity feed system. On any gun, if the user loads the gun without looking then pulls the trigger while pointing the gun at another person, the result is the same, regardless of the loading system. Since Mr. Berg concedes that the gravity feed design of the 880 and 856 cannot create a "substantial risk of injury to the public" within the meaning of 15 U.S.C. § 2064(a)(2), his testimony and personal criticisms of the gravity feed loading system of the Daisy Model 880 and 856 should be excluded from evidence at the hearing on this matter pursuant to Rules 402, 403 and 702, Fed. R. Evid.

Respectfully submitted,

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Attorneys for Defendant

By: _____ FOR:
William M. Griffin III #82069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by U. S mail, postage prepaid and addressed as follows, this 7 day of ~~March~~ April, 2003.

The Honorable William B. Moran,
Administrative Law Judge
and Presiding Officer

Todd Stevenson
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Bethesda, MD 20814-4408

Mark W. Porter
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400 W. Stribling Drive
Rogers, AR 72756

FOR:
William M. Griffin III

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

DAISY MANUFACTURING COMPANY,

d/b/a Daisy Outdoor Products
400 West Stribling Drive
Rogers, AR 72756,

CPSC Docket No.:02-2

Respondent.

DEPOSITION

The following is the deposition of STANTON BERG, taken before Kelly E. Hanna, Court Reporter, Notary Public, pursuant to Notice of Taking Deposition, at 7901 24th Avenue South, Room 312, Bloomington, Minnesota, commencing at approximately 12:06 p.m., March 3rd, 2003.

ORIGINAL

* * * * *



shotguns, isn't it?

A. Yes, it is.

Q. Designed by the greatest gun designer the world has ever known; isn't that correct?

A. That is true.

Q. And you found that product to be defective; isn't that correct?

A. I believe I have, yes.

Q. You found the Model 1911 -- no, you found the Browning High Power to be defective as well; correct?

A. Yes, I have.

Q. That was also designed by the greatest gun designer the world has ever known; correct?

A. Well, in my opinion he's one of the greatest ones, yes, but that doesn't mean that he didn't make mistakes or that the others that continued his product did not make mistakes in the further design of that product.

Q. You've never designed any firearms, have you?

A. No, I have not.

Q. You've never designed any air rifle, have you?

A. No, I have not.

Q. You've never designed any component of an air rifle; correct?

A. That's correct.

Q. You've never designed any safety system for an air rifle; correct?

A. That's correct.

Q. Now, you have testified that the Browning High Power is defective; correct?

A. Are you talking about the pistol or the --

Q. The pistol.

A. Yes, I have.

Q. And you would agree with me that was designed by John M. Browning; correct?

A. The initial design was by Browning, but the continuation was actually by another designer.

Q. By a Frenchman?

A. Yes. In fact, much of his original design was not incorporated into that gun.

Q. You have found almost every John Browning design to be defective, haven't you, in testimony on one occasion or another?

A. No, I don't think so.

Q. Tell me one you found not to be defective?

against firearms manufacturers and air gun companies?

A. I really don't know.

Q. Have you ever testified that any firearm, where you've taken the case for the plaintiff, that that gun was nondefective?

A. Well, I have a number of cases I've taken that I found to be nondefective, although, I wouldn't necessarily be testifying to that extent because probably if I found it nondefective, I would not be utilized.

Q. Do you have an engineering degree?

A. No, I don't.

Q. Do you have any college degree?

A. I have a bachelor of science and law from LaSalle Extension University.

Q. Did you have to take any classes to get that? Did you have to go to a classroom, go to lectures?

A. No. It was all extension.

Q. Any classroom work whatsoever for this law degree from LaSalle?

A. No. The final exam was taken under the Judge at the General's department in the Army.

Q. You mean, you were proctored there?

A. Yes.

Q. They didn't have anything to do with vouching for your degree from LaSalle, did they?

A. No, they did not.

Q. Do you know whether LaSalle is even accredited?

A. Well, it has been accredited, I think, by two or three organizations.

Q. And where does LaSalle advertise? Have you ever seen them advertised?

A. They're not in business at the present time.

Q. When did they go out of business?

A. Probably about ten years ago.

Q. Where did they advertise?

A. Originally?

Q. Yeah.

A. I think they were in Chicago.

Q. Where were their advertisements? Were they in magazines and things?

A. I don't recall that I really know that. They were founded in 1908, when they actually -- where they actually advertised, I don't know. Many of the large companies, they utilized them for training their staff. A lot of the large insurance companies retained them for training their staff.

Q. You were a claims adjustor for what, twenty years?

A. Probably about ten, fifteen at the most.

Q. For State Farm; correct?

A. State Farm Mutual Auto Insurance Company, yeah.

Q. Personal lines?

A. Well, everything. Commercial and personal.

Q. Were you property or were you personal entry as well?

A. I'm sorry?

Q. Did you do property only, or did you do personal injury as well?

A. I did everything. In fact, for a while I was what they called an attorney negotiator on certain injury claims, that sort of thing. I later, then, became a claims superintendent.

Q. Have you had any formal training in design or manufacture of air guns?

A. No, I haven't.

Q. Have you had any hands-on experience in design or manufacture of air guns?

A. No.

Q. Have you ever designed a safety for any air gun?

A. Only what I did while waiting to testify in a case.

Q. Was it ever implemented by any manufacturer?

A. No.

Q. Did you take engineering classes at any university that's accredited?

A. No, I did not.

Q. Have you ever been in an air gun facility, a manufacturing facility?

A. No, I haven't.

Q. The only classroom type classes you've had since you got out of high school would they have been CPCU exams?

A. Yes, and some preparatory classes at the University of Minnesota.

Q. For?

A. For that same designation.

Q. And that designation is what?

A. Certified Property and Casualty Underwriter.

Q. And did you obtain that?

A. Yes, I did.

Q. You have no experience in the manufacturing process for air guns, is that true?

A. Now that is true.

Q. You have no experience in life testing of air guns, is that true?

A. That is true.

Q. And you have no experience in the quality control processes for air guns; correct?

A. That is true.

Q. Did any of the seminars that you've taken over the years ever relate to firearm design or safety?

A. I go to special seminars every year that relate to firearms, but I don't believe any of them relate to design or safety, other than presentations that I made at those conferences.

Q. Other than the presentations you made, do you recall at any of the special seminars which you've taken over the years, relate specifically to firearm design or safety?

A. I don't recall that, no.

Q. In fact, they would not; correct?

A. Normally they would not be.

Q. And even abnormally they would not, that you know of; correct?

A. Well, there may be individual presentations by members that relate to a safety of a certain gun at those conferences, but the main thrust of the conference was not on that subject.

Q. And you are not an expert in quality control; correct?

A. No, but I received training in quality control.

Q. And where did you receive this training?

A. At Hennepin Technical College.

Q. What year was that?

A. 1987.

Q. Did you take a class there?

A. Yes.

Q. How long did the class last?

A. I think it was a one-quarter long class.

Q. Would you agree that based on that single course, you would not hold yourself out as an expert in the area of manufacturing and quality control?

A. I would not claim to be an expert. I would claim to be well versed in that area.

Q. Did you sit for the bar exam?

A. No, I have not.

Q. Are you a gunsmith?

A. No, but I've been an apprentice gunsmith.

Q. Have you written articles for magazines outside of litigation that are reviews of air guns?

A. Outside of litigation? I think everything I've published is outside of litigation. It's published by periodicals that don't necessarily deal with litigation.

Q. The articles arose out of something that was involved in litigation, though; correct?

A. No. I don't think that's true. There might be one or two individual cases that I would write about a specific case, but the work was done based on the research, because I had an interest in that area, and that interest could be related to litigation work. However, the research I did didn't bear on any particular case.

Q. Have you published articles on air guns?

A. Yes, I have.

Q. And where did they appear?

A. There was an article that was published in the AFTE Journal, April 1992 called "Airgun Safety

Designs." There was also an article published in the Journal of Forensic Identification, September-October, 1992, on "Airgun Loading Feeding Safety System Designs." I also had an article published on trigger pull that related to -- had areas in it that related to air gun trigger pull. That was published in the Journal of Forensic Identification in July-August, 1991. Those would be the ones.

Q. Would it be fair to say that by 1991 you had handled twenty air gun cases against manufacturers, including both Daisy and Crosman?

A. I just don't know.

Q. Well, isn't it true that at the time you published the work in AFTE and the other one in the Journal in 1992, that you had been handling cases against air gun manufacturers for at least ten years?

A. Oh, I'm sure that's true.

Q. Have you ever taught firearm safety instruction?

A. I'm certified as a safety instructor by the NRA, but I don't teach classes as such.

Q. Have you ever?

A. No, I haven't.

Q. Have you taught air gun safety courses anywhere?

A. No, I haven't.

Q. Do you think the rules of safety would be markedly different between the rules for firearm safety and the rules for air gun safety?

A. I think they would be very close.

Q. What are the top rules?

A. Controlling the muzzle of the gun, treating every gun as if they're loaded, that sort of thing.

Q. And isn't it true that if you followed those two rules, almost all of the accidents can be avoided?

A. I think that's generally true. Accidents happen, however, because someone makes a mistake. If everyone followed all the rules throughout life, we would never have accidents in any area.

Q. But you would agree with me, if you followed the rule about muzzle control and the rule to treat every gun as if it's loaded, you can generally avoid almost all accidents with which you're familiar in terms of air guns; correct?

A. I think that's true.

Q. As a young man or a young boy, did you shoot air guns?

purposes.

Q. Have you ever shot air guns competitively?

A. No.

Q. Would it be fair to say that you are not experienced in writing warnings or manuals for air guns or firearms?

A. That is true. I am not involved in writing warnings for any firearm or air gun.

Q. And you have testified before, and I assume you agree, that you do not consider yourself an expert in labeling or warnings?

A. That is true.

Q. Have you ever worked designing an air gun?

A. No, I have not.

Q. Have you ever worked in air gun competitions, either as a competitor or judge?

A. No.

Q. Have you ever worked as a gunsmith on air guns?

A. No, I haven't.

Q. Would it be fair to say that, at least as far as your adult life is concerned, your relationship with air guns is derived from

litigation-related activities?

A. Well, I'm a collector of air guns, but a collection is what I call a reference collection, to that extent it would be related to litigation. I collect certain types of air guns because I have an interest in them.

Q. Which type do you collect?

A. I collect air guns that have automatic safeties.

Q. Would it be fair to say that your relationship with air guns, at least as an adult, is derived from litigation-related activities?

A. Well, certainly a relationship to it, yes.

Q. You don't use air guns for pleasure or for hunting, do you?

A. That is true.

Q. And other than your litigation-related activities, you don't have any real reason to own air guns, do you?

A. I don't, although, like I say, I am a collector and I'm interested in the collection now as a collection.

Q. Would it be fair to say that in the last several years, or over the last ten to twelve

A. I think you covered all of them.

Q. You don't remember any others?

A. That I've been excluded or limited?

Q. Right.

A. There was a case in Virginia involving a burst firearm, and I was not allowed to talk about the metallurgical aspects of that particular gun or the gas containment qualities of that gun.

Q. Any other cases that you remember?

A. I don't recall any.

Q. So other than the ones that I referred to and the case in Virginia, you do not know of any other cases where your testimony has been limited or excluded?

A. I can't recall any. Most cases my testimony is accepted.

Q. Would you agree with me that you are not an expert in marketing?

A. That is true.

Q. And you're not an expert in the actual wording that goes into manuals or advertising?

A. That is true.

Q. You have never drafted an owner's manual?

A. That is true.

Q. You've never assisted in the drafting of an owner's manual?

A. That is true.

Q. And you're not an expert in actually designing a safety; is that correct?

A. I'm not an expert as it comes to the layout and dimensioning of a safety. I consider myself to be an expert on safety design, but I'm not a designer.

Q. Is it fair to say you are not an expert in actually designing a safety?

A. Well, I would repeat what I just said. I can't sit down and lay out a safety in dimension and property. I'm not a draftsman. I'm an expert on safety design, but not a designer.

Q. So as far as actually designing a safety, you are not an expert in that; correct?

A. I can't sit down and design one on a piece of paper, no.

Q. Tell me, in the Model 880 and 856, do you have any difficulty visualizing the BB in the loading area?

A. I'm not sure that I understand your question.

Q. Well, a BB in an 880 and 856 travels

from a magazine across a visible loading area into the chamber, doesn't it?

A. Yes.

Q. And if the BB is in that area, do you ever have any trouble visualizing it or seeing it, if you look?

A. I don't.

Q. You never told the Consumer Product Safety Commission that Daisy's BB's were the wrong color, did you?

A. No. I've seen that said. I don't think I said that.

Q. And you're not here to support such an allegation; correct?

A. That they're the wrong color?

Q. Yes.

A. Oh, I can see how a different color might have more contrast, but that has never been one of my criticisms.

Q. And, in fact, in twenty years of looking at Daisy products and Crosman's products, you've never been critical of either the copper colored BB or the silver colored BB, the color itself; correct?

A. That's correct.

Q. And one of the things that you have said about the Daisy 880 and 856, for that matter, and the 990 is that a BB is visible to the user in that loading area, if they chose to look?

A. If it's in the loading area and one looks, one should be able to see it, yes.

Q. And another one of the things that you like about, or that you've indicated is positive about the Daisy 880 and for that matter the 856 --

A. I don't think I'd describe those as positive or that I liked them, I just said that that was the facts.

Q. Another fact that you've testified to about the 880, the 856, and the 990 is that a user can, at any time they want to, know whether it's loaded or unloaded, that is a round in the chamber, they can simply pull the bolt back?

A. Well, if you're talking about BB's. If you're talking about pellets, that's not the case.

Q. I'm talking about BB's.

A. You should be able to do that.

Q. It's always done that in your experience in testing 880 and 856's; correct?

A. I can't recall any cases that they did not, other than where it rolled off the end of the tip

A. No. Well, theirs is on every one they produce and they say if you don't want one, we will take it off.

Q. Beretta is the same way. They offer to take it off for you or put it on certain models, they go both ways.

A. Beretta has probably one of the widest lines of imported over/under and double side-by-sides. It's on all of them.

Q. You think it's on all of them?

A. All of them, except for a few that they have that they call the competition skeet and trap, but all their hunting and sporting ones all have it on them.

Q. Do you know why that offer to take it off for you?

A. I assume there's some people that maybe desire to have it off, but the fact that they put it on shows that they obviously feel it should be on there.

Q. You've never designed an automatic safety for a firearm or air cock, right?

A. No, I haven't.

Q. Do you know why European designed break barrel shotguns are more likely to an automatic safety

not skeet?

A. I guess I assumed it was.

Q. Do you know --

A. What is it?

Q. Do you know what their position is? That organization?

A. I don't know anything about their position.

Q. Has anyone advised you that the position of that organization is that automatic safeties are more unsafe than no safety at all?

A. That's obviously a silly statement, but I haven't been advised of that, no.

Q. Well, it's a silly statement to you, isn't it?

A. I think it's a silly statement to any thinking person that automatic safeties are dangerous.

Q. And apparently -- Have you ever been out and watched youth using automatic safeties and how they treat automatic safeties?

A. Do you want to pass that one by again?

Q. Have you ever observed youth shooting with automatic safeties, rifles equipped with automatic safeties, and seen how they handle air rifles with automatic safeties?

A. No, I have not.

Q. Have you contributed money or time or anything to any courses or classes that teach youth how to shoot air guns?

A. No.

Q. Have you ever interviewed or talked to air gun instructors?

A. No.

Q. Do you know that the Consumer Product Safety Commission actually had an air gun instructor and a firearms instructor as one of the people in charge of air gun investigations?

A. I don't know who they had in charge. I would have no way of knowing that.

Q. That would be the type of person you'd want examining air guns; correct?

A. I think I would want someone who knows something about air gun accidents and how they happen.

Q. You would want someone who's actually involved in shooting sports and knows how the products are used, wouldn't you?

A. I think the most important person they could have is someone who had dealt with firearms and air gun accidents.

Q. Would you agree with me that BB's are

management. They just don't go off on their own and whip up something.

Q. Well, you've never really been involved in the design process of a firearm or an air gun, have you?

A. That's right.

Q. You've never sat down and analyzed why certain users may or may not want automatic safeties on an air gun, have you?

A. I have heard the various reasonings for some of the decisions, but I haven't been involved in that process as we've covered chapter and verse already.

Q. Would you agree with me that your opinions regarding the defectiveness of the Daisy 880 and 856 primarily center around the lack of an automatic safety and the gravity feed system, would that be fair to say?

A. Well, I think basically those would be the two main things. I feel the velocity of the 880, it has no utility value for young people, but that also impacts why I think it should have an automatic safety.

Q. You understand that the Consumer Product Safety Commission is making no claim against

Q. This is a case out of the State of Wisconsin, Circuit Court in Dane County, Buddy Bill's, do you remember that case?

A. Well, sure. We already talked about it.

Q. That's the case where the judge found that you are not an expert in the area of air gun design or safety; correct?

A. That is correct.

Q. Now, in that case that was a Crosman Air 17, wasn't it?

A. Yes, it was.

Q. Is it fair to say that you have no special experience, training, education, or expertise in human factors engineering?

A. That is true.

Q. And you have no special experience, training, education, or expertise in how people interact with air rifles with or without automatic safeties; correct?

A. That is true.

Q. You have no expertise or training in statistics; correct?

A. That's true.

Q. You have no experience in conducting,

assessing, or analyzing surveys; correct?

A. That's true.

Q. You've had no training or expertise in life cycle testing or durability testing for air gun loading and unloading mechanisms, have you?

A. That's true.

Q. In the cases in which you've testified on Crosman's multi-pump air rifles, you have found that BB's do not necessarily readily feed into the firing chamber when the bolt is manipulated; correct?

A. Probably has been in some particular cases, but as I'm sitting here without seeing the case, I'm not sure.

Q. Well, would it be fair to say that the Crosman and the Daisy multi-pump air rifles have basically the same defects as you've identified them in your review of these products?

A. Well, they both have the defects of not having an automatic safety, and they have problems with their gravity feed system, but it's not the same as the Daisy because they place a little magazine in between their reservoir, so you're dealing in most cases with a limited number of BB's. They also put a slot in the top so you can see most of them. That's probably why I see very few cases from Crosman as

A. How that safety would what?

Q. Would fail?

A. I don't think it would fail. I've seen the discussions of so-called defects and including warnings, and everything I've seen had been erroneous because the only indications I have had as to the possible failure have not been true.

Q. Do you know what Guy Brawler's own opinion is after evaluating that automatic safety design?

A. His what?

Q. Do you know what his own opinion is regarding the safety of this design?

A. You mean since that time?

Q. Yes.

A. No, I don't.

MR. WARD: Should we take a quick break?

MR. GRIFFIN: Sure.

(Recess taken at 1:57 p.m.)

BY MR. GRIFFIN:

Q. Mr. Berg, what opinions do you have in this case?

A. Well, basically that the Daisy 880 and the other members of the powerline group are defective

because they don't have automatic safeties and that the feed system is defective in that it allows users to think the gun is unloaded when, in fact, it may have a BB that's hung up in the magazine somewhere and is not carried along the line and eventually fed into the chamber. The individual thinks the gun is unloaded, and that happens in just about all of the powerline configurations. They all have a little different magazine setup, and that I think that the velocity is one of the reasons that I feel they also should have an automatic safety, because of the danger posed by the higher velocities.

Q. Well, you think the Red Ryder should have an automatic safety, don't you?

A. Well, sure, I think they all should.

Q. You think any BB gun or air rifle should have an automatic safety; correct?

A. I do, yes. I'm just saying that in this case I think the velocity is an aggravating factor.

Q. Well, whether or not the velocity is 250 feet per second or 1,200 feet per second, you still think it needs an automatic safety; correct?

A. Yes, I do.

Q. And you think an air rifle is defective

if it doesn't have an automatic safety, whether it shoots at 250 feet per second or at 12 or 1,400 feet per second; correct?

A. That is correct.

Q. And whether an air rifle shoots at 250 per second or 12 or 1,400 feet per second, you would find if it had a gravity feed system that it was defective; correct?

A. That is correct.

Q. And you believe all the Crosman multi-pump air rifles are defective; correct?

A. Yes.

Q. And you believe every Daisy BB gun that does not include an automatic safety and has a gravity system that it is defective as well; correct?

A. Correct.

Q. You would agree with me that the external appearance of the Daisy 880 is that of a larger caliber sporting rifle and the stock dimensions are better suited to adults than to youths; correct?

A. Well, I agree that it has an appearance that is somewhat similar to firearms. I really hadn't analyzed the stock dimensions.

Q. The stock dimensions are better suited to adults than to youth. Do you agree with that or

A. I actually did what?

Q. You actually tested the Daisy 880 gravity feed system, didn't you?

A. I have, yes.

Q. And as long as you held the barrel with the barrel tilted up, you found the Daisy 880 fed rather reliably, didn't you?

A. I wouldn't say that.

Q. As late as 1997 you tested the Daisy 880 to determine how often it would load, how regularly it would load; correct?

A. Everyone that I've examined I've tested and ran through feed cycles. Some have more problems than others.

Q. For instance, if you hold the barrel tip down, it's never going to load; correct?

A. That's true.

Q. Likewise, if you hold a Crosman with the barrel up, it won't ever load either.

A. Well, they have reverse feed systems.

Q. One advantage that the Daisy system has of holding the barrel up, that's the most likely way you're going to hold the barrel when you're pumping; correct?

A. I would think it would be more inclined

to be at some angle up, it wouldn't necessarily be at 45 degrees.

Q. It would be upward though; correct?

A. In most cases, not always.

Q. You've never had a BB lodge in a Daisy 880 such as you couldn't shake it lose, have you?

A. I can't recall what the tests were in all of my cases. It's been frequent that they have not failed to feed. I don't -- I can't recall any that in some time in the cycle they didn't fail to feed at some point or another.

Q. That they failed to feed a BB?

A. Yes.

Q. You've never had one lodge in a magazine of an 880 or an 856 such that you couldn't shake it lose, have you?

A. That I couldn't shake it lose?.

Q. Right?

A. I don't know. I can't recall as I'm sitting here today.

Q. As we sit here today, can you remember any occasion where you've been able to lodge a BB in an 880 or an 856 such that you couldn't get it to feed?

A. Well, I'm sure if you shake it enough,

you're going to get it to dislodge eventually.

Q. That's been your experience anyway; correct?

A. Yes.

Q. When you do your testing of the Daisy 880's, you always use quality BB's that are in speck; correct?

A. Quality BB's that what?

Q. Are in specification?

A. I'm sorry, I didn't get that last part.

Q. You don't use out of speck or deformed BB's when you do your testing, do you?

A. Well, I use Daisy standard BB's out of a Daisy container. I don't check them all to see whether they're within specifications or not.

Q. But you don't think it would be a fair test of a manufacturer's product to go get out of speck or deformed BB's and stick them in a magazine of a gun?

A. Well, I certainly wouldn't do that intentionally, but if a manufacturer had a BB that was out of specks, I would have no way of knowing that beforehand. I don't go measuring all of them.

Q. No, but that's not something you would do intentionally, to test a manufacturer's product, is

A. -- you're expected to make contributions and give presentations from time to time.

Q. And these presentations are generally, what, ten to fifteen minutes?

A. No, they're a half-hour to an hour. Most of mine, I think, have been an hour. I take that back. Most of them have been a little over a half-hour.

Q. None of the special courses or seminars that you've attended addressed why you should or shouldn't necessarily put an automatic safety on an air rifle, correct?

A. You mean the ones that I gave or what?

Q. The ones you attended that other people taught.

A. Well, I don't think I've heard anyone talk about the subject of automatic safeties, period.

Q. Other than you giving these talks, you've never heard it come up from anyone else, would that be fair to say?

A. I can't recall anyone talking about automatic safety, as such.

Q. What type of handguns do you shoot?

A. What kind do I shoot?

Q. It shows you enrolled on July 31, 1950; is that correct?

A. Yes.

Q. And by November 27th, 1951, you had graduated?

A. Yes.

Q. Do you work for any referral services?

A. Do I work for what?

Q. Are you signed up with any referral services that refer you business?

A. I think very early in my consulting there was a firm that used me for a while and then I severed all relations with them. I don't think it happened for more than two, three, cases.

Q. You've given 235 depositions and 119 trials?

A. If that's what it says there, yes.

Q. When was the last time you testified for a manufacturer of a product?

A. On behalf of a manufacturer? It would have been a long time ago.

Q. Since 1980?

A. I don't even remember when it would have been. It would have been a long time ago. Once you start taking cases against them, they take you off

sure there are some people that believe that. To look at the history and what happens, I mean, I feel it's a foolish believe, but, yes, I'm sure there are people that believe that, really believe that.

Q. Do you know any actual designers of air guns, someone who actually designs air guns, that adheres to the theories that you expose that all guns have to have a positive feed system and have to have an automatic safety?

A. I haven't interviewed them. I don't know.

Q. Well, do you know of any real air gun designers that follows you and agrees with you?

A. Well, I haven't interviewed them. If I had all the air gun designers and I interviewed them all, then we could see what they really believed, but I haven't done that and neither have you and no one knows what they agree with.

Q. Do you know if your views are accepted by the majority of air gun designers?

A. Again, they're designing what management asks them to design. It doesn't really make any difference what personal belief they may have. They are following the direction of the management. That's what management is for.

BY MR. GRIFFIN:

Q. Mr. Berg, do you review cases involving products other than air guns, firearms, and the hilty type?

A. And what?

Q. And The hilty type guns? The charge nail guns?

A. Oh, stud guns?

Q. Yeah.

A. No. I think everything I've testified on have either been firearms or related items or air guns or ammunition.

Q. A BB, in order to get it into the chamber where it can be fired, it has to be manually fed in there by a human being; correct?

A. An 880?

Q. 880, 856, 990.

A. Yes.

Q. So the user actually has to manually load the BB into the magazine or from the magazine into the chamber; correct?

A. Well, he manually operates the bolt mechanism of which is intended to feed a BB into the chamber, yes.

Q. And before it goes to the chamber, it

is visible as it crosses that feed track area?

A. It would be visible if one looked into that area.

Q. Have you always found the Daisy safety to function appropriately, the manual safety?

A. Most of the time. I think there was a case involving one that there was a part missing from the safety and it wasn't functioning right.

Q. It was a broken --

A. Either the spring was missing or something. I'm not sure but it was defective.

Q. You mean either it came from the manufacturer that way or somebody removed it subsequently?

A. Yes.

Q. And therefore, what, the safety wouldn't go into the on position or wouldn't go into the off position?

A. Well, you could move it in but it would slide, because there was nothing to hold it there, it would slid back and forth.

Q. It would just flop back and forth?

A. Yeah.

Q. Did you find that to be a defect in the 880, that was the manufacturer's fault?

A. No. That still has problems, their old line of Model 94s.

Q. Would you guarantee that any feed system would feed a shell or a BB or a pellet on every occasion?

A. Would I guarantee that?

Q. Yes.

A. No, because things can break, things can wear out, and that sort of thing, but the important thing is that they would do it most of the time, and they would probably do it the time that it would have prevented an accident. To say something shouldn't be used because something might break or wear out at some time is kind of a silly argument as far as I can see.

Q. Well, any feed system can fail, we agree on that; correct?

A. Any mechanical system can have things happen to them, but the point is that most of the time they're going to be working right.

Q. Have you done any type of research to determine whether automatic safeties are generally desired in the marketplace versus firearms or air guns without automatic safeties?

A. Any research in the marketplace? No.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

FRED W. SHIELDS and
JOYCE SHIELDS

V. CIVIL ACTION NO. J85-0691(B)

STURN, ROGER & COMPANY, INC.

RULING OF THE COURT, RE, STANTON BERG

BEFORE: The Honorable William H. Barbour, Jr., United States District Judge, and a jury

DATE: September 11, 1987

PLACE: Jackson, Mississippi

APPEARANCES:

For the Plaintiffs:

Mr. Jim Nobles
Mr. H. Lanier B. Foote
Jackson, Mississippi

Mr. A. Kennon Goff III
Ruston, Louisiana

For the Defendant:

Mr. James A. Becker,
Jackson, Mississippi

Mr. James P. Dorr
Mr. Brian W. Bell
Chicago, Illinois

DAVID A. SCOTT
COURT REPORTER
Post Office Box 2202
Jackson, Mississippi 39225-2202

EXHIBIT "2"

THE COURT: All right. The court is going to sustain the majority of the objection of the defendant to qualification of this witness as an expert. The court is convinced Mr. Berg is not an expert in firearms design, functioning and defects; that he is not an expert in design analysis of state of the art matters. He is not an engineer, he is not qualified in designing a gun to be safe, and specifically a single action revolver.

Mr. Berg has accumulated knowledge of history of various safety devices over years of self study and what can best be termed as being personally interested in a firearm, including pistols. He may be qualified as an expert ballistics examiner, but we have no question of ballistics in this particular case. All of the equipment in his laboratory seems to be directed primarily toward examination of bullets, casings, and the court presumes, although it was not presented to me directly, that tool marks examination basically goes to what the witness testified as to marks on bullets made by hammers or marks made on -- marks made on shell casings made on hammers or bullets by rifling or other matters as being a matter of ballistics primarily rather than design of firearms.

The court does not think in a case like this that anybody can come in, even though he might know a lot about firearms, and qualify as an expert for design purposes. Otherwise we could have everybody that appeared at the local

gun show over the weekend as an expert under some circumstances.

Accordingly, the court will recognize Mr. Berg as an expert in the field of historical research in firearm safeties and will allow him to testify as to his opinion as to how historically safeties have been developed for single action revolvers. The court does not feel that he can go further than that and apply those particular safeties to this firearm in question, because he is not a designer. This will allow the plaintiffs to get Mr. Berg's research into evidence for the purpose of showing, according to the plaintiff, that Sturm Ruger had notice of these various devices.

Mr. Into has already testified as to the feasibility of devices. The plaintiffs have other experts who can then take the information Mr. Berg provides and testify as to whether or not those particular devices are adaptable to the pistol in question. This will prevent this witness from testifying as an expert in design, which the court finds that he is not, and that prohibits him from taking particular historical designs which were in existence and specifically applying them insofar as his testimony to the gun in question.

All right. The witness's testimony will be limited in that regard.

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

DEPARTMENT NO. 27 BEFORE HON. GILBERT HARELSON, JUDGE

ERNEST W. SMALL,

Plaintiff,

vs.

STURM, RUGER & COMPANY, INC., a corporation; JIMMY COX, dba JIMMY COX SPORTING GOODS: and DOES I through XX, Inclusive,

Defendants.

No. 467485

REPORTERS' DAILY TRANSCRIPT

Volume III

August 18, 1983

Testimony of STANTON O. BERG

Pages 334 - 494, Inclusive

APPEARANCES: (See Volume I)

REPORTED BY: DONNA D. BEARD, CSR #1874
-and-
ANA L. REID, CSR # 3372
Official Reporters

EXHIBIT "3"

MR. WHITING: Yes, sir, that's what the state of the art was, that the safeties were safe. There were safeties that were safe against accidental drops at that point in time. I mean, the whole industry was using them more or less.

MR. DORR: The witness has testified that he only does research. He does research with advertising, with catalogs. He has testified what that research has shown.

He is totally unqualified to offer any technical opinion concerning the application of the safeties in, for example, a double-action Ivers Johnson revolver, or a double-action Smith & Wesson revolver to a Colt-style single-action revolver. There is no -- this witness has no background or expertise to be able to make such an assumption or give any such testimony, and I believe that is the direction of the testimony which Mr. Whiting intends to --

THE COURT: You started out back on the 18th saying that he is not involved in design or manufacture of guns; he is not a metallurgist; he is not an engineer; he did not testing on the guns. He is here as a researcher, and that's why I thought he was here.

MR. WHITING: That's correct.

THE COURT: I think you are going further than that. I think you are trying to expand on his qualifications. And at this point, I'm going to sustain the objections, and you can write it up in writing and do it the way we said, but I thought that that's what he was here for, as a researcher. I think the question now is going beyond that scope.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRADLEY ALAN SIKES,

Plaintiff,

v.

MOSSBERG AND SONS, INC., a foreign corporation,

Defendant.

No. 83-C-1017-E

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HAD ON OCTOBER 29, 1985

TESTIMONY OF STANTON O. BERG

BEFORE THE HONORABLE JAMES O. ELLISON, Judge.

APPEARANCES:

For the Plaintiff: Mr. Ronald S. Grant
Pray, Walker, Jackman,
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Attorneys at Law
Suite 900 Oneok Plaza
Tulsa, Oklahoma 74103

For the Defendant: Mr. Richard M. Eldridge
Rhodes, Hieronymus, Jones
Tucker & Gable
Attorneys at Law
2800 Fourth National Building
Tulsa, Oklahoma 74119

Glen R. Dorrough
UNITED STATES COURT REPORTER



the weight and sufficiency of his testimony rather than his ability to give such opinions under Rule 702. 702 doesn't really require very much other than an ability to testify in a way that will be of aid to the jury based upon his training. I understand your objection as to his engineering qualifications and his lack of engineering qualifications on the design function.

MR. ELDRIDGE: Your Honor, the intent of our objection, and we desire to limit the witness, relates to the -- I have no problem with him testifying as to what he measured and found in that measurement, that's no problem. I have no problem with him testifying as to what he saw in the examination, but I do have a problem if he starts getting into a discussion of what design criteria exists for a proper safety mechanism because he is not so qualified.

THE COURT: Where have you qualified him in that area? He has never designed one. He has never had any training in the design.

MR. GRANT: I'll accept that. I'll accept that. I understand.

THE COURT: Okay.

MR. ELDRIDGE: And the other factor that I wanted to point out as well is I don't want to get into a situation where his testimony is that this did or did not happen at the accident because he's not an accident reconstructionist.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
U.S. DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

JUN 3 0 1995

CLERK

KELLY LOWE,

Plaintiff,

vs.

No. CIV 94-0385 JP/LFG

GLOCK, INC., a foreign corporation,

Defendant.

SUMMARY JUDGMENT
AND
ORDER OF DISMISSAL

The subject of this order is defendant's motion for summary judgment (Doc. # 25) filed January 17, 1995. Defendant seeks summary judgment on plaintiff's claim that defendant defectively designed the handgun that injured plaintiff because the gun did not have a magazine disconnect safety feature. Defendant contends that plaintiff's proposed expert witness, Stanton Berg, is not qualified to offer an expert opinion that all handguns without a magazine disconnect are unsafe because the gun user may be unaware that a bullet could remain in the gun's chamber. Defendant argues that Mr. Berg's opinion is not based on reliable scientific evidence, is an untested theory, and is not widely accepted in the relevant field of study. After conducting a Rule 104(a) hearing, I determined that plaintiff failed to establish by a preponderance of the evidence that Mr. Berg's testimony was reliable as to the relevant issues in this case. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993). Mr. Berg's proposed expert opinion has not been tested, has not been subjected to peer review and publication, has an unknown potential for error, and has not been generally accepted in the relevant field. Daubert,

EXHIBIT "5"

113 S.Ct. at 2795-96. Therefore, I conclude that Mr. Berg's opinion is not sufficiently reliable to present to a jury.

Plaintiff must have the benefit of expert testimony to establish his prima facie case that defendant defectively designed the handgun without a magazine disconnect. Without an expert opinion in support of plaintiff's theory of recovery, plaintiff's evidence is critically flawed. Additionally, plaintiff did not comply with D.N.M. LR-Cv 56.1(b) in setting forth material facts that he alleges are in dispute. As such, plaintiff agrees with defendant's uncontroverted facts and, in effect, concedes that no material factual issues are in dispute. Therefore, a judgment as a matter of law is appropriate.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant Glock, Inc.'s motion for summary judgment is GRANTED and plaintiff's complaint is hereby dismissed with prejudice.

UNITED STATES DISTRICT JUDGE

Received Time Jul. 20. 12:00PM Print Time Jul. 20. 12:01PM

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

PETER WASYLOW, Plaintiff, v. GLOCK, INC. and GLOCK Ges.m.b.H., Defendants.	)	CIVIL ACTION NO. 94-11073-DPW

JUDGMENT

WOODLOCK, District Judge

In accordance with this Court's Memorandum and Order issued on April 4, 1996, it is hereby ORDERED

Judgment for the defendants against the plaintiff.

BY THE COURT,

Deputy Clerk

DATED: April 4, 1996

EXHIBIT "6"

PENGAD-Bayonne, N. J.

APR 24 1996

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER WASYLOW, Plaintiff,	)	CIVIL ACTION NO. 94-11073-DPW
v.	)	
GLOCK, INC. and GLOCK Ges.m.b.H., Defendants.	)	

MEMORANDUM AND ORDER
April 4, 1996

A 23-year-old worker in a sheriff's office, while storing his weapon at home, pulled the trigger, and shot himself in the stomach. In this products liability lawsuit, he blames the gun and its manufacturer for his self-inflicted wounds. The defendant/manufacturers[1] move for summary judgment. Concluding that there were adequate warnings regarding the use of the weapon and that the gun did what it was designed and manufactured to do when someone pulled the trigger while the weapon was loaded, I will grant defendants' motion.

I. Background

A. The Accident

On September 18, 1993, Peter Wasylow sustained a gunshot wound to the abdomen after he intentionally depressed the trigger while pointing the gun toward his abdomen. (Defs.' Mem. Supp. Mot. Summ. J., Ex. B (hereinafter "Wasylow Dep.") at 171-72,

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[1]The parties do not distinguish between the two named defendants against whom parallel and matching claims are made. Thus, Counts I, III, V and VII are asserted against the American Glock corporation, Glock Inc. and Counts II, IV, VI and VIII are asserted against the Austrian Glock entity, Glock Ges.m.b.H. The two defendants will be referred to collectively as Glock.

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254.) At the time, Wasylow was in his bedroom in his parents' house in Taunton, Massachusetts. During the relevant time period, Wasylow worked for the Bristol County Sheriff's Department, was a student in a correctional facilities program, and had recently completed a four-hour firearm safety class. (Defs.' Mem. Supp. Mot. Summ. J. at 3; Wasylow Dep. at 202.) Wasylow states that he did not intend to shoot himself. (Wasylow Dep. at 254.) He, however, concedes that he was "in a hurry" because friends were coming over. (Wasylow Dep. at 152, 164.)

Wasylow states that he thought the gun was unloaded at the time, and that he was preparing to store the gun in its case, the Glock box.[2] (Pl.'s Mem. Opp'n Mot. Summ. J. at 2; Wasylow Dep. at 171.) He asserts that because of the discharge, he sustained scarring on the abdomen and back, loss of a kidney, injury to the bowel necessitating a colostomy bag, injury to the liver, pain, loss of strength, and permanent disability. He reports $35,000 in medical bills. (Jt. Pre-Trial Mem. at 1.)

Police Sergeant Michael J. Silvia ("Silvia") responded to

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[2]I note that there is some discrepancy regarding what Wasylow was doing with the gun before it discharged and where the Glock box was located. His mother, Elaine Wasylow, stated that he had just returned from target practice and was preparing to clean the gun when it discharged. (Defs.' Mem. Supp. Mot. Summ. J., Ex. G (police report) at 2.) The police report makes no reference to a storage case being in Wasylow's bedroom. In any event, I find that this factual discrepancy is not material because Wasylow has admitted pulling the trigger before the gun was ever put inside the box. (Defs.' Mem. Supp. Mot. Summ. J., Ex. B (Wasylow Dep.) at 171-72.) I accept, however, for purposes of this motion, that Wasylow's intention was to pull the trigger because he was preparing to place the gun in the storage container.

the scene and reported a single gunshot wound to the abdomen; the wound appeared to be self-inflicted. (Defs.' Mem. Supp. Mot. Summ. J., Ex. G (police report) at 1-2.) Silvia investigated the premises with Detective Dykas and recovered the Glock Model 21, 45 ACP pistol serial number WC228US, on the floor at the foot of the bed.[3] Id. Sylvia reported one spent shell in the chamber and twelve rounds of similar ammunition in the magazine, which was still in place in the pistol.[4] (Defs.' Mem. Supp. Mot. Summ. J., Ex. G (police report) at 1; Ex. F (Silvia Dep.) at 46.)

B. The Handgun and the Warnings Regarding It

Wasylow purchased the handgun, a semi-automatic pistol, on January 16, 1992, from Foster's Gun Shop in Taunton, Massachusetts. (Defs.' Mem. Supp. Mot. Summ. J. at 3.) Wasylow had used the handgun for target shooting with no malfunction on at least two occasions prior to the incident; he agreed that he liked the "way it handled," and that it was "fine." (Wasylow Dep. at 125.) Wasylow's firearm consultant, Stanton O. Berg ("Berg") has since test fired the handgun and reported that all functions were normal. (Defs.' Mem. Supp. Mot. Summ. J., Ex. H *and* Pl.'s Mem. Opp'n Mot. Summ. J., Ex. E (hereinafter "Berg

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[3]The pistol was removed from the scene by Silvia. (Defs.' Mem. Supp. Mot. Summ. J., Ex. G at 2.) On November 10, 1994, this court granted a protective order directing that the pistol and storage case be retained in the exact condition they were in at the time of the commencement of this action. (Docket #12.)

[4]Viewing the facts in the light most favorable to the non-moving party, I must accept Wasylow's assertion the magazine was *not* in the pistol at the time of the discharge because he had previously removed it. (Pl.'s Mem. Opp'n Mot. Summ. J. at 3; Ex. C at 164.)

report") at 2, 12.)

At the time of purchase Wasylow received 1) an "Instructions for Use" manual ("Instructions manual"), 2) a "Basic Rules of Firearm Safety" booklet ("Basic Rules booklet"), and 3) a storage case with warning labels affixed. (Defs.' Mem. Supp. Mot. Summ. J., Exs. D, E.) The cover of the Instructions manual reads:

> WARNING: READ THIS MANUAL AND ANY ACCOMPANYING LITERATURE BEFORE REMOVING THIS FIREARM FROM ITS PACKAGE.
>
> CAUTION: THIS FIREARM LIKE MOST MODERN REVOLVERS, OR AUTO LOADING PISTOLS, IS DESIGNED WITHOUT AN EXTERNAL MANUAL SAFETY. THEREFORE IT SHOULD BE CONSIDERED AS LOADED AND READY TO FIRE, UNLESS FIRST THE MAGAZINE HAS BEEN REMOVED AND THEN THE CHAMBER CHECKED AND VERIFIED AS EMPTY-UNLOADED.

(bold and capitals in original). Additional warnings and cautions appear on the first page of the manual, including: "your safety and the safety of others (including your family) depends on your mature compliance . . . and constant employment of safe practices," and

> CAUTION: IT IS POSSIBLE THAT A ROUND MAY BE IN THE CHAMBER WHEN A LOADED OR EMPTY MAGAZINE IS BEING REMOVED OR INSERTED. ANY ROUND IN THE CHAMBER WILL DISCHARGE UPON PULLING THE TRIGGER WITH THE MAGAZINE INSERTED OR REMOVED.

(Instructions manual at 1) (capitals in original). Accordingly, the manual warns that the user should use "extreme caution after removing the magazine and personally must verify that the chamber is also empty." Id. Again, the manual instructs that a user should assume the firearm is loaded until he has "inspected the chamber and completed the unloading procedures." Id. Further

safety instructions appear on pages three and five of the Instructions manual:

> THE PISTOL HAS NO OUTSIDE LATERAL SAFETY LEVER AND NO GRIP SAFETY DEVICE. IT IS FIRED LIKE A DOUBLE-ACTION REVOLVER BY SIMPLY PRESSING THE TRIGGER FOR COMMERCIAL USE. ALWAYS KEEP THE GUN UNLOADED. WITH THE GUN LOADED DO NOT TOUCH THE TRIGGER UNLESS YOU INTEND TO FIRE.

(Instructions manual at 5) (emphasis in original).

Additional "General Precautions" admonish: "Handle your pistol as if it were loaded," "Never point your pistol at anything you do not intend to shoot," and "MAKE SURE that no round is in the chamber." (Instructions manual at 5, 9) (emphasis in original). Finally, the manual advises, "Always make sure your pistol is not loaded before cleaning [or] storing . . . ." (Instructions manual at 11.) This warning is repeated in the section describing "unloading" procedures (Instructions manual at 21), and again in the section describing cleaning procedures. (Instructions manual at 23.)

Wasylow also received the Basic Rules booklet, complete with pictures; it warns:

> 1. Handle all firearms as if they were loaded. . . .
> 2. Always keep the firearm pointed in a safe direction. . . . *Remember: You should never point a gun (whether loaded or unloaded) at another person or at yourself.* . . .
> 5. Whenever you handle a firearm, the first thing you should do (while keeping it pointed in a safe direction with your finger outside the trigger guard) is to open the action to determine whether or not the firearm is loaded.
> 6. Thoroughly read the instruction manual supplied with your firearm.

(Basic Rules booklet at 1-3) (emphasis in original).

In addition, bright yellow stickers affixed to the storage case read as follows:

a. **WARNING:** THIS BOX IS DESIGNED TO STORE AN UNLOADED WEAPON ONLY. DO NOT ATTEMPT TO STORE A LOADED WEAPON IN THIS BOX.

b. **DO NOT STORE LOADED PISTOL.** [This appears on two stickers, together with pictorials and the international symbol of "⊘"--for "no"--in red over the loaded chamber.]

c. **DANGER.** If the trigger is in the forward position STOP. The pistol may be loaded!
To unload the pistol, see the instructions on the back of this lid, or manual before proceeding, OR FOR HELP CALL GLOCK, INC. AT (404) 432-1202.
Placing, pushing or forcing the trigger of a loaded pistol against the center post of this container can cause the pistol to fire, causing injury or death. IF YOU ATTEMPT TO STORE A LOADED PISTOL IN THIS CONTAINER, OR PULL THE TRIGGER WITHOUT FIRST FOLLOWING THE UNLOADING PROCEDURES IN THE INSTRUCTION MANUAL, YOU CAN CAUSE INJURY OR DEATH TO YOURSELF OR ANOTHER.

d. **UNLOADING PROCEDURES**
1. Remove magazine by depressing MAGAZINE CATCH.
2. Pull slide back to eject the round which is in the chamber.
3. Check to ensure that there is no round in the chamber.
4. Allow the slide to spring forward by releasing it. Pull the trigger into the full pulled position with weapon pointing in a safe direction.
CAUTION: ALWAYS UNLOAD YOUR PISTOL IMMEDIATELY AFTER USE AND PRIOR TO CLEANING AND STORAGE TO MINIMIZE THE RISK OF ACCIDENTAL DISCHARGE.

e. **WARNING!! DO NOT USE RELOADED OR REMANUFACTURED AMMUNITION!**

(Defs.' Mem. Supp. Mot. Summ. J., Ex. C) (emphasis--capitals and bold--in original; differences in font size are *not* replicated here).

II. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In addition, I must view all facts in the light most favorable to the non-moving party. Woods v. Friction Materials, Inc., 30 F.3d 255, 259 (1st Cir. 1994). However, the existence of an alleged factual dispute will not defeat a motion for summary judgment unless it is related to genuine issue of material fact. Thomas v. Digital Equipment Corp., 880 F.2d 1486, 1489 (1st Cir. 1989) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)). "When a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party bears the burden of proof at trial, there can no longer be a genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." Smith v. Stratus Computer, Inc., 40 F.3d 11, 12 (1st Cir. 1994), cert. denied, 115 S. Ct. 1958 (1995) (citation omitted). Thus, the purpose of summary judgment is to "pierce the pleadings" and determine "whether there is a genuine need for trial." Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990).

III. The Causes of Action

In this diversity action, the parties properly agree that Massachusetts law prevails. The complaint asserts four specific

causes of action within the products liability sphere. He contends that his Glock pistol and storage container (known as a "Glock box") were negligently designed, manufactured, tested, inspected, marketed, and distributed by defendants; that both the pistol and container were unreasonably dangerous; and that both failed to include adequate warnings and instructions.[5] Specifically, Wasylow alleges negligence (Counts I and II), breach of implied warranty of merchantability (Counts III and IV), breach of implied warranty of fitness for a particular purpose (Counts V and VI), and violation of Mass. Gen. L. ch. 93A (Counts VII and VIII).[6] Analytically, these causes of action are distinct yet overlap, and consequently are often confused by the parties as well as in caselaw.[7]

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[5]Wasylow argues that the handgun was negligently designed and unreasonably dangerous because it did not incorporate a manual safety (external device which must be switched off before firing), nor a magazine disconnect (i.e., a device designed to prevent the firearm from discharging when the magazine is not in the firearm).

[6]Wasylow is an individual residing in Taunton, Massachusetts. Glock, Inc. is a corporation with its principal place of business in Smyrna, Georgia. Glock Ges.m.b.H. is a foreign corporation with its principal place of business in Deutch-Wagram, Austria. Both Glock corporations regularly transact business in Massachusetts.

This court has jurisdiction under 28 U.S.C. § 1332(a)(i) and (ii). There is complete diversity and the amount in controversy, exclusive of interest and costs, exceeds $50,000.

[7]I note that both parties fail to discuss the specific causes of action asserted in the eight counts. Instead, Wasylow concentrates solely on the lack of a manual safety/magazine disconnect as alleged defects, cites no cases (other than four cases for the summary judgment standard), and advances essentially a policy argument. On the other hand, Glock concentrates on the pertinent warnings, repetitively citing failure to warn cases. Neither party identifies the elements of

First, as to Counts I and II, Wasylow alleges negligence in design, manufacturing, testing, inspection, distribution, marketing, *and* in failure to warn regarding both the Glock pistol and the storage case. Negligence, in general, requires a duty, breach of duty, cause-in-fact (or "but-for-cause"), and proximate cause (or "legal cause"). "The focus of the negligence inquiry is on the conduct of the defendant. We impose liability when a product's manufacturer or seller has failed to use reasonable care to eliminate foreseeable dangers which subject a user to an unreasonable risk of harm." Colter v. Barber-Greene Co., 403 Mass. 50, 61 (1988); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 96, at 683 (5th ed. 1984).

Second, Wasylow alleges breach of the implied warranty of merchantability in Counts III and IV. This cause of action stands on a different footing, focusing on the product rather than on the conduct of the manufacturer or the user. Colter, 403 Mass. at 61-62. In Massachusetts, the warranty of merchantability is governed by Mass. Gen. L. ch. 106, § 2-314 which provides, *inter alia*, that goods must be "fit for the ordinary purposes for which such goods are used" and must "conform to the promises or affirmations of fact made on the container or label if any." § 2-314(2)(c) and (f). In turn, Massachusetts warranty law has been interpreted as congruent in nearly all respects with the strict liability principles in the

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proof nor analyzes the differences among the four causes of action found in the complaint.

Restatement (Second) of Torts § 402A (1965).[8] Back v. Wickes Corp., 375 Mass. 633, 640 (1978). In other words, although not recognized by name, the Massachusetts products liability claim for breach of the warranty of merchantability "is basically the same as strict liability theory in tort" under Massachusetts law. Hayes v. Douglas Dynamics, 8 F.3d 88, 89 n.1 (1st Cir. 1993) (citation omitted). Therefore, a breach of warranty can occur, regardless of negligence, if either 1) the product is defectively designed, or 2) foreseeable users are not adequately warned. Kearney v. Philip Morris, Inc., 1996 WL 74180 at *2 (D. Mass. Feb. 16, 1996). As with negligence, Wasylow must also prove that Glock's products were--more likely than not--the cause-in-fact, as well as the proximate cause of the injury. Id. at *2, 8; Hayes, 8 F.3d at 89; Lubanski v. Coleco Industries, Inc., 929 F.2d 42, 48 (1st Cir. 1991).

Third, Wasylow alleges breach of the implied warranty of fitness for a particular purpose in Counts V and VI. This warranty is similar to the warranty of merchantability but more narrowly applies "where the seller at the time of contracting has

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[8] § 402A provides:

> Special Liability of Seller of Product for Physical Harm to User or Consumer.
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer . . . .
> (2) The rule stated in Subsection (1) applies although
> (3) The seller has exercised all possible care in the preparation and sale of his product . . . .

reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." Mass. Gen. L. ch. 106, § 2-315. A "particular purpose" differs from the "ordinary purpose" in that it "envisages a specific use by the buyer which is peculiar to the nature of his business." Id., Comment 2.[9]

Fourth, Wasylow alleges a violation of Mass. Gen. L. ch. 93A which declares unlawful unfair methods of competition and unfair or deceptive acts or practices. However, if Wasylow's claims of breach of warranty and negligence fail, the 93A claim fails as well. Kearney, 1996 WL 74180 at *3.

A. Negligence in Manufacturing, Inspection, Testing, Distribution and Marketing

Wasylow fails to set forth *any* facts to support his claim, as to which he bears the burden of proof, that the Glock pistol and the Glock box were negligently manufactured (*or* inspected, tested, distributed or marketed). In fact, Wasylow testified that he had used the handgun for target shooting on at least two occasions prior to the incident with no malfunction or mechanical problems; Wasylow agreed that it was "fine" and that he liked the "way it handled." (Wasylow Dep. at 125.) Moreover, Wasylow's firearm consultant, Berg has since test fired the handgun and reported that all functions were normal. (Berg report at 2, 12.)

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[9]For example, a seller may have knowledge that the ordinary purpose of a pair of shoes is for walking, but that the particular purpose for a certain pair of shoes is for climbing mountains. Mass. Gen. L. ch. 106, § 2-315, Comment 2.

A defect from manufacturing, as opposed to design, occurs when a product differs from identical products issued from the same manufacturer. Back, 378 Mass. at 641. However, the Glock pistol was manufactured exactly as intended, similar to all other "Glock 21" pistols; the same holds true for the Glock box.

Thus, there are no facts by which any reasonable juror could find negligence in the manufacturing and distribution process and thus summary judgment as a matter of law is appropriate.

B. Failure to Warn as Negligence and Breach of Warranty

A manufacturer of a product which the manufacturer "knows or should know is dangerous" is under a duty to give warning of such dangers to persons who foreseeably will come in contact with that product. MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 135 (1985) (citation omitted). Liability for failure to give such warnings may be imposed even if there is no negligent design or manufacture. Laaperi v. Sears Roebuck & Co., 787 F.2d 726, 729 (1st Cir. 1986); Schaeffer v. General Motors Corp., 372 Mass. 171, 173 (1977). The adequacy of the warning must by "comprehensible to the average user," conveying the danger "to the mind of a reasonably prudent person," MacDonald, 394 Mass. at 140, and its forcefulness must be "commensurate with the danger involved." Wolfe v. Ford Motor Co., 6 Mass. App. Ct. 346, 349 (1978). If an adequate warning is supplied, under Massachusetts law there is a presumption that it will be read. Knowlton v. Deseret Medical, Inc., 930 F.2d 116, 123 (1st Cir. 1991).

However, as with all negligence allegations, failure to warn will not constitute negligence if it is not the proximate cause of the plaintiff's injuries. Laaperi, 787 F.2d at 729.

Wasylow argues that "the instructions and warnings provided with the Glock pistol were inadequate and dangerous" (Jt. Pre-Trial Mem. at 1), and that "the Glock box warning provided by the Defendant are [sic] both dangerous, inadequate, and arrogantly used in the face of known hazards." (Pl.'s Mem. Opp'n Defs.' Mot. Summ. J. at 2.) However, given the quantitative and qualitative extent of the warnings as outlined above, I find such assertions not only insupportable but frivolous.[10]

For his part, Wasylow has admitted:

-seeing, but not reading the warnings on the Glock box; (Wasylow Dep. at 175, 240)

-intentionally never reading the Instructions manual or the Basic Rules booklet; (Wasylow Dep. at 86, 130, 250)

-never reading product literature in general, except when he needs to program his VCR; (Wasylow Dep. at 89)

-knowing the gun did not have a manual safety; (Wasylow Dep. at 106-7)

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[10]I am inclined to believe the warnings were greater than were required given the obviousness, as a matter or law, of the dangers inherent in guns. See generally Laaperi v. Sears Roebuck & Co., 787 F.2d 726, 730-32 (1st Cir. 1986). For example, a manufacturer is not required to warn that "placing one's hand into the blades of a potato chopper will cause injury" or that "firing a BB gun at another at close range can injure or kill." Id. at 731 (citations omitted). I find warnings such as "do not point a weapon at anything you do not want to shoot" and "always check to make sure there is no bullet in the chamber" to be similar. "If a manufacturer had to warn consumers against every such obvious danger inherent in a product, 'the list of obvious practices warned against would be so long, it would fill a volume.'" Id. (citation omitted).

-that upon reading the Instructions manual and other warnings--e.g., the admonitions: 1) always to check the chamber and 2) never to point the gun at anything you do not want to shoot--he understood the instructions and warnings; that he is able to follow the instructions and warnings; that they are good safety rules; *and that if he had followed the instructions and warnings the accident would not have occurred.* (Wasylow Dep. at 243-44, 250-56)

-not paying much attention in his four-hour firearm safety class; (Wasylow Dep. at 202).

Thus, although I recognize that the adequacy of warnings is "almost always an issue to be resolved by a jury," MacDonald, 394 Mass. at 140, I find that given the facts before me--especially Wasylow's admissions--no reasonable juror could find a failure to warn. Moreover, Wasylow's deliberate indifference to the warnings constituted the cause-in-fact as well as the proximate cause of his injuries.

For the same reasons, I find no implied breach of warranty for failure to warn.

C. Design Defects

Wasylow's complaint, although obscure, appears to assert both negligent design and defective design as a breach of warranty regarding both the Glock pistol (given no manual safety or magazine disconnect) and the Glock box (given that the trigger may be pushed before fitting the pistol in the box). In a negligence action, Wasylow has the burden to show that the manufacture failed to exercise reasonable care to eliminate avoidable or foreseeable dangers to the user, Uloth v. City Tank Corp., 376 Mass. 874, 880-81 (1978), but there is no duty to design a product that is "risk free" or "risk proof." Morrell v.

Precise Engineering, Inc., 36 Mass. App. Ct. 935, 936 (1994) (citation omitted). "[T]here is a case for the jury if the plaintiff can show an available design modification which would reduce the risk without undue cost or interference with the performance of the machinery." Uloth, 376 Mass. at 881.[11]

Alternatively, in order to prove defective design as a breach of warranty, Wasylow need not prove negligence, but must prove that the design was not "fit" for ordinary usage because of a defect making it "unreasonably dangerous." Colter, 403 Mass. at 61-62.[12]

Under either theory, the defect must have proximately caused the injuries. Lubanski, 929 F.2d at 48.

I find no merit in Wasylow's defective design claims. First, I cannot find that a reasonable juror could conclude that

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[11]Massachusetts law further holds that:

> In evaluating the adequacy of a product's design, the jury should consider, among other factors, 'the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.

Back v. Wickes Corp., 375 Mass. 633, 642 (1978) (citation omitted).

[12]In contrast, a product is "reasonably fit" if the design avoids the "reasonably foreseeable risks attending the product's use . . . ." Back, 375 Mass. at 640-41. For example, the risk that a vehicle may collide with a guardrail is foreseeable, but the risk that a user may drive 100 m.p.h. and crash head-on is not. Id.

it was foreseeable to Glock that, *despite all warnings*, a user would nevertheless fail to check the chamber and proceed to pull the trigger while pointing the gun at his own stomach, and, consequently, that a different design would be required. Thus, the element of proximate cause is lacking.[13]

Second, I note that while an alternative design for the Glock pistol (incorporating a manual safety or magazine disconnect), or for the Glock box (allowing for loaded storage) is economically feasible, the functional purpose of both products would be altered. Glock intentionally designed the Glock 21 pistol, a semi-automatic weapon, *without* a manual safety or magazine disconnect to allow "the best possibility [for] getting off a shot quickly and without having to operate external safety devices."[14] (Instructions manual at 5.) Similarly, the lack of a magazine disconnect allows for firing, if necessary, while in the process of loading or reloading. (Jt. Pre-Trial Mem. at 3.) Thus, unlike, for example, automobile airbags, manual safeties and magazine disconnects affect the *functional capabilities* and

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[13]I note Massachusetts' comparative negligence statute, Mass. Gen. L. ch. 231, § 85, applicable to negligence actions but not to breach of warranty actions, Correia v. Firestone Tire & Rubber Co., 388 Mass. 342 (1983), but conclude that any reasonable juror would find Wasylow *more* than fifty percent responsible, thus barring all recovery. Colter v. Barber-Greene Co., 403 Mass. 50, 62-63 (1988).

[14]Instead, the Glock 21 features three other safeties which function automatically: (1) the trigger safety (external); (2) the firing pin safety (internal); and (3) the drop safety (internal). (Instructions manual at 17; Jt. Pre-Trial Mem. at 2.)

not just the *safety* of the respective products.[15] See also DaRosa v. Remington Arms Co., Inc., 509 F. Supp. 762, 768 (E.D.N.Y. 1981) (finding light trigger tension, with inexpensive alternatives available, not design defect due to its functional purpose).

Third, even if, *arguendo*, the lack of either a manual safety or magazine disconnect constitutes a defect, Wasylow had *full knowledge of such defects* (Wasylow Dep. at 106-7), and "a plaintiff's knowing and unreasonable use of a defective product is an affirmative defense to a defendant's breach of warranty." Colter, 403 Mass. at 60 (citing Correia v. Firestone Tire & Rubber Co., 388 Mass. 342 (1983)); see also Knowlton, 930 F.2d at 120.[16]

Finally, carelessness and misuse cannot transform an obviously--and inherently--dangerous product into a defective, and "unreasonably dangerous" product. Thus, under Massachusetts law:

> Toothpicks, like pencils, pins, needles, knives, razor blades, nails, tools of most kinds, bottles and other objects made of

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[15]As for the Glock box, the present design and accompanying warnings, in fact, appear to address safety considerations by preventing *loaded* storage. I note that Wasylow has presented no safer, alternative designs--apart from the manual safety and magazine disconnect contentions--for the storage case itself. That is an element which is required in a design defect case. Kotler v. American Tobacco Co., 926 F.2d 1217, 1225 (1st Cir. 1990).

[16]Unlike comparative negligence, a user's unreasonable use of an obviously dangerous product *completely bars* recovery in a breach of warranty action. Correia v. Firestone Tire & Rubber Co., 388 Mass. 342, 356 (1983).

> glass, present obvious dangers to users, but they are not unreasonably dangerous, in part because the very obviousness of the danger puts the user on notice. It is foreseeable that some will be careless in using such items and will be injured, but the policy of our law in such cases is not to shift the loss from the careless user to a blameless manufacturer or supplier.

Killeen v. Harmon Grain Products, Inc., 11 Mass. App. Ct. 20, 23 (1980). See also Kearney, 1996 WL 74180 at *12 (discussing authoritative value of Killeen in light of Back and Uloth); Mavilia v. Stoeger Industries, 574 F. Supp. 107, 111 (D. Mass. 1983) ("[T]hat death may result from careless handling of firearms is known by all Americans from an early age"). In other words, Wasylow's misuse of the product, as undeniably established on this record, has been shown as a matter of law to be the proximate cause of his injuries.

The question of fitness for ordinary purposes "is largely one centering around reasonable consumer expectations." Venezia v. Miller Brewing Co., 626 F.2d 188, 190 (1st Cir. 1980). Here, the Glock pistol and Glock box were exactly what they were represented to be, "neither more nor less, with no hidden dangers or unpredictable propensities," Killeen, 11 Mass. App. Ct. at 23, and would fulfill any reasonable consumer's expectations. Thus, I find that Wasylow's design defect claims, whether grounded in negligence or breach of warranty, fail.[17]

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[17] But see LeMaster v. Glock, Inc., 610 So.2d 1336, 1339 (Fla. App. 1 Dist. 1992) (finding genuine issue of material fact existed whether lack of manual safety constituted defect where police officer accidentally fired at suspect).

Prescinding from the precise elements of Massachusetts law of products liability, Wasylow presses a normative argument advocating absolute liability: that the Glock 21 pistol, without a manual safety or magazine disconnect, is unreasonably dangerous as a matter of social policy, regardless of 1) the existence or extent of warnings, 2) Wasylow's failure to read the warnings, 3) the obviousness of the danger, or 4) Glock's intention to design the pistol specifically *without* the manual safety or magazine disconnect. I decline to embrace such an argument.

It is the province of legislative or authorized administrative bodies, and not the judicial branch, to advance through democratic channels policies that would directly or indirectly either 1) ban some classes of handguns or 2) transform firearm enterprises into insurers against misuse of their products.[18] Frustration at the failure of legislatures to enact laws sufficient to curb handgun injuries is not adequate reason to engage the judicial forum in efforts to implement a broad policy change. The reporters for the developing draft American Law Institute RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY have noted that:

> common and widely distributed products such as alcoholic beverages, tobacco, firearms,

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[18]It is similarly not the function of a jury to make and enforce such policy in individual cases. Regardless of Back's discussion on the proper factors for a jury to consider in design defect cases, see above n. 11, the Supreme Judicial Court of Massachusetts has not "totally surrendered to the jury the function of all policy-weighing on which the scope and limits of product design liability depend." Kearney v. Philip Morris, Inc., 1996 WL 74180 at *10 (D. Mass. Feb. 16, 1996).

> and above-ground swimming pools may be found to be defective only upon proof of the [standard elements of products liability claims discussed above]. . . . Absent proof of defect under [such legal principles], however, courts do not impose liability based on a conclusion that an entire product category should not have been distributed in the first instance. That is, courts have not imposed liability for categories of products that are generally available and widely used and consumed, solely on the ground that they are considered socially undesirable by some segments of society. Instead, courts have concluded that the issue is better suited to resolution by legislatures and administrative agencies that can more appropriately consider whether distribution of such product categories should be prohibited.[19]

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[19]I note that, to date, the majority of courts, both state and federal, have rejected the argument that manufacturers should be held absolutely liable for injuries--whether from accidents or criminal misuse--caused by guns. This includes claims based on the lack of manual safeties, distribution policies, the manufacture of inexpensive "Saturday Night Specials," or solely for manufacture of a dangerous product. Because guns are inherently ultrahazardous--designed to kill or wound--there is no safer alternative but elimination of the products altogether. This task, courts have routinely found, is not appropriate for the judiciary. See, under Massachusetts law, Mavilia v. Stoeger Industries, 574 F. Supp. 107 (D. Mass. 1983). See also Shipman v. Jennings Firearms, Inc., 791 F.2d 1532 (11th Cir. 1986); Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985); Martin v. Harrington and Richardson, Inc., 743 F.2d 1200 (7th Cir. 1984); Armijo v. Ex Cam, Inc., 656 F. Supp. 771 (D. N.M. 1987), aff'd, 843 F.2d 406 (1988); Delahanty v. Hinckley, 686 F. Supp. 920 (D.C. 1986), aff'd, 900 F.2d 368 (1990); Patterson v. Rohn Gesellschaft, 608 F. Supp. 1206 (N.D. Tex. 1985); Riordan v. International Armament Corp., 132 Ill. App. 3d 642 (1985); Rhodes v. R.G. Industries, Inc., 173 Ga. App. 51 (1984). See generally Note, Handguns and Products Liability, 97 Harv. L. Rev. 1912 (1984); Donald E. Santarelli and Nicholas E. Calio, Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit, 14 St. Mary's L.J. 471 (1983).

In fact, other than Kelly v. R.G. Industries, Inc., 304 Md. 124 (1985) (finding manufacturer strictly liable for "Saturday Night Special"), the contrary position has been advanced exclusively by law journal articles, which I note, but decline to follow. These articles argue that the manufacturing of handguns should be classified as an ultrahazardous activity, and the cost

§ 2 at c at 21 (Tort. Draft No. 2, 1995).

I find in this case, that as a matter of law Glock is entitled to summary judgment on all claims relating to defective or "inherently dangerous" design.[20]

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of handgun injuries should be imposed on the manufacturers, with the anticipated effect of dampening the market for their sales. See, e.g., Carl T. Bogus, Pistols, Politics and Products Liability, 59 U. Cinn. L. Rev. 1103 (1991); Andrew O. Smith, The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity, 54 U. Chi. L. Rev. 369 (1987); Paul R. Bonney, Manufactures' Strict Liability for Handgun Injuries: An Economic Analysis, 73 Geo. L.J. 1437 (1985); H. Todd Iveson, Manufacturers' Liability to Victims of Handgun Crime: A Common-Law Approach, 51 Fordham L. Rev. 771 (1983); Gerard M. Mackarevich, Manufacturers' Strict Liability for Injuries from a Well-Made Handgun, 24 Wm. & Mary L. Rev. 467 (1983).

[20]I need not conclusively determine the issue of the admissibility of the "expert" report (in non-affidavit form) submitted by Wasylow's firearm consultant, Stephen O. Berg. Rule 702 of the Federal Rules of Evidence requires that the testimony be from a qualified witness who will "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. See generally United States v. Shay, 57 F.3d 126, 133 (1st Cir. 1995) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)); In re Paoli Yard PCB, 35 F.3d 717, 741-52 (3d Cir. 1994), cert. denied, 115 S. Ct. 1253 (1995).

The Berg report establishes several propositions: 1) that an alternative pistol design which incorporates a manual safety and/or magazine disconnect is feasible, 2) the historical emergence of the manual safety (dating back to the Holy Roman Emperor Maximilian I in the fifteenth century), 3) that semi-automatic weapons are more dangerous than double action revolvers, necessitating the need for manual safeties, 4) that semi-automatic weapons have, in the past, incorporated manual safeties, 5) that another Glock model incorporates a manual safety, and 6) that in Berg's opinion, the lack of a manual safety, as well as a magazine disconnect, are design defects.

Glock does not contest any of these propositions, apart from Berg's conclusion. I do not find Berg's conclusion to be based on any particular scientific qualifications; rather it expresses what is essentially a preference for the advantages of additional safety devices. Nevertheless, despite its apparent disabilities and unsworn character, I have considered Berg's report in evaluating whether summary judgment should be allowed. I do not find its conclusory historical and policy based observations

D. Breach of the Implied Warranty of Fitness for a Particular Purpose

Because Wasylow has proffered no evidence to support his claim for breach of warranty for a particular purpose, the claim fails for the same reasons underlying the warranty of merchantability or "ordinary purpose." In fact, it was Glock who designed the Glock 21 pistol with a more narrow purpose in mind, thereby incorporating semi-automatic features. Wasylow cannot advance any particular purpose on which he relied, and for which the pistol was not "fit."

E. Mass. Gen. L. ch. 93A

Because Wasylow has advanced no facts in support of his ch. 93A claim, other than the facts underlying his warranty and negligence claims, the ch. 93A claim also fails. Kearney, 1996 WL 74180 at *3.

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sufficient to overcome the shortcomings in plaintiff's proof. It is barely relevant to the material issues, particularly the fundamental issue of causation. Moreover, as other courts have observed, Berg lacks the specialized scientific qualifications to justify admitting his testimony as expertise under Fed. R. Evid. 702. I consider it likely that I would not permit Berg to testify even if this case were to survive the instant summary judgment motion. But even considering Berg's observation in connection with this motion, I find no basis to conclude that Glock's motion for summary judgment is anything other than well-founded.

IV. Conclusion

For the reasons set forth more fully above, Glock's motion for summary judgement, on all counts, is GRANTED.

Douglas P. Woodlock

DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No.: 02-2
Respondent.	)	

COMPLAINT COUNSEL'S PROPOSED PREHEARING ORDER

A final prehearing conference was held in this matter, pursuant to Rule 21 of the Commission's Rules of Practice for Adjudicative Proceedings (16 CFR 1025.21), on the 21st day of April, 2003 , at 10:00 am (EDT).

Counsel appeared as follows:

For the Commission staff: Eric L. Stone, Esq.
Mark W. Porter, Esq.
Quynh Nguyen, Esq.
Howard Tarnoff, Esq.
Sean Ward, Esq.

For the Respondent: William M. Griffin, III, Esq.
Aaron Locker, Esq.
Jeffrey M. Locker, Esq.
Marianne McBeth, Esq.

Others:

1. Nature of Action and Jurisdiction. By this action, Complaint Counsel seeks an order finding that certain Daisy Powerline Airguns present a substantial product hazard under Section 15(a)(2) of the Consumer Product Safety Act, 15 U.S.C. § 2064(a)(2), and present a substantial risk of injury to children under Section 15(c)(1)-(2) of the Federal Hazardous Substances Act, id. § 1274(c)(1)-(2). The jurisdiction of the Commission is invoked under United States Code, Title 15, Sections 2064 and 1274. The jurisdiction of the Commission is (not) disputed. The question of jurisdiction was decided as follows:

2. Stipulations and Statements. The following stipulations and statements were submitted, attached to, and made a part of this order:

(a) A comprehensive written stipulation or statement of all uncontested facts;

Attached hereto as Exhibit 1.

(b) A concise summary of the ultimate facts as claimed by each party;

Attached hereto as Exhibit 2.

(c) Written stipulation(s) or statement(s) setting forth the qualifications of the expert witnesses to be called by each party;

Attached hereto as Exhibit 3.

(d) Written list(s) of the witnesses whom each party will call, written list(s) of the additional witnesses whom each party may call, and a statement of the subject matter on which each witness will testify;

Attached hereto as Exhibit 4. Complaint Counsel reserves the right to name rebuttal witnesses after it has had an opportunity to review the witnesses listed by Respondent. Consistent with the Court's prior directive on the matter, Complaint Counsel will name rebuttal witnesses by no later than April 21, 2003.

(e) An agreed statement of the contested issues of fact and of law, or separate statements by each party of any contested issues of fact and law not agreed to;

Attached hereto as Exhibit 5.

(f) A list of all depositions to be read into evidence and statements of any objections thereto;

Attached hereto as Exhibit 6. Complaint Counsel reserves the right to designate additional depositions for purposes of rebuttal after it has had an opportunity to review the witnesses and depositions designated by Respondent. Complaint Counsel will make such additional designations by April 21, 2003, unless the Court otherwise directs.

(g) A list and brief description of any charts, graphs, models, schematic diagrams, and similar objects that will be used in opening statements or closing arguments but will not be offered in evidence. If any other such objects are to be used by any party, those objects will be submitted to opposing counsel at least three days prior to the hearing. If there is then any objection to their use, the dispute will be submitted to the Presiding Officer at least one day prior to the hearing;

Attached hereto as Exhibit 7. In addition, consistent with the Court's Order of February 5, 2003, Complaint Counsel's demonstrative exhibits have been compiled in a separate binder for the Court and Respondent's counsel.

(h) Written waivers of claims or defenses which have been abandoned by the parties.

As Complaint Counsel informed Respondent's counsel on April 10, 2003, Complaint Counsel waives the following allegation set forth in paragraph 16 of the Complaint: "Daisy manufactures BBs that are silver in color. The Powerline Airgun's feed ramp is made of zinc material. Due to the color similarity, a user operating the airgun rapidly may not be able to discern the presence of a BB even if he is looking directly into the loading port."

Also on April 10, 2003, Complaint Counsel informed Respondent's counsel of a clarification regarding certain of the Complaint allegations. Specifically, at various points in the litigation of this proceeding, Respondent has suggested that Complaint Counsel has alleged a defect relating specifically to the "gravity feed mechanism" in the Model 880 and Model 856 airguns. In Complaint Counsel's view, the Complaint does not allege a defect relating to the guns' gravity feed mechanism per se, nor will Complaint Counsel offer evidence at trial regarding a defect in the gravity feed mechanism.

The foregoing were modified at the pretrial conference as follows:

(To be completed at the conference itself. If none, recite "none.")

3. Complaint Counsel's Evidence.

An index of Complaint Counsel's proposed trial exhibits is attached hereto as Exhibit 8. Tabbed and indexed binders of the exhibits have been delivered to the Court and to Respondent's counsel.

The Court's Order of February 5, 2003, also directed the parties to provide in separate notebooks, any exhibits or documents intended to be used for cross-examination or rebuttal purposes. Without access to a definitive list of Respondent's intended trial witnesses, Complaint Counsel is unable to comply with that directive at this time. Consistent with the Court's earlier directive regarding the designation of rebuttal witnesses, Complaint Counsel will make such exhibit designations for purposes of rebuttal and cross-examination by April 21, 2002. However, in compiling its proposed trial exhibits, Complaint Counsel attempted to anticipate possible exhibits needed for cross-examination and rebuttal. Accordingly, it is likely that most such exhibits will be drawn from the proposed trial exhibits already designated, which are indexed at Exhibit 8 hereto.

3.1. The following exhibits were offered by Complaint Counsel, received in evidence, and marked as follows:

3.2 The following exhibits were offered by Complaint Counsel and marked for identification. There was reserved to the respondent(s) (and party intervenors) the right to object to their receipt in evidence on the grounds stated:

4. Respondent's Evidence.

4.1 The following exhibits were offered by the respondent(s), received in evidence, and marked as herein indicated:

4.2 The following exhibits were offered by the respondent(s) and marked for identification. There was reserved to Complaint Counsel (and party intervenors) the right to object to their receipt in evidence on the grounds stated:

Consistent with the Court's direction at the April 11, 2003 conference with the parties, Complaint Counsel will make the appropriate objections and/or stipulations of authenticity as to Respondent's proposed trial exhibits by April 18, 2003.

5. Additional Actions. The following additional action(s) were taken:

(Amendments to pleadings, agreements of the parties, disposition of motions, separation of issues of liability and remedy, etc., if necessary)

6. Limitations and Reservations.

6.1 Each of the parties has the right to further supplement the list of witnesses not later than ten (10) days prior to commencement of the hearing by furnishing opposing counsel with the name and address of the witness and general subject matter of his/her testimony and by filing a supplement to this pretrial order. Thereafter, additional witnesses may be added only after application to the Presiding Officer, for good cause shown.

6.2 Rebuttal witnesses not listed in the exhibits to this order may be called only if the necessity of their testimony could not reasonably be foreseen ten (10) days prior to trial. If it appears to counsel at any time before trial that such rebuttal witnesses will be called, notice will immediately be given to opposing counsel and the Presiding Officer.

6.3 The probable length of hearing is __ days. The hearing will commence on the 19th day of May, 2003, at 9:30 o'clock a.m. in the Environmental Protection Agency (EPA) Courtroom, Room 1152, 1201 Constitution Avenue, N.W., Washington, D.C. 20460.

6.4 Motions in limine will be filed not later than 5:00 p.m. on May 2, 2003. Prehearing briefs will be filed not later than 5:00 p.m. on May 9, 2003. All anticipated

legal questions, including those relating to the admissibility of evidence, must be covered by prehearing briefs.

This prehearing order has been formulated after a conference at which counsel for the respective parties appeared. Reasonable opportunity has been afforded counsel for corrections or additions prior to signing. It will control the course of the hearing, and it may not be amended except by consent of the parties and the Presiding Officer, or by order of the Presiding Officer to prevent manifest injustice.

Dated: April ___, 2003

Hon. William B. Moran
United States Administrative Law Judge
Presiding Officer

Approved as to Form and Substance:

Dated: April ___, 2003

Complaint Counsel

Dated: April ___, 2003

Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2003, I caused a copy of the foregoing **Complaint Counsel's Proposed Prehearing Order** to be served upon all parties of record in these proceedings, as follows:

By facsimile (on April 15, 2003) and by Federal Express overnight delivery (on April 16, 2003) to:

Aaron Locker, Esq.
Jeffrey Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

William M. Griffin, III, Esq.
Friday, Eldredge & Clark
2000 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stribling Avenue
Rogers, AR 72756

Attorneys for Daisy Manufacturing Company

By hand delivery to:

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408



Mark W. Porter
Complaint Counsel

EXHIBIT 1

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No.: 02-2
Respondent.	)	

COMPLAINT COUNSEL'S PROPOSED STIPULATIONS OF FACT

Complaint Counsel and Respondent Daisy Manufacturing Co. ("Daisy") stipulate that the following facts are true:

1. Daisy is a Delaware corporation with its principal place of business located at 400 West Stribling Drive, Rogers, AR.

2. Daisy began manufacturing the Daisy Model 880 Powerline airgun in 1972 and continues to manufacture that product.

3. Daisy has manufactured the Daisy Model 880 Powerline airgun under the following model and product numbers: 880, 881, 882, 1880, 1881, 9072, 9082, 9083, 9093, 9393, 9355, 9382, 3305, 3480, 3933, 3934, 1455 and 5150.

4. From 1972 to January 2001, Daisy sold or distributed approximately 4,925,353 Model 880 airguns. In 2001 and 2002, respectively, Daisy sold or distributed 131,620 and 131,241 Model 880 airguns.

5. Daisy began manufacturing the Daisy Model 856 Powerline airgun in 1984 and continues to manufacture that product.

6. Daisy has manufactured the Daisy Model 856 Powerline airgun under the following model and product numbers: 856, 860, 2856, 7856 and 990.

7. From 1984 to January 2001, Daisy sold or distributed approximately 2,353,798 Model 856 airguns. In 2001 and 2002, respectively, Daisy sold or distributed 153,562 and 108,290 Model 856 airguns.

8. Daisy is a "manufacturer," within the meaning of 15 U.S.C. § 2052(a)(4), of Model 880 and Model 856 airguns.

9. The Model 880 and Model 856 airguns are "consumer products" that are "distributed in commerce" within the meaning of 15 U.S.C. §§ 2052(a)(1) and 2052(a)(11).

10. The Model 880 airgun is a multi-pump, pneumatic-powered airgun that is designed to (i) shoot BBs at velocities ranging from 290 feet per second (fps) (at one pump) to 685 fps (at ten pumps) and (ii) shoot pellets at velocities ranging from 260 fps (at one pump) to 665 fps (at ten pumps).

11. As originally designed and manufactured through April 2001, the Model 856 airgun was a multi-pump, pneumatic-powered airgun that was designed to (i) shoot BBs at velocities ranging from 230 fps (at one pump) to 650 fps (at ten pumps) and (ii) shoot pellets at velocities ranging from 210 fps (at one pump) to 630 fps (at ten pumps). One variation of the Model 856 airgun (the Model 990) was designed to be used as both a multi-pump, pneumatic-powered airgun and as a carbon dioxide (CO2) charged airgun.

12. Commencing in April 2001, Daisy ceased manufacturing the Model 856 airgun as a dual-ammunition airgun capable of shooting both BBs and pellets. Since April 2001, Daisy has manufactured the Model 856 airgun as a pellet-only airgun.

13. Daisy is the oldest manufacturer of airguns in the United States.

14. Prior to 1972, Daisy was the leading United States manufacturer of low-powered (*i.e.*, velocity less than 350 fps) BB guns, including the Daisy Red Ryder spring-loaded BB gun. The Daisy Red Ryder spring-action air rifle, using a .177 caliber ball bearing, achieved a maximum muzzle velocity of 280 fps.

15. Prior to the introduction of the Model 880 airgun in 1972, Daisy had not learned of anyone suffering a fatal or life threatening injury after being shot by a Daisy product.

16. Prior to the introduction of the Model 880 airgun in 1972, Daisy did not manufacture a BB gun with a muzzle velocity as high as the Model 880.

17. The Model 880 was developed by Daisy as a multi-stroke pneumatic airgun that would have characteristics similar to the Crosman Model 760 and allow Daisy to compete with the Crosman 760 in the market for high-powered air rifles.

18. Daisy intentionally designed the Model 880 to have a higher velocity than the Crosman 760.

19. One design goal for the Model 880 was to have 15 percent more velocity/stroke than the Crosman 760.

20. In 1972, a velocity check of the Model 880 airgun revealed that two pumps allowed the BB to travel at 378 fps, four pumps allowed the BB to travel at 511 fps, six pumps allowed the BB to travel at 600 fps, eight pumps allowed the BB to travel at 652 fps, and ten pumps allowed the BB to travel at 695 fps.

21. The Model 880 and Model 856 airguns are high velocity airguns that can cause serious injury or death to a person if shot at close range.

22. A BB or pellet fired at 650 fps at another human being can cause serious injury including penetrating abdominal wounds.

23. Ronald Joyce, a product engineer for the Daisy Model 880, knew when the Model 880 was designed that it would have the capability of discharging a BB that could penetrate the human skull.

24. The Model 880 and Model 856 airguns are potentially lethal even when pumped fewer than ten (10) times.

25. Daisy did not incorporate an automatic safety mechanism into the Model 880 or Model 856 airguns.

26. Daisy has used automatic safety mechanisms in other BB guns it has designed or sold.

27. In October 1972, there was no age recommendation on the packaging which accompanied the Model 880.

28. When the Model 880 was first distributed and sold, Daisy provided no warnings to users that the airgun could cause death.

29. Within the first few years of manufacturing the Model 880 airgun, Daisy learned that this gun had caused human death.

30. Daisy did not include warnings with the Model 880 that it could cause death until after Daisy learned of the first death caused by a Model 880.

31. After seeing that the Model 880 airgun had caused human death, Daisy included an age recommendation of 14 years for the Model 880.

32. In the mid-1970's, Daisy raised the age recommendation on the Model 880 from 14 to 16. Daisy's age grading for the Model 880 and Model 856 airguns has remained at age 16 to this day.

33. The Model 880 and Model 856 airguns are multi-pump, pneumatic powered guns, meaning that a user can vary the velocity by the number of times he pumps the gun before firing.

34. Since the products were first designed and introduced in the market, Daisy has never reduced the muzzle velocities of the Model 880 or Model 856 airguns.

35. It has always been technologically feasible for Daisy to control and lower the muzzle velocity of the Model 880 and Model 856 airguns.

36. It has always been technologically feasible for Daisy to manufacture the Model 880 and Model 856 airguns with a reliable automatic safety mechanism that the user must manually turn off in order to fire the gun.

37. Among other uses that Daisy suggests for the Model 880 and Model 856 airguns is use in a basement, garage or other places where it would be improper to shoot a .22 caliber powder gun or a higher caliber powder gun.

38. In the early years of production of the Model 880, Daisy sold 70,000 to 80,000 units, and later sales reached approximately 200,000 units per year.

39. By 1981, the Model 880 was Daisy's largest-selling Powerline product.

40. Daisy does not recommend firing BBs from a Model 880 at a muzzle velocity of 685 fps for target shooting.

41. The Model 880 and Model 856 airguns have a large capacity BB magazine that is gravity fed and then chambered with a bolt action.

42. Daisy owns the copyright for "A Boy is a Boy," by David Brown.

43. Daisy received an in-store marketing survey on domestic airgun sales prepared in or about June 1979 by John W. Ford (the "Ford Survey").

44. The Ford Survey revealed that the average age of youngsters with a serious interest in airguns was age 9 in Tulsa, OK and Dallas, TX, age 10 in Rockford, IL, and age 11 in Milwaukee, WI.

45. The Ford Survey revealed that the average age that "shooters" began to show a real interest in owning a Powerline airgun was 13 in Dallas and Tulsa, 14 in Rockford, and 15 in Milwaukee.

46. Daisy conducted a survey of persons returning Powerline airgun registration cards from September 1976 through July 1980 (the "Daisy Registration Card Survey").

47. Through the Daisy Registration Card Survey, Daisy was aware that approximately half of its Model 880 airguns were registered to children between the ages of 10 and 15.

48. Subsequent to the Daisy Registration Card Survey, Daisy discontinued the collection of registration cards from purchasers and/or users of the Model 880 airgun.

49. In 1980, Marsteller Incorporated performed a study of Daisy's domestic airgun market (the "Marsteller Report"), and Daisy received a copy of the Marsteller Report in 1981.

50. The Marsteller Report revealed that the Daisy Model 880 airgun was more popular among youths than adults.

51. The Marsteller Report identified the following trend in the airgun market: more lads under the age of 18 were buying "adult" airguns such as the Daisy Powerline airguns.

52. The Marsteller Report found that parents identified the Daisy name with lower-powered airguns.

53. The Marsteller Report revealed that Daisy's share of the domestic airgun market was approximately $25 million, of which 63%, or $18.75 million, represented air guns sold that were used by users under the age of 18.

54. The Marsteller Report indicated that many of the warranty card returns for the Model 880 were being returned by children under the age of 15.

55. The Marsteller Report revealed that adults who owned multiple firearms felt that all airguns were suitable for children, particularly those air rifles manufactured by Daisy.

56. According to the Marsteller Report, 82% of the youths surveyed stated that "power" was a reason they bought a Daisy Powerline airgun.

57. According to the Marsteller Report, 80% of the 200 youths surveyed stated they preferred multiple pump guns over single action pump guns.

58. According to the Marsteller Report, 68% of youths surveyed stated that the power of the airgun was "very important" in evaluating an airgun.

59. In the Marsteller Report, 46% of the youths surveyed were under the age of 14.

60. While Daisy does not control the ultimate retail price at which independent vendors sell its products, the suggested retail price for a Model 880 airgun in 1999-2001 was $50.96.

61. While Daisy does not control the ultimate retail price at which independent vendors sell its products, the suggested retail price for a Model 856 airgun in 2001 ranged from $39.95 to $59.95.

62. Daisy has never instructed users not to use non-Daisy brand BBs in the Model 880 and Model 856 airguns.

63. Crosman brand BBs can be used in the Model 880 and Model 856 airguns.

64. Daisy was aware in 1998 that a BB could become stuck between the inner and outer barrels of the Model 856 airgun.

65. Daisy was aware in 1999 that a BB could become stuck between the inner and outer barrels of the Model 856 airgun.

66. The Model 856 design change documented by Engineering Change Notice ("ECN") No. 153763-001, dated August 11, 1998 (Bates No. 003426), was intended, in part, to eliminate the possibility of a BB lodging between the inner and outer barrels of the airgun.

67. The Model 856 design change documented by ECN No. 154436-001, dated March 10, 1999 (Bates No. 003422), was intended, in part, to eliminate the possibility of a BB lodging between the inner and outer barrels of the airgun.

68. The Model 880 airgun has a magazine the borders of which consist of receiver halves, the steel frame, the inner rifle barrel and the valve body. This magazine design is intended to permit BBs to freely move around the inside of the magazine.

69. The Model 856 airgun (prior to its redesign as a pellet-only airgun in April 2001) had a magazine consisting of the interior portion of the cylindrical receiver, which consists of two halves, a casing surrounding the cylindrical pump that holds the projectile propellant, the outer barrel casing, and the inner rifle barrel's forward support tab. This magazine design is intended to permit BBs to freely move around the inside of the magazine.

70. The magazine capacity of the Model 880 is a nominal 50 BBs.

71. The magazine capacity of the Model 880 was changed from a nominal 100 BBs to a nominal 50 BBs in 1994.

72. Prior to its April 2001 redesign as a pellet-only airgun, the magazine capacity of the Model 856 was a nominal 100 BBs.

73. The features of the Model 856 (prior to its redesign as a pellet-only airgun in April 2001) differed from the Model 880 in the following ways:

FEATURE	MODEL 856	MODEL 880
1. Magazine Capacity	Nominal 100	Nominal 50
2. Magazine Length	Approx. 1.80 inches	Approx. 1.23 inches
3. Magazine Width	0.814 inches	Approx. 1.000 inches
4. Floor (bottom) of Magazine	Pump Tube	Square Frame
5. Sides of Magazine	Receiver Halves and Outer Barrel	Receiver Halves
6. Top of Magazine	Receiver Halves and Outer Barrel	Receiver Halves
7. Front End of Magazine	Baffle welded into outer barrel	Webs in forward end of receiver halves
8. BB Feed Ramp Location	Rib on cast valve body	Ribs in left half of plastic receiver
9. Angle of BB Feed Ramp Location	Rib on cast valve body	Ribs in left half of plastic receiver
10. Position of bolt magnet relative to BB entry hole in feed track of valve body, in normal relaxed (not held rearward) position	Magnet covers BB entry hole about 50%	BB entry hole is fully exposed
11. Safety Type	Cross bolt trigger block safety with red warning band located in front portion of trigger guard	Cross bolt trigger block with red warning band located in front portion of trigger guard. Bolt must be opened to cock the gun before gun can be put "ON SAFE."
12. Bolt Open Feature	Trigger is blocked and gun will not fire when bolt is open. Trigger block is glass filled plastic, deactivated when bolt is closed.	Trigger is blocked and gun will not fire when bolt is open. Trigger block is sheet metal, deactivated when bolt is closed.
13. Velocity – fps (feet per second)	Multi-Pump BB Spec. = 230 fps (one pump) to 650 fps (@ ten pumps). Pellet Spec. = 210 fps (one pump) to 630 fps (@ 10 pumps).	Multi-Pump BB Spec. = 290 fps (one pump) to 685 fps (@10 pumps). Pellet Spec. = 260 fps (one pump) to 650 fps (@10 pumps).
14. Energy (Foot Pounds)	BB = 0.63 Ft. Lb. (one pump) to 5.1 Ft. Lb. (@10 pumps). Pellet = 0.91 Ft. Lb. (one pump) to 6.8 Ft. Lb. (@ 10 pumps).	BB = 1.01 Ft. Lb. (one pump) to 5.6 Ft. Lb. (@ 10 pumps). Pellet = 1.2 Ft. Lb. (one pump) to 7.6 Ft. Lb. (@ 10 pumps).
15. Firing System	Hammer fired "knock off" type valve. Valve recoils immediately after firing	Sear operated valve operating system with valve remaining open after firing until bolt is

	without bolt reactivation. Gun may immediately be pumped without bolt having to be opened.	opened to recock sear. Gun will not pump until bolt has been opened to allow valve to close.
16. Barrel Length	19.07 inches	20.57 inches
17. Trigger Pull Length	13.4 inches	13.6 inches
18. Overall Length	37.4 inches	37.6 inches
19. Slight Radius	Ramp and blade.	Hood front sign with blade and ramp.
20. Weight	2.7 lbs.	3.7 lbs.
21. Pump Lever	Forearm	Lever with integral handle
22. Pump Force (maximum)	20 lbs.	18.5 lbs.

EXHIBIT 2

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No.: 02-2
Respondent.	)	

COMPLAINT COUNSEL'S SUMMARY OF THE ULTIMATE FACTS

1. Daisy Manufacturing Company, Inc. (Daisy) is a manufacturer of certain Model 880 and Model 856 Powerline Airguns ("Powerline Airguns").

2. Daisy distributed these airguns to retailers, including large discount and general merchandisers located throughout the United States, who sold the guns to consumers.

3. Daisy initially sold these guns without age recommendations, and later with a recommendation that they be used by youth and children age 14 and above, and finally, with a recommendation for use by those age 16 and above.

4. A large proportion of these guns were sold to or used by youth and children younger than the recommended ages.

5. The Powerline Airguns were and are used by consumers (including children) in or around a household or residence, and in recreational activities such as target shooting and "plinking".

6. The Daisy Powerline Airguns shoot projectiles such as BBs and pellets at velocities that can penetrate the body sufficiently to cause grievous injury or death and have caused grievous injuries and deaths.

7. The Powerline Airguns have a magazine defined generally by the receiver halves, the barrels, and the pump housing that can be filled with BBs.

8. The Powerline Airguns do not have an automatic safety to prevent a loaded gun from being fired until the safety is intentionally turned-off by the user.

9. It was technically and economically feasible to install an automatic safety device into the Powerline Airguns.

10. Other airguns, manufactured by Daisy and several of its competitors, contain automatic safeties to prevent unintentional discharge of a BB or other projectile.

11. Daisy knew at the time it designed these Powerline guns that children and other airgun users engaged in horseplay, do not always use manual safeties, sometimes carry guns with their fingers on, or in proximity to, the trigger, and do not always control the direction of the muzzle.

12. It is foreseeable that a child or other consumer, handling a loaded and cocked Powerline airgun without an engaged safety, will accidentally fire that weapon.

13. Unintentional discharge of a BB or pellet from a Powerline Airgun can cause serious, grievous, and even fatal injuries if a human being is in the path of the discharged BB or pellet.

14. Those who use the Powerline Airguns are unlikely to read much, if any, of the instruction booklet and warnings.

15. Daisy's instruction booklet tells a consumer how to determine whether the gun is empty by dry firing the gun.

16. Daisy's instructions for loading and firing, located on the Powerline Airgun itself, do not tell the user to look into the loading chamber to see if there is a BB ready to be loaded into the chamber.

17. A BB can lodge in the Model 856 airguns between the inner and outer barrels.

18. In Model 856 versions made prior to Daisy's redesign of the gun's baffle in 1999, a BB can lodge between the tab of the baffle and the inner barrel.

19. Daisy modified the design of the Model 856 airgun in both 1998 and 1999 in attempts to prevent lodging of BBs in that model.

20. Daisy redesigned the model 856 airgun in 2001 to make it a pellet-only product.

21. A BB that is smaller than specified in the ASTM voluntary standards can lodge in the Model 880 airgun between the inner barrel and a hole in the frame directly behind the BB loading port.

22. A BB that does not meet ASTM standards can lodge in Model 880 airguns between the inner barrel and the frame in a hole directly behind the BB loading port.

23. Daisy's operation manual for the Model 880 and 856 Powerline Airguns do not specify that users must use a particular brand of BBs with the airguns.

24. It is both possible and foreseeable to load more than 100 BBs into a Model 856 airgun and a pre-1994 Model 880 airgun, and to load more than 50 BBs into a post-1994 Model 880 airgun.

25. The application of a small amount of force can dislodge a lodged BB in Model 880 and 856 airguns, allowing the formerly lodged BB to fire, if the user proceeds through the loading and firing procedures following dislodgement.

26. Parents, youth and children do not have a full appreciation of the degree of hazard posed by these high powered Powerline Airguns.

27. The children and youth using the airguns do not have a full appreciation of the concept that a gun that has been dry fired and otherwise appears to be unloaded may, in fact, contain a BB.

28. Children and youth engage in activities such as dry firing Powerline Airguns at each other, and this is foreseeable conduct.

29. A child or other gun user who believes a Powerline Airgun is not loaded, may inadvertently load a lodged BB that has become dislodged within the gun.

30. It is foreseeable that a user of the gun is not going to be looking into the loading port each time he go through the loading and cocking procedure.

31. It is foreseeable that a user of the Powerline Airgun, thinking the gun is unloaded, will fire the gun in the direction of another person.

32. If a user fires what he thought was an empty Powerline airgun at another person, that person may be killed, maimed, or seriously injured by the BB.

EXHIBIT 3

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No.: 02-2
Respondent.	)	

SUMMARY QUALIFICATIONS OF COMPLAINT COUNSEL'S EXPERT WITNESSES

J. William Morris, Sc.D.

Dr. J. William Morris received a B.S. in Metallurgical Engineering in 1964 and an Sc.D. in Materials Science in 1969 both from the Massachusetts Institute of Technology. He was employed at the Bell Aerospace Company in Buffalo, NY from 1968 through 1971 as a Research Scientist (1968-1970) and as a Materials Science Manager (1970-1971). In 1971, Dr. Morris joined the faculty of the Department of Materials Science and Engineering at the University of California at Berkeley. He has been a full Professor of Metallurgy, Materials Science and Mineral Engineering since 1977. Professor Morris has taught numerous science courses, including, "The Structure and Property of Materials" and "Statistical Mechanics." In 1971, Dr. Morris also joined the staff of the Material Science Division of Lawrence Berkeley Laboratory where he has been a Principal Investigator (1971-1978) and a Faculty Senior Scientist (1978-present).

Dr. Morris has edited one technical book, he has received two patents, and he has published over 350 technical articles in peer-reviewed scientific journals.

Among the awards and honors that Dr. Morris has received for his teaching and engineering research are: Fellow, The Metallurgical Society (TMS, 2001); Excellence in Teaching and Research Award, AT&T Foundation (1989); Fellow, American Society of Metals (1987); and Technology Magazine's Technology 100 Citation for Advancement of Technology in the United States (1981).

Dr. Morris is a member of the following professional societies: American Society of Metals (ASM); The Metallurgical Society, American Institute of Metallurgical Engineering (TMS-AIME); the American Physical Society (APS); The Iron and Steel Institute of Japan (ISIJ); and The Material Research Society (MRS). Administrative positions he has held in these professional societies include Chairman, Chemistry & Physics of Metals Committee TMS-AIME (1978-1980); Chairman, Publications Committee, TMS-AIME (1978-1979); and Member, Mechanical Properties Committee, TMS-AIME (current). Dr. Morris also holds editorial positions on the ASM and TMS and various international metallurgical and materials science advisory boards

Charles E. Irwin, M.D.

Charles E. Irwin, M.D., is a practicing pediatrician and Professor of Pediatrics in the Department of Pediatrics, Division of Adolescent Medicine, at the University of California, San Francisco. Dr. Irwin received his M.D. in 1971 from the University of California, San Francisco, where he also completed his internship and residency.

Currently president of the Society of Adolescent Medicine, Dr. Irwin has been the principal or co-investigator on numerous research grants concerning adolescent behavior, including studies of adolescent risk perception. Dr. Irwin has published widely in the field of adolescent medicine, including peer-reviewed articles relating to the psychosocial context of

adolescent risk-taking behaviors. He has been a frequent lecturer and speaker on the biological, psychological and social correlates of risk-taking behavior during adolescence.

Arthur D. Fisk, Ph.D., CHFP

Dr. Arthur Fisk is a Professor and Coordinator of the Engineering Psychology Program at the Georgia Institute of Technology in Atlanta, GA. He received his Ph.D. in Experimental Psychology from the University of Illinois in 1982. Before his academic career, Dr. Fisk was a Manager, Human Factors Engineering, at American Telephone & Telegraph Co., Inc.

Dr. Fisk has authored and co-authored numerous peer reviewed articles in the fields of engineering psychology and human factors. He is a member of several scientific societies, including the American Psychological Association, the Human Factors and Ergonomics Society, and the Psychonomic Society. He is a fellow of the American Psychological Association and of the Human Factors and Ergonomics Society.

Dr. Fisk is a Past President of the Human Factors and Ergonomics Society and a Past President of the American Psychological Association's Division of Applied Experimental and Engineering Psychologists. He served as Editor of the scientific journal, *Human Factors*, and has served on the editorial boards of numerous scientific journals.

Stanton O. Berg

Stanton O. Berg has been qualified as an expert numerous times in the field of historical firearm and airgun research. He has been qualified in the area of research into the origin, history and "State of the Art" of safeties and safety systems. Mr. Berg has handled over 925 firearms cases since 1961. He has been qualified as a firearms expert in hundreds of cases since 1963. He has testified as an expert at trial 119 times and 232 times in depositions. Since 1961, Mr. Berg has spent approximately 96,720 hours studying, researching, examining, testing,

disassembling and reassembling firearms. He has disassembled and reassembled over 1,000 guns during this time. Mr. Berg has also conducted many thousands of laboratory test firings in his own laboratory where he has velocity testing and bullet recovery equipment. Mr. Berg has a reference collection of over 160 firearms and sixty-one different makes and models of airguns. Thirty-two of his airguns have automatic safeties. He has been retained by sixteen firearms and ammunition manufacturers to act as a consultant in firearms product liability accident cases.

Mr. Berg has published nineteen papers and articles on safety design systems, mainly in the Association of Firearm and Tool Mark Examiners Journal. He has presented technical papers at twenty-six Forensic Science Conferences (including international conferences in Germany, Canada, Norway, England and Scotland) specifically about safety systems, nineteen of which have been published. Mr. Berg has served as the chairman of the firearms sessions at four international meetings in Forensic Science in Scotland, Switzerland, Norway and Germany.

Mr. Berg has been a member of the American Society for Testing and Materials (ASTM) since 1989. He has served on the following committees for standards development: Committee E-30 on Forensic Sciences (Subcommittee E-30.01 on Criminalistics); Committee F-15 Consumer Products (Subcommittee F-15.06 on Non Powder Gun Products; and Committee F-15 Consumer Products (Subcommittee F-08.24 Paintball Guns and Systems). Mr. Berg is also a member of the following professional associations: American Academy of Forensic Science (Fellow), American College of Forensic Examiners (Life Fellow of the College), Forensic Science Society, Association of Firearm and Tool Mark Examiners (Life-Distinguished Member), International Association of Forensic Sciences, International Association for Identification (Life-Distinguished Member), Minnesota Division of the IAI (Life Member),

International Wound Ballistics Association and the Midwestern Association of Forensic Scientists.

Michael A. Greene, Ph.D.[1]

Dr. Greene has been a Mathematical Statistician with the CPSC since April 1998. He received his doctorate in 1977 from Carnegie-Mellon University, specializing in the areas of statistics and operations research. From 1994 to the present, Dr. Greene has held positions as a statistician and/or statistical analyst. He has published a number of articles in the area of statistics and epidemiology. He has been a journal referee for a number of scientific journals, including *Accident Analysis and Prevention*. From 1984 to 1994, Dr. Greene was an Associate Professor of Statistics in the Department of Mathematics and Statistics at The American University in Washington, DC.

[1] Dr. Greene's testimony is the subject of a Motion for Leave to Designate an Additional Expert Witness, which was filed and served by Complaint Counsel on April 15, 2003. Dr. Greene will testify in Complaint Counsel's affirmative case if the Court grants that motion.

EXHIBIT 4

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No.: 02-2
Respondent.	)	

COMPLAINT COUNSEL'S WITNESS LIST

At trial, Complaint Counsel expects to call the following witnesses in its case-in-chief, though not necessarily in the order presented below:[1]

1. J. William Morris, Sc.D.
   Professor of Metallurgy
   University of California, Berkeley

   To testify concerning the propensity for BB lodging in the Daisy Model 880 and Model 856 airguns.

2. Charles E. Irwin, M.D.
   Professor of Pediatrics
   University of California, San Francisco

   To testify concerning adolescent psychosocial development and its effect on risk perception and behavior by adolescent users of the Daisy Model 880 and 856 airguns.

3. Stanton O. Berg
   Firearms Consultant
   (b) (6) [redacted]

[1] Complaint Counsel reserves the right to name rebuttal witnesses after it has had an opportunity to review the witnesses listed by Respondent. Consistent with the Court's prior directive on the matter, Complaint Counsel will name rebuttal witnesses by no later than April 21, 2003.

To testify, based on his knowledge of the field of historical firearm and airgun research, concerning the availability of airguns and firearms equipped with automatic safety mechanisms.

4. Arthur D. Fisk, Ph.D.
Professor of Engineering Psychology
Georgia Institute of Technology

To testify concerning the efficacy of Daisy's system of product warnings and instructions accompanying the Model 880 and Model 856 airguns.

5. Michael Greene, Ph.D.[2]
Directorate for Epidemiology
Division of Hazard Analysis
U.S. Consumer Product Safety Commission

To testify concerning the frequency of, and probabilities related to, BBs of dimensions capable of lodging in the Daisy Model 880 airgun.

6. Catherine A. Sedney
Directorate for Engineering Sciences
Division of Human Factors
U.S. Consumer Product Safety Commission

To testify concerning the efficacy of Daisy's system of product warnings and instructions accompanying the Model 880 and Model 856 airguns. Also, to authenticate Commission staff prepared in-depth investigations (IDI's) of product-related injuries that are offered as evidence by Complaint Counsel.

7. Dennis Blasius
Associate Regional Director
Directorate for Field Operations
U.S. Consumer Product Safety Commission

To testify concerning the process by which the Commission staff prepares in-depth investigations (IDI's) of product-related injuries, and to authenticate the IDI's offered as evidence by Complaint Counsel.

8. Ronald W. Joyce
(b) (6)

(former Daisy draftsman and product engineer)

[2] Dr. Greene's testimony is the subject of a Motion for Leave to Designate an Additional Expert, which was filed and served by Complaint Counsel on April 15, 2003. Dr. Greene will testify in Complaint Counsel's affirmative case if the Court grants that motion.

To testify concerning the design, manufacture, and operation of the Daisy Model 880 and 856 airguns, and the operation manuals accompanying the products. Also, to testify concerning the authenticity of Daisy design drawings, engineering change notices, memoranda, and other documents.

9. Richard I. Daniel
(b) (6)

(former Daisy Vice-President of Research, Vice-President of Manufacturing, and President)

To testify concerning the design, manufacture, operation, marketing, and user population of the Daisy Model 880 and 856 airguns. Also, to testify concerning the authenticity of Daisy memoranda and other documents, and documents created by companies commissioned by Daisy to conduct research and marketing.

10. Guy E. Braughler
(b) (6)

(former Daisy Vice President of Research and Director of Product Evaluation)

To testify concerning the design, manufacture, and operation of the Daisy Model 880 and 856 airguns. To testify about the Operation Manuals for the Daisy Model 880 and 856 airguns. Also, to testify concerning the authenticity of Daisy design drawings, memoranda, and other documents.

11. Theresa L. Wrazel
Draftsperson & Engineering Technician
Daisy Manufacturing Company
400 West Stribling Drive
Rogers, AR 72756

To testify concerning the design and manufacture of the Daisy Model 880 and 856 airguns. Also, to testify concerning the authenticity of Daisy design drawings, engineering change notices, memoranda, and other documents.

12. Clayton L. Williams
Engineering and Plant Manager
Daisy Manufacturing Company
400 West Stribling Drive
Rogers, AR 72756

To testify concerning the design and manufacture of the Daisy Model 880 and 856 airguns. Also, to testify concerning the authenticity of Daisy design drawings, engineering change notices, memoranda, and other documents.

13. E. Lynn Scott
(b) (6)

(former Daisy Vice-President of Sales and Marketing and former member of the Daisy Board of Directors)

To testify concerning the marketing and user population of the Daisy Model 880 and 856 airguns. Also, to testify concerning the authenticity of Daisy memoranda and other documents, and documents created by companies commissioned by Daisy to conduct research and marketing.

Depending on Respondents' willingness or ability to authenticate certain of Complaint Counsel's proposed trial exhibits, Complaint Counsel reserves the right to name the following witnesses solely for the purpose of exhibit authentication:

14. In-house drawing technician(s) (to be named)
Daisy Manufacturing Company
400 West Stribling Drive
Rogers, AR 72756

To testify regarding the authenticity of certain engineering drawings and documents, including engineering change notices.

15. Document Custodian (to be named)
Sun Manufacturing, Inc. (a Daisy component part manufacturer)
P.O. Box 1960
Broken Arrow, OK 74013

To testify regarding the authenticity of certain engineering drawings and documents, including engineering change notices.

16. Document Custodian (to be named)
Cramer-Krasselt, or its successor firm (a marketing firm used by Daisy)
225 North Michigan Avenue
Chicago, IL 60601

To testify regarding the authenticity of certain marketing studies and documents.

17. Document Custodian (to be named)
Ackerman McQueen, Inc. or its successor firm (a marketing firm used by Daisy)
1601 NW Expressway
Suite # 1100
Oklahoma City, OK

To testify regarding the authenticity of certain marketing studies and documents.

18. Document Custodian (to be named)
Burson-Marsteller, Inc. or its successor firm (a marketing firm used by Daisy)
208 South LaSalle Street
Chicago, IL 60604-1135

To testify regarding the authenticity of certain marketing studies and documents.

EXHIBIT 5

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No.: 02-2
Respondent.	)	

COMPLAINT COUNSEL'S
PROPOSED ISSUES OF FACT AND LAW

1. Is Daisy a "manufacturer" within the meaning of 15 U.S.C. § 2052(a)(4)?

2. Are Daisy Model 880 and Model 856 Powerline Airguns ("Powerline Airguns") "consumer products" that are "distributed in commerce" within the meaning of 15 U.S.C. §§ 2052(a)(1) and (11)?

3. Are Powerline Airguns used by children in or around households and residences, and in recreational activities such as target shooting and "plinking"?

4. Do children and youth below the recommended age constitute a large proportion of Powerline Airgun consumers and/or users?

5. Can Powerline Airguns shoot projectiles such as BBs and pellets at velocities that can penetrate the body sufficiently to cause grievous injury and death?

6. Has use of those guns in fact resulted in grievous injuries and deaths?

7. Is it reasonably foreseeable that children and other Powerline Airgun users sometimes engage in horseplay with the guns, do not always use the manual safeties, sometimes carry the guns with their fingers on, or in proximity to, the trigger, and do not always control the direction of the gun muzzle?

8. Was it technologically and economically feasible for Daisy to incorporate an automatic safety into the design of the Powerline Airguns?

9. Do other airguns, manufactured by Daisy and others, contain automatic safeties to prevent unintentional discharge of a BB or other projectile?

10. Does Daisy's failure to incorporate an automatic safety in the design of the Powerline Airguns constitute a design defect under Section 15 of the Consumer Product Safety Act (CPSA) and/or Section 15 of the Federal Hazardous Substances Act (FHSA)?

11. As a result of the design and manufacturing variances of the Powerline Airguns, can BBs become lodged in the guns' receivers during routine use?

12. Can BB lodging foreseeably lead consumers to believe that the Daisy Powerline Airguns are empty when, in fact, they are not?

13. Can a BB lodged in the receiver of a Powerline Airgun become unlodged in routine use and then feed into the loading chamber and be fired?

14. Is it reasonably foreseeable that consumers, particularly children and adolescents, believing the gun to be unloaded, will operate the Daisy Powerline Airgun rapidly and not continue to check the loading port to determine whether BBs are feeding into the chamber?

15. Does Daisy's design rely unduly on a consumer to check for the presence of a BB in the loading port, while failing to instruct users (through the operation manuals and on-product warnings) to check the loading port before firing the airgun?

16. Is it reasonably foreseeable that consumers, particularly children and adolescents, will be less careful with an airgun they believe to be unloaded?

17. As a result of the design and manufacturing variances of the Powerline Airguns, which permit BBs to become lodged in the receiver, are the guns rendered defective under Section 15 of the Consumer Product Safety Act (CPSA) and/or Section 15 of the Federal Hazardous Substances Act (FHSA)?

18. Do the defects in the Powerline Airguns create a substantial risk of injury and a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2)?

19. As a result of the defects in the Powerline Airguns, the number of Powerline Airguns distributed in commerce, and the likelihood of serious injury or death, especially to children, do these airguns present a substantial risk of injury to children under Sections 15(c)(1)-(2) of the FHSA, 15 U.S.C. §§ 1274(c)(1)-(2)?

EXHIBIT 6

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No.: 02-2
Respondent.	)	

COMPLAINT COUNSEL'S LIST OF DEPOSITIONS

At trial, Complaint Counsel anticipates using portions of the depositions named below. However, the list below may change depending on the witnesses called by Respondent and the availability of witnesses named by Complaint Counsel in this Proposed Prehearing Order.

1. Guy E. Braughler
2. Richard I. Daniel
3. Jay DeMarco
4. Timothy Hart
5. Ronald W. Joyce
6. Marc Schoem
7. E. Lynn Scott
8. Joe V. Scott
9. Catherine Sedney
10. Duncan Scott Snyder
11. Clayton Williams
12. Theresa Wrazel
13. Richard Wright

EXHIBIT 7

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No.: 02-2
Respondent.	)	

COMPLAINT COUNSEL'S LIST OF DEMONSTRATIVE EXHIBITS

Complaint Counsel expects to use the following demonstrative exhibits and exemplars at trial:

1. Nine (9) charts summarizing relevant data relating to deaths and injuries involving Daisy Model 880 and 856 Powerline Airguns, a copy of which has been included in a demonstrative exhibit binder to be filed with the Court and exchanged with Respondent's counsel.

2. A multi-page Powerpoint presentation to be used in conjunction with the expert testimony of Dr. Arthur D. Fisk, a copy of which has been included in a demonstrative exhibit binder to be filed with the Court and exchanged with Respondent's counsel.

3. Various exemplars of Daisy Powerline Model 880 and 856 Airguns, which have been described in a two-page chart included in a demonstrative exhibit binder to be filed with the Court and exchanged with Respondent's counsel. These exemplars are available for inspection by Respondent and its counsel prior to trial.

4. Various exemplars of out-of-specification BBs used in testing that supports the expert testimony of Dr. J. William Morris. These exemplars are available for inspection by Respondent and its counsel prior to trial.

EXHIBIT 8

IN THE MATTER OF DAISY MANUFACTURING
COMPANY d/b/a Daisy Outdoor Products
U.S. CPSC Docket No. 02-2

List of Exhibits

(Volume I)

Exhibit 1 – ASTM Safety Specification for Non-Powder Guns F 589-00 (10 pages)

Exhibit 2 – ASTM Safety Specification for Non-Powder Gun Projectiles and Propellants F 590-92 (8 pages)

Exhibit 3 – American Gunsmith – Converting a Manual Safety to Automatic on O/U Shotguns dated 3/03 – depo ex. 1 (4 pages)

Exhibit 4 – Daisy website – Winchester air rifles dated 3/6/03 – Galan depo ex. 3 (4 pages)

Exhibit 5 – Report by Jess Galan in Mahoney dated 7/31/00 – Galan depo ex. 9 (Bates # 36234-36244)

Exhibit 6 – Report by Jess Galan in Wild dated 7/23/98 – Galan depo ex. 10 (Bates # 4464-4470)

Exhibit 7 – Supplemental Report by Jess Galan in Wild dated 8/2998 (Bates # 3470-3475)

Exhibit 8 – Report by Jess Galan dated 4/9/01 – Galan depo ex. 11 (Bates # 40948-40955)

Exhibit 9 – Report by Jess Galan in Swix dated 8/19/02 – Galan depo ex. 12 (Bates # 3851-3862)

Exhibit 10 – Report by Jess Galan in Heim undated – Galan depo ex. 13 (Bates # 24697-24703)

Exhibit 11 – Memo from Hank Waring to Earl Fischer, et al. dated 7/13/71 re Project Number 69-138 – Daniel depo ex. 1 (one page)

Exhibit 12 – Memo from Guy Braughler to Henry Warning dated 11/2/71 re Multi-Stroke Safeties (Bates # 6488-6491)

Exhibit 13 – Memo from Guy Braughler to Henry Waring dated 2/4/72 re 880 Design Review – Plaintiff's depo ex. 13 (Bates #31267-31269)

Exhibit 14 – Memo from Richard Daniel to File dated 7/12/76 re Guy Braughler 880 Design Review Memo – Daniel depo ex. 4 (Bates # 31311)

Exhibit 15 – Memo from Richard Daniel to File dated 7/12/76 re Guy Braughler Multi-Stroke Safeties Memo – Daniel depo ex. 5 (2 pages)

Exhibit 16 – Memo from Richard Daniel to Henry Waring dated 5/7/81 re Guy Braughler's 880 Design Review Memo (Bates # 31338-31339)

Exhibit 17 – Memo from Richard Daniel dated 5/8/81 re Guy Braughler's Multi-Stroke Safeties Memo – Daniel depo ex. 7 (Bates # 31340-31341)

Exhibit 18 – Memo from Henry Waring to Guy Braughler dated 8/1/73 re Model 880 Lever Handle Label – Daniel depo ex. 8 (Bates # 31307)

Exhibit 19 – Memo from Guy Braughler to Henry Waring dated 8/6/73 re Model 880 Lever Handle Label – Daniel depo ex. 9 (Bates # 31308)

List of Exhibits

(Volume I)

Exhibit 20 – Memo from Hank Waring to Earl Fischer dated 8/3/71 re Multi-Stroke Program and Sears Input – Joyce depo ex. 1 (one page)

Exhibit 21 – Memo from Richard Daniel to Sheldon Baker et al dated 9/20/71 re Multi-Stroke Gun – Joyce depo ex. 2 (one page)

Exhibit 22 – Memo from Thomas Cisar to Richard Daniel dated 10/1/71 re Multi-Stroke Gun – Joyce depo ex. 3 (1-4) with attached memo from Earl Fischer (Bates # 1353-1356)

Exhibit 23 – Product Specification dated 10/11/71 re Pneumatic Pump-Up BB and Pellet Rifle (Bates # 1357)

Exhibit 24 – Work Schedule For Pneumatic Rifle – 69 –138 dated 11/3/71 – Joyce depo ex. 4 (one page)

Exhibit 25 – Memo from Guy Braughler to Henry Waring dated 11/6/71 re Multi-Stroke – Joyce depo ex. 6 (3 pages)

Exhibit 26 – Memo from Earl Fischer to Henry Waring dated 11/18/71 re Braughler Multi-Stroke Design Review Memo (Bates # 31262-31263)

Exhibit 27 – 880 Additional Testing dated 3/10/72 – Joyce depo ex. 8 (one page)

Exhibit 28 – Memo from Richard Daniel to Sheldon Baker et al dated 3/14//72 re Production Rate Model 880 Gun – Joyce depo ex. 7 (one page)

Exhibit 29 – Product Planning Meeting Minutes dated 3/24/83 re Decision Point 4 and 5 on Model 860 – Joyce depo ex. 11 (5 pages)

Exhibit 30 – Comparison of Daisy Model 860 and Crosman 760 Performance by W.J. Myers dated 3/23/83 re velocity (3 pages)

Exhibit 31 – Daisy Design Specification prepared by W.J. Myers dated 12/10/81 – Joyce depo ex. 12 (Bates # 7821-7828)

Exhibit 32 – 860 Specification Performance Test dated 1/14/91 – Joyce depo ex. 13 (Bates #2414)

Exhibit 33 – Memo from Hang Waring to Earl Fischer dated 7/13/71 re Multi-Stroke Gun Project Number 69-138 – Joyce depo exhibit 34

Exhibit 34 – Memo from William H. Cole to Douglas Runnels dated 9/21/71 re Sears/Daisy "Power Pump Gun – Daniel depo ex. 3 (Bates #2146)

Exhibit 35 – Memo from Ron Joyce to Steve Cherry et al dated 4/13/94 re 880 with Plastic Receiver Halves (Bates # 29781)

Exhibit 36 – Memo from Henry Waring to R&D Personnel dated 9/24/71 re "Power Pump" – Multi-Stroke Pneumatic Gun – Joyce depo ex 39 (one page)

Exhibit 37 – Memo from Richard Daniel to Sheldon Baker et al dated 9/20/71 re Multi-Stroke Gun – Braughler depo ex 4 (one page)

List of Exhibits

(Volume I)

Exhibit 38 – Memo from Henry Waring to Guy Braughler dated 3/15/72 re Model 880 Operating Procedure – Braughler depo ex. 4 (Bates # 31278-31284)

Exhibit 39 – Significant Changes in Model 880 From First Production, undated (Bates # 31361 – 31364)

Exhibit 40 – All Changes Model 990 from first production to March 1999 dated 3/99 (one page).

Exhibit 41 – Product Specifications for Pneumatic pump-up BB and Pellet Rifle dated 7/28/71 (Bates # 31231-31233)

Exhibit 42 – 880 Product Specification dated 11/18/82 (Bates # 002943)

Exhibit 42A – 880 Product Specification dated 11/18/82 (Bates # 002944)

Exhibit 43 – Daisy Pneumatic Pump Gun Specification for Model 880 undated (Bates # 31353-31354)

Exhibit 44 – Product Specification for Model 880 dated 7/29/74 (Bates # 31355-31356)

Exhibit 45 – H.W. White Laboratory Comparison tests of Daisy Power King 880and Crosman 760 dated 7/25/72 (Bates # 31357-31360)

Exhibit 46 – Letter from Dale Reinecker to Mr. Martin dated 6/29/72 re model 880 testing (Bates # 31292)

Exhibit 47 – Letter from Dale Reinecker to Mr. Martin dated 7/12/72 re model 880 testing (Bates # 31393)

Exhibit 48 – Letter from Aaron Locker to J. DeMarco dated 8/15/95 re responding to prior letter with list of significant changes in 880 from first production – Joyce depo ex. 44 (5 pages)

Exhibit 49 – Letter from Ron Joyce to Christopher Pittman dated 7/24/98 re 856 gun exam in Wild – Joyce depo ex. 43 (5 pages)

Exhibit 50 – Life test of Model 990 dated 11/15/93 re gravity feed mechanisms (one page)

Exhibit 51—Specification Performance Test (Model 856); dated 1/14/94 (Bates # 2414)

Exhibit 52—Test Report (Model 856); undated (Bates # 2411 – 2413)

Exhibit 53—Daisy Document Control Procedure; undated (Bates # 40210 – 40213)

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Exhibit 166—Letter from Marc Schoem to Aaron Locker (re case closing and recommendations for Models 880 & 856); dated 11/2/95 (Bates # 0022875 – 0022877)

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Exhibit 176—Technical report correspondence from Campbell Laird to Andrew Youman, Esq. with photo attachments (re. magazine geometry of Model 7856); dated 7/31/00 (Bates # 36375 - 36380).

Exhibit 177—Respondent's Second Supplemental Answers to Certain of Complaint Counsel's First and Second Sets of Interrogatories, from In the Matter of Daisy Manufacturing Company, Inc., CPSC Docket No.: 02-2; dated 9/10/02 (pages 1-4 only)

Exhibit 178—Various design drawings (Models 880 and 856); various dates (Bates # Daisy (M880) 0269, 0276, 0285-88, 0291, 0345-49, 0361-62, and 0375; Daisy (M856) 0022, 0044, 0057, 0063, 0082, 0083, 0084)

Exhibit 179—Technical report correspondence from Campbell Laird to Andrew S. Youman, Esq. with design drawing attachments (re. examination of Model 7856 and performance of three kinds of experiments); dated 9/26/00 (Bates # 36364 - 36374).

Exhibit 180—Memo by C. Craig Morris, through Mary Ann Danello and Arthur McDonald, to James DeMarco (re. Nonpowder Gun Injuries and Deaths); dated 3/25/97; (Bates # 0025285 - 0025293).

Exhibit 181—Report by Deborah K. Tinsworth and Suzanne P. Cassidy, E, Directorate for Epidemiology (re. Injuries and Deaths Involving Non-Powder Guns); dated November 1994 (Bates #0025316 – 0025329).

Exhibit 182—Typed sheet by A.C. Homan (re. Non-Powder Gun Fact Sheet); dated 1/6/95 (Bates # 025695 – 025696).

Exhibit 183—Typed sheet by John D. Preston (re. Summary of Provisions for General Purpose Guns in ASTM Standard for Non-Powder Guns, ASTM F589-85); dated 1/89 (Bates #025697 – 025699).

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Exhibit 185—Data Review form memo. by M. Edmonds to J. DeMarco (re. data search on injuries); dated 1/12/94 (1 page).

Exhibit 186—Memo by Anthony C. Homan to Deborah Tinsworth (re. percentage of air guns sold that have muzzle velocities greater than 350 fps and 500 fps); dated 9/16/94 (1 page).

Exhibit 187—Letter by James DeMarco to Aaron Locker (re. Compliance request for additional information regarding SPSC CA 940002, Daisy Manufacturing Co., Daisy Powerline 880 airgun); dated 8/3/95 (2 pages).

Exhibit 188—Letter by Aaron Locker to J.A. DeMarco, with attachment (re. response to Compliance request for additional information as set forth in Exhibit 187); dated 8/15/95 (5 pages).

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Exhibit 190—Product Safety Assessment Report (PSA # 0867.95) by Catherine A. Sedney, George W. Rutherford, Jr., to James DeMarco (re. any change to response to earlier PSA #0337 based on review of materials provided by Daisy's law firm); dated 10/18/95 (1 page).

Exhibit 191—Product Safety Assessment Report (Draft, PSA # 0337) by Catherine A. Sedney, through George W. Rutherford, Jr., to James DeMarco (re. Human Factors issues associated with Daisy Powerline 880 airgun); dated 7/21/95 (10 pages, begins at "page 2").

Exhibit 192—Typed (draft) sheet by an unknown author (re. CPSC data on non-powder gun fatalities and related information); dated 11/10/94, marked "latest version" (3 pages).

Exhibit 193—Memo by George Rutherford, through Dr. Robert Verhalen, to Elaine Besson, with attachment (re. Analysis of Injuries Associated with Non-Powder Guns (Gas, Air, and Spring Operated Guns)); dated 3/6/81 (Bates #027107 – 027126).

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Exhibit 195—Product Safety Assessment Report (PSA # 0284.97) by Ronald T. Reichel, through R.T. Garrett, to Jay DeMarco, with attachments (re. testing of several air rifles to voluntary standard ASTM F589-92); dated 2/13/97 (8 pages).

Exhibit 196—Typed (draft) sheet by Air Gun Mini-Project team member (re. data and current status of the Mini-Project); dated 3/18/97 (2 pages).

Exhibit 197—Email message by Ronald T. Reichel to Duncan Snyder, James A. DeMarco, with attachments (re. Additional Data: Energy of Rifles tested data); dated 3/21/97 (5 pages).

Exhibit 198—Product Safety Assessment Report (PSA # 0284.97) by Ronald T. Reichel, through R.T. Garrett, to Jay DeMarco (re. testing of several air rifles to voluntary standard ASTM F589-92); dated 2/18/97 (2 pages).

Exhibit 199— Memo (draft) by C. Craig Morris, through Mary Ann Danello and Arthur McDonald, to James DeMarco (re. Nonpowder Gun Injuries and Deaths); dated 3/25/97; (Bates # 0025285 - 0025293).

Exhibit 200— Product Safety Assessment Report (PSA # 0323.97) by Suad Nakamura to J. DeMarco, with attachments (re. projectile injury potential of several air rifles); undated (7 pages).

Exhibit 201 – E-mail from James DeMarco to Tony Johnson dated 6/21/99 re destroying samples; unlabeled

Exhibit 202 – Draft Memo from George Rutherford to James DeMarco dated 7/12/99 re PSA 775.99 Non Powder Guns; unlabeled

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Exhibit 206—Daisy Brochure "A Parent's Guide to Recreational Shooting for Youngsters: Seven Experts Answer a Parent's Important Questions"
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Exhibit 207—Daisy Targeted Safety Manual, unlabeled

Exhibit 208—Daisy Powerline Manual; Model 860/856 (Bates # 29570 - 29598)

Exhibit 209—Daisy Warranty Information and Powerline Models Index re 800 Series (Bates # 29850-A-30056)

Exhibit 210— Daisy 2000 Catalog (Bates # 1244 – 1258)

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Exhibit 216—Memo from John Preston to Debbie Tinsworth dated 8/18/89 re request for incident data concerning non-powder guns (Bates # 026956)

Exhibit 217— Series of log meetings dated 05/24/76-12/15/98 re non-powdered guns (Bates # 026977 – 027030)

Exhibit 218— Letter from Elaine Tyrrell to Sig Leipins dated 2/5/90 re Commission's representation in ASTM Task group meetings and suggested revisions
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Exhibit 219—Letter from Colin Church to Kathie Morgan dated 7/31/98 re reapproval of "Consumer Safety Specification for non-powder guns (Bates # 027036)

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Exhibit 221— Letter from Elaine Tyrrell to Sig Leipins dated 5/2/89 re 5/3/89 ASTM Task group meeting and update on 4/1/82 meeting
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Exhibit 222— Memo from W. Crigler to J. DeMarco dated 5/19/87 re PSA 2636, Daisy BB/Pellet Air Gun request (Bates # 027041)

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Exhibit 224— Non-Powder Gun Performance Test Data Per ASTM F589-92 dated 2/5/97 (Bates # 027044-027049)

Exhibit 225— Route Slip from John Preston to CRPP Team Representative dated 4/20/83 attaching Non-Powder Gun Performance Test Data Log Per ASTM F589-92 dated 2/5/97 (Bates #027050)

Exhibit 226—Memo from Frank Brauer to Thomas Murr re investigation of injuries and deaths associated with BB/pellet guns; undated (Bates #027102)

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Exhibit 228— Memo from Debbie Tinsworth to John Preston dated 9/5/89 re response to a request for incident data concerning non-powder guns (Bates # 027018)

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Exhibit 253 – Email from Daryl Chrzan to Howard Tarnoff dated 2/13/03 re photos Daryl has on record for this litigation (Bates # 025985-026001)

Exhibit 254 – Email from Daryl Chrzan to Jimmie Williams dated 10/01/01 re photos of deformed BBs and Model 880 gun (Bates # 026002-026006)

Exhibit 255 – Email from Daryl Chrzan to Jimmie Williams dated 10/01/01 re photos of deformed BBs and Model 880 gun (Bates # 026007-026011)

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products	)	
400 West Stribling Drive	)	
Rogers, AR 72756	)	
	)	
Respondent	)	
	)	

MOTION IN LIMINE TO EXCLUDE TESTIMONY OF JOHN WILLIAM MORRIS, JR.

Comes now respondent, Daisy Manufacturing Company, and for its Motion in Limine to Exclude Testimony of John William Morris, Jr., states:

The Commission has hired Dr. John Morris, a metallurgist, as an "expert" witness in this matter to see if he could find a way to cause BBs to "stick" or "lodge" in the magazine of the Daisy Model 880 and 856 airguns:

Q. Was that essentially all you were requested to do in this case?

A. I'm sorry; was what?

Q. To test to determine to find ways you can get BBs to stick in an 856 and 880?

A. I think that's an accurate description, yes.

(p. 50, March 18, 2003 Deposition of Dr. John Morris, attached as Exhibit "1"). Dr. Morris intends to give an opinion at the hearing of this matter on the sole issue of whether he has figured out ways to make BBs "stick" or "lodge" in these air rifles:

Q. Your sole opinions are going to be how you can conceivably get a BB to stick in either one of these types of rifles?

A. Well, somebody might ask me something that – well, for example, we did some work on the statistics of Crossman BBs and how many of them could be too small. So there could be a couple of other issues that come up, but you're essentially correct.

(Exhibit "1," p. 88) (emphasis added).

I. DAUBERT REQUIREMENTS

1. THE COURT IS THE GATEKEEPER

As explained in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Court must act as a gatekeeper to insure that any and all expert testimony admitted in federal court satisfies the requirements of Rule 702 for the Federal Rules of Evidence. *See also,* Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc., 254 F.3d 706, 714-5 (8th Cir. 2001) ("When it comes to the admission of expert testimony under the Federal Rules of Evidence, a trial judge has a gatekeeping responsibility to 'insure that an expert's testimony rests on a reliable foundation and is relevant to the task at hand.'" *citing* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999); General Electric Co. v. Joiner, 522 U.S. 136 (1997). Indeed, the Supreme Court emphatically held that under Rule 702 "the trial judge must insure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert, 509 U.S. at 589. In doing so, as several courts of appeal have recognized, the trial court must be convinced that jurors will be exposed to real science-based testimony. *See, e.g.*, Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996) ("an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process"), *cert. den.*, 117 S.Ct. 73 (1996).

2. DAUBERT APPLIES TO ALL EXPERT TESTIMONY

The court in Kumho Tire clarified that the gatekeeping function established in Daubert applies to all expert testimony, not just testimony based on science. Rule 702 has been amended in response to Daubert and to the many cases applying Daubert, including Kumho Tire. As a result of the 2000 amendment to Fed. R. Evid. 702, the rule now reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles or methods, or (3) the witness has applied the principles and methods reliably to the facts of the case.

The amendment to Rule 702 affirms the trial court's role as gatekeeper and provides general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistent with Kumho, the rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See* Bourjaily v. United States, 483 U.S. 171 (1987).

The language of Rule 702 itself makes no relevant distinction between scientific knowledge or other specialized knowledge. It makes clear that such knowledge might become the subject of expert testimony. Kumho at 147. The court in Kumho Tire concluded that there is not a convincing

need to make distinctions between scientific knowledge and technical or other specialized knowledge. Id. In Kumho Tire, the court explained that:

> [T]his language makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. It makes clear that any such knowledge might become the subject of expert testimony. ... Hence, as a matter of language, the rule applies as its reliability standards to all "scientific," "technical," or "other specialized" matters within its scope. We concede that the court in Daubert referred only to "scientific" knowledge. But as the court there said, it referred to "scientific" testimony "because that was the nature of the expertise" at issue.

Id. (citations omitted). Accordingly, the Courts have repeatedly applied the Daubert standard to experts whose testimony is based on technical and specialized knowledge. *See, e.g.*, Concord Boat Corp. v. Brunswick Corp., 207 F.3rd 1039 (8th Cir. 2000) (economic expert); Blue Dane Simmental Corp. v. American Simmental Association, 178 F.3d 1035 (8th Cir. 1999) (agricultural economist); Peitzmeier v. Hennessy Industries, Inc., 97 F.3rd 293, 297 (8th Cir. 1996). Daubert has been applied in the context of observers attempting to testify as experts. *See* Rice v. Cincinnati, New Orleans & Pacific Railroad Co., 920 F. Supp. 732 (E.D. Ky. 1996) (district court granted motion in limine excluding expert testimony by railroad employees regarding safety of engine cab), *accd*, Thirkill v. J.B. Hunt Transport, Inc., 950 F. Supp. 1105 (N.D. Ala. 1996) (neither plaintiff train engineer nor fellow crewmen were qualified to testify as design experts).

3. THE FACTORS TO CONSIDER

In Daubert, the Court set forth a number of factors that "will bear on the inquiry,... [but do not] set out a defenitive checklist or test." Id. at 593. The factors established by Daubert include:

> 1) whether it [the theory or technique] can be (and has been) tested;
> 2) whether the theory or technique has been subjected to peer review and publication;

3) the known or potential rate of error; and
4) the "general acceptance" of the theory or technique.

Id. at 593-4. The Court in Kumho held that the Daubert factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending on "the particular circumstances of the particular case at issue." Kumho at 1175.

The standards set forth in the amendment to Rule 702 are broad enough to require consideration of any or all of the specific Daubert factors where appropriate. Courts have found other factors relevant to determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. The factors include:

> (1) whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of litigation, or whether they have developed their opinions expressly for the purpose of testifying. Daubert at 1317.
>
> (2) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. See General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997).
>
> (3) whether the expert has adequately accounted for obvious alternative explanations. *See* Claar v. Burlington Northern Railroad, 29 F.3d 499 (9th Cir. 1994);
>
> (4) whether the expert is "being as careful as he would be in his regular professional work outside his paid litigation consulting." Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997); *see* Kumho Tire at 1176 (Daubert requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigors that characterizes the practice of an expert in the relevant field");
>
> (5) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. Kumho Tire at 1175 (Daubert's general acceptance factor does not "help show that an expert's testimony is reliable where the discipline

itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy").

In Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000) the court held that "even a theory that might meet certain Daubert factors, such as peer review and publication, testing, known or potential error rate, and general acceptance, should not be admitted if it does not apply to the specific facts of the case." Id. at 1056 *citing* Kumho Tire, 526 U.S. at 154; Joiner, 522 U.S. at 146. "A court must focus on the 'reasonableness of using such an approach, along with the expert's particular method of analyzing the data thereby obtained, to draw a conclusion regarding the particular matter to which the expert's testimony was directly relevant.'" Concord Boat at 1055 *citing* Kumho Tire. *See also* Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the court in Daubert do not neatly apply to expert testimony from a sociologist); Kannakeril v. Terminix International, Inc., 128 F.3d 802, 809 (3rd Cir. 1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge").

4. ANALYSIS UNDER RULE 702 - QUALIFICATIONS

A witness can be qualified as an expert under Fed. R. Evid. 702 by knowledge, skill, experience, training, or education, and it is the responsibility of the trial judge to determine whether a particular expert has sufficient specialized knowledge to assist jurors in deciding the specific issues in the case. *See* Kumho Tire, 526 U.S. at 156. "Once initial expert qualifications and usefulness to the jury are established, however, a district court must continue to perform its gatekeeping role by insuring that the actual testimony does not exceed the scope of the expert's expertise, which if not done can render expert testimony unreliable under 702, Kumho Tire and related precedents."

Wheeling Pittsburgh Steel, 254 F.3d at 715. *See* Weisgram v. Marley Co., 169 F.3d 514, 515-21 (8th Cir. 1999) (holding that portions of the testimony from three different expert witnesses each lacked a sufficient foundation because they had exceeded the scope of the witness' expertise and thus were unreliable); Redman v. John D. Brush & Co., 111 F.3rd 1174, 1179 (4th Cir. 1997) (holding it was error for metallurgical engineer to give opinion testimony where the expert had no personal knowledge about or experience with the industry in question).

5. ANALYSIS UNDER RULE 702 - RELIABILITY

Rule 702(2) requires that the "testimony is the product of reliable principles or methods" based in the "knowledge and experience of his discipline". With regard to reliability, the Supreme Court explained that under the terms of Rule 702, "[t]he subject of an expert's testimony must be 'scientific ...,'" a phrase that both "implies a grounding in the methods and procedures of science" and "connotes more than subjective belief or unsupported speculation." 509 U.S. at 589-90. The court elaborated:

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – *i.e.*, "good grounds," based on what is known.

Id. at 590. "In short, the requirement that an expert's testimony pertains to 'scientific knowledge' establishes a standard of evidentiary reliability." Id. Under Rule 702, then, an expert's opinion must "have a reliable basis in the knowledge and experience of his discipline." Id. at 592. The trial judge is given considerable leeway in determining what is reliable. Kumho Tire, 526 U.S. at 152. Additionally, the trial judge should consider a variety of factors, including the factors specified by Daubert when appropriate, when determining reliability of an expert's opinion. Id.

6. ANALYSIS UNDER RULE 702 - RELEVANCE

Rule 702(3) requires that the "witness has applied the principles and methods reliably to the facts of the case." The court in Daubert also elaborated on the relevancy requirement, which it derived from Rule 702's admonition that expert testimony must "assist the trier of fact to understand the evidence or determine a fact in issue." That consideration, the Court noted, "has been aptly described as one of 'fit.'" 509 U.S. at 591 (emphasis added). The court continued:

> "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes ... The study of phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is in fact an issue, the knowledge will assist the trier of fact. However (absent credible grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

Id. at 591-92 (citations omitted). The Supreme Court has indicated that it would strictly enforce the "fit" requirement. *See* General Electric v. Joiner, 118 S.Ct. 512, 518 (1997) (upholding district court's exclusion of studies on infant mice to show chemical caused cancer in plaintiff on grounds that the "studies were so dissimilar to the facts present in this litigation"); Id at 518-19 (same for various other studies with only tenuous connection to facts of case). In Concord Boat, the Eighth Circuit focused on the recent Supreme Court emphasis on the importance of "fit":

> Conclusions and methodology are not entirely distinct from one another... [N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Concord Boat, 207 F.3d at 1055. *Quoting* Joiner, 522 U.S. 136, 146 (1997); Jaurequi v. Carter Mfg. Co., 173 F.3d 1076, 1082 n. 3 (8th Cir. 1999).

II. DR. MORRIS' OPINIONS ARE IRRELEVANT

Even if Dr. Morris' opinions on how to make a BB "stick" in the magazine of an 880 or 856 Daisy air rifle were otherwise admissible under Daubert (which they are not – see Part III and IV, infra), his opinions are inadmissible as they simply do not "assist the trier of fact to understand the evidence or determine a fact in issue" as required under Daubert and Rule 702, Fed. R. Evid. The Commission brought this action against Daisy upon a claim that the Daisy 880 and 856 BB guns contain a "product defect" that "creates a substantial risk of injury to the public" under 15 U.S.C. §2064(a)(2). Dr. Morris very clearly testified that even if BBs can be made to "stick" or "lodge" in the magazine of the 880 or 856, that occurrence creates no risk of injury.

Dr. Morris testified that a BB stuck in the magazine of an 880 or 856 cannot be fired from the BB gun. The only way for such a BB to be fired from the gun is for the BB to become "unstuck" and become loose in the magazine, just like every other BB in the magazine. The BB guns are designed to allow the gun user to access the loose BBs from the magazine, load them across a visible loading port into the chamber to be fired. Only "unstuck" BBs can be loaded against the bolt, across the visible loading port, and into the chamber for firing. Whether the BB that is loaded was at one time previously "stuck" (before becoming "unstuck" then loaded and fired from the gun), can in no way create a "substantial risk of injury," as only "unstuck" BBs can be fired from the gun; "stuck" BBs cannot.

Dr. Morris testified:

Q. Tell me, on this, did you handle the Daisy 880 or an 856?

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A. Yes, I did.

Q. Did you have any trouble seeing the BB in the loading port?

A. You mean when –

Q. If you put the BB in the loading port, did you have any trouble seeing it?

A. You mean when it was being put forward in the –

Q. Yes.

A. No, no; not at all.

Q. It's entirely visible?

A. Yes, it is.

(Exhibit "1," p. 10).

Q. Would it be fair to say that you had no trouble discerning the presence of a BB when you looked directly into the loading port?

A. You mean when the BB is attached magnetically to the plunger?

Q. The bolt?

A. To the bolt? No, you can see it.

(Exhibit "1," p. 12).

Q. Okay. BBs in a magazine cannot be fired from the rifle unless the user manually loads, somehow gets the BB to unlodge, loads into the chamber, is that correct?

A. Yes, that's correct.

Q. And in order for that user to fire the BB, the BB is going to have to cross a visible loading area. Correct?

A. Yes.

Q. I understand you are primarily a metallurgist?

A. That's correct.

Q. And obviously you have to design some equipment for your laboratory to do some of the tests you do. Correct?

A. That's correct.

Q. What I'm getting at is, is there any product in the marketplace that someone could buy that you designed or had a part in designing?

A. Gosh; it depends on how broadly you want to take it. Well, my group is responsible for creating some materials which have been used in products, but I really wouldn't call it designing a product.

Q. Have you ever worked as an adviser or consultant to an airgun company or firearm company?

A. No, I have not.

Q. Have you ever been to an airgun or firearm factory?

A. I don't believe so. I've been around a long time. I may have at one time or another.

Q. Have you ever designed any component of an airgun?

A. No.

(Exhibit "1," pp. 4-6).

Q. Had you ever looked at any airgun products before for the purposes of evaluating their design?

A. No, I had not.

(Exhibit "1," p. 34).

Q. Your prior litigation involvement has almost always involved structure failure of metals. Correct?

IV. DR. MORRIS' METHODS AND CONCLUSIONS ARE UNRELIABLE

In addition to not being relevant to the issues before the court, Dr. Morris' methods and conclusions are unreliable. Under Rule 702(2), Fed. R. Evid., Dr. Morris' testimony must be "the product of reliable principles and methods" based on "knowledge and experience of his discipline [metallurgy]."

1. DAISY MODEL 880

On the Model 880 airgun, Dr. Morris could not figure out a way to get a BB to "stick" in the magazine, so, he asked the CPSC's lawyer for help in an August 30, 2001 e-mail:

> The 880 problem is more subtle. I have not been able to get BBs to stick, and have not yet identified a place where they might stick. Do you have any more information on the sticking problem reported by others? We don't have much time to solve this problem, and I'd like all the help I can get.

(see Exhibit "2," August 30, 2001 e-mail from Dr. Morris to Jimmie L. Williams, Exhibit "1" to the March 18, 2002 Deposition of Dr. Morris). Dr. Morris testified:

> Q. So you wrote Mr. Williams about the 880, and you told him, "I can't get the BBs to stick in the 880's"?
>
> A. That was true at the time I wrote this. I had no found a mechanism to cause them to stick.
>
> Q. And your job was to find a way to get BBs to stick in the 880 and 856, correct?
>
> A. That's what he asked me to do, yes.

(Exhibit "1," p. 18).

> Q. You asked him for help in trying to figure out a way to get the BBs to stick, right?
>
> A. That's correct.

Q. And two weeks later you issued a report saying that you'd found a way to do it. Correct?

A. That's correct.

Q. What happened in those intervening two weeks?

A. I played around with the gun and found a way to do it.

Q. And that way that you found to play around was to back out the screw?

A. That's right.

(Exhibit "1," pp. 19-20).

Q. Did you see any of the rifles that you looked at where the screws were loose one full turn?

A. No, I did not.

Q. Do you know if screws will come loose one full turn in regular use?

A. No, I do not.

(Exhibit "1," p. 21).

Q. Okay. Would you agree with me that once you get it one full turn loose, the receiver halves are starting to part, correct?

A. Yes. They're quite obviously separated.

Q. At that point the whole receiver is loose, isn't it?

A. Fairly, yes. The receiver wouldn't be loose if you had a BB stuck in there, because that would be propping it apart.

Q. But it would be splitting –

A. Before you got there it would be loose, certainly.

Q. And that would be obvious to the user, correct?

A. I would think so, but I'm not every user.

(Exhibit "1," p. 22).

Q. So you can say unequivocally in all of your testing, you cannot, you were unable, nor were your people working under you, able to get an in-specification BB to lodge in the magazine of a Daisy 880. Correct?

A. In our testing to date we have not had an in-spec BB stick; and as I sit here, I do not know a mechanism that would cause an in-spec BB to stick. That doesn't mean there's no such mechanism. That just means that's the result of our test.

* * * * *

Q. Well, the only way you could get BBs to stick was to take out-of-specification BBs and back out screws, correct, in an 880?

A. BBs that did not meet the ASTM specification ....

(Exhibit "1," pp. 23-24).

Q. Did you look at Daisy BBs themselves?

A. Yes, I did.

Q. Did you find any of them to be out of specification?

A. Not grossly out of specification. It's not easy to check 1,500 BBs and verify that they are all in specification.

Q. Did you look at some Crossman's BBs?

A. Yes.

Q. Did you find them to be out of specification?

A. Yes ....

(Exhibit "1," p. 14).

Q. One thing you did find is that another manufacturer, not Daisy, was making BBs that were not to the ASTM specification. Correct?

A. That is correct. And they can stick in the 880.

(Exhibit "1," pp. 25-26).

Q. The pre-1995 880's, the only way that BB lodges is, those rifles have a lodging problem, is if you back the screw out a full turn, or it's conceivable you could use out-of-spec BBs. Correct?

A. Out-of-ASTM-spec BBs.

Q. Out-of-ASTM-spec BBs. Correct?

A. That's correct.

(Exhibit "1," p. 86).

The only way Dr. Morris could complete his lawyer-assigned task of "finding a way to make the BBs stick" in the pre-1995 880 was to use BBs that were out-of-spec and not designed for the gun, or to alter the product from its normal configuration by backing out screws. On the Model 880's manufactured after 1995, the only way Dr. Morris could get a BB to "stick" or "lodge" in the magazine was to take the gun apart, use an out-of-spec BB from another manufacturer (other than Daisy), and manually place the BB in a "stuck" location, then reassemble the gun. This "sticking" never occurred in normal usage of the 880:

Q. Okay. The only way that you're able to get a post-1994, '95 BB to lodge in a power line 880 is by using an out-of-ASTM-spec BB and placing it in the rifle, correct?

* * * * *

A. The way that we did it is by placing the BB in the rifle. If it were to happen naturally during loading, then you would have to get that BB in the right position in the chamber, and since such BBs are not that common in the Crossman BB set, you would load a good many times before you found that event to happen naturally. So we did not try to do that.

Q. You never got a BB in a post-94, '95 880 to lodge by itself, is that correct?

A. You mean by just loading it?

Q. Right.

A. I personally haven't. I don't think Daryl has, either. I believe that all of the BBs that were photographed have been BBs that were observed to be thin and were placed in that position.

Q. They were manually placed under that inner barrel and on the plate?

A. That's correct.

(Exhibit "1," pp. 85, 86) (emphasis added).

Q. So you've got to alter the gun by backing out the screw to get the BB to stick?

A. That's correct.

Q. Or you take a BB that's out of specification and put it in a Daisy 880, and there's a way you can get it to lodge.

A. Without loosening the gun in any way, yes, that's correct.

Q. And you did that by placing the BB manually underneath the inner barrel against the plate. Correct?

A. Yes, we did.

(Exhibit "1," p. 68).

Q. And to this day, you've never been given any information that anyone else has been able to recreate this lodging in the 880 phenomenon, correct?

A. The answer to your question is yes, I haven't been given any such information.

(Exhibit "1," p. 82). Without question, Dr. Morris' methods are not "the product of reliable principles and methods" of "knowledgeable and experienced metallurgists."

IV. DAISY MODEL 856

Dr. Morris testified that BBs "regularly" became "stuck" in the magazine of the Model 856 that he tested, which was a used Daisy 856 airgun supplied to him by the CPSC, not a gun as it came from the manufacturer:

Q. And was this an 856 that was sent to you by Jimmie Williams?

A. Not by him, by someone on his behalf....

(Exhibit "1," p. 34).

Q. Did you ever test an as-new 856?

A. Can't buy one.

Q. Did you get one from the Consumer Product Safety Commission?

A. That had never been fired?

Q. No....

(Exhibit "1," p. 35-36).

Dr. Morris testified that if the inner and outer barrels of the 856 were out of alignment, BBs could get "stuck" in the magazine. He testified that it was "a heck of a lot easier" to get the BBs to lodge or "stick" if you packed the magazine with almost double the manufacturer's recommended number of BBs:

Q. You have indicated in this report that in the Model 856 air guns you've observed that the inner rifle is misaligned and off center toward the outer barrel casing?

A. That was in one particular example. We've had two guns.

Q. Now, in two guns, is that now the case?

A. I think in the second gun the misalignment is not slightly to the left but slightly to the top. And I haven't seen anything that says what the tolerances are supposed to be. So the word "misalignment" may not be correct. This may be within Daisy's tolerances. It's just sufficiently displaced in that direction to trap a BB.

Q. If it's dead center, it will not?

A. If it's absolutely dead center, it will not. If it's as much as half a centimeter off, it will.

(Exhibit "1," pp. 58-59).

Q. So there's various ways of manipulating the outer barrel, which contains the inner barrel, of course, to possibly get a BB to lodge?

A. There appear to be, yes.

(Exhibit "1," p. 60).

A. ... It is fairly easy to take the barrels and cause that displacement. What we haven't studied is to what extent the displacement caused would be permanent. Would it go back to its original position or not. I think the bigger problem is, the tolerances allow four hundredths and after two hundredths displacement from the absolute dead center position, you're sticking BBs. So while we've only examined two guns, I would be very surprised if the substantial majority of 856 models do not stick BBs.

Q. The thing you do not know, of course, is whether they come from the factory this way, correct?

A. Again, I have to use my reasoning. To get an alignment within two-one hundredths on a barrel this long is not a trivial feat.

Q. But you've never been in a airgun factory?

A. No.

Q. And you've never seen how these barrels are fitted, correct?

A. No. And it's possible that they fit them absolutely perfectly, but I have my doubts that that is true.

Q. Let me ask you this, then. Both the rifles you looked at were, of course, used, correct?

A. I assume so, yes. They appeared to be.

Q. And they came from the Consumer Products Safety Commission?

A. That's correct.

Q. And it's entirely possible that those barrels had been torqued or twisted before they came to you, correct?

A. Yes, that is possible.

Q. So it's entirely possible that the rifles as they came from the factory were dead center and fine and would not stick BBs but by the time they got to you they had been torqued in some way; correct?

A. Possible, but I think that unlikely.

Q. But you don't know?

A. I don't know, but I have a professional opinion that that is unlikely.

Q. But you don't have any experience in building, designing or manufacturing air guns do you?

A. No ....

(Exhibit "1," pp. 61-63).

Q. But what you found is, it's a heck of a lot easier to get them to lodge if you kind of pack the BBs in there, correct?

A. Of course.

Q. ... Did you read the manual to determine how many BBs you were supposed to put in it?

A. The manual suggests that you put in 100. I can't imagine anyone actually counting 100 BBs, but that's what the manual says.

Q. The way you found best to get it to lodge was to put somewhere in the range of 196, right?

A. We didn't count them, either; we just put in until the chamber was full.

Q. At one point you said 196.

A. That's correct. We counted them at one point. The experiment, the first experiment and subsequent experiment in which I participated, you just loaded up BBs until it was full.

Q. Until you couldn't get any more to roll in?

A. Yes.

(Exhibit "1," pp. 49-50).

In addition to testifying that a "stuck" BB causes no risk of harm (see Part II, supra), Dr. Morris further testified that it was also quite possible that just normal use in the pumping action of the BB gun would dislodge any "stuck" BBs in the magazine, as far as he knew:

Q. What I'm asking you is if, at the end of shooting all the BBs out of it, did you ever suspect there might be a BB in it and just shake the rifle while it was together, and the BB would just come out?

A. I believe Daryl has done that. Yes, he told me he had. I haven't done it personally.

Q. So you have never tested to see how hard it is just to shake the rifle and get the BB to come loose?

A. Not specifically. No. He has done that, as I say.

(Exhibit "1," pp. 41-42).

Q. So it's possible that just the normal pumping mechanism of the rifle would dislodge the BB on every occasion, you just don't know?

A. I would be very surprised if that was true.

Q. But you don't know?

A. I don't know.

(Exhibit "1," p. 43).

VI. "DARYL"

Dr. Morris' opinions are further unreliable because he did not do the testing upon which his "opinions" of "stuck" BBs are based. Someone named "Daryl" who has never been identified as an expert by the CPSC formed opinions and told Dr. Morris about his findings and opinions, and now Dr. Morris wishes to repeat "Daryl's" opinions. Daisy has not had the opportunity to cross-examine "Daryl" on the basis of his opinions, and Dr. Morris simply relies on "Daryl's" hearsay reports and assumes them to be accurate for the basis of his opinions. Dr. Morris' opinions cannot be "reliable" under the requirements of Daubert and Rule 702, Fed. R. Evid. Dr. Morris testified:

Q. What I'm asking you is if, at the end of shooting all the BBs out of it, did you ever suspect there might be a BB in it and just shake the rifle while it was together, and the BB would just come out?

A. I believe Daryl has done that. Yes, he told me he had. I haven't done it personally.

(Exhibit "1, " p. 41-42) (emphasis added).

Q. So as you put in the additional BBs, what you're doing, in essence, is forcing the BBs into a space where they might lodge?

A. That's correct. They can get there anyway, but if you fill up the chamber, then you're pretty much forcing them.

Q. Okay. Did you get lodging when you would put three or four BBs in there?

A. It's not, three or four is not an experiment we tried. Well, let me phrase it correctly. Once you take it apart where you can actually see what's going on, you can get lodging with one BB.

Q. Once it's apart, you can do it yourself, manually?

A. Yes. But when it's together, I don't think we ever – I'd have to ask Daryl if he ever tried it with his three or four BBs. I'm not sure we ever did.

Q. Is it fair to say that Daryl did most of the testing?

A. This kind of testing, yes.

Q. He is the person most knowledgeable about the tests, how they were done, how many BBs were put in; that kind of thing?

A. That's correct.

(Exhibit "1," pp. 47-48) (emphasis added).

Q. What other tests did you do?

A. The other thing that we did, this, again, actually Daryl did, was to get a variety of Crossman BBs, also Daisy BBs, measured some. The Daisy BBs seemed to be in accordance with the ASTM specs, so we stopped testing them and looked at the Crossman BBs and looked at the statistics of how many Crossman BBs were below .162.

(Exhibit "1," p. 50) (emphasis added).

Q. The pictures you're referring to appear to show a redwood-stained deck that somebody's standing on. Is that correct?

A. That's the deck in the back of Daryl Chrzan's house.

* * * * *

Q. Were you present for those tests?

A. No, I was not. He photographed it and sent me the photographs.

Q. Do you know exactly how he got those BBs to lodge?

A. This was just loading, filling the chamber, emptying it, taking it apart to see what was in there.

Q. This was just based on what he told you?

A. That's correct.

Q. You were not present to see exactly how that occurred, correct?

A. Well, no, he didn't just tell me. He sent me the photographs documenting what he saw.

Q. But as far as how the BBs got stuck and how many BBs were loaded, that kind of thing ...

A. I wasn't there.

Q. And only Daryl could testify to that?

A. That's correct.

(Exhibit "1," pp. 54-55) (emphasis added).

Q. Did Daryl prepare documents to address exactly what he did in each step of the experiment?

A. He has a fairly extensive notebook.

Q. That goes through all of his testing?

A. That's correct.

Q. Did you bring it?

A. No, I did not.

Q. Did you produce it?

A. It's not my notebook, it's his notebook.

Q. Did you produce it to the Consumer Products Safety Commission?

A. No, I did not.

Q. So there's no firsthand account of how we would get more than one BB stuck except through Daryl. Correct?

A. Well, and what he reported to me on the experiment that he did. But he's the person who did it.

(Exhibit "1," pp. 57-58).

The hearsay opinions and comments of "Daryl" are not a sufficient basis under Daubert and Rule 702, Fed. R. Evid., to entitle Dr. Morris to simply parrot the hearsay statements and opinions of "Daryl" and claim that his opinions are based on sufficiently reliable evidence to be admissible.

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – i.e., "good grounds," based on what is known.

Daubert, 509 U.S. at 590. "The requirement that an expert's testimony that an expert's testimony pertains to scientific knowledge establishes a standard of evidentiary reliability." Id. Dr. Morris' testimony based on "Daryl's" opinions and manipulation of the products at issue render his opinions absolutely "unreliable" under the requirements of Daubert and the Federal Rules of Civil Procedure.

CONCLUSION

Dr. Morris' "opinions" that BBs can get stuck in the Model 880 and 856 Daisy Powerline air guns are irrelevant to the issue before this court, i.e., whether those air guns "create a substantial risk of injury to the public," as Dr. Morris clearly testified that the "sticking" or "lodging" incidents that he was able to create do not cause a risk of injury to anyone. Furthermore, Dr. Morris is a metallurgist, not a design engineer. His opinions on "sticking BBs" have nothing to do with metallurgy. He may be an expert, but not on the issue of "sticking BBs." Finally, it is abundantly clear that the underlying bases for his opinions are wholly unreliable under Daubert and the Federal Rules of Evidence. He is not able to offer any opinion that any "sticking BB" occurrence that "Daryl" was able to recreate would occur in the normal usage of the Model 880 or 856 BB guns as they come manufactured from the Daisy facility. For these reasons, the testimony and opinions of Dr. John

William Morris should be excluded from the hearing of this matter pursuant to Rules 402, 403, and 702, Fed. R. Evid.

Respectfully submitted,

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2000 Regions Center
400 West Capitol Avenue
Little Rock, Arkansas 72201-3493
(501)-376-2011

Attorneys for Defendant

By: William M. Griffin III #82069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by U. S mail, postage prepaid and addressed as follows, this 22nd day of April, 2003.

The Honorable William B. Moran,
Administrative Law Judge
and Presiding Officer

Todd Stevenson
Office of the Secretary
U.S. Consumer Product Safety Commission
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Bethesda, MD 20814-4408

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TO: Mr. Mark Porter
USCPSC

TELECOPY NO.: 301-504-0359

FROM: William M. Griffin III

DIRECT DIAL: 501-370-1515

RE: CPSC v. Daisy

MESSAGE: Attached herewith please find our Motion in Limine to Exclude Testimony of John William Morris, Jr. The exhibits will be sent by regular mail.

TOTAL NO. OF PAGES: 30

DATE: March 28, 2003

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UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, Inc., doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas Respondent	CPSC Docket No.: 02-2

To: The Honorable William B. Moran
Presiding Officer

MOTION FOR EXTENSION OF TIME TO RESPOND
TO MOTION IN LIMINE TO EXCLUDE TESTIMONY OF STANTON BERG

Pursuant to 16 C.F.R. §§ 1025.15(c) and 1025.23(a), (c), Complaint Counsel hereby moves for an extension of time, until April 25, 2003, to file a written response to Respondent's Motion in Limine to Exclude Testimony of Stanton Berg.

On April 8, 2003, Respondent served the subject Motion in Limine upon Complaint Counsel via Federal Express. Under 16 C.F.R. § 1025.23(c), any party who desires to oppose the granting of a motion must file a written response within ten (10) days after service of the motion. Since the motion was received by the Office of Compliance on April 8, 2003, Complaint Counsel's must file its response by April 18, 2003, to comply with the above-mentioned regulation.

The subject of Respondent's motion to exclude testimony is Stanton Berg. Mr. Berg is an expert witness who intends to testify on behalf of Complaint Counsel about automatic safeties and other relevant matters pertaining to the Daisy Model 856 and 880 airguns. The Motion to exclude the testimony of Mr. Berg raises complex issues of law and requires a thoughtful and detailed response. The amount of time currently available to Complaint Counsel is not sufficient to allow for a meaningful response.

Complaint Counsel has been diligently engaged for some time in the preparation of the final prehearing order in this matter (Order Regarding Final Prehearing Order, dated February 5, 2003). This is a voluminous and time- consuming task, which includes the exchange with Respondent of many volumes of proposed trial exhibits.
The exchange of exhibits is due on April 15, 2003. Further work regarding authenticity stipulations or objections needs to be completed by April 18, 2003, the same date that Complaint Counsel's response to the instant motion must be filed under the regulations.

Complaint Counsel wishes to bring to the Court's attention that the deadline for filing Motions in Limine in this matter is not until May 2, 2003. Therefore, the granting of Complaint Counsel's motion for an extension of time will in no way prejudice Respondent.

Accordingly, Complaint Counsel respectfully requests that the date for filing a response to Respondent's Motion in Limine be extended until April 25, 2003.

Respectfully submitted,

Ronald G. Yelenik
Complaint Counsel
Office of Compliance
Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
(301) 504-7582

Dated: April 15, 2003

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, Inc., doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas	CPSC Docket No.: 02-2
Respondent	

ORDER

UPON CONSIDERATION of Complaint's Counsel's Motion for Extension of Time to Respond to Motion in Limine to Exclude Testimony of Stanton Berg, and it appearing that good cause exists to grant the Motion, it is this _____ day of _____, 2003, hereby

ORDERED that the Motion be and hereby is granted, and

IT IS FURTHER ORDERED that the date for filing a response to Respondent's Motion in Limine to Exclude Testimony of Stanton Berg is extended to April 25, 2003.

_____

William B. Moran
Administrative Law Judge and
Presiding Officer

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2003, I caused a copy of the foregoing **Motion for Extension of Time to Respond to Motion in Limine to Exclude Testimony of Stanton Berg** to be served upon all parties of record in these proceedings, as follows:

By facsimile and first class mail, postage prepaid to:

The Honorable William B. Moran, Administrative Law Judge
And Presiding Officer

By certified mail, return receipt requested, postage prepaid, and facsimile to:

Aaron Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 fifth Avenue, 26th Floor
New York, NY 10018

Attorneys for Daisy Manufacturing Company

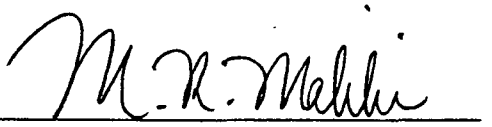
By first class mail, postage prepaid and facsimile to:

William M. Griffin, III, Esq.
Friday, Eldredge & Clark
2000 Regions Center
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Attorneys for Daisy manufacturing Company

By hand delivery to:

Office of the Secretary
U.S. consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408



M. Reza Malihi, Office of Compliance
U.S. Consumer Product Safety Commission
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COPY

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WASHINGTON, DC 20207

OFFICE OF COMPLIANCE
LEGAL DIVISION
FACSIMILE: 301-504-0359

FAX MESSAGE COVER SHEET

DATE: 04/15/03 ***# of Pages including cover sheet*** 6

TO: Aaron Locker, Esq. - Locker Greenberg & Brainin

FAX #: (212) 391-2035

FROM: Ron Yelenik (By M.R.M.)

TELEPHONE: ***301-504-7914*** x7582

Message/Remarks:

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TO: William M. Griffin, III, Esq. — Friday Eldredge & Clark
FAX #: (501) 244-5327

FROM: Ron Yelenik (By M.R.M.)
TELEPHONE: ***301-504-7914*** x 7582
Message/Remarks:

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WASHINGTON, DC 20207

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LEGAL DIVISION
FACSIMILE: 301-504-0359

FAX MESSAGE COVER SHEET

DATE: 04/15/03 ***# of Pages including cover sheet*** 6

TO: Marianne McBeth, Esq. – Daisy Manufacturing Co.

FAX #: (479) 636-1163

FROM: Ron Yelenik (BYM.RM)

TELEPHONE: ***301-504-7914*** X7582

Message/Remarks:

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-CPSC COMPLIANCE -

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF STANTON BERG

Pursuant to 16 C.F.R. § 1025.23, Complaint Counsel hereby opposes Respondent's Motion in Limine to Exclude Testimony of Stanton Berg ("Motion"). In its desire to disqualify Mr. Berg, Respondent seeks to exclude Berg's testimony in areas about which he did not intend to testify: 1) firearm, airgun and safety design; 2) the gravity feed loading system of the Daisy Model 880 and Model 856; and 3) the penetration potential or velocity of the Daisy Model 880 or Model 856 airguns. In fact, the staff does not require Mr. Berg's opinions on these issues. Daisy's own employees and experts have admitted in depositions that an automatic safety could have been incorporated into the guns at low cost[1] and about the lethality of these guns.[2] As a careful review of our expert listing discloses, Complaint Counsel did not offer Mr. Berg to testify

[1] December 18, 2002 Deposition of Richard I. Daniel, p. 118-19, attached as Exhibit "1;" January 14, 2003 Deposition of Guy E. Braughler, p. 48, attached as Exhibit "2."

[2] January 14, 2003 Deposition of Guy E. Braughler, p. 65-66, attached as Exhibit "2;" January 14, 2003 Deposition of Ronald Joyce, p. 242-43, attached at Exhibit "3."

on these areas and Mr. Berg will not offer an opinion concerning these matters. Further, Complaint Counsel did not allege that gravity feed mechanisms are per se defective.[3]

In support of its Motion, Respondent cites cases where Mr. Berg's testimony has been limited or excluded in the area of "gun design." Most of the cases cited by Daisy involve the design of "gun powder" based firearms. As stated, Complaint Counsel does not offer Mr. Berg as an expert on gun design and does not intend to elicit testimony from him concerning his opinion on gun design. Accordingly, Mr. Berg's perceived qualifications regarding gun design are irrelevant to his proposed testimony in this case.

Mr. Berg's proposed testimony will be limited to the history and availability of automatic safety mechanisms in airguns and firearms to counter Daisy's oft-repeated and inaccurate assertions that automatic safeties are not used on and are inappropriate for airguns. Mr. Berg has spent over forty years collecting information about firearm and airgun safeties. He has also served since 1989 on the ASTM Committee which sets the voluntary standards for airguns as well as other professional organizations dealing with airgun safety issues.

Mr. Berg will testify based on his extensive knowledge and experience in this field. In its Motion, Respondent did not attempt to exclude or limit Mr. Berg's testimony regarding his historical firearm and airgun research. On the contrary, Respondent offered evidence of Mr. Berg's qualifications as an expert "firearms researcher." *See* Respondent's Motion, p. 17, *citing* Small v. Strum, Ruger, & Co., Inc., Trial Transcript,

[3] In a letter from Mark Porter to Aaron Locker dated April 11, 2003, Complaint Counsel informed Respondent that it will disclose the following clarification in connection with the Pre-Trial Order, Section 2(h). Complaint Counsel will clarify the meaning of an allegation contained in the Complaint pertaining to the "gravity feed mechanism" in the Model 880 and Model 856 airguns. At Section 2(h), Complaint Counsel will state that "the Complaint does not allege a defect relating to the guns' gravity feed mechanism per se, nor will Complaint Counsel offer evidence at trial regarding a defect in the gravity feed

Vol. III, August 18, 1993, p. 911). Complaint Counsel agrees with Respondent's assessment regarding Mr. Berg's qualifications as a firearm and airgun researcher. Mr. Berg should be allowed to offer expert testimony as a firearm and airgun researcher.

I. Mr. Berg is Qualified to Offer Expert Testimony in this Matter

1. Based on his extensive experience in historical research of firearm and airgun automatic safety systems, Mr. Berg's proposed testimony will assist the trier of fact in understanding the availability of automatic safety systems on firearms and airguns.

Rule 702 of the Federal Rules of Evidence, Fed. R. Evid. 702, was amended in response to the Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) decision and the cases that followed. *See* Fed. R. Evid. 702 advisory committee's note. Rule 702, as amended states:

> If scientific, technical, other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. Rule 702, as amended in 2000 expressly states that a witness "may be qualified on the basis of knowledge, skill, experience, training, or education." Id. Mr. Berg has extensive knowledge, skill and experience in historical research of firearm and airgun automatic safety systems. Since 1961, Mr. Berg has spent approximately 96,720 hours studying, researching, examining, testing, disassembling and reassembling firearms. Mr. Berg has published a "State of the Art" research paper detailing firearm and airgun automatic safeties produced from 1859 to the present. This paper is an

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mechanism." Accordingly, Mr. Berg will not offer an opinion regarding defects in the gravity feed mechanism.

historical review of the automatic safety as a safety system. The review offers detailed descriptions, in chronological order, of all firearms and airguns with automatic safety systems from 1859 to the present. This paper was first published in the Association of Firearms and Toolmark Examiners ("AFTE") Journal in April 1992. Mr. Berg continuously updates this research paper. He has also presented nineteen papers on safety designs at various conferences and seminars in the firearm and airgun field.[4]

Mr. Berg also maintains a computer database of airgun safeties that was established in 1985. This database currently has approximately 425 different makes and models of firearm and airgun safeties that are identified and arranged by make, model and production time period. Within this database, Mr. Berg has identified and arranged over 180 automatic safety devices for airguns.

Based on his extensive knowledge, skill and experience as a researcher of the history of firearms and airguns, Mr. Berg is uniquely qualified to testify concerning the availability of automatic safeties on firearms and airguns. His research materials include numerous historical books on firearms and airguns as well as various patents, magazine articles and handbooks dedicated to firearms and airguns. In addition, Mr. Berg also maintains a personal firearm and airgun collection of over 160 guns as well as a collection of components of firearms' safety systems. Contrary to what Respondent argues in its Motion, Mr. Berg is not being offered to provide testimony regarding his personal opinions or preferences regarding automatic safeties. He will present evidence

[4] Mr. Berg's lectures on safety mechanisms have included "Firearms Safety Designs: State of the Art," slide lecture at the Association of Firearm and Tool Mark Examiners (AFTE) training seminar, June 8, 1994; "Firearms Safety Designs II," slide lecture at AFTE training seminar, June 8, 1995; "Firearms Safety Designs III," slide lecture at AFTE training seminar, July 16, 1996; "The World of Firearms Safety Designs," slide lecture at the International Association for Identification (IAI) Educational Conference, July 29, 1994; "The World of Firearms Safety Designs II," slide lecture at the IAI Educational Conference,

of the various types and models of firearms and airguns that use an automatic safety system based on his research and the computer databases he maintains.

2. The proposed expert testimony of Stanton O. Berg is reliable and he should be permitted to testify in this matter. The proposed testimony satisfies the requirements of Rule 702 of the Federal Rules of Evidence and the principles espoused in Daubert and its progeny.

The Court in Daubert noted that the trial judges have the responsibility of acting as gatekeepers to exclude unreliable expert testimony to satisfy the requirements of Rule 702 of the Federal Rules of Evidence. Daubert, 509 U.S. at 589-95. The Court in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) expanded this gatekeeper function to all expert testimony, not just testimony based in science. Kumho, 526 U.S. at 156-57.

Daubert set forth non-exclusive factors for trial courts to use in assessing the reliability of scientific expert testimony. These factors listed by Daubert are:

> (1) whether the [expert's technique or theory] can be [or has been] tested;
> (2) whether the theory or technique has been subjected to peer review and publication;
> (3) the known or potential rate of error;
> (4) the existence and maintenance of standards and controls; and
> (5) the general acceptance of the theory or technique.

Id. at 592-94. These Daubert factors may also be used to determine the reliability of non-scientific expert testimony, depending on the facts of a particular case. Kumho, 526 U.S. at 150.

Mr. Berg has been involved in historical research of firearm and airgun safety systems for approximately forty years. His historical research into the origins of automatic safeties on firearms and airguns has resulted in the publication of numerous

---

July 26, 1995; "The World of Firearms Safety Designs III," slide lecture at the IAI Educational Conference, July 25, 1996.

papers on the subject. His research paper, "State of the Art," was published in the AFTE Journal, April 1992: "Air Gun Safety Designs." This paper was subject to peer review. Berg's research on firearm safety designs has also been peer reviewed during his many presentations of such research at the Association of Firearm and Tool Mark Examiners training seminars and the International Association for Identification annual educational conferences.

Mr. Berg is a recognized expert in his field. He has been qualified in the area of research into the origin, history and "State of the Art" of safeties and safety systems by numerous courts.[5] In fact, as previously noted, Respondent cites to a case in their Motion, Small v. Strum, Ruger & Co., Inc., where the court ruled that Mr. Berg could properly testify as an expert "firearms researcher." Mr. Berg is being tendered as an expert in this case to offer testimony about automatic safeties on firearms and airguns. His testimony will be based on the research he has conducted over the past forty years. The court in Small qualified him as an expert in precisely this area. Presumably, it did so because his testimony was "the product of reliable principles or methods" based in the "knowledge and experience of his discipline." Daubert, 509 U.S. at 592. Complaint Counsel urges the Court to qualify Berg in this case.

[5] Shields v. Sturm, Ruger and Co., (1987), the court qualified Mr. Berg as an expert in the field of historical firearm research and firearms safety. In MacDougall v. Feather Indus., (1996), Mr. Berg was qualified as a firearms design historian. A Madison Wisconsin Circuit Court allowed Mr. Berg to testify regarding a description of the manner in which various features have historically been included on airguns in Bills v. Crosman, (1991). In Brown v. Daisy Manufacturing Co., Mr. Berg qualified with respect to the history of airguns in the United States District Court for the Northern District of New York and in the Supreme Court, Onondaga County.

3. The Administrative Law Judge Has Broad Discretion to Allow the Expert Testimony of Mr. Berg

Because of the broad discretion given to administrative law judges ("ALJ" or "ALJ's"), they are generally liberal in their approach in allowing documents and testimony into evidence. This does not result in any prejudice to the parties because by training and experience, ALJ's have the ability to accord appropriate weight to the evidence adduced. In essence, they have the ability to "separate the wheat from the chaff." As the Fourth Circuit stated in Underwood v. Elkay Mining, Inc., 105 F.3d 946 (4th Cir. 1997), "[b]ecause the ALJ is presumably competent to disregard that evidence which should be excluded or to discount that evidence which has lesser probative value, it makes little sense, as a practical matter, for a judge in that position to apply strict exclusionary evidentiary rules." Id. at 949. The Court followed up by saying " ... we strongly advise administrative law judges: if in doubt, let it in." Id. at 950 (*quoting* Multi-Medical Convalescent & Nursing Ctr. of Towson v. NLRB, 550 F.2d 974, 978 (4th Cir. 1977).

The same principles espoused above are applicable to the realm of expert testimony. ALJ's have broad discretion to admit into evidence the testimony of experts. Alabama Ass'n of Ins. Agents v. Board of Governors of Fed. Reserve Sys., 533 F.2d 224, 254 (5th Cir. 1976); *cited in* the Administrative Procedure Act, 5 U.S.C.A. § 556 note 20 (2003). Absent abuse of discretion, Courts of Appeal will not interfere with the decisions of ALJ's regarding an expert's competence to testify, nor on whether such testimony is relevant. *See* Yaffe Iron and Metal Co., Inc. v EPA, 774 F.2d 1008 (10th Cir. 1985); Knight v. Otis Elevator Co., 596 F.2d 84 (3rd Cir. 1979); *See also* Keystone Plastics, Inc. v. C & P Plastics, 506 F.2d 960 (5th Cir. 1973) (This decision relates to the discretion of

a trial court regarding expert testimony). Since an ALJ sits without a jury, the presiding officer is entitled to wide latitude concerning the admission of expert testimony. *See* Goodman v. Highlands Ins. Co., 607 F.2d 665 (5th Cir. 1979) (referring to the discretion of a trial court regarding expert testimony; citation omitted). As the Administrative Procedure Act's legislative history notes, "[t]he mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) ...." S. Doc No. 79-248, at 208 (1946) (*quoted in* Underwood, 105 F.3d at 951. In this case, there is no need for a gatekeeper to assist jurors in deciding specific issues. *Cf.* Kuhmo, 526 U.S. at 156.

Based on his knowledge, skill and experience in the field of historical firearm and airgun research, Mr. Berg is eminently qualified to testify regarding the availability of airguns and firearms equipped with automatic safety mechanisms.[6] Mr. Berg's proposed expert testimony is reliable in this area and his specialized knowledge and skill will assist the trier of fact in understanding about the availability of airguns and firearms equipped with automatic safeties. Moreover, the Court has broad discretion to allow for the testimony of Mr. Berg.

Conclusion

For the above reasons, Complaint Counsel respectfully requests that the Court deny the Respondent's Motion in Limine to Exclude Testimony of Stanton O. Berg.

Respectfully submitted,

April 25, 2003

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Sean R. Ward
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[6] Ironically, Respondent's designated "safety design" expert, Robert Beeman, conceded in his deposition the substance of Mr. Berg's testimony: that automatic safeties have been widely used in airguns, including those he sold. March 18, 2003 Deposition of Dr. Robert D. Beeman, p. 19-22, attached as Exhibit "4."

COPY

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

CPSC/OFFICE OF
THE SECRETARY

2003 APR 25 P 12: 09

In the Matter of:	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products	)	
400 West Stribling Drive	)	
Rogers, AR 72756	)	
	)	
Respondent	)	
	)	

MOTION FOR PARTIAL SUMMARY DECISION

Respondent, Daisy Manufacturing Company, d/b/a Daisy Outdoor Products, moves for a Partial Summary Decision on the issue of automatic safety and for reason states:

1. The Complaint alleges a cause of action for failure to incorporate an automatic safety. (See Complaint at Paragraph 18)

2. Complaint Counsel's sole proof on whether this makes the product defective was to come from Stanton O. Berg. (See original Expert Witness Disclosure of Complaint Counsel at Page 7)

3. Complaint Counsel has now conceded that Stanton O. Berg does not have the qualifications or expertise to address design issues and has now modified the Expert Witness Disclosure to eliminate his testimony on design. Specifically, the testimony of Stanton O. Berg will be limited to whether some air rifles or firearms have automatic safeties. (See Pre-Trial Order and Complaint Counsel's Witness List)

4. The only expert proof on the issue of whether there should be an automatic safety is

from Daisy's expert witnesses who conclude that the automatic safety is inappropriate on this type of rifle. It should also be pointed out that Complaint Counsel's own employees concede that an automatic safety is inappropriate on this type of air rifle.

(a) See Affidavit of Jess Galan at Paragraph 11 attached as **Exhibit A.**

(b) See Affidavit of Robert Beeman at Paragraphs 8 and 9, attached as **Exhibit B.**

(c) See deposition of Ron Reichel, attached as **Exhibit C.**

5. There are numerous reasons for not including an automatic safety on a bolt-action air rifle:

(a) It is not a design found on most firearms and in fact is rarely if ever found on a bolt-action rifle. (See previously listed Exhibits)

(b) There is a greater risk of harm according to some safety committees who have studied this issue. (See minutes of the meeting of the American Sporting Clays Association at Page 6, attached as **Exhibit D**)

6. As pointed out by Ron Reichel in his deposition and Michael Hampton in his deposition it can be even more unsafe to have an automatic safety than to not have a safety.

7. Daisy considered and rejected the automatic safety on these bolt-action rifles and had valid reasons for so rejecting.

8. The Court is referred to the attached Memorandum Brief.

WHEREFORE, Respondent prays that the Motion of Partial Summary Decision be granted, for its costs, attorneys' fee and all other proper relief to which it is entitled.

Respectfully submitted,

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By: _____
William M. Griffin III #82069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by U. S mail, postage prepaid and addressed as follows, this 24th day of April, 2003.

The Honorable William B. Moran,
Administrative Law Judge
and Presiding Officer

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

OFFICE OF THE SECRETARY

In the Matter of:	)	2003 APR 25 P 12: 11
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, AR 72756	)	
	)	
Respondent	)	
	)	

MEMORANDUM BRIEF IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY DECISION

BACKGROUND

The Complaint filed by the Consumer Product Safety Commissions alleges that the Daisy Model 880 and 856 air rifles are defective because of their failure to include an automatic safety.

The only expert named by the Complaint Counsel to put forth such a opinion is Stanton O. Berg. However, during the deposition of Stanton O. Berg, Complaint Counsel became aware that Stanton O. Berg had been excluded by Court from giving testimony on design features on airguns and firearms at least six times due to the fact that he is not qualified to address such issues. Consequently, Complaint Counsel changed the Witness Disclosure for Stanton O. Berg to read as follows:

> To testify based on his knowledge of the field of historical firearm and airgun research, concerning the availability of airguns and firearms equipped with automatic safety mechanisms. (Pre-Hearing Order and Complaint Counsel's Witness List)

Obviously, this is an issue that requires expert testimony from someone with design expertise in airguns. Complaint Counsel had originally relied on and expected Stanton O. Berg to provide this testimony. However, upon learning that Stanton O. Berg not only had no qualifications in design, engineering or airguns in general, Complaint Counsel has withdrawn him as a design expert. (See Motion In Limine regarding Stanton O. Berg, previously filed with this Court).

Complaint Counsel essentially has no expert testimony on the issue of whether a rifle should or should not have an automatic safety from anyone with design expertise on airguns. On the other hand, Daisy has proof from numerous witnesses that an automatic safety is an undesirable feature and in some cases possibly more unsafe than equipping the rifle with a manual safety or no safety at all.

Daisy considered and rejected the idea of an automatic safety. Automatic safeties are generally used in break-barrel air rifles to protect the spring of the air rifle. They are also used in some break-barrel shotguns of European manufacture. Primarily because if the use of gun handler in driven hunts popular in Europe.

TESTIMONY OF WITNESSES

Ron Reichel (an employee of the Consumer Product Safety Commission), the engineer assigned to study airguns on numerous occasions over the last ten to fifteen years testified specifically on the issue of automatic safeties:

Q Another thing the Consumer Product Safety Commission contends is wrong with Daisy 880 and 856 air rifles in their Complaint is that they are not equipped with automatic safeties. Would you agree with me, sir, that almost every air rifle and firearm you know of would be defective under that standard by the Consumer Product Safety Commission?

A Well, it would because there are few very weapons with automatic safeties. I don't know specifically of any with automatic safeties, real firearms. I do know of one BB gun with an automatic safety.

Q If you wanted to train younger people and use a rifle like this, if I wanted to take a person and train them how to use it, you would want it to function like a firearm they might –

A I would not want it to have an automatic safety. I wouldn't even want to bring the concept of automatic safeties into consideration.

Q And that is a logical design choice by a manufacturer as far as you are concerned, not to put an automatic safety on the rifle, correct?

A I think it would be one of the choices they make, and it's logical, and there's reasons not to.

Q And, in fact, in your mind, that's the best decision, isn't it?

A I would not like to see automatic safeties on any weapons or any guns. I shouldn't say weapons, but any firearms because I think it brings a false sense of security. And when you need the reliability, it could possibly impede the correct functioning.

(Deposition of Ronald Thomas Reichel, Page 73 and 74)

Jay DeMarco, another long time employee of the Consumer Product Safety Commission Compliance Officer stated as follows:

Q Let me ask it this way: The consensus opinion of the staff that you worked with is that automatic safeties are not required to make air rifles sake. Correct?

Mr. Moore: Objection

A I don't recall any recommendations to any documents that I was part of a team, or

whatever, making that recommendation.

Q That was true through 1999. Correct?

Mr. Moore: Objection

The Witness: As I recall.

(Deposition of Jay DeMarco, Pages 207 and 208)

Q In fact, you're aware of, generally, that American hunters do not want automatic safeties on their shotgun and rifles. Correct?

Mr. Moore: Objection to foundation.

By Mr. Griffin:

Q Well, you're a lifetime NRA member, Aren't you?

Mr. Moore: Objection. Doesn't make him an expert.

The Witness:

A I mean I don't know what all hunters want, or I couldn't speak to everybody. But I am familiar through literature that it's something that is not wanted by hunters on firearms.

Q As a hunter, you would not want one on any of your rifles. Correct?

A Personally, I would not.

Q Do you know of a single soul who hunts or shoot activity that would want an automatic safety on a rifle?

Mr. Moore: Objection

A. I don't know anybody.

(Deposition of Jay DeMarco, Pages 50 and 51)

Q One of the problems that you can see in an automatic safety is very clearly giving No

1 a false sense of security to the shooter that it's automatically on. Correct?

A That might be an impression, yes. ...

Q The consensus opinion of the groups of people you worked was that Daisy power line air rifles did not need to be recalled up until the year 2000 when you were taken off the case. Correct?

Mr. Moore: Objection.

A I mean, it was case-by-case basis and the cases I worked on with teams, no. We did not. (Deposition of Jay DeMarco, Pages 58 through 60)

Michael Wayne Hampton, one of the leading clay sport shooters in the country as well as shooting instructor specifically addresses the issue of automatic safeties in his deposition.

At page 68 of his deposition, Michael Hampton specifically addressed the issue of automatic safeties:

A. Because 99.999, whatever that percent is, of all firearms do not have automatic safety. To have a particular firearm with an automatic safety just creates, in my opinion, creates the problem.

Q So you would just –if – You would like to get rid of all guns with automatic safeties, is that correct?

A. Yes, yes.

(Deposition of Michael Wayne Hampton, Page 68)

Mr. Hampton also explained to Complaint Counsel that on airguns, you put an automatic safety on break-barrel air rifles to prevent damaging the gun. The break-barrel airgun is cocked by extending the barrel downward which begins the cocking mechanism and charges the air to propel the pellet. If the trigger is pulled anywhere in this scenario, the barrel will be damaged because it

will fly up. Consequently, the break-barrel air rifles contain an automatic safety. These rifles are very distinct from bolt-action rifles like the Daisy 880 and 856 air rifles which incorporate a safety mechanism that prevents the trigger from being pulled anytime the bolt is open. Mr. Hampton explained as follows:

A Explain that. You said "break-barrel" what? What was the other word you used?

Q Spring air.

A Spring, spring air?

Q Yes.

A If it's a spring air, then I would say the manufacturer put the automatic safety on there to keep from damaging the gun. When you break open the gun to – to cock the spring, if the gun is accidentally fired, I believe it will damage the gun.

Q And that's the only reason that you think that would employ an automatic safety.

A In my opinion, yes.

(Deposition of Michael Wayne Hampton, Pages 67 and 68)

Mr. Hampton goes on to state at Page 110, the reason an automatic safety is not desirable:

Q In your opinion as an experienced shooter, firearm safety instructor, is an automatic safety a desirable feature on any gun? ...

A An automatic safety is not a desirable feature on any firearm largely because of creating an unsafe situation, as well as giving the person a false sense of security, as well as the shooting of – an automatic is not on 99.99-something percent of all the guns in the United States and could not be.

Q And would that apply to nonspring-loaded airguns as well? Your same opinion?

A I would have the same opinion on any firearm, yes sir.

Q Have you seen any - - in your experience, have you seen any bad habits developed with users of guns with automatic safety?

A Yes. The ones that I spoke of earlier where we had firsthand knowledge of instructors with loaner guns. The automatic safeties created more of a safety problem with beginners, novice shooters using loaner guns. The ones with automatic safeties invariably were the cause of some kind of a problem, safety problem, with the muzzle.

Q In your experience, do most people in the United States grow up using guns with an automatic safety?

A No.

(Deposition of Michael Wayne Hampton, Pages 110 and 111)

Mr. Hampton went on the explain the fallacy of the Complaint Counsel's argument that an automatic safety would prevent injuries:

Q Would an automatic safety in your opinion provide any better protection than a manual safety in a situation where kids, intend to be shooting each other, like, in a BB gun war that we discussed earlier today? ...

A If it's a manual safety or an automatic safety, it's going to be off whenever you're going to try to shoot the gun. So it has no relevance to an automatic safety would keep kids from shooting at each other.

Q Do you know of any type of airgun or firearm ever developed in history or designed in such a way that the gun would not fire when someone pointed it at a person and pulled the trigger?

A No.

(Deposition of Michael Wayne Hampton, Pages 113 and 114)

Another of Respondent's experts, Jess Galan, who has written over nine hundred articles on airguns as well as several books including Airgun Digest, specifically addressed the issue of automatic safeties in his Affidavit:

> The action in the Model 856 and Model 880 can be readily kept open by retracting the bolt. This allows you instant visual access to the breach area and the bolt tip in this gun, as well as in several other models which employ a similar design. In a bolt action firearm, the top cartridge in the magazine would be seen when the bolt is retracted. Obviously, the Model 856 and similar airguns do not use firearm cartridges but small round projectiles requiring a very different feed system. There is total visual access to any BB picked up by the bolt from the BB reservoir. Since the Model 856 and Model 880 are ideal as firearms trainers for new shooters of various ages, this design feature is of great value because it duplicates closely the general handling and cartridge loading characteristics of a cartridge bolt-action rifle.
>
> Over the years, I have examined air rifles and BB guns with and without automatic safeties: First it should be noted there are no semi-automatic bolt action of pump firearms made, of which I am aware, that incorporate an automatic safety. Automatic safeties are relegated to a very small number of side-by-side shotguns, usually of foreign manufacture and a few models of over and under shotguns. Because the Model 880 and the Model 856 are designed to be used as training models for later firearm use, it is important that they function similarly. The addition of an automatic safety on these air rifles would defeat the purpose. American firearms generally do not have automatic safeties for many, many good reasons. (These

reasons include that a large number of automatic safeties are taken off firearms when they have been incorporated in shotguns of foreign manufacture due to the fact that they create frustration in making follow up shots for the user. In fact, on many target shotguns, there are no safeties whatsoever. American shooting enthusiasts have not wanted an automatic safety. Thus a manual safety is something that allows the user to always be in control of the position of the safety on the firearm). An automatic safety on this type of air rifle would necessarily create a situation where the novice shooter would learn to rely on a device which he would be unlikely to ever encounter with firearms.

(Exhibit A, Affidavit of Jess Galan, Pages 3 and 4, Paragraph 11).

Robert Beeman, the owner of Beeman Airgun Company testified at length on the issue of automatic safety and his testimony tracts that of the witnesses above. A copy of his Affidavit is attached which reflects similar opinions to those witnesses identified above.

DAISY CONSIDERED AND REJECTED THE CONCEPT OF AN AUTOMATIC SAFETY

Daisy was aware as were all manufacturers that automatic safeties had existed for certain limited purposes since the 1800s.

Richard I. Daniel, the former President of Daisy and a design engineer with many years of experience in designing airguns, addressed the concern Daisy had about automatic safeties in 1972 when the Daisy Model 880 was designed.

Q .... Now prior to the 880, had Daisy manufactured BB or other air guns with automatic safeties?

A Yes, we had.

Q A

A W [redacted] oint in time. When you cock the gun, tl ally took those off those guns. We f d habit training wise to the use of the p e of users to cock the gun, close the l that they – the safety became a – an inconvenience.

The shooting education people insisted that their guns be built without safeties, without automatic safeties, because they found that in training young people, they might have ten people standing in a firing line, and they're there trying to instruct them, and they're telling them to cock the gun and to close the lever, and, you know, move the safety and fire the gun down range and handle it safely, that one of the things that happened with an automatic safety is that a beginner, particularly, unfamiliar with the automatic safety, would pull the trigger and find the safety was still on. And then became befuddled, did not know what was wrong, why the gun didn't fire.

And now you've got a person who is reckless with the gun, and you've got ten shooters there. And the shooting education people were very insistent that guns for educational purposes be built without safeties. And I believe the standards provide for that.

That – that what was happening is that we were teaching young people bad habits with regard to the use of the product and a habit that wouldn't be transferrable into firearms because most firearms don't have automatic safeties.

(Deposition of Richard Daniel, Pages 113, 114and 115).

Daisy employee Guy E. Braughler, a self-described devil's advocate, evaluated the Model 880 in 1971 and 1972. He first examined drawings and came to the conclusion that some type of other safety mechanism might be helpful. In fact he designed an automatic safety which he indicates now probably would not have worked.

Q And what I am getting at is that – I mean, I understand that you changed your view on the necessity of an automatic safety on the 880, and I just want to know all the bases on which you changed that view. And one was your realization of the effectiveness of the open bolt. And was there any other basis?

A Well, the – the automatic safety and its problems have a lot to do with it. The reliance on it, the false sense of security, the added parts that have possibility of going wrong, we're not training the child or the shooter correctly because its not a common place in the shooting field. These all added up, combined with my own personal feelings of safety, which is "I don't care whether you have a safety on a gun or not. I'm a shooter and I don't care. But if you mishandle that gun and point it at me, I don't care whether its got a safety on it or not, I'm – you're gone, and I'm gone." And that's deep within. So all of those things add up that we had a good system put together good with the whole package, and it should go into production.

(Deposition of Guy E, Braughler, Pages 72 and 73)

Again, at Page 78, Mr. Braughler addressed these issues:

Q Mr. Braughler, as you know, Daisy is being sued by the Consumer Product Safety Commission over the 880 and 856 and the variations thereof. I want to ask you about some if the allegations they've made. One of the allegations is, is that the 880 and

856 should have automatic safeties on them. Could you explain as a air gun design expert why or why not is an automatic safety desired or necessary on a rifle like the 880, or, for that matter, like the 856.

A Automatic safeties on any gun, firearm or air gun, have their problems. They convey a false sense of security, they have added parts. They malfunction. Mainly the poor gun handling is one of the biggest factors that is conducive to mishandling the gun and ignoring safe gun habits like not pointing it at anybody. It's – in the air gun industry, it's also an unusual thing because there's not many automatic safeties on firearms. So to build a training tool with an unusual safety is not a training tool.

(Deposition of Guy E. Braughler, Page 78)

Mr. Braughler also addressed the fact that he and Mr. Daniel concluded that the fact that the Daisy 880 (and later 856) have a safety feature wherein when the bolt is opened the trigger cannot be pulled is a superior feature to a "automatic safety".

On Page 47 of his deposition Guy Braughler states:

Q And you and Mr. Daniel concluded at the end of the day that the open bolt was a superior safety to the automatic safety you designed. Is that fair?

A That was our conclusion. I don't know that occurred in one day. It occurred definitely before the unit went into production, yes. This was an ongoing, long project to establish this level.

(Deposition of Guy E. Braughler, Pages 47 and 48)

LEGAL ARGUMENT

Pursuant 16 C.F.R § 1025.25, Daisy is requesting a Partial Summary Decision on the issue of whether the fact that the Daisy Model 880 and Model 856 air rifle do not incorporate an automatic

safety is a defect in the air rifle under § 15 of the C.P.S.A. and § 15 of the F.H.S.A. Pursuant to the Regulation, Daisy is filing this Motion with supporting memorandum upon one of the issues in controversy.

16 C.F.R §1025.25 closely tracks Federal Rule of Civil Procedure 56. The partial summary judgment according to the notes to Rule 56 is "merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case"... and that this "likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact".

Probably the most cited case regarding summary decisions is *Celotex Corporation v. Catrett* 477 US 317, 91 L.Ed2d 265, 016 S Crt 2548 (1986). In that case, the Court pointed out that summary judgment procedure is properly regarded not as a disfavored procedural shortcut but rather as an integral part of the Federal Rules... The United States Supreme Court pointed out:

> "One of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose". *Celotex Corporation v. Catrett* @ 477 US 323 and 91 L.Ed.2d @ 274.

In this case, Consumer Product Safety Commission's allegation that Daisy Model 880 and Model 856 air rifles should incorporate an automatic safety is totally ludicrous in light of the fact that their own engineer has pointed out that the automatic safety should not be on these air rifles. Complaint Counsel's only "expert" on this issue is recognized by the Complaint Counsel as being incompetent to testify on the issue of design. On the other hand, there are at least six witnesses who will testify that an automatic safety is an inappropriate feature on a bolt action air rifle of this type including Commission employees Jay DeMarco and Ron Reichel as well as Richard I Daniel, Guy

E. Braugher, Ron Joyce, Jess Galan, Robert Beeman and Michael Hampton.

For the above reasons, Daisy Manufacturing Company respectfully requests that its Motion for Partial Summary Decision be granted and for all other proper relief to which it may be legally entitled.

Respectfully submitted,

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Attorneys for Defendant

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by U. S mail, postage prepaid and addressed as follows, this 24th day of April, 2003.

The Honorable William B. Moran,
Administrative Law Judge
and Presiding Officer

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William M. Griffin III

[477 US 317]

CELOTEX CORPORATION, Petitioner

v

MYRTLE NELL CATRETT, Administratrix of the Estate of LOUIS H. CATRETT, Deceased

477 US 317, 91 L Ed 2d 265, 106 S Ct 2548

[No. 85-198]

Argued April 1, 1986. Decided June 25, 1986.

Decision: Party moving for summary judgment held not required by Rule 56 of Federal Rules of Civil Procedure to support motion with affidavits or other similar materials negating opponent's claim.

SUMMARY

A widow sued in the United States District Court for the District of Columbia, alleging that her husband's death resulted from his exposure to asbestos manufactured or distributed by 15 named corporations. One corporation moved for summary judgment, claiming that the plaintiff had failed to produce evidence that her husband had been exposed to its asbestos products. The plaintiff produced documents tending to show such exposure, but the moving party argued that they were inadmissible hearsay and could not be considered in opposition to the motion for summary judgment. The District Court granted the motion, holding that there had been no showing that the decedent had been exposed to the moving party's products in the District of Columbia or elsewhere. The United States Court of Appeals for the District of Columbia Circuit reversed, holding that the moving party had not adduced evidence, in the form of affidavits or otherwise, to support its motion, and that Rule 56(e) of the Federal Rules of Civil Procedure and the decision of the United States Supreme Court in Adickes v S. H. Kress & Co. 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598, required that the party opposing a motion for summary judgment bore the burden of responding only after the moving party had met its burden of coming forward with proof of the absence of any genuine issue of material fact (244 App DC 160, 756 F2d 181).

On certiorari, the United States Supreme Court reversed and remanded the case for further proceedings. In an opinion by REHNQUIST, J., joined by

Briefs of Counsel, p 660, infra.

WHITE, MARSHALL, POWELL, and O'CONNOR, JJ., it was held that the position taken by the majority of the Court of Appeals was inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure, because Rule 56 did not require the moving party to support its motion with affidavits or other similar materials negating the opponent's claim, Rule 56(c) suggesting the absence of such requirement when it referred to "the affidavits, if any," and because the decision in Adickes v S. H. Kress & Co. should not be construed to mean that the burden is on the moving party to produce evidence showing the absence of a genuine issue of material fact.

WHITE, J., concurred in the court's opinion and judgment, expressing the view that while the Court of Appeals was wrong in holding that the moving party must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact, the moving party must discharge the burden that the rules placed upon him and it was not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff had no evidence to prove his case.

BRENNAN, J., joined by BURGER, Ch. J., and BLACKMUN, J., dissented, expressing the view that while the Court of Appeals erroneously read the decision in Adickes v S. H. Kress & Co. when it required the moving party to submit evidence establishing that the widow's decedent had not been exposed to the moving party's asbestos, and while the moving party could seek summary judgment on the ground that the widow could not prove exposure to the moving party's asbestos at trial, the moving party was nevertheless still required to satisfy its initial burden of production under Rule 56, and it had failed to do so, thereby rendering summary judgment improper.

STEVENS, J., dissented, expressing the view that, in the context of the motion for summary judgment based on the decedent's lack of exposure to the moving party's asbestos in the District of Columbia, the District Court's decision to grant the motion was erroneous and the reversal of summary judgment should have been affirmed on the narrow ground that the widow had made an adequate showing that the decedent had been exposed to the moving party's asbestos in Illinois.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Summary Judgment and Judgment on the Pleadings § 3 — summary judgment — evidence negating nonmoving party's claim

1a-1e. In a wrongful death action in Federal District Court arising from the death of the plaintiff's husband allegedly due to exposure to asbestos manufactured or distributed by named corporations, where one corporation moved for summary judgment on the ground that the plaintiff failed to produce evidence showing the decedent's exposure to the moving party's asbestos, the decision of the Federal Court of Appeals reversing the grant of summary judgment on the ground that the moving party failed to produce proof of the absence of any genuine issues of material fact is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the

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73 Am Jur 2d, Summary Judgment §§ 15, 16-19

28 Federal Procedure, L Ed, Pleadings and Motions §§ 62:535-62:541, 62:589-62:612

1 Federal Procedural Forms, L Ed, Actions in District Courts §§ 1:1731-1:1758

USCS, Federal Rules of Civil Procedure, Rule 56

US L Ed Digest, Appeal § 1692.2; Summary Judgment and Judgment on the Pleadings §§ 1, 3-5

Index to Annotations, Summary Judgment

VERALEX™: Cases and annotations referred to herein can be further researched through the **VERALEX™** electronic retrieval system's two services, **Auto-Cite®** and **SHOWME™**. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references. Use SHOWME to display the full text of cases and annotations.

ANNOTATION REFERENCES

Reviewability of federal court's denial of motion for summary judgment. 17 L Ed 2d 886.

Propriety, under Rule 56(c) of the Federal Rules of Civil Procedure, of granting oral motion for summary judgment. 52 ALR Fed 567.

Sufficiency of showing, under Rule 56(f) of Federal Rules of Civil Procedure, of inability to present by affidavit facts justifying opposition to motion for summary judgment. 47 ALR Fed 206.

Federal Rules of Civil Procedure, because (1) Rule 56 does not require that the moving party support its motion with affidavits or other similar materials negating the opponent's claim, Rule 56(c) suggesting the absence of such requirement when it refers to "the affidavits, if any"; (2) Rule 56(e), in requiring the nonmoving party to come forward with rebuttal affidavits or other specified kinds of materials only in response to a motion for summary judgment "made and supported as provided in this rule," does not require that the motion be supported by affidavits, since, in a case such as the instant one where the nonmoving party will bear the burden of proof at trial on a dispositive issue, the moving party may rely solely on the pleadings, depositions, answers to interrogatories, and admissions on file, and such a motion will be "made and supported as provided in this rule"; and (3) the statement in Adickes v S. H. Kress & Co., 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598, that the moving party must show initially the absence of a genuine issue concerning any material fact, should not be construed to mean that the moving party must produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof, but should instead be understood as requiring the moving party to discharge his burden by showing—that is, pointing out to the District Court—that there is an absence of evidence to support the nonmoving party's case. (Stevens, J., dissented from this holding.)

Summary Judgment and Judgment on the Pleadings § 5 — summary judgment — nonmoving party's burden

2. The plain language of Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial; in such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial; the moving party is entitled to judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof.

Summary Judgment and Judgment on the Pleadings § 3 — summary judgment — moving party's duty

3. A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes will demonstrate the absence of any genuine issue of material fact.

Summary Judgment and Judgment on the Pleadings § 1 — summary judgment — purpose

4. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose.

Summary Judgment and Judgment on the Pleadings § 4 — summary judgment — nonmoving party's proof

5. The nonmoving party is not required to produce evidence in a form that would be admissible at trial in order to avoid summary judgment; Rule 56 of the Federal Rules of Civil Procedure does not require the nonmoving party to depose his own witnesses; Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to show that there is a genuine issue for trial.

Summary Judgment and Judgment on the Pleadings § 3 — summary judgment — premature motion

6. The plaintiff in an action in Federal District Court cannot claim to have been "railroaded" by a premature motion for summary judgment, where the motion is filed 12 months after the commencement of the action; any potential problem with a premature motion can be adequately dealt with under Rule 56(f) of the Federal Rules of Civil Procedure, which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

Appeal § 1692.2 — summary judgment — issues not determined — remand

7. In a wrongful death action in Federal District Court arising from the death of the plaintiff's husband allegedly due to exposure to asbestos manufactured or distributed by named corporations, where one corporation moved for summary judgment on the ground that the plaintiff failed to produce evidence showing the decedent's exposure to the moving party's asbestos, and the plaintiff produced documents tending to show such exposure, but the moving party argued that they were inadmissible hearsay and could not be considered in opposition to the motion for summary judgment, and where the United States Supreme Court reverses and remands for further proceedings the decision of the Federal Court of Appeals which reversed summary judgment for the moving party's failure to produce evidence negating the nonmoving party's claim, the Supreme Court will leave to the Court of Appeals the determination of the adequacy of the showing made by the plaintiff in opposition to the motion for summary judgment and whether such a showing, if reduced to admissible evidence, would be sufficient to carry the plaintiff's burden of proof at trial, because that court with its superior knowledge of local law is better suited than the Supreme Court to make these determinations in the first instance.

Summary Judgment and Judgment on the Pleadings §§ 3, 4 — summary judgment — construction of Rule 56

8. Rule 56 of the Federal Rules of Civil Procedure must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

SYLLABUS BY REPORTER OF DECISIONS

In September 1980, respondent administratrix filed this wrongful-death action in Federal District Court, alleging that her husband's death in 1979 resulted from his exposure to asbestos products manufactured or distributed by the defendants, who included petitioner corporation. In September 1981, petitioner filed a motion for summary judgment, asserting that during discovery respondent failed to produce any evidence to support her allegation that the decedent had been exposed to petitioner's products. In response, respondent produced documents tending to show such exposure, but petitioner argued that the documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion. In July 1982, the court granted the motion because there was no showing of exposure to petitioner's products, but the Court of Appeals reversed, holding that summary judgment in petitioner's favor was precluded because of petitioner's failure to support its motion with evidence tending to negate such exposure, as required by Federal Rule of Civil Procedure 56(e) and the decision in Adickes v S. H. Kress & Co. 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598.

Held:

1. The Court of Appeals' position is inconsistent with the standard for summary judgment set forth in Rule 56(c), which provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

(a) The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof.

(b) There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to the affidavits, "if any," suggests the absence of such a requirement, and Rules 56(a) and (b) provide that claimants and defending parties may move for summary judgment "with or without supporting affidavits." Rule 56(e), which relates to the form and use of affidavits and other materials, does not require that the moving party's motion always be supported by affidavits to show initially the absence of a genuine issue for trial. Adickes v S. H. Kress & Co., supra, explained.

(c) No serious claim can be made that respondent was "railroaded" by a premature motion for summary judgment, since the motion was not filed until one year after the action

was commenced and since the parties had conducted discovery. Moreover, any potential problem with such premature motions can be adequately dealt with under Rule 56(f).

2. The questions whether an adequate showing of exposure to petitioner's products was in fact made by respondent in opposition to the motion, and whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial, should be determined by the Court of Appeals in the first instance.

244 US App DC 160, 756 F2d 181, reversed and remanded.

Rehnquist, J., delivered the opinion of the Court, in which White, Marshall, Powell, and O'Connor, JJ., joined. White, J., filed a concurring opinion. Brennan, J., filed a dissenting opinion, in which Burger, C. J., and Blackmun, J., joined. Stevens, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

Leland S. Van Koten argued the cause for petitioner.
Paul March Smith argued the cause for respondent.
Briefs of Counsel, p 660, infra.

OPINION OF THE COURT

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Justice **Rehnquist** delivered the opinion of the Court.

[1a] The United States District Court for the District of Columbia granted the motion of petitioner Celotex Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, however, holding that petitioner's failure to support its motion with evidence tending to *negate* such exposure precluded the entry of summary judgment in its favor. Catrett v Johns-Manville Sales Corp., 244 US App DC 160, 756 F2d 181 (1985). This view conflicted with that of the Third Circuit in In re Japanese Electronic Products, 723 F2d 238 (1983), rev'd on other grounds sub nom Matsushita Electric Industrial Co. v Zenith Radio Corp. 475 US 574, 89 L Ed 2d 538, 106 S Ct 1438 (1986).[1] We granted certiorari to resolve the conflict, 474 US 944, 85 L Ed 2d 157, 105 S Ct 1863 (1985), and now reverse the decision of the District of Columbia Circuit.

Respondent commenced this lawsuit in September 1980, alleging that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in negligence, breach of warranty, and strict liability. Two of the defendants filed motions challenging the District Court's in personam jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September 1981, argued that summary judgment was proper because respondent had

1. Since our grant of certiorari in this case, the Fifth Circuit has rendered a decision squarely rejecting the position adopted here by the District of Columbia Circuit. See Fontenot v Upjohn Co. 780 F2d 1190 (1986).

"failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged within the jurisdictional
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limits of [the District] Court." In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's summary judgment motion, respondent then produced three documents which she claimed "demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970-1971. Petitioner, in turn, argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion.

In July 1982, almost two years after the commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that it was granting petitioner's summary judgment motion because "there [was] *no* showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." App 217.[2] Respondent
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appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion." 244 US App DC, at 163, 756 F2d, at 184 (emphasis in original). According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure,[3] and this Court's decision in

2. Justice Stevens, in dissent, argues that the District Court granted summary judgment only because respondent presented no evidence that the decedent was exposed to Celotex asbestos products *in the District of Columbia*. See post, at 338-339, 91 L Ed 2d, at 283. According to Justice Stevens, we should affirm the decision of the Court of Appeals, reversing the District Court, on the "narrower ground" that respondent "made an adequate showing" that the decedent was exposed to Celotex asbestos products in Chicago during 1970-1971. See post, at 338-339, 91 L Ed 2d, at 283.

Justice Stevens' position is factually incorrect. The District Court expressly stated that respondent had made no showing of exposure to Celotex asbestos products "in the District of Columbia *or elsewhere*." App 217 (emphasis added). Unlike Justice Stevens, we assume that the District Court meant what it said. The majority of the Court of Appeals addressed the very issue raised by Justice Stevens, and decided that "[t]he District Court's grant of summary judgment must therefore have been based on its conclusion that there was 'no showing that the plaintiff was exposed to defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period.'" Catrett v Johns-Mansville Sales Corp., 244 US App DC 160, 162, n 3, 756 F2d 181, 183, n 3 (1985) (emphasis in original). In other words, no judge involved in this case to date shares Justice Stevens' view of the District Court's decision.

3. Rule 56(e) provides:
"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant

Adickes v S. H. Kress & Co. 398 US 144, 159, 26 L Ed 2d 142, 90 S Ct 1598 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 244 US App DC, at 163, 756

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F2d, at 184 (emphasis in original; footnote omitted). The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial. Ibid. The dissenting judge argued that "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute." Id., at 167, 756 F2d, at 188 (Bork, J., dissenting). According to the dissenting judge, the majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." Id., at 166, 756 F2d, at 187.

[1b, 2] We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure.[4] Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation,

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there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the stan-

is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

4. Rule 56(c) provides:
"The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

dard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ." Anderson v Liberty Lobby, Inc., ante, at 250, 91 L Ed 2d 202, 106 S Ct 2505 (1986).

[1c, 3, 4] Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, *if any*" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment *"with or without supporting affidavits"* (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported [477 US 324] claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.[5]

[1d] Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for summary judgment "made and supported as provided in this rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

[5] We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does

5. See Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale LJ 745, 752 (1974); Currie, Thoughts on Directed Verdicts and Summary Judgments, 45 U Chi L Rev 72, 79 (1977).

not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

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[1e] The Court of Appeals in this case felt itself constrained, however, by language in our decision in Adickes v S. H. Kress & Co. 398 US 144, 26 L Ed 2d 142, 90 S Ct 1598 (1970). There we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 USC § 1983 [42 USCS § 1983]. In the course of its opinion, the Adickes Court said that "both the commentary on and the background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party . . . to show initially the absence of a genuine issue concerning any material fact." Id., at 159, 26 L Ed 2d 142, 90 S Ct 1598. We think that this statement is accurate in a literal sense, since we fully agree with the Adickes Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in Adickes, the motion for summary judgment in that case should have been denied. But we do not think the Adickes language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.

The last two sentences of Rule 56(e) were added, as this Court indicated in Adickes, to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. While the Adickes Court was undoubtedly correct in concluding that these two sentences were not intended to *reduce* the burden of the moving party, it is also obvious that they were not adopted to *add to* that burden. Yet that is exactly the result which the reasoning of the Court of Appeals would produce; in effect, an amendment to Rule 56(e) designed to

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facilitate the granting of motions for summary judgment would be interpreted to make it *more difficult* to grant such motions. Nothing in the two sentences themselves requires this result, for the reasons we have previously indicated, and we now put to rest any inference that they do so.

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence. See 244 US App DC, at 167-168, 756 F2d, at 189 (Bork, J., dissenting); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2720, pp 28-29 (1983). It would surely defy common sense to hold that the Dis-

trict Court could have entered summary judgment sua sponte in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

[6] Respondent commenced this action in September 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f),[6] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

[7] In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was

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made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial. We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.

[8] The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed Rule Civ Proc 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 FRD 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

6. Rule 56(f) provides:
"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

[477 US 328]

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINIONS

Justice **White**, concurring.

I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

A plaintiff need not initiate any discovery or reveal his witnesses or evidence unless required to do so under the discovery Rules or by court order. Of course, he must respond if required to do so; but he need not also depose his witnesses or obtain their affidavits to defeat a summary judgment motion asserting only that he has failed to produce any support for his case. It is the defendant's task to negate, if he can, the claimed basis for the suit.

Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Tr of Oral Arg 43, 45. It asserts, however, that respondent has failed on request to produce any basis for her case. Respondent, on the other hand, does not contend that she was not obligated to reveal her witnesses and evidence but insists that she has revealed enough to defeat the motion for summary judgment. Because the Court of Appeals found it unnecessary to address this aspect

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of the case, I agree that the case should be remanded for further proceedings.

Justice **Brennan,** with whom The **Chief Justice** and Justice **Blackmun** join, dissenting.

This case requires the Court to determine whether Celotex satisfied its initial burden of production in moving for summary judgment on the ground that the plaintiff lacked evidence to establish an essential element of her case at trial. I do not disagree with the Court's legal analysis. The Court clearly rejects the ruling of the Court of Appeals that the defendant must provide affirmative evidence disproving the plaintiff's case. Beyond this, however, the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case.[1] This lack of

1. It is also unclear what the Court of Appeals is supposed to do in this case on remand. Justice White—who has provided the Court's fifth vote—plainly believes that the Court of Appeals should reevaluate whether the defendant met its initial burden of production. However, the decision to reverse rather than to vacate the judgment below

clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion. For this reason, even if I agreed with the Court's result, I would have written separately to explain more clearly the law in this area. However, because I believe that Celotex did not meet its burden of production under Federal Rule of Civil Procedure 56, I respectfully dissent from the Court's judgment.

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I

Summary judgment is appropriate where the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed Rule Civ Proc 56(c). The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727, p 121 (2d ed 1983) (hereinafter Wright) (citing cases); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15[3] (2d ed 1985) (hereinafter Moore) (citing cases). See also, ante, at 323, 91 L Ed 2d, at 273-274; ante, at 328, 91 L Ed 2d, at 277 (White, J., concurring). This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. See 10A Wright § 2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion[2] unless and until the court finds that the moving party has discharged its initial

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burden of production. Adickes v S. H. Kress & Co. 398 US 144, 157-161, 51 L Ed 2d 260, 97 S Ct 990 (1970); 1963 Advisory Committee's Notes on Fed Rule Civ Proc 56(e), 28 USC App, p 626 [USCS Court Rules, Fed Rules of Civ Proc, Notes following Rule 56.].

The burden of production imposed by Rule 56 requires the moving

implies that the Court of Appeals should assume that Celotex has met its initial burden of production and ask only whether the plaintiff responded adequately, and, if so, whether the defendant has met its ultimate burden of persuasion that no genuine issue exists for trial. Absent some clearer expression from the Court to the contrary, Justice White's understanding would seem to be controlling. Cf. Marks v United States, 430 US 188, 193, 51 L Ed 2d 260, 97 S Ct 990 (1977).

2. The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. 6 Moore ¶ 56.15[3], p 56-466; 10A Wright § 2727, p 124. Summary judgment should not be granted unless it is clear that a trial is unnecessary, Anderson v Liberty Lobby, Inc., ante, at 255, 91 L Ed 2d 202, 106 S Ct 2505, and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party, Adickes v S. H. Kress & Co. 398 US 144, 158-159, 51 L Ed 2d 260, 97 S Ct 990 (1970). In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion. 10A Wright § 2721, p 44; see, e.g., Stepanischen v Merchants Despatch Transportation Corp. 722 F2d 922, 930 (CA1 1983); Higgenbotham v Ochsner Foundation Hosp. 607 F2d 653, 656 (CA5 1979). As explained by the Court of Appeals for the Third Circuit in In re Japanese Electronic Products Antitrust Litigation, 723 F2d 238 (1983), rev'd on other grounds sub nom. Matsushita Electric Industrial Co. v Zenith Radio Corp. 475 US 574, 89 L Ed 2d 538, 106 S Ct 1348 (1986), "[i]f . . . there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment . . . ." 723 F2d, at 258.

party to make a prima facie showing that it is entitled to summary judgment. 10A Wright § 2727. The manner in which this showing can be made depends upon which party will bear the burden of persuasion on the challenged claim at trial. If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence—using any of the materials specified in Rule 56(c)—that would entitle it to a directed verdict if not controverted at trial. Ibid. Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery. Ibid.; Fed Rules Civ Proc 56(e), (f).

If the burden of persuasion at trial would be on the *nonmoving* party, the party moving for summary judgment may satisfy Rule 56's burden of production in either of two ways. First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. See 10A Wright § 2727, pp 130-131; Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale LJ 745, 750 (1974) (hereinafter Louis). If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. Anderson v Liberty Lobby, Inc., ante, at 249, 91 L Ed 2d 202, 106 S Ct 2505.

Where the moving party adopts this second option and seeks summary judgment on the ground that the nonmoving party—who will bear the burden of persuasion at trial—has

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no evidence, the mechanics of discharging Rule 56's burden of production are somewhat trickier. Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. See ante, at 328, 91 L Ed 2d, at 277 (White, J., concurring). Such a "burden" of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. See Louis 750-751. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. Ante, at 323, 91 L Ed 2d, at 273. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied, and the court need not consider whether the moving party has met its ultimate burden of persuasion. Accordingly, the nonmoving party may defeat a motion for summary judgment that asserts that the nonmoving party

has no evidence by calling the court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party. In that event, the moving party must respond by making an attempt to demonstrate the inadequacy of this evidence, for it is only by attacking all the record evidence allegedly supporting the nonmoving party that a party seeking summary judgment satisfies Rule 56's burden of production.[3] Thus, if the record disclosed that the moving

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party had overlooked a witness who would provide relevant testimony for the nonmoving party at trial, the court could not find that the moving party had discharged its initial burden of production unless the moving party sought to demonstrate the inadequacy of this witness' testimony. Absent such a demonstration, summary judgment would have to be denied on the ground that the moving party had failed to meet its burden of production under Rule 56.

The result in Adickes v S. H. Kress & Co., supra, is fully consistent with these principles. In that case, petitioner was refused service in respondent's lunchroom and then was arrested for vagrancy by a local policeman as she left. Petitioner brought an action under 42 USC § 1983 [42 USCS § 1983] claiming that the refusal of service and subsequent arrest were the product of a conspiracy between respondent and the police; as proof of this conspiracy, petitioner's complaint alleged that the arresting officer was in respondent's store at the time service was refused. Respondent subsequently moved for summary judgment on the ground that there was no actual evidence in the record from which a jury could draw an inference of conspiracy. In response, petitioner pointed to a statement from her own deposition and an unsworn statement by a Kress employee, both already in the record and both ignored by respondent, that the policeman who arrested petitioner was in the store at the time she was refused service. We agreed that "[i]f a policeman were present, . . . it would be open to a jury, in light of the sequence that followed,

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to infer from the circumstances that the policeman and Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." 398 US, at 158, 26 L Ed 2d 142, 90 S Ct 1598. Consequently, we held that it was error to grant summary judgment "on the basis of this record" because respondent had "failed to fulfill its initial burden" of demonstrating that there was no evidence that there was a policeman in the store. Id., at 157-158, 26 L Ed 2d 142, 90 S Ct 1598.

The opinion in Adickes has sometimes been read to hold that sum-

3. Once the moving party has attacked whatever record evidence—if any—the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). See 10A Wright § 2727, pp 138-143. Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial. See, e.g., First National Bank of Arizona v Cities Service Co. 391 US 253, 289, 20 L Ed 2d 569, 88 S Ct 1575 (1968).

mary judgment was inappropriate because the respondent had not submitted affirmative evidence to negate the possibility that there was a policeman in the store. See Brief for Respondent 20, n 30 (citing cases). The Court of Appeals apparently read Adickes this way and therefore required Celotex to submit evidence establishing that plaintiff's decedent had not been exposed to Celotex asbestos. I agree with the Court that this reading of Adickes was erroneous and that Celotex could seek summary judgment on the ground that plaintiff could not prove exposure to Celotex asbestos at trial. However, Celotex was still required to satisfy its initial burden of production.

II

I do not read the Court's opinion to say anything inconsistent with or different from the preceding discussion. My disagreement with the Court concerns the application of these principles to the facts of this case.

Defendant Celotex sought summary judgment on the ground that plaintiff had "failed to produce" any evidence that her decedent had ever been exposed to Celotex asbestos.[4] App 170. Celotex supported this motion with a

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2-page "Statement of Material Facts as to Which There is No Genuine Issue" and a 3-page "Memorandum of Points and Authorities" which asserted that the plaintiff had failed to identify any evidence in responding to two sets of interrogatories propounded by Celotex and that therefore the record was "totally devoid" of evidence to support plaintiff's claim. See id., at 171-176.

Approximately three months earlier, Celotex had filed an essentially identical motion. Plaintiff responded to this earlier motion by producing three pieces of evidence which she claimed "[a]t the very least . . . demonstrate that there is a genuine factual dispute for trial," id., at 143, 26 L Ed 2d 142, 90 S Ct 1598; (1) a letter from an insurance representative of another defendant describing asbestos products to which plaintiff's decedent had been exposed, id., at 160, 26 L Ed 2d 142, 90 S Ct 1598;

4. Justice Stevens asserts that the District Court granted summary judgment on the ground that the plaintiff had failed to show exposure in the District of Columbia. He contends that the judgment of the Court of Appeals reversing the District Court's judgment should be affirmed on the "narrow ground" that it was "palpably erroneous" to grant summary judgment on this basis. Post, at 339, 91 L Ed 2d, at 284 (dissenting). The Court replies that what the District Court said was that plaintiff had failed to show exposure in the District of Columbia "or elsewhere." Ante, at 320, n 2, 91 L Ed 2d, at 272. In my view, it does not really matter which reading is correct in this case. For, contrary to Justice Stevens' claim, deciding this case on the ground that Celotex failed to meet its burden of production under Rule 56 does not involve an "abstract exercise in Rule construction." Post, at 339, 91 L Ed 2d, at 284 (Stevens, J., dissenting). To the contrary, the principles governing a movant's burden of proof are straightforward and well established, and deciding the case on this basis does not require a new construction of Rule 56 at all; it simply entails applying established law to the particular facts of this case. The choice to reverse because of "palpable erro[r]" with respect to the burden of a moving party under Rule 56 is thus no more "abstract" than the choice to reverse because of such error with respect to the elements of a tort claim. Indeed, given that the issue of the moving party's burden under Rule 56 was the basis of the Court of Appeals' decision, the question upon which certiorari was granted, and the issue briefed by the parties and argued to the Court, it would seem to be the preferable ground for deciding the case.

(2) a letter from T. R. Hoff, a former supervisor of decedent, describing asbestos products to which decedent had been exposed, id., at 162, 26 L Ed 2d 142, 90 S Ct 1598; and (3) a copy of decedent's deposition from earlier workmen's compensation proceedings, id., at 164, 26 L Ed 2d 142, 90 S Ct 1598. Plaintiff also apparently indicated

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at that time that she intended to call Mr. Hoff as a witness at trial. Tr of Oral Arg 6-7, 27-29.

Celotex subsequently withdrew its first motion for summary judgment. See App 167.[5] However, as a result of this motion, when Celotex filed its second summary judgment motion, the record *did* contain evidence—including at least one witness—supporting plaintiff's claim. Indeed, counsel for Celotex admitted to this Court at oral argument that Celotex was aware of this evidence and of plaintiff's intention to call Mr. Hoff as a witness at trial when the second summary judgment motion was filed. Tr of Oral Arg 507. Moreover, plaintiff's response to Celotex' second motion pointed to this evidence—noting that it had already been provided to counsel for Celotex in connection with the first motion—and argued that Celotex had failed to "meet its burden of proving that there is no genuine factual dispute for trial." App 188.

On these facts, there is simply no question that Celotex failed to discharge its initial burden of production. Having chosen to base its motion on the argument that there was no evidence in the record to support plaintiff's claim, Celotex was not free to ignore supporting evidence that the record clearly contained. Rather, Celotex was required, as an initial matter, to attack the adequacy of this evidence. Celotex' failure to fulfill this simple requirement constituted a failure to discharge its initial burden of production under Rule 56, and thereby rendered summary judgment improper.[6]

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This case is indistinguishable from Adickes. Here, as there, the defendant moved for summary judgment on the ground that the record contained no evidence to support an essential element of the plaintiff's claim. Here, as there, the plaintiff responded by drawing the court's attention to evidence that was already in the record and that had been ignored by the moving party. Consequently, here, as there, summary judgment should be denied on the ground that the moving party failed to satisfy its initial burden of production.[7]

5. Celotex apparently withdrew this motion because, contrary to the assertion made in the first summary judgment motion, its second set of interrogatories had not been served on the plaintiff.

6. If the plaintiff had answered Celotex' second set of interrogatories with the evidence in her response to the first summary judgment motion, and Celotex had ignored those interrogatories and based its second summary judgment motion on the first set of interrogatories only, Celotex obviously could not claim to have discharged its Rule 56 burden of production. This result should not be different simply because the evidence plaintiff relied upon to support her claim was acquired by Celotex other than in plaintiff's answers to interrogatories.

7. Although Justice White agrees that "if [plaintiff] has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact," he would remand "[b]ecause the Court of Appeals found it unnecessary to address this aspect of the case." Ante, at 328-329, 91 L Ed 2d, at 277 (concurring). However, Celotex has admitted that plaintiff had disclosed her intent to call Mr. Hoff as a witness at trial

Justice **Stevens**, dissenting.

As the Court points out, ante, at 319-320, 91 L Ed 2d, at 271-272, the petitioner's motion for summary judgment was based on the proposition that respondent could not prevail unless she proved that her deceased husband had been exposed to petitioner's products "within the jurisdictional limits" of the District of Columbia.[1]

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Respondent made an adequate showing—albeit possibly not in admissible form[2]—that her husband had been exposed to petitioner's product in Illinois.[3] Although the basis of the motion and the argument had been the lack of exposure *in the District of Columbia,* the District Court stated at the end of the argument: "The Court will grant the defendant Celotex's motion for summary judgment there being no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia *or elsewhere* within the statutory period." App 217 (emphasis added). The District Court offered no additional explanation and no written opinion. The Court of Appeals reversed on the basis that Celotex had not met its burden; the court noted the incongruity of the District Court's opinion in the context of the motion and argument, but did not rest on that basis because of the "or elsewhere" language.[4]

Taken in the context of the motion for summary judgment on the basis of no exposure in the District of Columbia, the

[477 US 339]

District Court's decision to grant summary judgment

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before Celotex filed its second motion for summary judgment. Tr of Oral Arg 6-7. Under the circumstances, then, remanding is a waste of time.

1. See Motion of Defendant Celotex Corporation for Summary Judgment, App 170 ("Defendant Celotex Corporation, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure moves this Court for an Order granting Summary Judgment on the ground that plaintiff has failed to produce evidence that any product designed, manufactured or distributed by Celotex Corporation was the proximate cause of the injuries alleged *within the jurisdictional limits of this Court")* (emphasis added); Memorandum of Points and Authorities in Support of Motion of Defendant Celotex Corporation for Summary Judgment, id., at 175 (Plaintiff "must demonstrate some link between a Celotex Corporation product claimed to be the cause of the decedent's illness and the decedent himself. The record is totally devoid of any such evidence *within the jurisdictional confines of this Court")* (emphasis added); Transcript of Argument in Support of Motion of Defendant Celotex Corporation for Summary Judgment, id., at 211 ("Our position is . . . there has been no product identification of any Celotex products . . . that have been used *in the District of Columbia* to which the decedent was exposed") (emphasis added).

2. But cf. ante, at 324, 91 L Ed 2d, at 274 ("We do *not* mean that the *nonmoving* party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment").

3. See App 160 (letter from Aetna Life Insurance Co.) (referring to the "asbestos that Mr. Catrett came into contact with while working for Anning-Johnson Company" and noting that the "manufacturer of this product" was purchased by Celotex); id., at 162 (letter from Anning-Johnson Co.) (confirming that Catrett worked for the company and supervised the installation of asbestos produced by the company that Celotex ultimately purchased); id., at 164, 164c (deposition of Catrett) (description of his work with asbestos "in Chicago").

4. See Catrett v Johns-Manville Sales Corp. 756 F2d 181, 185, n 14 (1985) ("[T]he discussion at the time the motion was granted actually spoke to venue. It was only the phrase 'or elsewhere,' appearing with no prior discussion, in the judge's oral ruling at the close of argument that made the grant of summary judgment even conceivably proper").

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
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	)	
	)	
DAISY MANUFACTURING COMPANY, INC.	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
	)	
Respondent	)	
	)	

Order on Motion in Limine to Exclude Testimony

Daisy Manufacturing Company, ("Daisy"), has filed a motion in limine to exclude the testimony of Mr. Stanton Berg, an expert named by Complaint Counsel for the Consumer Product Safety Commission ("CPSC"). The motion relates that Berg is presented to testify that "[a]ll air rifles without automatic safeties are defective, including the Daisy 880 and 856 [models] and [that] [a]ll air rifles with a gravity feed loading system are defective, including the Daisy 880 and 856."[1] Motion at 1.

Looking to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), ("*Daubert*"), Daisy notes the Court's role in ensuring that, for expert testimony to be admissible, Rule 702 of the Federal Rules of Evidence must be satisfied. The essence of determining the admissibility of such scientific, technical or other specialized knowledge testimony involves assessing its reliability and helpfulness.

While Daisy acknowledges that Berg has researched information about guns and that it is his view that automatic safeties are preferable than manual safeties for them, it maintains that he is

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[1]Daisy adds that Complaint Counsel also intends to use Berg to assert that the projectile velocity of these guns contributes to their defectiveness in that the guns' projectile velocities serves to underscore the need for automatic safeties on them. Motion at 1-2.

not a "qualified witness" to offer his opinion as an expert on that issue.[2] In addition, Daisy asserts that Berg is not qualified to offer an expert opinion that the gravity feed loading system for BB guns is defective. It argues that Berg's view is not based on knowledge and experience of his discipline, as he has no underlying engineering degree, formal training, or hands on experience to support it.

On April 25, 2003,[3] Complaint Counsel filed its opposition to Respondent's motion. The Court notes that both sides acknowledged that the Court has discretion in these matters.[4] Upon consideration of the Motion and the Opposition thereto, the Court DENIES Respondent's Motion in Limine. Per Complaint Counsel's Opposition, the Court directs that Mr. Berg's testimony "be limited to the history and availability of automatic safety mechanisms in airguns and firearms to counter Daisy's ... assertions that automatic safeties are not used on and are inappropriate for airguns."[5] Opposition at 2.

So Ordered.

William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: April 29, 2003
Washington, D.C.

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[2]Daisy notes several cases in which the issue of Berg's ability to testify has been explicitly discussed. For example, one court held that Berg could not testify as an expert in firearms design, while another court held that he could testify as a firearms researcher. Motion at 17-18.

[3]The Court, during a conference call with the parties, orally granted Complaint Counsel's request for an extension of time to file its opposition to Respondent's Motion, to April 25th.

[4]*See* Daisy's Motion at 8 and Complaint Counsel's Opposition at 7.

[5]The Court recognizes its gatekeeping role continues during the hearing testimony of Mr. Berg and for any other experts.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
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	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products	)	
400 West Stribling Drive	)	
Rogers, AR 72756	)	
	)	
Respondent	)	
	)	

MOTION FOR SUMMARY DECISION

Respondent, Daisy Manufacturing Company, moves for Summary Decision pursuant to 16 C.F.R. § 1025.25, and states:

1. The following motions and briefs by Daisy are currently pending before this Court:

   (a) Motion in Limine to Exclude Testimony of Stanton Berg;

   (b) Motion in Limine to Exclude Testimony of John William Morris;

   (c) Motion for Partial Summary Decision on "Automatic Safety" Issue (filed April 24, 2003);

   (d) Motion for Partial Summary Decision on "Lack of BB Visibility" Issue (filed April 14, 2003);

   (e) Motion for Partial Summary Decision on "Lodged BB" Issue (filed April 24, 2003);

   (f) Respondent's Response to Order Directing Briefing on Issues of Significance; and

   (g) Respondent's Second Memorandum of Law Re: Briefing on Issues of Significance.

2. Upon review of these motions and briefs, it has become apparent that a Summary Decision should be rendered in this matter upon the Complaint of the CPSC in favor of Daisy pursuant to 16 C.F.R. § 1025.25. When the arguments of CPSC's counsel are set aside and not considered as evidence, upon consideration of CPSC's "proof" in support of its Complaint against Daisy, there is no genuine issue of material fact, and Daisy is entitled to Summary Decision and Order as a matter of law.

3. A brief in support of this motion is filed contemporaneously herewith.

WHEREFORE, respondent, Daisy Manufacturing Company, prays that its Motion for Summary Decision be granted, for its costs, attorney's fees and all other proper relief to which it may be entitled.

Respectfully submitted,

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(501)-376-2011

Attorneys for Defendant

By: _____ Fax:
William M. Griffin III #82069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by U. S mail, postage prepaid and addressed as follows, this 29 day of April, 2003.

The Honorable William B. Moran,
Administrative Law Judge
and Presiding Officer

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William M. Griffin III

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
	)	
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DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products	)	
400 West Stribling Drive	)	
Rogers, AR 72756	)	
	)	
Respondent	)	
	)	

MEMORANDUM BRIEF IN SUPPORT OF
MOTION FOR SUMMARY DECISION

On February 27, 2003, the CPSC's counsel filed Complaint Counsel's Response to Order Directing Briefing on Issues of Significance. CPSC's brief for the first time clearly sets forth the true allegations of the Commission against Daisy, as well as its legally-flawed basis for the Complaint. At page 2-3, CPSC counsel states:

> The Complaint alleges two principal modes of defect and corresponding patterns of injury involving Daisy Powerline Model 880 and 856 airguns, by children and younger adolescents.
>
> First, during normal use of the airguns, BB's may become lodged within the guns' "virtual magazine." Users may "dry" fire the gun repeatedly or shake the gun and receive no visible or audible indication that the airgun is still loaded. Believing the airgun to be unloaded, adolescent and younger users of Daisy Powerline guns have pointed the guns in unsafe directions, expecting only a discharge of compressed air, not a BB projectile traveling at lethal velocity.
>
> Second, the absence of an automatic safety mechanism on these high-velocity guns has resulted in multiple incidents involving accidental discharge of the guns by young users who were carrying or handling the guns while in a cocked and loaded condition.

The CPSC finally acknowledges that it is unable to produce evidence of a defective product, and that "lodged BB's" and "lack of automatic safety" are not "defects" in the design of the Daisy airguns which create "a substantial risk of injury;" rather, it is the "careless behavior" of "children and younger adolescents" in violating basic gun safety and manufacturers' warnings and instructions that creates the "substantial risk of injury" of which the CPSC complains. It is simply the CPSC's view that Daisy should be "legally responsible" for such careless behavior. The CPSC's counsel's statements to this Court are enlightening:

> [T]he behavior of children and adolescent users of the Daisy Powerline airguns, while perhaps exhibiting a carelessness not uncommon for that age ...
>
> [A]dolescent and younger users of Daisy Powerline guns have pointed the guns in unsafe directions, expecting only a discharge of compressed air ....
>
> [M]ultiple incidents involving accidental discharge of the guns by young users who were carrying or handling the guns while in a cocked and loaded condition [and pointing the guns in unsafe directions].
>
> [A] gun that entraps BB's encourages a child to believe the gun is not loaded and engage in behaviors that are unsafe.
>
> Providing a design with an automatic safety and a magazine that precluded BB lodging would have been a far better alternative than trying to change behavior or prevent accidental behaviors.
>
> Who should be legally responsible here?

(See p. 3-4, Complaint Counsel's Response to Order Directing Briefing on Issues of Significance).

While the CPSC's counsel may honestly hold such a political or social philosophy that Daisy should be "legally responsible" for the "careless behavior" of "children and younger adolescents," the case before the Commission is not about philosophy. Under 15 U.S.C. § 2064 and 15 U.S.C. § 1274, the Commission bears the burden of proof by presenting facts and evidence (16 C.F.R. § 1025.43)

that is reliable, probative and substantial (16 C.F.R. § 1025.51) through witnesses (not arguments or philosophies of counsel) of the following elements under each theory of liability:

Lodged BB's

(1) The CPSC must provide reliable, probative and substantial proof that a BB can become lodged in the magazine of a Daisy 880 or 856 airgun in the course of the normal and intended use of the airgun.

(2) The CPSC must provide reliable, probative and substantial proof that a lodged BB is a product "defect" (15 U.S.C. § 2064(a)(2)).

(3) The CPSC must provide reliable, probative and substantial proof that a lodged BB product "defect" causes the Daisy 880 or 856 airgun to "create a substantial risk of injury to the public" (15 U.S.C. § 2064(a)(2)).

Of course, the additional issue for the Court to consider is whether the CPSC will be able to produce "reliable, probative, and substantial" evidence of legal causation required by 16 C.F.R. § 1025.51(b). In virtually every state in the United States where a "design defect" has been alleged in a products liability action against a gun manufacturer or supplier, in order to recover damages the plaintiff must not only prove a "design defect" causing the gun to be "unreasonably dangerous," but must also prove that the defect was the "proximate cause" of the plaintiff's injuries or damages. If the "defect" is not the cause of the injury, the plaintiff has failed to meet his burden of proof. See generally, DeRosa v. Remington Arms Co., Inc., 509 F. Supp. 762 (E.D.N.Y. 1981); Cervelli v. Thompson/Center Arms, 183 F. Supp. 2d 1032 (S.D. Ohio 2002); Treadway v. Smith & Wesson Corp., 950 F. Supp. 1326 (E.D. Mich. 1996); Eichstedt v. Lakefield Arms Ltd., et al., 849 F. Supp. 1287 (E.D. Wis. 1994); Edwards v. Atro Spa, et al., 891 F. Supp. 1074 (E.D.N.C. 1995); Armijo v. Ex Cam, Inc., 656 F. Supp. 771 (Dist. N.M. 1987); Sanchez v. Stanley-Bostitch, Inc., 1999 U.S.

DIST. LEXUS 12975 (S.D.N.Y. 1999); Moss v. Coleman Wolohan Lumber Co., et al., 1995 U.S. DIST. LEXUS 8854(N.D. Ill. 1995).

To avoid Summary Decision, the CPSC must prove – with evidence – that if the Daisy 880 and 856 could be redesigned in such a way that there was no "defect" and BB's did not "get stuck" as the CPSC claims, then the "substantial risk of injury" created by the "careless" and "unsafe" behavior of "children and younger adolescents"[1] would be eliminated or significantly reduced. As discussed at Part I, infra, the CPSC has not produced and is unable to produce any such evidence.

Lack of Automatic Safeties

(1) The CPSC must provide reliable, probative and substantial proof that an airgun with a manual safety, but without an automatic safety, is a defectively-designed product (15 U.S.C. § 2064(a)(2)); and

(2) The CPSC must provide reliable, probative and substantial evidence that the presence of a manual safety, but lack of an automatic safety, which creates a product design "defect" causes the Daisy 880 or 856 airgun to "create a substantial risk of injury to the public" different than the risk of injury to the public that exists on all other types of airguns or firearms that are equipped with manual safeties but are not equipped with automatic safeties, which also may be used by a "child or young adolescent" exercising "careless behavior" (15 U.S.C. § 2064(a)(2)).

Of course, the additional issue for the Court to consider is whether the CPSC will be able to produce "reliable, probative and substantial evidence" of proximate causation required by 16 C.F.R. § 1025.51(b)) (see citations for requirements of proximate causation, supra). The CPSC must prove – with evidence – that if a "defect" exists in the Daisy 880 and 856 airguns due to the lack of an

[1]Use by a "child or younger adolescent" of a Daisy 880 or 856 airgun without adult supervision is an additional misuse of the product, as the instructions and warnings accompanying the product clearly indicate that they are only to be used in the absence of adult supervision by persons 16 years of age and older. Thus, either the CPSC is arguing that persons 16-18 years of age are "children and younger adolescents," or the "users" that the CPSC claim create the "substantial risk of injury" are those who not only use the product in violation of the basic rules of gun safety, but also use the product in violation of manufacturer's instructions and warnings.

"automatic safety," then future inclusion of an "automatic safety" would eliminate or substantially reduce the "substantial risk of injury" created by the "careless" and "unsafe behavior" of "children and younger adolescents."[2] As discussed at Part II, infra, the CPSC has not produced any such evidence to date, and is unable to produce any such evidence.

I. "LODGED BB'S"

Under 16 C.F.R. § 1025.25, the Court must consider the total lack of evidence (witness testimony, affidavits, records or documents) on the following issues which the CPSC has the burden of proof in this case. The CPSC has no evidence to present to this Court on the following essential issues of fact:

(1) BB's "lodge" or "get stuck" in the magazine of the 880 or 856 Daisy airguns as designed, in the normal, intended and expected use of the guns. To the contrary, the occurrence could only be "recreated" by the CPSC's expert after alteration and manipulation of the product (see Daisy's Motion for Partial Summary Decision, filed April 24, 2003).

(2) A qualified fact or expert witness (either for Daisy or the CPSC) will testify that they consider it a product design "defect" in the Daisy 880 or 856 that a BB can "lodge" (15 U.S.C. §§ 2064 and 1274) (see required proof of "defect" set forth in "Respondent's Second Memorandum of Law Re: Briefing on Issues of Significance").

(3) A qualified fact or expert witness (either for Daisy or the CPSC) will testify that a "lodged" or "stuck" BB creates a "substantial risk of injury to the public" under 15 U.S.C. § 2064 or a "substantial risk of injury to children" under 15 U.S.C. § 1274. To the contrary, every witness in this case has testified that a "stuck" or "lodged" BB creates no risk of injury to anyone at any time. Only when a stuck BB becomes "unstuck," like every other BB in the magazine, can that BB be loaded, the gun pumped, pointed at another individual and the trigger pulled, creating the risk of injury. The CPSC has produced no evidence that a "previously-temporarily-stuck BB," as opposed to a "never-before-stuck-BB," is more likely to be the BB that is involved in a "substantial risk of injury" caused by "careless behavior" of "children and

[2]See footnote 1.

younger adolescents." (see Motion in Limine to Exclude Testimony of John William Morris, and Respondent's Motion for Partial Summary Decision filed April 24, 2003).

(4) A qualified fact or expert witness (either for Daisy or the CPSC) will testify that the "substantial risk of injury" caused by the "careless behavior" of "children and younger adolescents" of loading, pumping, pointing and shooting at another person would be eliminated or significantly reduced if only BB's were never temporarily "stuck" in the magazine before becoming "unstuck" at some point before the "careless behavior" began. All the evidence in the case is exactly the contrary. Proximate causation is a key element of proof in any product defect case under the common law of every state in the United States, and the CPSC is simply unable to produce any evidence of proximate causation between the counsel's theory of "defect" and any "substantial risk of injury."

Pursuant to 16 C.F.R. § 1025.25, a Summary Decision and Order shall be granted if the pleadings and the depositions, answers to interrogatories, admissions or affidavits show that there is no genuine issue as to any material fact and the moving party is entitled to Summary Decision and Order as a matter of law. This regulation adopts its language from Rule 56, Fed. R. Civ. P., governing summary judgments. Rule 56(e), Fed. R. Civ. P., additionally provides:

> When a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest on the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. [Emphasis added]

Respondent Daisy is entitled to Summary Decision and Order in this case pursuant to 16 C.F.R. § 1025.25 upon the CPSC's claim that the Daisy Model 880 and 856 airguns violate 15 U.S.C. § 2064 or 15 U.S.C. § 1274.

II. "AUTOMATIC SAFETY"

Under 16 C.F.R. § 1025.25, the Court must consider the total lack of evidence (witness testimony, affidavits, records or documents) on the following issues which the CPSC has the burden of proof in this case. The CPSC has no evidence to present to this Court on the following essential issues of fact:

(1) A qualified fact or expert witness (either for Daisy or the CPSC) will testify that they consider the Daisy 880 or 856 with a manual safety, but without an automatic safety, to be "defective" from a product design standpoint as required under 15 U.S.C. § 2064 and § 1274 (see Motion for Partial Summary Decision filed by Daisy on April 24, 2003). To the contrary, the only proof presented by any party to this action is that the "lack of an automatic safety" on an airgun or any firearm is not a "design defect," but rather an "option" for which some shooters may have a preference in some limited situations, but the majority of shooters do not prefer for various valid and logical reasons (see April 24, 2003 Motion for Partial Summary Decision).

(2) A qualified fact or expert witness (either for Daisy or the CPSC) will testify on the basis of scientific evidence or empirical studies that the "careless behavior" of "children and young adolescents" that create "substantial risk of injury to the public" does not occur, or occurs with less frequency, in airguns/firearms with automatic safeties than with airguns/firearms with manual safeties. The CPSC can never overcome this clear and obvious void in its proof. The CPSC's social or political philosophy that "Daisy should be held legally responsible" for the "careless behavior" of "children and young adolescents" could apply to any mechanism of any airgun or any firearm ever made by any manufacturer. Any gun with a barrel, projectile and trigger can be used by someone under age 16 without adult supervision, and in conjunction with "careless behavior," can create a "substantial risk of injury to the public" (by loading, pumping, pointing and shooting at another person). The CPSC, by argument rather than proof or citation to authority, is attempting to convince the Court that this "careless behavior" of "children and young adolescents" in handling airguns and firearms is the only required evidence of a "defect" under 15 U.S.C. § 2064 and 20 U.S.C. § 1274. Because it is this "careless behavior" that creates the "risk of substantial harm," rather than a "defect" in the design of all airguns ever manufactured without an automatic safety, the CPSC falls far short of providing tht the lack of an automatic safety creates a defect in the Daisy 880 or 856.

(3) A qualified fact or expert witness (for either Daisy or the CPSC) will testify from scientific studies and empirical evidence that a Daisy 880 or 856 with a

manual safety increases the "substantial risk of injury to the public" caused by the "careless behavior" of "children and young adolescents" over and above what the "substantial risk" of the "careless behavior" would be if the airguns instead had an automatic safety. In other words, when the CPSC's counsel's arguments are set aside, the CPSC has failed to come forward with proof that the presence or absence of the automatic safety, rather than a manual safety, on the Daisy airguns is in any way connected to the "careless behavior" of "children and young adolescents" and the "substantial risk of injury" that such "careless behavior" causes.

(4) A qualified fact or expert witness (for either Daisy or CPSC) will testify from scientific studies and empirical evidence that when "children and young adolescents" engage in "careless behavior" of loading, pumping, pointing a gun at another person and pulling the trigger on a Daisy 880 or 856, that an automatic safety would indeed remain in the "on" position rather than being turned "off" and not used (as occurs with the manual safety with which the products are already equipped). After all, it is the CPSC's lawyers themselves that argue that "children and young adolescents" may intentionally point the Daisy airguns "in unsafe directions, expecting only a discharge of compressed air (p. 3 of CPSC's brief). Of course, the same unsupervised "child and young adolescent" would obviously quickly learn that it is necessary to switch the automatic safety "off" to achieve the desired "discharge of compressed air" while "pointing the gun in an unsafe direction." No CPSC witness has tried to explain how an automatic safety produces or eliminates this "careless behavior." No CPSC expert has offered scientific or empirical evidence to make a causal connection between the "automatic safety" and a reduction in the "substantial risk of harm" created by loading, pumping, pointing a gun in an unsafe direction and pulling the trigger.

(5) A qualified fact or expert witness (for either Daisy or the CPSC) will testify from scientific studies and empirical evidence that the presence of an automatic safety on the Daisy 880 or 856 will prevent more instances of "careless behavior" by "children and young adolescents" than will be created when the "child" user becomes accustomed to an automatic safety on the Daisy 880 or 856, but thereafter engages in the "foreseeable" and "unpreventable" "careless behavior" with one of the majority of airguns in the United States without an automatic safety, then loads, pumps, points and shoots, in reliance upon an automatic safety which is not present. While CPSC's counsel may "prefer" an automatic safety, no scientific or empirical evidence has been produced to indicate that an automatic safety on the Daisy 860 or 856 would eliminate or substantially reduce the types of "substantial injury to the public" which the CPSC claims is created by the "careless

> behavior" of "children and young adolescents" when other airguns and firearms with only manual safeties are encountered.

Pursuant to 16 C.F.R. § 1025.25, a Summary Decision and Order shall be granted if the pleadings and the depositions, answers to interrogatories, admissions or affidavits show that there is no genuine issue as to any material fact and the moving party is entitled to Summary Decision and Order as a matter of law. This regulation adopts its language from Rule 56, Fed. R. Civ. P., governing summary judgments. Rule 56(e), Fed. R. Civ. P., additionally provides:

> When a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest on the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. [Emphasis added]

Respondent Daisy is entitled to Summary Decision and Order in this case pursuant to 16 C.F.R. § 1025.25 upon the CPSC's claim that the Daisy Model 880 and 856 airguns violate 15 U.S.C. § 2064 or 15 U.S.C. § 1274.

CONCLUSION

For the reasons stated herein and as set forth in the motions currently pending before this Court as set forth in paragraph 1 of Daisy's Motion for Summary Decision, Daisy Manufacturing Company is entitled to Summary Decision and Order pursuant to 16 C.F.R. § 1025.25.

Respectfully submitted,

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By: _____ FOR:
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by U. S mail, postage prepaid and addressed as follows, this 29 day of April, 2003.

The Honorable William B. Moran,
Administrative Law Judge
and Presiding Officer

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FROM:	Office of William M. Griffin III	DIRECT DIAL: (b) (6)
RE:	CPSC v. Daisy	

MESSAGE: Faxed herewith please find Motion for Summary Judgment and Memorandum Brief in Support of same to be filed of record in the above referenced matter. The original and one copy of each of these document are being sent to you by Fed Ex. By copy of this fax and regular mail these documents are being served on all counsel of record.

TOTAL NO. OF PAGES: 17

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF JOHN WILLIAM MORRIS, JR.

Pursuant to 16 C.F.R. § 1025.23, Complaint Counsel hereby opposes Respondent's Motion in Limine to Exclude Testimony of John William Morris, Jr. ("Respondent's Motion"). Complaint Counsel contends that BB lodging in Daisy's Model 856 and 880 Powerline airguns ("the Powerline airguns") constitutes a defect under Section 15 of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2064, and/or Section 15 of the Federal Hazardous Substances Act (FHSA), 15 U.S.C. § 1274. Dr. Morris, a mechanical metallurgist and failure analysis expert, is eminently qualified to testify about the propensity of BB's to lodge in these airguns. His testimony will be part of the evidence that Complaint Counsel will present to demonstrate that this defect creates a "substantial product hazard" under Section 15(a)(2) of the CPSA, 15 U.S.C. 2064(a)(2), and/or a "substantial risk of injury to children" under Sections 15(c)(1) and (2) of the FHSA, 15 U.S.C. § 2074(c)(1) and (2).

The methods Dr. Morris employed to conduct his analysis were scientifically sound, and his conclusions are supported by others, including, on some points, Daisy.[1] His reliance on the assistance of a colleague and frequent collaborator, Dr. Daryl C. Chrzan, is the norm in the scientific community and the best way to conduct scientific investigation. Under the principles of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and its progeny and Federal Rules of Evidence 702 and 703, the testimony of Dr. Morris should not be excluded in this case.

I. Dr. Morris' proposed testimony is relevant.

A. Dr. Morris' proposed testimony will assist the trier of fact to understand one of the threshold issues in this case: the propensity of BB's to lodge in Daisy's Model 856 and 880 Powerline airguns.

Rule 702 of the Federal Rules of Evidence, Fed. R. Evid. 702, is the basic rule concerning the testimony of expert witnesses. Rule 702 was amended in response to the Daubert decision and the cases that followed. See Fed. R. Evid. 702 advisory committee's note. Rule 702, as amended, states:

> If scientific, technical, other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

The first part of Rule 702 establishes that an expert's testimony must assist the factfinder; consequently, any information that is not common knowledge can be an appropriate subject of

[1] See, e.g., "Stipulations of Fact" No. 66 describing changes Daisy made to the internal construction of the Model 856 ". . . in part, to eliminate the possibility of a BB lodging in the magazine of the Model 856 (990) airgun."

expert testimony.[2] In this matter, Dr. Morris' testimony clearly will help the Administrative Law Judge (ALJ) determine if there is a defect present in the Powerline Airguns. Dr. Morris' testimony will answer issues 9 – 11 identified in "Complaint Counsel's Separate Statement of Contested Issues of Fact and Law" in the Joint Prehearing Order issued on April 30, 2003:

9. As a result of the design and manufacturing variances of the Powerline Airguns, can BBs become lodged in the guns' receivers during routine use?

10. Can BB lodging foreseeably lead consumers to believe that the Daisy Powerline Airguns are empty when, in fact, they are not?

11. Can a BB lodged in the receiver of a Powerline Airgun become unlodged in routine use and then feed into the loading chamber and be fired?

B. Dr. Morris has determined that BB's can lodge in Powerline airguns during normal use of the airguns, and this presents a risk of injury to the public.

In August 2001, Dr. Morris was hired by the Consumer Product Safety Commission (CPSC) staff to conduct a dimensional analysis of the magazine area of the Powerline Airguns and determine whether the internal components of the airguns could be sufficiently displaced or deformed during normal use of the airguns so that a BB could become lodged inside the magazine area. See Declaration of John William Morris, Jr. ("Morris Declaration") at ¶ 2 (attached hereto as Exhibit A). Assisting Dr. Morris with his work on this project was Professor Daryl C. Chrzan, his colleague at both the Department of Materials Science and Engineering at the University of California at Berkeley and the Material Science Division of Lawrence Berkeley Laboratory. See Morris Declaration at ¶ 3.

Based on testing and analysis of Model 856 airguns, design drawings, and other materials, it is Dr. Morris' opinion that a BB will lodge in a Model 856 airgun when it is loaded

[2] See Notes of Advisory Committee on Fed. R. Evid. 702 (2003) (with amendments and commentary).

with BB's (whether the amount loaded is a handful or over 100 BB's) and unloaded (either through firing or dumping them out of the BB loading door as per Daisy's operating instructions). See Morris Declaration at ¶ 4. Dr. Morris believes that this BB lodging can occur due to: (1) a misalignment of the inner rifle barrel by two hundredths of an inch (which is permitted by Daisy's design) (see Morris Declaration at ¶ 5); or (2) flexibility of the inner barrel (see Morris Declaration at ¶ 6).[3] Dr. Morris has observed that if a BB becomes lodged in a Model 856 airgun, a user can proceed through the loading and firing procedures without dislodging the BB, resulting in a "dry fire" of the airgun. He has observed that the application of a small amount of force (for example, applying a small amount of torque near the forward area of the magazine) can dislodge a lodged BB, allowing the formerly lodged BB to fire, if the user proceeds through the loading and firing procedures following the dislodgment. See Morris Declaration at ¶ 8. These findings by Dr. Morris clearly answer issues 9 – 11 identified in "Complaint Counsel's Separate Statement of Contested Issues of Fact and Law" in the Joint Prehearing Order.

Based on testing and analysis of Model 880 airguns, design drawings, and other materials (including BB's sold for use with these airguns), it is Dr. Morris' opinion that a misshapen BB (i.e., one that is significantly smaller than the minimum size of 0.162 inches permitted by the voluntary ASTM Safety Specification for Non-Powder Gun Projectiles and Propellants (F 590-92)) will lodge in a Model 880 airgun in a machine hole below the rifle barrel. See Morris Declaration at ¶¶ 13, 14, and 17.[4] Based upon his dimensional analysis and observations of the

[3] Dr. Morris does not believe that the design changes implemented by Daisy in 1998 (elongating an interior part called a baffle) and 1999 (reversing the baffle), in an attempt to eliminate BB lodging, have eliminated the possibility of BB's lodging in Model 856 airguns. See Morris Declaration at ¶ 7 and footnote 1 infra.

[4] Dr. Morris also conducted testing on a theory he had developed whereby if the left-side receiver screw of the Model 880 airgun was loosened by about one turn, a BB could lodge at the front of the magazine. However, he ultimately came to believe that there was a much greater likelihood of BB's lodging under the misshapen BB theory

Model 880 airgun, it is Dr. Morris' opinion that if a BB becomes lodged in a Model 880 airgun, a user can proceed through the loading and firing procedures without dislodging the BB, resulting in a "dry fire" of the airgun. It is his opinion that the application of a small amount of force can dislodge a lodged BB, allowing the formerly lodged BB to fire, if the user proceeds through the loading and firing procedures following the dislodgment. Again, these findings by Dr. Morris clearly answer issues 9 – 11 identified in "Complaint Counsel's Separate Statement of Contested Issues of Fact and Law" in the Joint Prehearing Order.

In Respondent's Motion at page 9, Daisy argues that Dr. Morris' opinions about BB lodging in the Powerline airguns are irrelevant because lodged BB's create no risk of injury. To the contrary, lodged BB's are exactly what leads a user to believe that the airguns are unloaded, which foreseeably can lead a user to handle the gun in a less careful manner. As explained above, Dr. Morris believes a lodged BB can become dislodged when a minimal amount of force is applied. Under these circumstances, a user, believing the Powerline airgun to be unloaded, may fire at and strike (with the formerly lodged BB) the user or another person in the vicinity. See Complaint at ¶ 21. In straining to make its point, Daisy completely mischaracterizes Dr. Morris' deposition testimony. It is Dr. Morris' unambiguous opinion that a lodged BB creates a risk of injury. See Morris Declaration at ¶ 19.

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than under the loose screw theory. Dr. Morris then focused his attention on the misshapen BB theory, and he did not further pursue the loose screw theory. See Morris Declaration at ¶¶ 12 and 14.

II. Dr. Morris is qualified to testify as an expert in this matter.

A. Rejection of expert testimony is the exception rather than the rule.[5]

Federal Rule of Evidence 702, as amended, expressly states that a witness may be "qualified as an expert by knowledge, skill, experience, training or education . . . ." Fed. R. Evid. 702. Dr. Morris qualifies as an expert in this proceeding under these criteria.[6]

The Advisory Committee on the 2000 amendments to Rule 702 explained:

> A review of the caselaw after Daubert shows that the rejection of expert testimony is the exception rather than the rule. Daubert did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system."

Notes of Advisory Committee on Fed. R. Evid. 702 (2003) (with amendments and commentary), quoting United States v. 14.38 Acres of Land Situated in Leflore County, Miss., 80 F.3d 1074, 1078 (5th Cir. 1996). In determining whether an expert is qualified to testify, the Court should employ "liberality" and "flexibility."[7]

B. Dr. Morris is mechanical metallurgist and a failure analysis expert.

Given Dr. Morris' extraordinary qualifications to conduct testing and analysis on the Powerline airguns, there is no need for this Court to employ "liberality" or "flexibility." As a review of his curriculum vitae demonstrates (attached hereto as Exhibit B), Dr. Morris is one of

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[5] This is especially true when the trial is before an ALJ rather than a jury. ALJ's have broad discretion to admit into evidence the testimony of experts. See, e.g., Goodman v. Highlands Ins. Co., 607 F.2d 665, 669 (5th Cir. 1979) (referring to the discretion of a non-jury trial judge regarding expert testimony, the Court held ". . . a trial judge sitting without a jury is entitled to even greater latitude concerning the admission or exclusion of evidence).

[6] These bases for qualification are disjunctive. See Commentary to Fed R. Evid. 702 (2003) by Stephen A. Saltzburg, Daniel J. Capra, and Michael M. Martin, construing Friendship Heights Assoc. v. Vlastimil Koubek, 785 F2d. 1154 (4th Cir. 1986) (an expert was not unqualified to render an opinion on the cause of paint delamination merely because she lacked practical experience, where she was a materials scientist and thus qualified on the basis of her education).

[7] See Lappe v. American Honda Motor Co., 857 F. Supp. 222, 226 (N.D.N.Y. 1994) ("Liberality and flexibility in evaluating qualifications should be the rule; the proposed expert should not be required to satisfy an overly narrow test of his own qualifications.")

the pre-eminent metallurgical engineers in the world. Daisy does not dispute this. However, Daisy argues that Dr. Morris's qualifications as a metallurgist are irrelevant to determining the propensity of BB's of lodge. Daisy could not be more wrong. Dr. Morris' knowledge, skill, experience, training *and* education as a mechanical metallurgist and failure analyst make him the perfect expert to explain the propensity of BB's to lodge in Powerline airguns.

At his deposition in this matter taken on March 18, 2003 (see Deposition of John William Morris, Jr. ("Morris Deposition"), which is attached hereto as Exhibit C), Daisy's counsel discovered that Dr. Morris is a mechanical metallurgist (Morris Deposition at p. 4), has designed complex devices including laboratory equipment and superconductive magnets (Morris Deposition at pp. 4-6), and believes that "structural failures can have many causes." (Morris Deposition at pp. 77-78). However, Daisy's counsel did not explore these areas to gain further insight into Dr. Morris' qualifications, and Respondent's Motion clearly reflects this intentional ignorance.

Had Daisy's counsel chosen to fully explore Dr. Morris' qualifications, he would have learned that Dr. Morris specializes in failure analysis, and it was his background and reputation in this field that was responsible for his retention in this case. See Morris Declaration at ¶ 21.[8] Daisy's counsel also would have learned that Dr. Morris has over twenty-five years of professional experience in the field of failure analysis that includes examination of over one hundred failures. "Virtually all of these matters have involved distinct failure modes in very different systems, and virtually all have required some **engineering analysis of design and**

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[8] As a side note, prior to Dr. Morris' investigation, perhaps the most comprehensive investigation of BB lodging in the Powerline airguns was conducted by Professor Campbell Laird in the matter Mahoney v. Daisy (E.D. PA; case no. 99-CV-4286). Professor Laird is a metallurgist on the faculty of the University of Pennsylvania. See Morris Declaration at ¶ 31.

function as well as the specific performance of structural materials." Morris Declaration at ¶ 25 (emphasis added). Daisy's counsel also would have learned that Dr. Morris has testified at numerous depositions and trials in matters involving not only materials failures, but also design, manufacturing, or services issues. See Morris Declaration at ¶¶ 25-26; see Morris Deposition at Exhibit 6 (listing Dr. Morris' deposition and trail testimony since 1992). Had Daisy's counsel probed the slightest bit further at the deposition, he would have learned that Dr. Morris has significant "hands-on" experience in designing and manufacturing high precision equipment, and he has extensive consulting experience that relates to the design, manufacture and performance of commercial products. See Morris Declaration at ¶¶ 28-30.

C. Metallurgical failure analysis is not done in isolation.

Metallurgical failure analysis involves a combination of analyses that address the design, manufacture, materials selection, operation and materials performance of the device that failed. "There is no other way." Morris Declaration at ¶ 27.

"A great many, if not most, engineers who do failure analysis professionally are metallurgists by training, largely because virtually any failure of a machine or structure involves the properties of materials in some sense." Morris Declaration at ¶ 22.

> **It is a fundamental feature of metallurgical failure analysis that it cannot be done in metallurgical isolation.** The things that fail are structures and devices. While the failure is, ultimately, due to a material breaking or deforming or, as in the present case, getting stuck, the failure results from loads or motions that are caused by the device, and reflect its design, manufacture and operation. The competent metallurgist must understand these design and operational issues to put the materials failure in context. A proper failure analysis always begins with a review of the design, construction and operation of the device. Not infrequently, it also ends there; an analysis of the operation of the device often makes it obvious why a particular failure had to happen and makes further work unnecessary.

Morris Declaration at ¶ 23 (emphasis added).

Had Daisy's counsel bothered to ask, he would have learned that Dr. Morris believes that the failure of Powerline airguns to load BB's from the magazine is a classic "geometry-induced failure," in which both design and flexural stiffness play a role (in addition to manufacturing imprecision). Daisy's counsel also would have learned that "geometry-induced failure" is one of the two types of classic "distortion failures." See Morris Declaration at ¶ 24; see James J. Scutti and William J. McBrine, "Introduction to Failure Analysis and Prevention," ASM Handbook (2002) at 6 – 8 and 17(attached hereto as Exhibit D).

III. Dr. Morris' analysis of the Powerline airguns was based on reliable principles and methods.

A. Trial judges have broad leeway in determining the reliability of expert testimony.

The Court in Daubert noted that trial judges have the responsibility of acting as gatekeepers to exclude unreliable expert testimony to satisfy the requirements of Rule 702 of the Federal Rules of Evidence. Daubert, 509 U.S. at 589-95. The Court in Kumho Tire Co. v. Carmichael, 526 U.S. 137, 156-57 (1999) expanded this gatekeeper function to all expert testimony, not just testimony based in science.

Daubert set forth a set of non-exclusive factors for trial courts to use in assessing the reliability of scientific expert testimony. The factors listed by Daubert are:

(1) whether the [expert's technique or theory] can be [or has been] tested;
(2) whether the theory or technique has been subjected to peer review and publication;
(3) the known or potential rate of error;
(4) the existence and maintenance of standards and controls; and
(5) the general acceptance of the theory or technique.

509 U.S. at 592-94. These Daubert factors may also be used to determine the reliability of non-scientific expert testimony, depending on the facts of a particular case. Kumho, 526 U.S. at 150. Rather than establishing bright-line exclusionary or inclusionary rules, the Supreme Court concluded that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." Id. at 152.

As described in the Commentary to Fed R. Evid. 702 (2003) by Stephen A. Saltzburg, Daniel J. Capra, and Michael M. Martin, post-Daubert Courts have focused on several factors that are considered "red flag" warnings that a proposed expert's testimony is unreliable: (1) improper extrapolation of analysis or expertise; (2) reliance on anecdotal evidence; (3) reliance on temporal proximity; (4) insufficient connection between the expert's opinion and the case; (5) failure to consider other possible causes; (6) lack of testing; and (7) subjectivity.

The Court should employ its "gatekeeper" role and allow Dr. Morris' testimony to be subject to any "vigorous cross-examination" or "presentation of contrary evidence" that Daisy can muster. Daubert, 509 U.S. at 595.

B. Dr. Morris conducted a reasonable and scientifically reliable analysis of Powerline airguns.

Pages 15 through 24 of Respondent's Motion are devoted to partial recitations of Dr. Morris' deposition testimony concerning his analysis of the Powerline airguns. At the end of the recitations concerning Model 880 airguns, Daisy makes a legal conclusion that "[w]ithout question, Dr. Morris' methods are not 'the product of reliable principles and methods' of 'knowledgeable and experienced metallurgists'." Respondent's Motion at 19.[9] Yet nowhere does Daisy explain how the principles and methods employed by Dr. Morris are unreliable, nor

[9] At the end of it recitations concerning Model 856 Airguns, Daisy dispenses with even making a conclusion about the reliability of Dr. Morris' analysis.

does Daisy explain what it believes to be the accepted principles and methods of experienced metallurgists for conducting a failure analysis on Powerline airguns.[10] Daisy has not pointed out which of the "red flags" of unreliability have been raised by Dr. Morris' analysis. Apparently, Daisy expects the Court to take its word for it that Dr. Morris used unreliable methods for determining the propensity of BB's to lodge in the Powerline airguns. On the contrary, in conducting his analysis for this case, as in each project for which Dr. Morris has been employed over his career (see Morris Declaration at ¶¶ 1, 20 , 21, 25, 26, 28, 29, and 30; see Dr. Morris' CV attached hereto at Exhibit B),[11] Dr. Morris has employed the accepted principles and methods described in Section II.C above.

Although Daisy has not explained how Dr. Morris' test methods were unreliable, we will provide explanations for the methods Daisy apparently takes issue with:

1. Model 880

Daisy apparently takes issue with Dr. Morris' method[12] of loosening the left-side receiver screw of the Model 880, which created enough space for a BB to lodge. As explained in footnote 4 supra, Complaint Counsel will not seek to prove this theory at trial. See also Morris Declaration at ¶ 14. Therefore, Daisy's criticism of this theory is moot.

---

[10] Perhaps because of its blind allegiance to voluntary ASTM standards that it helped create and its belief that anything passing these minimal standards must be safe, Daisy never developed a comprehensive failure analysis program for the Powerline airguns. Simple testing conducted by Ronald Joyce, *15 years after he designed the Model 856*, led Daisy to finally make changes to the design of the Model 856 to prevent BB's from lodging in the magazine. See "Stipulations of Fact" No. 66.

[11] See Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir 1996) (an expert's outstanding qualifications provide "circumstantial evidence" that the expert has employed a sound methodology).

[12] By selectively excerpting Dr. Morris' deposition testimony on pages 15-16 of Respondent's Motion, Daisy circumspectly suggests that former Complaint Counsel Jimmie L. Williams, Jr. of instructing Dr. Morris how to get a BB to lodge in the Model 880. To the best of Dr. Morris' recollection, Mr. Williams did not provide him with any information that led to the observations he made. Dr. Morris so testified at page 19 (lines 16-17) and page 64 (lines 10-13) of his deposition. See Morris Deposition at 19, 64; see Morris Declaration at ¶ 12.

Daisy also apparently takes issue with Dr. Morris' theory that a deformed BB could lodge in the machine hole under the inner barrel of the Model 880, fully independent of whether the receiver screw is loose. Daisy apparently takes issue with this theory because: (1) Dr. Morris and Dr. Chrzan used BB's manufactured by Crosman Corporation in the airguns; and (2) Dr. Morris and Dr. Chrzan initially only manually placed the BB's into the spot where they believe lodging could occur during normal usage of the airguns. See Morris Declaration at ¶¶ 13 – 16.

There is absolutely nothing irregular with using a very commonly available BB for testing in an airgun. Especially because "Daisy has never instructed users not to use non-Daisy brand BBs in the Model 880 . . . airguns." Stipulations of Fact No. 33. In fact, one of Daisy's own expert witnesses conceded that he uses both Daisy and Crosman BB's. See Deposition of Jess I. Galan at 169 – 172 (excerpt attached hereto as Exhibit E).

In his deposition testimony, Dr. Morris explained why he and Dr. Chrzan initially placed the deformed BB's into the machine hole to test what size BB could lodge in a Model 880 airgun. Dr. Morris explained that while he believed it was "obvious" that BB's would lodge in the machine hole (Morris Deposition at 86, lines 11 – 12), it would take a great many loadings before the event happened naturally (Morris Deposition at 85, lines 15 – 21; Morris Deposition at 86, lines 14 –17). Dr. Morris believed it was reasonable to rely on his dimensional analysis and observations of the Model 880 airguns, rather than hope to beat the odds and achieve a lodging after a limited number of BB loading cycles.[13] Nonetheless, in April 2003, Dr. Chrzan found that deformed BB's did lodge in the machine hole of two Model 880 airguns (with

[13] Given that more than 5 million Model 880 airguns were sold by Daisy from 1972 to the present, and that each airgun can be expected to be loaded with thousands of BB's over its useful life, the probability of a deformed BB lodging in the machine hole is not insignificant. One of the factors for determining whether a consumer product is a "substantial product hazard" is "the number of defective products distributed in commerce." 15 U.S.C. § 2064(a)(2). The FHSA has similar language for a product that "contains a defect which creates a substantial risk of injury to children." 15 U.S.C. §§ 1274(c)(1) and (c)(2).

manufacturing date codes of July 1981 and August 2002), after placing 11 deformed BB's *into the loading port* of each airgun. See Morris Declaration at ¶¶ 17.a and .b

2. Model 856

Daisy has already stipulated to its own concern that BB's may lodge in its Model 856 airguns. "Stipulations of Fact" No. 66 states:

> From October 20, 1998 to March 12,1999, Daisy lowered the sides of the baffle between the inner and outer barrels of the Model 856 (990) (Drawing #153763-001), and then reversed the baffle (Drawing #154436-001). Both changes were made, in part, **to eliminate the possibility of a BB lodging in the magazine of the Model 856 (990) airgun.** (emphasis added)

Daisy apparently takes issue with the principles and methods employed by Dr. Morris in analyzing the BB lodging problem with Model 856 airguns. Perhaps Daisy does not want the Court to learn the startling truth about the prevalence and frequency with which BB's will lodge in Model 856 airguns. It is Dr. Morris' opinion that "a BB will lodge in a Model 856 airgun **very frequently** when it is loaded with BB's (whether the amount loaded is a handful or over 100 BB's) and unloaded (either through firing or dumping them out of the BB loading door as per Daisy's operating instructions)." Morris Declaration at ¶ 4 (emphasis added).

Dr. Morris believes that BB's lodge in the Model 856 airguns for at least two reasons:

> I have observed that in the Model 856 airguns, if the inner rifle barrel is misaligned and off-center towards the outer barrel casing by two hundredths of an inch, an average-sized BB can lodge. **My analysis of Daisy's design drawings shows that the amount of misalignment needed to allow a BB to lodge is permitted by Daisy's design**. The two Model 856 airguns that we examined contained this misalignment which allowed BB's to lodge.

Morris Declaration at ¶ 5 (emphasis added).

> I have observed that it is not strictly necessary that the Model 856 inner rifle barrel be manufactured in a misaligned condition for a BB lodging to occur. As I found, . . . **the inner rifle barrel is sufficiently flexible** that the space

> required to lodge a BB is easily created by lightly twisting the barrel or leaning on the airgun.

Morris Declaration at ¶ 6 (emphasis added).

a) BB's will lodge in Model 856 airguns whether they are new or used.

Daisy apparently believes that Dr. Morris' testing was flawed because he tested "used" Model 856 airguns, rather than airguns that came directly from the manufacturer. The first flaw in Daisy's presumed premise is that, because Daisy stopped manufacturing Model 856 airguns for use with BB's in April 2001 (see "Stipulations of Fact" No. 38), it is virtually impossible to obtain an unused Model 856 airgun that shoots BB's. All of the BB-shooting Model 856 airguns in the possession of consumers are now used airguns; and the airguns examined by Dr. Morris are more representative of these used airguns. See Morris Declaration at ¶ 9.

The second flaw in Daisy's presumed premise it is based on the assumption that Dr. Morris' analysis relied solely on his examination of the physical Model 856 airguns. Not only did Dr. Morris examine, load, and fire the Model 856 airguns, but, among other things, he also analyzed Daisy's design drawings, Daisy's engineering change notices, previous deposition testimony by the designer of the Model 856 airguns, and expert reports prepared for previous Model 856 airgun litigations. Based on this complete analysis, Dr. Morris concluded that "the amount of misalignment [of the inner rifle barrel] needed to allow a BB to lodge is permitted by Daisy's design." Morris Declaration at ¶ 5. Thus, BB lodging can occur in a Model 856 airgun fresh from the manufacturing line (prior to its conversion to a pellet-only airgun in April 2001), and it is not dependent on post-manufacturing handling of the airguns.

b) A BB can lodge in even a perfectly manufactured Model 856 airgun.

Based on his experience designing high-precision equipment, it is Dr. Morris' opinion that it is "inconceivable" to manufacture the barrels of the Model 856 airguns to a perfect fit:

> A. . . . if the inner barrel is dead exactly in line, then the BB would not stick. If, however, it's out of line by as much as one to two hundredths, then the BB will stick. **And I think it's inconceivable that these guns are made to that kind of tolerance.** Certainly the two guns we looked at were not.

Morris Deposition at 44-45.

> Q. So it's entirely possible that the rifles as they came from the factory were dead center and fine and would not stick BBs but by the time they got to you had been torqued in some way; correct?
>
> A. Possible, but I think unlikely.
>
> Q. But you don't know?
>
> A. I don't know, but I have a professional opinion that that is unlikely.
>
> Q. But you don't have any experience in building, designing, or manufacturing airguns, do you?
>
> A. No. **But I have experience in designing things to tolerances of this order, and it's not easy to manufacture to these high tolerances.**

Morris Deposition at 62-63 (emphasis added).

However, even in the extremely unlikely scenario that Daisy perfectly manufactured a Model 856 airgun, it is still Dr. Morris' opinion that a BB can lodge in that airgun because of the flexibility of the inner rifle barrel. See Morris Declaration at ¶ 6. It is Dr. Morris' opinion that because of this flexibility of the inner rifle barrel, only a slight force is needed to create the space necessary for a BB to lodge *in even a perfectly manufactured Model 856 airgun*. See Morris Declaration at ¶ 6. At his deposition Dr. Morris explained that:

A. . . . this inner barrel is held at two points. They're very far apart. The least displacement of these points relative to one another, either in their geometric location or in their angular alignment, will cause a displacement of the inner barrel. It is fairly easy to take the barrels and cause that displacement . . . .

Morris Deposition at 61, lines 9-16.

Q. So what we have is the, a situation where the rifles as-built may not stick a BB at all, but due to something a user does to them later, somehow they're torqued, they can lodge BBs?

A. As I said, I think that's unlikely, but it is possible [referring to Daisy's counsel's proposition that the rifles as-built may not stick a BB at all]. **And it's perfectly true in the use of the weapon one could get distortions that would cause BBs to be lodged.**

Morris Deposition at 63, lines 12-19 (emphasis added).

c) A BB will very frequently lodge in a Model 856 airgun regardless of how many BB's are loaded into the magazine.

Daisy apparently believes that Dr. Morris' analysis was flawed because in some tests on the Model 856 airguns he and Dr. Chrzan loaded more than 100 BB's into the magazine. This argument has little merit based on the design and manufacturing defects discussed above in Sections III.B.2.a and III.B.2.b. It is Dr. Morris' opinion that these defects can lead to a lodged BB regardless of whether the amount of BB's loaded is a handful or over 100. See Morris Declaration at ¶ 5.

Dr. Morris doesn't dispute that BB's lodge most easily if you fill the Model 856 magazine up completely. And while Dr. Morris would contend that "it takes no great amount of effort to load significantly more than 100 BB's into a Model 856 airgun" (Morris Declaration at ¶ 10), Dr. Morris and Dr. Chrzan tested the Model 856 airguns "with various loadings" (Morris Deposition at 47, line 7), and it is Dr. Morris' conclusion that **"[g]iven the geometry of the**

Model 856, one BB loaded into the magazine could, in theory, lodge" (Morris Declaration at ¶ 10, emphasis added).

d) The amount of force necessary to dislodge a lodged BB in a Model 856 naturally depends on how firmly it is stuck.

In the middle of page 23 of Respondent's Motion, Daisy argues that "Dr. Morris further testified that it was quite possible that just the normal use in the pumping action of the BB gun would dislodge any 'stuck' BB's in the magazine, as far as he knew." Complaint Counsel is bewildered at the point that Daisy is trying to make here, especially because at the bottom of page 9 of Respondent's Motion Daisy argues that only "unstuck BBs can be fired from the gun," which Daisy argues is the only way to create a "substantial risk of injury."

Regardless of the point the Daisy is trying to make, Dr. Morris disagrees with Daisy's contention that the mere pumping action of the Model 856 airgun will always provide enough force to dislodge a lodged BB. He also argues that it is difficult to determine the precise force necessary to dislodge a BB because (a) you might not know a BB is lodged unless you take the airgun apart; and (b) taking the airgun apart decreases the force necessary to unlodge a BB:

> Q. You do know that pumping, more likely than not, is going to dislodge a BB in the way that you found it lodged; correct?
>
> **A. It depends on how firmly it's stuck.**
>
> Q. Well, did you find it ever so firmly stuck you think it wouldn't come loose from shaking?
>
> A. I really can't answer the question because the way you determine that BBs are stuck is, you take it [the airgun] apart. Once you've taken it apart, the BB is very easy to get out. Whether pumping would loosen that same BB when the gun was still assembled, I really don't know. I know it will sometimes, but whether it will every time or not, I just don't know.

Q. So it's possible that just the normal pumping mechanism of the rifle would dislodge the BB on every occasion. You just don't know?

A. I would be very surprised if that's true.

Morris Deposition at 42 – 43 (emphasis added).

IV. Dr. Morris is entitled to rely on analyses of Powerline Airguns performed by his colleague, Professor Daryl C. Chrzan, particularly because Dr. Morris supervised and consulted with Dr. Chrzan on all such analyses.

Dr. Morris received significant assistance on this project from his colleague at both the Department of Materials Science and Engineering at the University of California at Berkeley and the Material Science Division of Lawrence Berkeley Laboratory, Professor Daryl C. Chrzan. Dr. Chrzan received his Ph.D. in physics from the University of California and his professional specialty is mechanical behavior (Dr. Chrzan's curriculum vitae is attached hereto as Exhibit F). Drs. Morris and Chrzan run a joint research group and collaborate closely in almost all of their academic and consulting research and have done so since Dr. Chrzan arrived at Cal Berkeley in 1995. See Morris Declaration at ¶¶ 3 and 32.

On page 24 of Respondent's Motion, Daisy argues that some[14] of Dr. Morris' opinions are unreliable because the opinions relied on work performed by Dr. Chrzan, who reported to Dr. Morris. Dr. Chrzan did do some testing of the Powerline airguns and BB's sold for use with Powerline airguns without Dr. Morris present. However, when Dr. Morris was not going to be present for a test, he would discuss the test beforehand with Dr. Chrzan, and Dr. Chrzan would report the results to Dr. Morris afterwards. See Morris Declaration at ¶ 33. Dr. Morris explained their collaboration at his deposition:

[14] Complaint Counsel assumes that Daisy is not arguing that testing, observation, and analysis conducted directly by Dr. Morris or in his presence are inadmissible hearsay reports.

Q. Have you discussed with Dr. Chrzan the results of the investigations for the Powerline, the Daisy Powerline guns?

A. Constantly.

Q. You're in constant contact?

A. Yes.

Q. And he fills you in after he conducts his testing?

A. Yes. We've done some of the testing together, and he's done some of the testing on his own, and he reported the results to me. We've usually discussed what he was going to do, and then he told me what the results are. That's the usual way I do investigations with other people.

Morris Deposition at 92 – 93. Dr. Morris has testified that for the testing he conducted with Dr. Chrzan and the testing that Dr. Chrzan conducted and discussed with him, it is his opinion that Dr. Chrzan always used the appropriate scientific method. See Morris Declaration at ¶ 34; see also Morris Deposition at 93.[15]

Daisy seemingly argues that it has been prejudiced by not having cross-examined Dr. Chrzan.[16] Daisy has suffered no prejudice in this case, because Dr. Morris "[has] not stated an opinion or conclusion that [he] did not personally verify, either by repeating the experiment or observation or seeing positive evidence of it in the form of photographs or records that conform to [his] understanding of how the guns behave." Morris Declaration at ¶ 35. At his deposition, when Dr. Morris was asked to provide information on matters that were beyond the opinions he

[15] This is in accord with Daubert, which held: "[I]n order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., 'good grounds,' based on what is known. Daubert, 509 U.S. at 590.

[16] Interestingly, though Daisy learned about Dr. Chrzan's involvement in the case in February 2003, Daisy has never once requested the opportunity to depose him. In addition, on March 28, 2003, Complaint Counsel produced to Daisy Dr. Chrzan's extensive notebook containing notes of his Powerline airgun testing (Bates #'s 026725 – 026749).

expressed, he forthrightly indicated that it was Dr. Chrzan who may possess that information. See Morris Declaration at ¶ 36.

Finally, as a scientific investigator, Dr. Morris *is* entitled to rely on the conclusions of others, and he does so regularly, both in his consulting activities and in his scientific research. According to Dr. Morris, "that is the way good research is done." Morris Declaration at ¶ 35. Nonetheless, in this Powerline airgun case, all of the opinions expressed by Dr. Morris were ones that he personally verified. Morris Declaration at ¶ 35.

V. Conclusion

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny Respondent's Motion in Limine to Exclude Testimony of John William Morris, Jr.

Respectfully submitted,



Howard N. Tarnoff
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Dated: May 5, 2003

COPY

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

OFFICE OF SECRETARY
2003 MAY -6 P 4:57

In the matter of	
DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

COMPLAINT COUNSEL'S MOTION FOR LEAVE
TO SUPPLEMENT AND UPDATE CERTAIN OF ITS TRIAL EXHIBITS

TO THE PRESIDING OFFICER:

Pursuant to 16 C.F.R. § 1025.13 and 16 C.F.R. § 1025.23, Complaint Counsel hereby seeks leave of the Court to supplement its binders of proposed Trial Exhibits originally submitted to the Court on April 16, 2003 (the "Trial Exhibits"), with certain documents detailed herein. For the reasons set forth below, the inclusion of the supplemental documents attached hereto ("Supplemental Documents") would enable the Court to consider additional materials of significant probative value without unduly broadening the issues or causing undue delay in this proceeding.

Specifically, the Supplemental Documents constitute either new items or updated versions replacing existing documents found in the Trial Exhibits, and include the following items:

Item Ref:	Document Description:	New or Substitute:	Proposed Location in Trial Exhibit Binders:
(A)	Updated Curriculum Vitae of Daryl C. Chrzan (Spring 2003), with attached transmittal email message dated May 2, 2003.	New Item (Updates Ex. 62)	Binder Volume XI - Supplemental, **Exhibit 607** (See attachment)
(B)	C.P.S.C. Sample Collection Report for Daisy Model 880 airgun, sample # 01-302-0856.	New Item	Binder Volume XI - Supplemental, **Exhibit 608** (See attachment)
(C)	Email message from Daryl Chrzan to Howard Tarnoff, dated May 1, 2003, containing lot numbers for Model 880 airguns purchased by Dr. Chrzan on April 26-27, 2003, along with attached copies of three purchases receipts from Kmart, Walmart and Sportmart.	New Item	Binder Volume XI - Supplemental, **Exhibit 609** (See attachment)
(D)	Report by Daryl C. Chrzan titled "Analysis of Daisy Model 880 Tooling Hole Geometry", dated April 29, 2003, with transmittal email message.	New Item	Binder Volume XI - Supplemental, **Exhibit 610** (See attachment)
(E)	Report by Daryl C. Chrzan titled "Measurements of Recent Daisy Model 880 Tooling Hole Geometry", dated May 1, 2003, with transmittal email message.	New Item	Binder Volume XI - Supplemental, **Exhibit 611** (See attachment)
(F)	Updated version of table titled "Complaint Counsel's BB Gun Samples for Use at Trial"	Replaces Current Table	Binder Volume XI - Supplemental, **Tab 3** (See attachment)

Other than item (B), the Supplemental Documents (A) through (E) only came into the possession of Complaint Counsel after April 16, 2003, and, therefore, could not be included as part of Complaint Counsel's original submission of Trial Exhibits to the Court. Similarly, item (F), which was updated with information from (among other sources) document (C), also could not be provided with the original submission. The omission of item (B) from Complaint Counsel's original submission, although a regrettable oversight, was very likely due to the fact that so many other Sample Collection Report forms were included among the Trial Exhibits.[1]

[1] See e.g., Exhibit 75, Exhibit 154, Exhibits 277 through 280, Exhibits 281 through 312 (BB samples), and Exhibits 593 to 603.

The Supplemental Documents are significant insofar as they supplement previously disclosed analyses conducted by Dr. J. William Morris relating to hazard and defect allegations in this matter. For instance, items (D) and (E), represent the product of additional analysis conducted by Dr. Chrzan and Dr. J. William Morris, and will provide additional support for a theory already propounded by Dr. Morris. Furthermore, item (A) is a new version of the *curriculum vitae* of Dr. Daryl Chrzan which updates an earlier version of the same found as Exhibit 62 of the Trial Exhibits.[2]

Daisy has had ample notice of the subject matter of and, in some cases, the specific information in, the Supplemental Documents for a considerable period preceding the filing of the instant Motion. For example, with respect to items (D) and (E), other similar reports were prepared by Dr. Chrzan and were produced to Daisy as early as February 21, 2003, well before Daisy counsel had an opportunity to explore such areas of inquiry at Dr. Morris' deposition on March 18, 2003. Furthermore, Daisy has been aware of the existence of, and identifying information for, the Model 880 airgun described in item (B)[3] for weeks because that airgun was listed on Exhibit 5 of Dr. Morris' deposition.[4]

[2] The latter was also designated as Exhibit 8 at the deposition of Dr. J. William Morris on March 18, 2003.
[3] Also as set forth in the updated information of item (F).

Conclusion

For the above reasons, Complaint Counsel respectfully requests that the Court grant leave to supplement its binders of Trial Exhibits with the Supplemental Exhibits.

Respectfully submitted,

May 6, 2003

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[4] See also, Exhibit 60 of the Trial Exhibits.

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
DAISY MANUFACTURING COMPANY, doing business as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	CPSC Docket No.: 02-2
Respondent.	

ORDER

There being good cause shown to grant this motion, it is this _____ day of _____, 2003, hereby ORDERED that Complaint Counsel's Motion for Leave to Supplement and Update Certain of Its Trial Exhibits is hereby granted.

It is further ORDERED that, with respect to Compliant Counsel's proposed Trial Exhibits:

(i) the attached documents bearing tab numbers 607 – 611 be included as Exhibits 607 through 611, respectively, in binder Volume XI thereof; and

(ii) the attached document bearing tab number "3" be inserted in lieu of the document which currently appears under Tab "3" in the binder titled Demonstrative Exhibits thereof.

_____

Honorable William B. Moran
United States Administrative Law Judge
Presiding Officer

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2003, I caused a copy of the attached **Complaint Counsel's Motion for Leave to Supplement and Update Certain of Its Trial Exhibits**, and the attached accompanying proposed order, to be served upon all parties of record in these proceedings, as follows:

By facsimile and first class mail, postage prepaid to:

The Honorable William B. Moran, Administrative Law Judge
and Presiding Officer

By first class mail (postage prepaid), and facsimile to:

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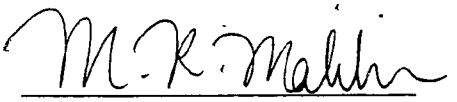
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May 8, 2003

Office of the Secretary
Mr. Todd Stevenson
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Re: Daisy v. CPSC, Docket :02-2

Dear Mr. Stevenson:

Enclosed please find copies of an Objection to Complaint Counsel's Motion to Supplement and Update Certain of Its Trial Exhibits and the Memorandum Brief in Support of Response to Complaint Counsel's Motion to Supplement and Update Certain of Its Trial Exhibits, to be filed of record in the above referenced matter. By copy of this letter these documents have been served on all other counsel of record.

If you have any questions or anything further is needed, please do not hesitate to call.

Sincerely,

William M. Griffin III

WMG:bcw
Enclosures
cc w/encl: Judge William B. Moran (via fax)
Mr. Howard Tarnoff (via fax)
Mr. Aaron Locker (via fax)
Ms. Marianne McBeth (via fax)

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May 8, 2003

The Honorable William B. Moran
Office of the Administrative Law Judge
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460-2001

Via Facsimile

Re: Daisy v. CPSC

Dear Judge Moran:

Enclosed please find copies of an Objection to Complaint Counsel's Motion to Supplement and Update Certain of Its Trial Exhibits and the Memorandum Brief in Support of Response to Complaint Counsel's Motion to Supplement and Update Certain of Its Trial Exhibits, which are being filed with the Office of the Secretary.

Respectfully,

William M. Griffin III

WMG:bcw
Enclosure
cc: Mr Todd Stevenson (via fax & US Mail)
Mr. Howard Tarnoff (via fax)
Mr. Aaron Locker (via fax)
Ms. Marianne McBeth (via fax)
19894.0006

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products	)	
400 West Stribling Drive	)	
Rogers, AR 72756	)	
	)	
Respondent	)	
	)	

OBJECTION TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO SUPPLEMENT AND UPDATE CERTAIN OF ITS TRIAL EXHIBITS

Respondent, Daisy Manufacturing Company, d/b/a Daisy Outdoor Products, objects to Complaint Counsel's Motion for Leave to "Supplement" and Update Certain of Its Trial Exhibits and for reason states:

1. Complaint Counsel has listed six new exhibits. Five of the six new exhibits relate to the deficiencies that have been pointed out to the Court and to Complaint Counsel in the testimony of William Morris.

2. Complaint Counsel appears to be adding different BB gun samples however; we have not received the supporting documents at this time.

3. The Court is referred to the attached Memorandum Brief.

WHEREFORE, Respondent prays that the Motion for Leave to Supplement and update certain of Its Trial Exhibits be denied, for it costs, attorneys' fees and all other proper relief.

Respectfully submitted,

FRIDAY, ELDREDGE & CLARK, LLP
2000 Regions Center
400 West Capitol Avenue
Little Rock, Arkansas 72201-3493
(501)-376-2011

Attorneys for Defendant

By: _____
William M. Griffin III #82069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by Facsimile and/or U. S mail, postage prepaid and addressed as follows, this 8th day of May 2003.

The Honorable William B. Moran
Administrative Law Judge
and Presiding Officer

Todd Stevenson
Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

Howard Tarnoff
Reza Malihi
Complaint Counsel
4330 East West Highway
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Marianne McBeth
Daisy Manufacturing Company
400 W. Stribling Drive
Rogers, AR 72756

William M. Griffin III

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. :02-2
	)	
d/b/a Daisy Outdoor Products	)	
400 West Stribling Drive	)	
Rogers, AR 72756	)	
	)	
Respondent	)	
	)	

MEMORANDUM BRIEF IN SUPPORT OF RESPONSE TO COMPLAINT COUNSEL'S MOTION FOR LEAVE TO SUPPLEMENT AND UPDATE CERTAIN OF ITS TRIAL EXHIBITS

Complaint Counsel originally named Dr. William Morris as an expert witness who was supposedly going to testify about BBs lodging in the air rifles in question. Unfortunately, Dr. Morris had not done any of the testing which formed the basis for his opinions. The Court is referred to the Memorandum Brief regarding the exclusion of the testimony of Dr. Morris.

Daryl Chrzan has never been listed as a witness. Any reports that he may have generated would constitute hearsay and are not admissible. He has never been identified as an expert nor have his reports been identified as exhibits.

The time for filing additional exhibits has long since passed. As the Court is well aware, the discovery cut-off for taking the depositions of experts has passed, the date for naming experts has passed and the Joint Pre-Trial Order has already been entered.

It is apparent that Complaint Counsel now understands the lack of proof they have against Daisy and are seeking to supplement that with hearsay reports from a previously unidentified expert.

The Curriculum Vitae of Daryl Chrzan is certainly not admissible because it cannot come into evidence since Daryl Chrzan is not an expert in this case. Moreover, any documentation generated by Daryl Chrzan is not admissible. It is hearsay and there is no exception which would allow for the admission of this specific document. The mere fact that his testing may have been relied upon by others does not make the document itself admissible. In any event, the time has long since passed for filing of additional exhibits.

Respondent, Daisy Manufacturing Company d/b/a Daisy Outdoor Products, respectfully requests that the Complaint Counsel's Motion for Leave to Supplement and Update Certain of Its Trial Exhibits be denied in its entirety.

Respectfully submitted,

FRIDAY, ELDREDGE & CLARK, LLP
2000 Regions Center
400 West Capitol Avenue
Little Rock, Arkansas 72201-3493
(501)-376-2011

Attorneys for Defendant

By: _____
William M. Griffin III #82069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by Facsimile and/or U. S mail, postage prepaid and addressed as follows, this 8th day of May, 2003.

The Honorable William B. Moran
Administrative Law Judge
and Presiding Officer

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TO:	Todd Stevenson (Original to follow by US mail) Office of the Secretary of USCPSC	301-504-0359
	Mr. Howard Tarnoff Ms. Reza Milihi USCPSC	301-504-0359
	Marianne McBeth	479-636-1163
	Aaron Locker	212-391-2035

FROM: William M. Griffin III DIRECT DIAL: (b) (6)

Re: CPSC Docket No. :02-2

Objection to Complaint Counsel's Motion to Supplement and Update Certain of Its Trial Exhibits and Memorandum Brief in Support of Response to Complaint Counsel's Motion to Supplement and Update Certain of Its Trial Exhibits

TOTAL NO. OF PAGES: 10

DATE: May 8, 2003

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of DAISY MANUFACTURING COMPANY 400 West Stribling Drive Rogers, Arkansas 71756 Respondent.	CPSC Docket No. 02-2

COMPLAINT COUNSEL'S PREHEARING BRIEF

I. INTRODUCTION

At the April 11, 2003 telephone conference, the Court ordered the parties to submit abbreviated prehearing briefs by May 9, 2003. In light of the parties' extensive briefing on the issues of significance cited in the Court's January 2, 2003 Order, the Court emphasized that the prehearing briefs need not include a detailed statement of the law and authorities relied on by the parties. Rather, the Court indicated that it would be assisted by a more "bare bones" presentation of the basic facts to be proven in each party's case and the expected order of witnesses at trial. Consistent with the Court's guidance, Complaint Counsel submits the following prehearing brief.

II. THE ISSUES AT TRIAL

A. The Applicable Law

The Complaint in this matter sets forth the following basic defect allegations:

(1) Daisy's Model 880 and 856 Powerline Airguns ("Powerline Airguns") are defective because the "virtual magazine" design allows BBs to

lodge in the guns, which can lead consumers to mistakenly believe that the guns are unloaded; and

(2) The Powerline Airguns use a safety mechanism that does not automatically engage when the airgun is loaded and ready to fire to prevent subsequent accidental discharge of a projectile.

The Commission alleges that these defects create a substantial risk of injury within the meaning of Section 15 of the Consumer Product Safety Act (CPSA)(governing consumer products) and Section 15 of the Federal Hazardous Substances Act (FHSA)(governing toys and other articles intended for use by children). 15 U.S.C. § 2064 and 15 U.S.C. § 1274. These provisions contain common elements: the product must contain a defect which presents a substantial risk of injury to the public. Congress provided no guidance on the term "defect" in the statute.

As a result, the Commission sought in its interpretative regulations to give some guidance to the public about how it viewed that term. 16 C.F.R. § 1115.4. In doing so, it drew on both the legislative intent that the term "defect" include both design and manufacturing flaws,[1] and the product liability law. The Commission recognized that even a product that was manufactured as intended by the manufacturer could be defective "if the design presents a risk of injury to the public." To illustrate what it meant, the Commission set forth examples. In discussing one of those examples, a knife, the Commission noted that it would look at the

[1] "Design defects are those which occur when a product is constructed according to a plan, without production error, but the plan itself results in a product which presents a risk to safety. . . We must keep in mind that the legislation before us does not deal simply with esthetic complaints, but with safety related defects—those which pose an unreasonable risk to health and safety." Statement of Senator Eagleton. 118 Cong. Rec. S. 9930 (June 21, 1972).

> utility of the product involved; the nature of the risk of injury which the product presents; the necessity for the product; the population exposed to the product and its risk of injury, the Commission's own experience and expertise; the case law interpreting Federal and State public health and safety statutes; the case law in the area of products liability.[2]

Id.

While the utility of a lethal air gun destined for children can be debated, we need not reach that issue to resolve this case. Whether the design must include places where BBs can lodge is the more relevant inquiry. Similarly, one may question whether an automatic safety is preferable to a manual one in a lethal gun intended for use by children and risk-taking teenagers.

Under Section 15 of the CPSA and the FHSA, in determining whether a product presents a substantial risk of injury, the Presiding Officer must examine the pattern of the product defect, the number of products involved, the severity of the risk of injury, and other relevant factors. In its interpretative rules, the Commission suggests that pattern of defect includes considerations such as whether the defect arises from the design and is present in all products. In looking a severity of risk, both the likelihood of injury and the severity of the expected injury are relevant:

> A risk is severe if the injury which might occur is serious and/or if the injury is likely to occur. In considering the likelihood of any injury the Commission and the staff will consider the number of injuries reported to have occurred, the intended or reasonably foreseeable user or misuse of the product, and the population group exposed to the product (e.g., children. . .).

16 C.F.R. §1115.12(g)(1)(iii).

[2] The Restatement of the Law, Third, Torts, Products Liability, (ALI 1998) recognizes that products can be defective "when the reasonably foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonably alternative design. . ."

If the Presiding Officer finds that these guns present a substantial product hazard, he may issue a preliminary order directing the Respondent to provide public notice to protect the public, and to elect to either repair the defect, replace the defective airguns, or refund the purchase price of the airguns, and to cease distributing the hazardous airguns. 15 U.S.C. §2064(c) & (d), 15 U.S.C. §1274(c). Consumers may not be charged for the remedy or for reasonable and foreseeable expenses associated with the remedy. 15 U.S.C. §2064(e), 15 U.S.C. § 1274(d).

B. The Evidence to be Presented and Order of Presentation

The staff expects to offer evidence corresponding generally to the Complaint Counsel's Summary of the Ultimate Facts filed as Exhibit 2 to the Joint Prehearing Order. (For the convenience of the Court, we have attached another copy to this brief.)

Because trial of this case will be split between Washington, D.C. and Fayetteville, Arkansas, the presentation of this case will necessarily be somewhat disjointed in order to accommodate the witnesses living in each area. Essentially, the Commission currently intends to offer the following witnesses in the order set forth below. We reserve the right to alter this order for logistical reasons or to adjust as necessary to events or issues that become apparent closer to trial.

In Washington, D.C.:

- Dr. J. William Morris, the Commission's failure analysis expert, will testify about the way BBs can lodge in the virtual magazine of the Powerline Airguns, and the likelihood of such lodgings.

- Dennis Blasius, Deputy Regional Director for the Commission's Central Region, will testify regarding the Commission's practices and procedures for conducting incident investigations known as "in-depth investigations."
- Dr. Charles E. Irwin will testify regarding risk perception and behavior of adolescents.
- Stanton O. Berg will testify regarding his knowledge of the history and availability of firearms equipped with automatic safeties.

In Arkansas:

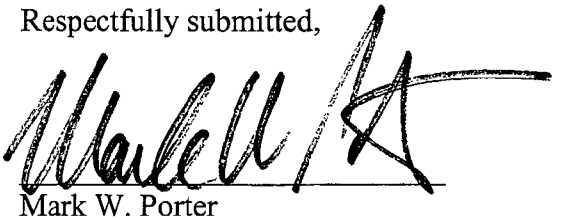
- Arthur D. Fiske will testify concerning the efficacy of the warnings and instructions that accompany the Powerline Airguns.
- Ronald W. Joyce is expected to testify regarding the design, manufacture, and history of the Powerline Airguns, as well as the design changes to those guns.
- Richard I. Daniel is expected to testify regarding the design, manufacture, operation, marketing, user population and history of the Powerline Airguns.
- Guy Braughler is expected testify about the design, manufacture, operation, marketing, user population and history of the Powerline Airguns.
- Clayton L. Williams is expected to testify about the design, manufacture, operation, marketing, manufacture, and history of the Powerline Airguns.
- Theresa L. Wrazel is expected to testify regarding the design and manufacture of the Powerline Airguns and about various engineering changes to those guns.
- E. Lynn Scott is expected to testify regarding the marketing and user populations for the Powerline Airguns.

The Commission expects to introduce many of the Daisy design, engineering, manufacturing, and marketing documents during the testimony of these witnesses.

III. CONCLUSION

Based on the Respondent's answer, motion to dismiss, and its many prehearing motions, the staff infers that this trial will largely come down to whether Respondent Daisy made reasonable choices in designing its product for the population of expected users.[3] The staff believes the evidence will show that it did not. As a manufacturer, Daisy had a responsibility to design these lethal guns for the real world of users. Daisy cannot escape that responsibility—as it has tried to so far—by blaming users for not being perfect in using its imperfect product. Consumers should not continue to pay the price of Daisy's poor design decisions with their lives, their mobility, their ability to function, and their physical and emotional anguish.

Respectfully submitted,



May 2, 2003

Mark W. Porter
Eric L. Stone
for Complaint Counsel
Office of Compliance
Consumer Product Safety Commission
4330 East West Hwy.
Bethesda, MD 20814
(301) 504-7732

[3] The staff believes that Respondent's various "procedural irregularity" and "estoppel" arguments should and will be properly excluded from this hearing. *See* Complaint Counsel's Motion in Limine (filed May 2, 2003). Even a cursory review of Respondent's Pre-Hearing Brief (filed May 9, 2003) reveals the need for the relief sought by Complaint Counsel's Motion in Limine. Most of Respondent's ten-page brief is devoted to irrelevant matters relating to purported "procedural irregularities" and implied claims of equitable estoppel based on the Commission's and staff's prior investigations and statements on airguns.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
DAISY MANUFACTURING COMPANY, d/b/a as Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	CPSC Docket No.: 02-2
Respondent.	)	

COMPLAINT COUNSEL'S SUMMARY OF THE ULTIMATE FACTS

1. Daisy Manufacturing Company, Inc. (Daisy) is a manufacturer of certain Model 880 and Model 856 Powerline Airguns ("Powerline Airguns").

2. Daisy distributed these airguns to retailers, including large discount and general merchandisers located throughout the United States, who sold the guns to consumers.

3. Daisy initially sold these guns without age recommendations, and later with a recommendation that they be used by youth and children age 14 and above, and finally, with a recommendation for use by those age 16 and above.

4. A large proportion of these guns were sold to or used by youth and children younger than the recommended ages.

5. The Powerline Airguns were and are used by consumers (including children) in or around a household or residence, and in recreational activities such as target shooting and "plinking".

6. The Daisy Powerline Airguns shoot projectiles such as BBs and pellets at velocities that can penetrate the body sufficiently to cause grievous injury or death and have caused grievous injuries and deaths.

7. The Powerline Airguns have a magazine defined generally by the receiver halves, the barrels, and the pump housing that can be filled with BBs.

8. The Powerline Airguns do not have an automatic safety to prevent a loaded gun from being fired until the safety is intentionally turned-off by the user.

9. It was technically and economically feasible to install an automatic safety device into the Powerline Airguns.

10. Other airguns, manufactured by Daisy and several of its competitors, contain automatic safeties to prevent unintentional discharge of a BB or other projectile.

11. Daisy knew at the time it designed these Powerline guns that children and other airgun users engaged in horseplay, do not always use manual safeties, sometimes carry guns with their fingers on, or in proximity to, the trigger, and do not always control the direction of the muzzle.

12. It is foreseeable that a child or other consumer, handling a loaded and cocked Powerline airgun without an engaged safety, will accidentally fire that weapon.

13. Unintentional discharge of a BB or pellet from a Powerline Airgun can cause serious, grievous, and even fatal injuries if a human being is in the path of the discharged BB or pellet.

14. Those who use the Powerline Airguns are unlikely to read much, if any, of the instruction booklet and warnings.

15. Daisy's instruction booklet tells a consumer how to determine whether the gun is empty by dry firing the gun.

16. Daisy's instructions for loading and firing, located on the Powerline Airgun itself, do not tell the user to look into the loading chamber to see if there is a BB ready to be loaded into the chamber.

17. A BB can lodge in the Model 856 airguns between the inner and outer barrels.

18. In Model 856 versions made prior to Daisy's redesign of the gun's baffle in 1999, a BB can lodge between the tab of the baffle and the inner barrel.

19. Daisy modified the design of the Model 856 airgun in both 1998 and 1999 in attempts to prevent lodging of BBs in that model.

20. Daisy redesigned the model 856 airgun in 2001 to make it a pellet-only product.

21. A BB that is smaller than specified in the ASTM voluntary standards can lodge in the Model 880 airgun between the inner barrel and a hole in the frame directly behind the BB loading port.

22. When consumers purchase BBs compatible for use with the Model 880 airgun, there is a likelihood that some of those BBs will be smaller than specified in the ASTM voluntary standards and therefore capable of being lodged in the Model 880 airgun magazine.

23. Daisy's operation manual for the Model 880 and 856 Powerline Airguns do not specify that users must use a particular brand of BBs with the airguns.

24. It is both possible and foreseeable to load more than 100 BBs into a Model 856 airgun and a pre-1994 Model 880 airgun, and to load more than 50 BBs into a post-1994 Model 880 airgun.

25. The application of a small amount of force can dislodge a lodged BB in Model 880 and 856 airguns, allowing the formerly lodged BB to fire, if the user proceeds through the loading and firing procedures following dislodgement.

26. Parents, youth and children do not have a full appreciation of the degree of hazard posed by these high powered Powerline Airguns.

27. The children and youth using the airguns do not have a full appreciation of the concept that a gun that has been dry fired and otherwise appears to be unloaded may, in fact, contain a BB.

28. Children and youth engage in activities such as dry firing Powerline Airguns at each other, and this is foreseeable conduct.

29. A child or other gun user who believes a Powerline Airgun is not loaded, may inadvertently load a lodged BB that has become dislodged within the gun.

30. It is foreseeable that a user of the gun is not going to be looking into the loading port each time he go through the loading and cocking procedure.

31. It is foreseeable that a user of the Powerline Airgun, thinking the gun is unloaded, will fire the gun in the direction of another person.

32. If a user fires what he thought was an empty Powerline airgun at another person, that person may be killed, maimed, or seriously injured by the BB.

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2003, I caused a copy of the foregoing **Complaint Counsel's Prehearing Brief** to be served upon all parties of record in these proceedings, as follows:

By facsimile and first class mail, postage prepaid to:

Hon. William B. Moran
United States Administrative Law Judge
Presiding Officer

By facsimile and first class mail, postage prepaid to:

Aaron Locker, Esq.
Jeffrey Locker, Esq.
Locker, Greenberg & Brainin, P.C.
420 Fifth Avenue, 26th Floor
New York, NY 10018

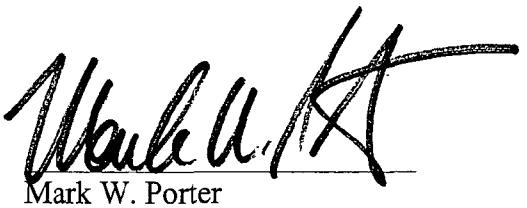
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Attorneys for Daisy Manufacturing Company

By hand delivery to:

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Mark W. Porter
Office of Compliance, Legal Division
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814-4408

COPY

May 19, 2003

BY FACSIMILE and REGULAR MAIL

Mr. Todd Stevenson
Secretary
U.S. Consumer Product Safety Commission
Office of the Secretary
4330 East West Highway
Room 502, South Tower
Bethesda, Maryland 20814

Re: In the Matter of Daisy Manufacturing Company
CPSC Docket No. 02-02

Dear Mr. Stevenson:

Enclosed are two orders regarding this litigation: 1. Order Regarding Respondent's Motion in Limine to Exclude the Testimony of John William Morris, Jr., and 2. Order Regarding Complaint Counsel's Motion for Leave to Designate an Additional Expert Witness and File a Second Supplemental Expert Disclosure Statement. Please transmit this Order via facsimile and in this instance by regular mail or hand-delivery to all parties.

Sincerely,

William B. Moran

William B. Moran
United States Administrative Law Judge

Enclosures

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
	)	
Respondent	)	
	)	

Order Regarding Respondent's Motion in Limine to Exclude Testimony of John William Morris, Jr.

Daisy has filed a Motion in Limine seeking to have the testimony and opinions of Dr. John William Morris, Jr. excluded from this hearing, pursuant to Rules 402, 403, and 702 of the Federal Rules of Evidence. Complaint Counsel filed an opposition to the motion. Having carefully considered the motion and the opposition thereto, the Court DENIES Respondent's Motion in Limine.

So Ordered.

William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: May 19, 2003

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
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Respondent	)	
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Order Regarding Complaint Counsel's Motion for Leave to Designate an Additional Expert Witness and File a Second Supplemental Expert Disclosure Statement

Complaint Counsel has filed a Motion for leave to designate an additional expert witness, Dr. Michael A. Greeno, and to file a second supplemental expert disclosure statement regarding that witness. Daisy filed a Response in opposition to the motion. Upon consideration of the Motion and Response, the Court DENIES Complaint Counsel's Motion. The Court agrees with Daisy that the time for disclosing expert witnesses, which itself involved a protracted period of time, has now passed. However, because this proceeding has been stayed and the hearing, which was to commence May 19, 2003, has been postponed, Complaint Counsel may refile this motion for reconsideration, should the case be reset for hearing.

So Ordered.

William B. Moran
William B. Moran
United States Administrative Law Judge

Dated: May 19, 2003

Rockelle S. Hammond, Docket Control/Communication Specialist
Office of the Secretary
4330 East West Highway, Room 502
Bethesda, MD 20814
Phone: (301) 504-6833
Fax (301) 504-0127

U.S. Consumer Product Safety Commission

Fax

To: 1. Aaron Locker, Jeffrey Locker/Locker, Greenberg & Brainin 212-391-2035

2. William Griffin/Friday, Eldridge & Clark 501-376-2147

3. Marianne McBeth/Daisy Manufacturing Company 479-636-1163

4. Eric Stone, Ron Yelenik, Mark Porter, Howard Tarnoff, Quynh Nguyen, Sean Ward CPSC 301-504-0008

From: Rocky Hammond
Office of the Secretary

Fax:

Date: May 19, 2003

Phone: 301-504-7923, fax 301-504-0127

Pages: 4, including this page

Re: CPSC Docket No. 02-2: In the Matter of Daisy Manufacturing Company

1.Order Regarding Complaint Counsel's Motion for Leave to Designate an Additional Expert Witness and File a Second Supplemental Expert Disclosure Statement

2. Order Regarding Respondent's Motion in Limine to Exclude Testimony of John William Morris, Jr.

Todd A Stevenson, Secretary
Consumer Product Safety Commission Office of the Secretary
4330 East West Highway, Room502
Bethesda, MD 20814 / Washington, DC 20207

US Consumer Product Safety Commission

Fax

To: 1. Aaron Locker, Jeffrey Locker / Locker, Greenberg & Brainin 212-391-2035

2. William Griffin / Friday, Eldridge & Clark 501-376-2147

3. Marianne McBeth / Daisy Manufacturing Company 479-636-1163

4. Eric Stone, Ron Yelenik, Mark Porter, Howard Tarnoff, Quynh Nguyen, Sean Ward CPSC 301-504-0008

From: Todd Stevenson, Secretary
Office of the Secretary

Fax:

Pages: 3, plus this cover page

Phone: 301-504-7923, fax 301-504-0127

Date: 05/27/03

Re: In the Matter of Daisy Manufacturing Company, CPSC Docket No. 02-2:

In Camera Comment Regarding Order Transmitting Offer of Settlement to the Commission

• Comments:

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
	)	
	)	
DAISY MANUFACTURING COMPANY	)	CPSC Docket No. : 02-2
	)	
d/b/a Daisy Outdoor Products 400 West Stribling Drive Rogers, Arkansas 72756	)	
	)	
	)	
	)	
Respondent	)	
	)	

In Camera[1]

Comment Regarding Order Transmitting Offer of Settlement to the Commission

As both parties have commented upon the Court's remarks concerning certain conduct by some of Daisy's counsel, the Court adds the following final words on the subject. First, while the Court agrees that the issue of the conduct referred to in Section IV of the Court's May 12, 2003 Order Staying Proceeding and Transmitting Offer of Settlement to the Commission is "peripheral to the defect and hazard case,"[2] that fact does not diminish the importance of the issue to proceedings before the Commission. *Cf. Lee C. Smith v. Scripto-Tokai Corp.* 170 F.Supp.2d 533, at *538-540. (W.D. Pa. 2001), discussing duty to disclose adverse legal authority to a court.

The simple point made by the Court in its May 12, 2003 Order is that ***when a litigant files an affidavit and thereafter the facts recited in that affidavit materially change, that litigant has an obligation to file an amended or supplemental affidavit before the Court.***

---

[1] **In accordance with 16 C.F.R. § 1025.26, this Order Transmitting Offer of Settlement to the Commission is being sent *in camera* and is not to be made part of the public docket in this proceeding.**

[2] May 21, 2003 letter from Complaint Counsel to the Court regarding this issue.

In the Court's view, anything less than that is inconsistent with 16 C.F.R. § 1025.61 and is also inconsistent with the parties' obligations as officers of the court. Thus, if the Commission agrees that all litigants have such an obligation under Section 1025.61, the Court urges that, in the absence of an apology, the matter should be investigated to ascertain the attendant facts. *See* the Court's May 12, 2002 Order.

Last, the Court wishes to reiterate that, regardless of the Commission's view on this matter, should the Offer of Settlement be rejected and the matter is remanded to the Court, it will continue its fundamental duty to fairly preside in this proceeding.[3] *U.S. v. Beckham*, 789 F.2d 401 (6th Cir. 1986), *Bowles v. Six States Coal Corp.*, 64 F.Supp. 651 (D.C. Pa. 1946).

William B. Moran
William B. Moran
United States Administrative Law Judge

Dated: May 27, 2003

[3] *See* May 12, 2003 Order at 8.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Todd A. Stevenson
Director ▪ Office of the Secretary

Tel: 301-504-7923
Fax: 301-504-0127 ▪ Email: tstevenson@cpsc.gov

September 22, 2003

IN CAMERA
By FACSIMILE and CERTIFIED MAIL

The Honorable William B. Moran
United States Environmental Protection Agency
Suite 350
1099 – 14th St. NW
Washington, DC 20005

Aaron Locker, Esq.
Jeffrey Locker, Esq.
Locker, Greenberg & Brainin
420 Fifth Avenue, 26th Floor
New York, NY 10018

Marianne McBeth, Esq.
Daisy Manufacturing Company
400 W. Stibling Avenue
Rogers, AR 72756

William M. Griffin III, Esq.
Friday, Eldredge & Clark
2000 Regions Center
400 West Capitol
Little Rock, AR 72201-3493

Mark Porter, Esq.
Office of Compliance
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Re: In the Matter of Daisy Manufacturing Company, Inc.
CPSC Docket No.: 02-2

The Commission has rejected the proposed Offer of Settlement that the Administrative Law Judge transmitted to the Commission. Enclosed is the Commission Order, dated September 22, 2003.

Sincerely,

Todd Stevenson
Secretary

Enclosure: Commission Order and
Statement of the Honorable Mary Sheila Gall on the Proposed Consent Agreement and Order Submitted by Daisy

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
	)	
DAISY MANUFACTURING COMPANY,	)	
d/b/a as Daisy Outdoor Products	)	CPSC Docket No. 02-2
400 West Stribling Drive	)	
Rogers, Arkansas 72756	)	
	)	
Respondent.	)	
	)	

IN CAMERA
ORDER

By Order of the Commission,[1] the proposed Offer of Settlement transmitted to the Commission on May 13, 2003 has been rejected. This matter is remanded to the Administrative Law Judge.

FOR THE COMMISSION:

Todd A. Stevenson
Secretary

Dated: September 22, 2003

[1]Chairman Stratton and Commissioner Moore voted to reject the proposed Offer of Settlement. Commissioner Gall voted to accept the proposed Offer of Settlement.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

STATEMENT OF THE HONORABLE MARY SHEILA GALL ON PROPOSED CONSENT AGREEMENT AND ORDER SUBMITTED BY DAISY

September 15, 2003

I voted to approve the proposed Consent Agreement and Order ("the settlement offer") submitted by Daisy Manufacturing Company ("Daisy") to settle CPSC Docket No: 02-2, *In the matter of Daisy Manufacturing Company* because it is in the public interest and represents a fair resolution of this case.

I opposed the filing of this case when it was presented to the Commission almost two years ago. Since that time, Complaint Counsel and Daisy have developed their cases through discovery and pre-trial motions. In May of this year the Presiding Officer transmitted Daisy's settlement offer. In order to evaluate the fairness and adequacy of that settlement offer, I reviewed the record as it now exists. Based on my review of that record I believe that Daisy's settlement offer is adequate to correct whatever hazard *may be* presented by Daisy's Model 856 and 880 air rifles.

I emphasize that my decision to approve Daisy's proposed settlement is based on my review of the record *as it now exists*. If this case proceeds to trial the parties will present their evidence to the Presiding Officer and a new record will be developed. I will, of course, base any subsequent decision as to the merits of this case on the record as it exists at that time.

Why the Daisy Settlement Proposal is in the Public Interest and Resolves the Case Fairly

Issues Generic to Air Guns

The Daisy settlement offer proposes to refer to the voluntary standards setting process five issues raised by the case:

1. The use of gravity-feed magazines.

2. The color of loading ports.

3. The use of an automatically resetting safety.

4. The appropriate age recommendations for airguns with a muzzle velocity exceeding 350 feet per second.

5. The appropriate muzzle velocity for airguns.

These issues are not unique to either the Daisy 856 or 880 model air rifles, nor to Daisy air guns. Rather, they are industry-wide concerns. They should not be the subjects of an administrative complaint directed against one manufacturer seeking a corrective action for certain models of air guns. They are more appropriately resolved in the voluntary standards setting process that has already resulted in such a standard for air guns. If the Commission finds that it is dissatisfied with the results of the voluntary standards setting process, it is always free to begin rulemaking proceedings that will apply to the entire industry.

Issues Specific to the Models 856 and 880 Air Rifles

The Daisy settlement offer also deals with the magazine-lodging allegations of the complaint that are specific to the Models 856 and 880 air rifles. The Daisy settlement offer states that Daisy will continue to manufacture the Model 856 air rifle as a single-shot pellet gun. Since current and future production of the Model 856 will not have a magazine, there is no possibility that a BB will become lodged in the magazine.

In the case of the Model 880 the record reveals that BBs lodging in the magazine of the Model 880 are exclusively a laboratory phenomenon. Lodging can be induced either by use of grossly out-of-specification BBs (not manufactured by Daisy) or by a modification to the magazine that ordinary users of the Model 880 would likely not undertake and that would be readily noticed if it did occur. I conclude whatever hazard *may exist* with the magazine design of the Model 880 will be addressed by Daisy's "Take Aim at Safety" campaign, for the same reasons that it addresses whatever hazard may exist in the magazine arrangements of many Model 856 air rifles in the hands of consumers.

In the case of previously-produced Model 856 air rifles, the record reveals that BBs appear to lodge in the magazine in field use. However, a lodged BB *in and of itself* presents no hazard. A hazard may be presented if the BB then moves from the magazine into the chamber, and the rifle is discharged at close range at another person. However, the BB can only move from the magazine to the chamber by normal loading movements on the part of the shooter; *there is no self-loading mechanism that moves the BB from the magazine to the chamber without any intervention on the part of the shooter*. During normal loading operations the shooter is able to see the BB as it moves from the magazine and into the loading port. Moreover, the shooter personally provides the propellant force for the discharge by either repeatedly pumping the forend in the case of the Model 856, or repeatedly moving a lever in the case of the Model 880. The shooter can be under no illusion that either air rifle is in a condition to be discharged. The shooter also has ample opportunity to observe whether a projectile has been placed in the chamber. Even if a shooter has failed to observe the loading of a BB and believes that pulling the trigger will result in a "dry fire," an injury will occur only if the shooter points the gun at another person at close range and pulls the trigger, an action violating every known rule of shooting safety and common sense.

The first three points of Daisy's "Take Aim at Safety" campaign address precisely the behavior that results in injury when a BB lodged in the magazine is inadvertently loaded into the

chamber. If the muzzle is kept pointed in a safe direction and never allowed to point in the direction of a person, if the gun is treated as if were loaded (projectile in the chamber and propellant energy ready for discharge) and if guns were only loaded when shooting, no injuries would occur. I recognize that no information and education campaign is completely effective, and that not all shooters follow all rules of shooting safety all of the time. Nevertheless, Daisy's campaign will address whatever risk of injury may exist from the magazine characteristics of the Model 880 air rifle and previously-produced Model 856 air rifles now in the hands of consumers.

It is an axiom of jurisprudence that the law favors settlement of disputes. Prior to the transmission of the Daisy settlement offer, this matter had been set for a two-week trial in Washington DC and Arkansas. Trial of this matter will be very resource intensive for both the Commission and for Daisy. The Commission must be especially sensitive to the expenditure of resources, both because it spends taxpayer dollars, and because it must constantly balance its resources in light of the wide range of product hazards against which Congress has charged it to protect the public. Daisy's settlement offer is adequate to protect the public against whatever hazard may be represented by the Models 856 and 880 air rifles, on the state of the record now before the Commission. If the matter proceeds to trial and a different record emerges, I will base my decision on that record. But I believe that the Daisy settlement offer is in the public interest and I vote to approve it.

CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of

NATIONAL PRESTO INDUSTRIES, INC.

CPSC Docket No. 74-2

ORDER TERMINATING THE PROCEEDING

This proceeding was initiated by a notice published in the Federal Register on January 30, 1974, (39 F.R. 3849) which announced that a hearing in accordance with section 554 of title 5 of the United States Code would be held to consider whether Presto electric fry pans manufactured by National Presto Industries, Inc. present a substantial product hazard as the term is used in section 15(a)(2) of the Consumer Product Safety Act (15 U.S.C. 2064(a)(2)). On March 5, 1974 a prehearing conference was held before Paul N. Pfeiffer, Administrative Law Judge. Subsequent to the prehearing conference the staff of the Commission and National Presto Industries, Inc. filed a joint motion requesting that the matter be certified to the Commission and that the proceeding be suspended for consideration of an informal settlement proposed by counsel.

On March 24, 1974 the Administrative Law Judge certified and forwarded the items of the informal settlement set forth in a stipulation, proposed press release, proposed letter to trade accounts (customers) of National Presto Industries, Inc. and a proposed order. Under the terms of the agreemeent National Presto Industries, Inc. is to carry out a specified

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program with respect to certain Presto electric fry pans manufactured before September, 1973, to determine if any of such fry pans have excessive leakage current which could cause electric shock, and take appropriate measures to correct the defect if one exists.

The Commission has considered the stipulation and related papers and concludes it is in the public interest to expeditiously dispose of the proceeding in accordance with the terms of the agreement.

It is therefore ordered:

1. That the stipulation entered into by counsel is approved.

2. That the hearing in this matter be cancelled and the proceeding terminated.

3. That National Presto Industries, Inc. shall follow the procedures set forth in the stipulation entered into by Counsel and that the terms of the stipulation are incorporated in this order as though such terms were here set forth in full.

By the Commission.

Sadye E. Dunn
Secretary
Consumer Product Safety Commission
(Sadye E. Dunn)

ISSUED: May 9, 1974

SERVED: * April 5, 1976

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of RELCO, INC., a corporation doing business in its own name and as the WEL-DEX WELDER MFG. COMPANY and the estate of THOMAS DOSS (deceased) formerly an officer of the corporation	CPSC DOCKET NO. 74-4

AMENDED INITIAL DECISION AND
ORDER ON REOPENED PROCEEDING

The Initial Decision and Orders previously issued in this proceeding are hereby modified and supplemented on the basis of the reopened record as follows:

* Pursuant to Rule 72 of the Commission's Interim Rules of Practice for Adjudicative Proceedings (Part 1025.72) a notice of appeal from this Amended Initial Decision must be filed within 10 days of the service date above. An appeal brief may be filed 30 days after said service date.

1. Pursuant to the Commission's Order of January 17, 1975, Respondents are granted six months from the date of a request by a consumer for corrective action to refund the purchase price in whole or in part or replace the Wel-Dex Electric Arc Welder with a safe product.

2. Since the evidence in the reopened hearing reveals an instance of intermittent use over a 3 1/2 year period, it is found to be in the public interest that deductions from the purchase price representing reasonable allowances for use of welders in the possession of consumers for more than one year at the time of notice of the hazard as mandated by Section 15(d)(3) of the Consumer Product Safety Act, be established as follows:

   a. A consumer who possessed the welder for more than one year at the time of notice of the hazard and tenders it together with unused or partially used rods is entitled a full refund of his purchase price including shipping costs.

   b. A consumer who possessed the welder for more than one year at the time of notice of the hazard and who tenders the welder without rods is presumed to have obtained considerable beneift from the device and is, therefore, entitled to a refund of 50% of his total purchase price, plus shipping costs.

   c. A consumer who disposed of the welder after recognizing its unsafe character and executes an affidavit to that effect is entitled to a refund of 50% of his total purchase price plus shipping costs.

   d. A consumer who ignores the Commission's or manufacturer's notice that the welder is hazardous and continues to use it, or makes it available to others, or disposes of it for other than safety reasons is not entitled to any refund.

3. The priorities for expenditure of Respondents' available funds shall be as follows:

   First - Public notice to all purchasers.

   Second - Refunds to consumers tendering the welders.

   Third - Refunds to consumers tendering affidavits in lieu of welders on a first-come, first-served basis.

4. Shipping costs may be reduced by tendering the welder's asbestos sole plate with attached resistance elements and welding rods, if available, in lieu of the entire welder. Tender may be by U.S. mail or in person to the manufacturer or any Commission office.

I

PRELIMINARY STATEMENT

On April 29, 1975, an Interim Initial Decision and Order was issued in this proceeding finding as follows:

1. That the Wel-Dex Electric Arc Welder is a substantial product hazard within the meaning of Section 15(a)(2) of the Consumer Product Safety Act.

2. That Respondents be ordered to cease manufacture of said welder, give public notice of the substantial hazard involved, and offer to replace the device or refund its purchase price less a reasonable allowance for past use to all welder customers since 1968 pursuant to Section 15 (c) and (d) of said Act.

3. That the proceeding be reopened for further hearing commencing on May 13, 1975, to receive testimony and exhibits concerning the proper amount of refund less a reasonable amount for use, if the welder has been in the possession of a consumer for one year or more (A) at the time of public notice under Section 15(c) or (B) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs pursuant to Section 15(d)(3) of the Act.

On August 11, 1975, after further hearing on finding (3) above, an Addendum to the Interim Initial Decision was issued finding as follows:

1. That the usable life of the Wel-Dex Electric Arc Welder under normal operating conditions is approximately one year.

2. That Respondents be required to elect between replacement or refund of full purchase price plus shipping charges for all Wel-Dex Welders purchased by consumers within one year of actual notice of the admitted substantial product hazard; design of replacement welders to be approved by the Commission.

- proof of date of purchase and date and means of actual notice to be submitted to manufacturer by tendering consumers.

3. That no replacement or refunds be required as to welders purchased more than one year prior to actual notice of the substantial product hazard.

At the same time, a summary of the confidential record relating to the individual Respondent's health and the corporate Respondent's financial condition was forwarded to the Commission with copies available only to the parties.

The exceptions filed by Respondents did not contest the finding that the Wel-Dex Welder presents a substantial product hazard. In fact, Respondents have ceased manufacturing the welder and have agreed to abide by the provisions of the proposed order to give public notice of the hazard and to replace the welder with a safe product or refund the purchase price to all consumers who possessed it for a year or less at the time they received actual notice of the hazard. On September 30, 1975, the individual Respondent died.

Thereafter, Enforcement Counsel moved to amend the Notice of Enforcement to substitute the Estate of Thomas Doss, deceased, for the individual Respondent serving both counsel of record and counsel for the Estate. Respondent's Counsel, Gilbert Lessenco, Esquire, has interposed an objection in effect disclaiming Estate liability.

The motion is granted pursuant to Section 15(d) of the Act which confers authority upon the Commission to designate

the persons required to carry out its order. The pertinent House Committee Report states that "it is contemplated that the Commission would have the authority to place this obligation (refund) on the person most able to bear the cost where equitable and other considerations appear to warrant such action in the public interest."[1/] The financial condition of the corporate Respondent may not be sufficient to satisfy all claims. Therefore, the Estate of Thomas Doss who was the President and principal operating officer of the Respondent Corporation during his lifetime is properly als designated to respond to any consumer claims arising out of this proceeding.

On December 22, 1975, the Commission reopened this proceeding on Motion of Enforcement Counsel to Remand for Receipt of Further Evidence relating to the first known injury which occurred on September 13, 1975, to a user of the Wel-Dex Electric Arc Welder. On February 18, 1976, the further hearing was held in Seattle, Washington, and opposing briefs were filed by Enforcement Counsel on February 23, 1976, and by Counsel for Respondents on March 18, 1976, on which date the case was submitted for supplemental initial decision.

1/ House Report Document #92-15003, p.43

II

THE EVIDENCE

The evidence adduced at the reopened hearing described the following incident:

Mr. Charles S. Brown, Sr., a former Federal Aviation Administration Air Traffic Controller for 28 years living in Amarillo, Texas, purchased a Wel-Dex Welder in early 1972, paying $26-$27 (including extra cables) for the purpose of welding a 3/16" metal tool box to the front of his trailer. As a home owner, Mr. Brown had handled and repaired electrical equipment such as toasters, radios, television sets, and portable electric tools. He had read advertisements concerning the Wel-Dex Welder in various sporting magazines.

After failing to weld (he was able to strike an arc, but the arc promptly disappeared), he wrote to Wel-Dex on June 16, 1972, returning the welder for repair. Sometime later the same welder was returned by the company without comment. The witness knew that it was the same welder because he had previously dropped some stain on it and the stain was still there when the welder was returned.

After trying again to weld with different methods and using various size rods capable of welding brass, steel, and aluminum, he was still unsuccessful. This time

he did not send the welder back for a refund thinking that the fault was his. Instead, he placed it on a shelf and eventually moved from Amarillo to the Seattle area.

Mr. Brown has a son, Charles S. Brown, Jr., a college graduate in engineering with 15 years experience in the U.S. Army having received many commendations and medals and having been separated with the rank of Major. As a civilian, Mr. Brown, Jr., completed a vocational school course in welding. Thereafter, he became a welding instructor and received a certificate as such from the City of Seattle.

On the evening of September 13, 1975, Mr. Brown, Sr., asked his son to try the welder to see what was wrong because he had several small jobs to perform and he had never been able to successfully operate the tool. They entered the garage, placed the welder on a board across two saw-horses, and connected it with a wall swtich. With power on, Mr. Brown, Jr., attempted to weld a heavy piece of metal and a bar, utilizing two carbon rods which when pressed together were supposed to produce a suitable arc. He was unsuccessful in that, like his father, he could strike an arc; but the arc would not sustain sufficiently to "run a bead."

The son was wearing rubber soled shoes but no gloves. The garage floor was constructed of cement, dry at this time. The bar and the piece of metal appeared to come apart. With the two wooden handles of the rod holders in his hands, Mr. Brown, Jr., moved to push the bar and the metal back together. He may have pushed the metal parts of the rod holders together with his thumb. In any event, at that moment he appeared to "bend clear over" and slump to the floor having apparently received a severe electrical shock. Subsequently, he was revived by heart massage administered by his father and mouth-to-mouth resuscitation given by a neighboring doctor. After several days of hospitalization, Mr. Brown, Jr., recovered, but not fully. However, he accepted a position in Saudi Arabia and thus was unavailable to testify at the hearing.

Mr. Brown, Sr., was not aware of the Commission press release issued in July of 1974 warning the public that the Wel-Dex Welder may be a substantially hazardous product. He testified that he "would have thought" that each purchaser should have received a letter concerning the hazardous nature of the product.

Mr. Brown, Sr., testified that if he had been notified by the manufacturer that the welder was a hazardous device, and if he had been offered transportation charges, he

would have returned it immediately because the welder was in the original box which had the extra equipment in it. However, if no refund had been offered, or if he had to pay the transportation charges, he would have taken the device apart and "seen what he would have been able to get out of it and use." He would not have thrown the device away if he had been notified that it was hazardous (since he characteristically never threw anything away), because he would have preferred to have used the parts and particularly the wiring. The refund was not important to him compared to the danger. However, he believes that if the manufacturer sold something that was no good, in all fairness it should refund the purchase price. "It would have been a lot of trouble to send it back unless there was something to be gained (Tr R. 49-50)."

The only reason he used the welder again was because his son was experienced and he thought that maybe the latter could get some use out of it. Having been in the Civil Aeronautics and Federal Aviation Administrations for 28 years, safety was the basis of his position and he would not, in any manner, have ignored a notification that the device was hazardous.

The witness gave his opinion that if a person received notification that the device was hazardous and nevertheless ignored the warning and continued to use the instrument, such a person should not receive a refund because of his carelessness.(Tr R53).

III

THE OPPOSING CONTENTIONS

Enforcement Counsel argues that the welder is not only hazardous, which Respondent has conceded, but defective as well; and since it cannot weld successfully, all consumers have received no benefit from the welder and, therefore, are entitled to a refund of the full purchase price plus transportation costs.

Respondents' position is that, as a matter of fundamental fairness and based upon the financial evidence of record in this proceeding, Relco should have six months from the date of each consumer request for corrective action to refund the welder purchase price or to replace the welder with one free of the defects in issue. Secondly, Respondents maintain that the evidence of record clearly establishes that the usable life of the welder approximates one year and therefore, there must be a deduction from the purchase price for prior use if the product has been in possession of a consumer for one year or more at the time actual notice of the hazardous nature of the product was received.

IV

DISCUSSION

The proposed Order attached to the Addendum to the Initial Decision issued August 11, 1975, did not contain a provision which would allow Respondents six months from the date of a consumer request to provide for a refund or replacement of the welder. Nor was there any discussion of this point in the Interim Initial Decision of April 29, 1975. It is correct, as stated by Respondent, that the Order of the Commission dated January 17, 1975, rejecting the proposed consent agreement and setting the case for hearing, did provide for such a six month period for the making of the necessary refunds or replacements. The language in the Commission's Order is as follows:

> "In addition, the proposed agreement and order provides that the Respondent has six (6) months after the date of the Order to make the necessary refund or replacement. The Commission agrees that a manufacturer with limited capital could be subject to a severe economic impact if the demand for replacement or refund has to be satisfied immediately. Therefore, to defray (sic) the immediate costs, the Commission, in this case, would allow the Respondent six (6) months from the date of the request by the Consumer for corrective action to refund the purchase price of the welder or replace the welder with one free of the defects in issue." (Emphasis added)

Enforcement Counsel has not objected to this provision. While the undersigned has some reservations,[2] the Commission's Order is controlling. Accordingly, the proposed Order will be modified[3] to include a six month period for arranging refunds or replacements.

With respect to the second issue concerning the usable life of the welder, it will be recalled that the findings in the Addendum to the Initial Decision held that the usable life of the welder approximates one year. This was based upon evidence produced by Respondents which demonstrated that the welder was successfully operated by an engineer from Atlantic Research, Inc., using the electric arc method involving consumable electrodes, for several types of welding, brazing, soldering, and cutting tasks. The expert witness testified that a user, recognizing the inherent construction of the product and employing reasonable care, could expect to use the welder several times a month over the course of one year.[4]

2/ A six month period after each request for remitting refunds of from $10 to $20 appears unnecessarily lengthy and may serve to discourage consumers from tendering the hazardous products.

3/ Respondents' limited capital position has previously been discussed in the Summary of the Confidential Record which accompanied the Addendum to the Initial Decision of August 11, 1975.

4/ Tr 231-232; 227; Addendum to Initial Decision, p.6.

received any actual notice from the Commission or the manufacturer concerning the hazardous nature of the product. It is, therefore, evident that the finding in the Addendum to the Initial Decision of August 11, 1975, that the welder has a usable life of only one year must now be modified to reflect the new evidence of record.

The statutory language as read in conjunction with its legislative history suggests that the Congress has conferred an unusually wide degree of latitude upon the Commission to exercise its discretion with respect to the persons who pay the refund, what the consumer has to do to obtain a refund, and the amount of the deductable allowance from a refund for use in excess of one year. The pertinent language of Section 15(d)3 is as follows:

> "Sec. 15(d) If the Commission determines (after affording interested parties, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f) that a product distributed in commerce presents a substantial product hazard and that action under this subsection is in the public interest, it may order the manufacturer or any distributor or retailer of such product to take whichever of the following actions the person to whom the order is directed elects:
>
> * * *
>
> (3) To refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (A) at the time of public notice under subsection (C), or (B) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs.)."

It is noteworthy that a finding that a product is a substantial hazard does not ipso facto lead to a finding that the elective remedies must be ordered. A second finding namely "that action under the (substantial product hazard) section is in the public interest" is a necessary predicate to an order concerning elective remedies.

Further light is shed upon this Subsection by the discussion in the House Committee Report which is particularly instructive since the House rather than the Senate version of the Bill was the one ultimately adopted by the Conference Committee and subsequently enacted into law.[5/]

The appropriate discussion in the House Committee Report is as follows:

> "The Commission is also authorized to specify which persons are to receive refunds where that remedy is elected. This would permit the Commission to control not only who will be entitled to refund but also what proof of claim must be made in order for a person to recover the purchase price. Accordingly, the Commission is intended to have authority to specify whether present owners or only first purchasers are entitled to refund and whether the product must be tendered or whether

5/ Report of House Interstate and Foreign Commerce Committee No. 92-1153, June 20, 1972, accompanying HR 15003 page 43. The Senate version which required a tender of the unsafe product did not survive the Conference Committee--see Conference Committee Report No. 92-1593, October 12, 1972, U.S. Code Congressional and Administration News, 92nd Cong. p. 4643-4.

the sales slip or some other proof of purchase or ownership must be made. The Committee has decided against an absolute requirement that consumers must tender products in order to be entitled to the refund in favor of this more flexible approach. The Committee was concerned that, in some instances, to require the tender of the product might unduly expose consumers and persons within the distribution chain to the hazards associated with the product. Also, the offending product may no longer be in a form which would allow its tender.

Consumers who avail themselves of the remedy provided by Commission order shall not be charged and must be reimbursed for any reasonable and foreseeable expenses incurred in availing himself of the remedy. The Commission is given authority to require any manufacturer, distributor, or retailer to reimburse any other person in the distribution chain for his expenses in carrying out the Commission's order. While it is expected that the Commission in the exercise of this authority will most commonly order those at fault to reimburse others for their expenses, it is contemplated that the Commission would have the authority to place this obligation on the person most able to bear the cost where equitable and other considerations appear to warrant such action in the public interest. In this area, general rules are neither appropriate or feasible. The Commission would be expected to exercise this power on an ad hoc basis taking into account the individual circumstances of each case. (Emphasis added.)

Thus, the Commission has plenary power to exercise its expert judgment on an ad hoc basis taking into account the individual circumstances of each case. It must balance the policy to prevent consumer unjust enrichment mandated by the quoted language of Section 15(d)(3) of the Act against the need to ensure public safety by encouraging the return of the hazardous product by consumers.

In the instant case certain facts are clearly established by the evidence of record:

1. The electrical shock hazard from the device is extremely serious, in this case resulting in near death.

2. The hazard was present in each welder the day it was sold.

3. The welder is a tool which is normally used intermittently with varying intervals between use.

4. The hazard does not decline with the age of the welder, but is present each time it is plugged into an electrical outlet.

5. The parts of the welding package which are consumed through use are the welding rods.

6. The previous proceedings have revealed that there is no possibility of repair of any of the welders. Therefore, the elective remedy must be either to replace with a safe device or refund the purchase price less a reasonable allowance for use extending for more than one year.

It is noteworthy that the House Report suggests that the Commission does not have to require the consumer to tender the device in order to obtain a refund. The Report states that in certain instances "to require the tender

of the product might unduly expose consumers and persons within the distribution chain to the hazards associated with the product." However, this problem does not pertain to the welder. The suggestion seems more applicable to a product such as yarn contaminated with anthrax which might expose the consumer and those in the tender chain to disease. As previously stated, the welder is only dangerous if plugged in to an electrical circuit.

The Report also suggests that the "offending product may no longer be in a form which would allow its tender." However, even if the welder were disintegrated by an electrical short circuit, the remains would still be capable of being returned.

Under these circumstances and bearing in mind the serious nature of the hazard, it would seem that there is a public interest in encouraging consumers to tender the product to the manufacturer or the Commission so as to ensure that it is no longer capable of causing injury, not only to the consumer himself, but also to others in his household, neighbors and friends. For this purpose it appears that mere notice of the hazard to a consumer is not sufficient and that in order to remove the hazardous product from consumer use, the public interest requires either replacement or a refund.

The question then filters down to two propositions: (1) Is a full refund required to encourage a consumer to turn in the welder? (2) What criterion can be devised to ensure that a consumer who has received substantial use from the device for more than a year will not be unjustly enriched through a full refund?

At the outset it is clear that any consumer who has possessed the device for less than one year before receiving actual notice of its hazardous nature is entitled to a full refund plus shipping costs--the latter under the express wording of Section 15(e)(1) [6/] of the Act. Moreover, since the evidence of record now shows that intermittent use of the device over a period of 3 1/2 years is a distinct possibility, it is necessary to consider what sort of refund will encourage the intermittent user to return the welder on a basis which will not involve his unjust enrichment.

It would be unreasonable to assign percentages of refunds based upon varying lengths of time that the consumer had possession of the welder in excess of one year. Time is not necessarily a true measure of use of a household tool of this nature. Nor is it administratively

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6/ Section 15(e)(1) provides that "No charge shall be made to any person (other than a manufacturer, distributor, or retailer) who avails himself of any remedy provided under an order issued under subsection (d), and the person subject to the order shall reimburse each person (other than a manufacturer, distributor, or retailer) who is entitled to such a remedy for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy." See also quotation from House Committee Report, supra p. 17.

feasible to have each consumer submit an affidavit as to the number of times he used the welder. A more appropriate test would seem to be whether the consumer has used the device sufficiently frequently to constitute the equivalent of one year of use. An appropriate measure of use would seem to be the degree of consumption of the welding rods supplied with the tool.

In the case of Mr. Brown, Sr., he would be clearly able to execute an affidavit setting forth that he received no use from the device whatsoever although he possessed it for 3 1/2 years. In fact, an investigator exhibited the device essentially unused at the reopened hearing.

Thus, any consumer who possessed the device for more than a year and who could tender the welder together with the furnished rods (even if partially used) would thereby establish that he had not had one year's use and, consequently, would receive a full refund plus shipping costs. On the other hand, if the consumer has possessed the welder for more than one year and has expended the rods, it can be presumed that he obtained considerable benefit from the welder, and therefore, it seems reasonable that such a consumer should receive a refund of no more than 50%[7/] of the purchase price plus shipping costs.

7/ Any percentage chosen may be open to a charge of arbitrary judgment. Fifty percent or approximately $10 plus shipping costs seems sufficient to encourage tendering after substantial use without unjust enrichment and appears to represent a fair estimate of the value of the use received by the consumer.

On the basis proposed, all consumers who tender the welder would receive refunds of 50% or 100% depending upon the degree of their use of the tool. Such an approach would carry out the intention of Section 15(d)3 to prevent unjust enrichment where the consumer received substantial use from a hazardous product and then returns it for a full refund. On the other hand, the requirement for at least a 50% refund for all such consumers would give encouragement to those who need some "gain", as Mr. Brown, Sr., testified, in order to take the trouble to return the product to safety.

Some consumers may have thrown the welder into a trash receptacle after personally observing its unsafe design. It would be patently unreasonable to exclude safety conscious purchasers from the remedial order. It is clearly in the public interest to encourage all consumers to examine potentially hazardous products with a critical eye, and to take action without waiting for adjudication which can, as in this case, extend for a considerable period of time.

If such a consumer executes an affidavit form that he disposed of the welder because he believed it to be unsafe, he should receive a 50% refund without the necessity of producing the welder, providing he presents proof of purchase by a sales slip or other tangible evidence. Under these circumstances the manufacturer, like all public authorities in many instances, must accept the consumer's oath in affidavit form, properly notarized.

Finally, a consumer who ignores the Commission's or manufacturer's notice that the device is hazardous and continues to use the product or makes it available to others, would not be entitled to receive any refund. Not having cooperated with the Commission's program to remove the hazardous product from circulation, such a consumer has not earned any monetary consideration.

Similarly, a consumer who disposed of the welder either in disgust at its failure to operate, or even after successful use, is not entitled to a refund. Since the device is out of circulation and therefore harmless, there is no longer any need for the manufacturer to "pay" for its return to ensure public safety. Any payment that a manufacturer should be responsible for under these circumstances would lie under the terms of the express or implied warranties.[8/] Since failure to operate satisfactorily is not a safety problem but a breach of the implied warranty of fitness for a particular purpose, the consumer's rights can be protected either by the Federal Trade Commission or in the courts.

8/ The record is in some conflict. There is evidence of a 10 day unconditional money back guarantee contained in the instruction manual accompanying the welder. There is also evidence of magazine advertising of a "lifetime guarantee, parts and service," see p.6 Addendum to Initial Decision; Enforcement Counsel Exhibit EC-12 and 13.

Based upon the confidential record, the fact of Mr. Doss's demise and the resulting legal questions as to the liability of his estate, it is probable that there will be limited funds available to finance the recall of the welders. In this event, it is desirable to determine priorities.

The first priority should be notice to all purchasers of the device concerning the hazardous nature of the product. The remaining funds would then be available for purchase price refunds. However, since Respondents are also liable for transportation costs, it is reasonable to make some provision to reduce such expense. This could be accomplished most effectively by requiring only a small vital part of the welder to be shipped, such as the asbestos sole plate with its attached resistance elements. Those could be flattened and mailed with the welding rods in one large envelope, thus reducing costs. Alternatively, the welder could be delivered in person to the manufacturer or to a Commission field office. Those either tendering the welders or mailing the sole plate would be entitled to first claim on remaining funds. If this group does not exhaust the available funds, the group submitting

affidavits only would be entitled to recover from the balance on a first-come, first-served basis.

An appropriate order implementing the findings and conclusions above set forth is attached.

Paul N. Pfeiffer

PAUL N. PFEIFFER
Administrative Law Judge

DATE: April 2, 1976

Attachment

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of RELCO, INC., a corporation doing business in its own name and as the WEL-DEX WELDER MFG. COMPANY and The Estate of Thomas H. Doss (deceased) formerly an officer of the corporation	CPSC DOCKET NO. 74-4

DECISION AND ORDER

On July 17, 1974, the Commission issued a notice of enforcement pursuant to section 15, Consumer Product Safety Act (CPSA), 15 U.S.C. 2064, alleging that Relco, Inc. and its chief operating officer Thomas H. Doss had manufactured and distributed an electric arc welder which presents a substantial product hazard. The product known as the Wel-Dex Electric Arc Welder was alleged to have design and performance defects which could cause electric shock, severe skin burns or fires. The product is an inexpensive mail order item which was manufactured and distributed from 1968 through early 1975. The record indicates that approximately 124,000 units had been sold.

After a hearing, presentation of documentary evidence and stipulations, the Administrative Law Judge on April 29, 1975 issued an interim initial decision and order finding that the product produces a potentially dangerous electrical shock as well as burns and fire and thus presents a substantial product hazard within the meaning of section 15(a)(2), CPSA. Respondents were ordered to stop manufacture and distribution of the product; to give public notice of the dangers presented; and to offer replacement welders or refunds.1/ The order continued the proceedings for a determination of the proper amount of refunds.

Further proceedings were held on the question of the proper amount of refund. On August 11, 1975 the Administrative Law Judge issued an addendum to the interim initial decision finding the usable life of the product to be one year and ordering replacement or full refunds for welders purchased within one year of actual notice of the hazard. Enforcement Counsel filed a notice of appeal but later requested the Commission to remand the matter for further hearings on newly discovered evidence concerning an injury caused by the welder. The request was granted and further hearings were held concerning the injury. 2/

1/ Although section 15(d) CPSA, permits the election of repair of the defect, this remedy was found to be impractical

2/ On September 30, 1975, prior to the reopened hearing, respondent Thomas H. Doss died.

On April 5, 1976 the Administrative Law Judge issued and served his amended initial decision and order on reopened proceedings. This amended decision reiterates the earlier decision that the Wel-Dex Electric Arc Welder creates a substantial product hazard which could lead to electric shocks, burns and fires. Respondents were again ordered to offer replacement welders or refunds. However, as a result of evidence received at the reopened hearings, the prior decision limiting relief only to persons who purchased the welders within one year of the notice was eliminated. The new decision required refunds in accordance with a percentage schedule based on length of possession and amount of use.

No appeals of the decision were filed by any of the parties. On May 6, 1976 the Commission, noting certain ambiguities in the refund aspects of the amended initial decision, issued an order allowing the parties ten days to file comments on specific provisions. No comments were filed by the parties; however, the Commission did receive a communication from the Administrative Law Judge advising that the Commission had misinterpreted his order in certain respects.

The Commission agrees with the Administrative Law Judge that the welder in question presents a substantial product hazard within the meaning of section 15(a)(2), CPSA. The Commission is for the most part in agreement with the

Administrative Law Judge on the relief ordered. It is, however, concerned with the policy implications of various portions of the order including the refund provisions insofar as they may not require tender of the welder from persons in possession of the product and the treatment of persons not in possession of the welder.

The amended initial decision requires that persons in possession of the welder who have possessed it for more than one year from the date of notice[3/] of the hazard to tender the welder or specific internal components to the manufacturer in order to receive a refund. In contrast, the decision provides that persons who have possessed the welder for less than one year from the date of notice are entitled to a full refund regardless of whether or not they tender the product or the internal components. The Commission believes that this approach is inconsistent with the statutory intent and on the basis of the record in this case tender should be mandatory for all persons seeking a refund who are in possession of the welder regardless of how long they may have possessed it.

Although the language of section 15(d)(3), CPSA, is silent as to any mandatory tender requirement, the legislative history clearly expresses the Congressional intent that the

3/ The date of notice under section 15(d)(3), (CPSA), 15 U.S.C. 2064(d)(3), is the date of public notice after hearings or the date the consumer receives actual notice of the defect, whichever occurs first.

Commission possesses the authority to specify a tender requirement where the refund option is elected. The legislative history indicates that Congress, while favoring tender, even contemplated a mandatory tender requirement in all refund situations. However, the Congress decided on a more flexible approach which allows the Commission discretion to specify such a requirement after recognizing that a product may not be in a tenderable form or that tender may present a danger to persons in the chain of recall. The pertinent legislative history states:

> ...the Commission is intended to have authority to specify...whether the product must be tendered....
>
> * * *
>
> The Committee has decided against an absolute requirement that consumers must tender products in order to be entitled to the refund in favor of this more flexible approach. The Committee was concerned that, in some instances, to require the tender of the product might unduly expose consumers and persons within the distribution chain to the hazards associated with the product. Also, the offending product may no longer be in a form which would allow its tender. See H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. p. 43 (1972).

Neither of the two situations mentioned in the legislative history warranting elimination of a tender requirement appear to be applicable here. The record demonstrates that the welder or the designated components are in a

tenderable form and no danger is presented to persons in the recall channels. Given the strong Congressional intent and the obvious statutory purpose of section 15, to protect the public by encouraging removal of dangerous products from the marketplace and consumers' homes, the Commission believes that tender should be required whenever practicable and where no danger is presented in the tender process. A prime example of the danger to the public of a product which is not removed from the home was presented in this case. A defective welder which had been stored by the owner after not working properly was retrieved and caused a serious injury to a family member. As the example in this case demonstrates, a refund allowance not accompanied by a tender requirement would not advance the purposes of the legislation and might expose unwary consumers and other users to the dangers posed by the hazardous product. 4/

The Commission is also concerned with the treatment in the amended initial decision of refunds for persons no longer in possession of the welder. Under the order, persons

4/ The Commission is in agreement with the difference in refund allowed by the Administrative Law Judge based on the time of possession and the use received for persons in possession over one year. The Commission also agrees that section 15 mandates a full refund to persons in the under one year possession category.

who possessed the welder less than one year and are no longer in possession are entitled to a 100% refund upon filing a claim. No requirement is included for the claimants in this class to specify why they are not in possession; and the order, as drafted, would allow persons who sold the welder, gave it away, or disposed of it for non-safety related reasons to receive a full refund. For persons who possessed the welder for longer than one year and are no longer in possession, a 50%, second priority refund is permitted if they file an affidavit that they disposed of the product after learning, through their own inspection, or otherwise, of its dangerous characteristics.

The Commission sees no rational basis in the record for allowing one group of non-possessors to recover regardless of why they disposed of the product and to limit the other group to recovery only on the basis of disposal for safety reasons. Moreover, the Commission sees no furtherance of the statutory goals by allowing recovery to a person who has sold or disposed of the product in question for non-safety related reasons. Conversely, the Commission believes it is important that safety conscious consumers who take the initiative to protect themselves and others from a dangerous product by destroying it should not be penalized

and should be given a right of recovery. 5/ Accordingly, the Commission has amended the order to require an affidavit from all claimants not in possession. To minimize the potential abuse from false or multiple claims, the Commission has added a provision requiring proof of purchase to be submitted with the affidavit and has expanded the affidavit provisions requiring the claimants to certify that they have not sold, given away or otherwise transferred the welder to anyone. 6/

The amended initial decision provides for a scheme of priorities in the event that sufficient assets are not available to provide complete relief to persons entitled to a refund. The order provides that respondents' assets would first be used for payment for notice, then to pay refunds to consumers who tender the welder and lastly to pay refunds to persons tendering affidavits on a first-come, first-serve basis. Because the number of claims to be made is unknown, the record is unclear as to the ability of respondents to

5/ Both section 15(d)(3) and the supporting legislative history explicitly indicate that the Commission has the authority to specify the persons to whom refunds must be made as well as the necessary proof of purchase.

6/ No proof of purchase is required for claimants who tender the welder or the designated components. This allows claimants who may have obtained the welder second hand to obtain a refund. This appears to satisfy the overriding statutory purpose of removing the hazardous product from consumer use.

satisfy all claims. It appears sound to deal with the potential problem of priorities at this time so as to alert claimants of the possibility that their claims may not be satisfied and to avoid any unnecessary delay which might result if the Commission is later called upon to make a priority determination. 7/

A further provision of the amended initial order which merits consideration is the provision permitting return of the welders to Commission offices. The decision does not elaborate the reasons for including this provision in the order, but the Commission presumes that it is intended to reduce shipping costs and to provide a convenient dropping off point for consumers who may live near such offices. The decision also does not specify the mechanics for using the Commission offices, including provisions for the respondents to reclaim the products, the manner of disposal, or other disposition of welders or components which are returned. Since either the consumer who returns a welder or respondents will have a property interest in the items, the Commission believes it is essential

7/ The Commission believes it important that claimants be advised of the potential lack of assets in the notice of recall. While such a warning may deter consumers from tendering their welders or otherwise seeking refunds, such reluctance should be alleviated somewhat by amending the priorities set forth in the order to allow claimants in the tender category as well as the affidavit group to be repaid on a first-come, first-serve basis. This change should also serve as an incentive for claimants to quickly return the product.

that any order which allows the use of Commission offices must specifically deal with these problems. In the present case the Administrative Law Judge has included an innovative practical solution for reducing shipping and handling costs by allowing consumers to return certain vital components instead of the entire welder. The Commission believes that this provision will adequately reduce shipping and handling costs so as to eliminate any necessity for using the Commission offices and the multitude of problems which accompany the involvement of these offices. To enhance the utility of the component tender provision, the Commission believes that it is necessary to include detailed and illustrated instructions for dismantling the welder in the letter sent to consumers under the recall.

Although the use of Commission office facilities is not warranted in this case, the Commission believes that it can assist in the recall through its communication resources. In addition to an extensive written communications facility, the Commission maintains a toll-free "hotline" in its national headquarters which can be used to assist consumers seeking to return the product in question or otherwise filing a claim. To utilize this resource, the Commission has drafted a form public notice to be used which advises claimants to contact the Commission or the manufacturer for details

concerning the recall. In conjunction with this notice, the Commission has also ordered the parties to draft a letter to reply to inquiries which will include the necessary warning and the details of the recall. This format will serve two principal purposes. It will first provide a simple and convenient manner for claimants to obtain information concerning the recall. Secondly, it will avoid the use of a complex, confusing and possibly misleading published notice which could not include all of the necessary details. The Commission believes that it is important that the letter used to respond to inquiries be in clear, plain language. It should also include a specific disclaimer advising that the Commission assumes no responsibility for replacing the product or providing refunds. The same letter can also be sent to purchasers and dealers whose identity and addresses are ascertainable from the manufacturers records.

One final matter which the Commission has considered is the provision of the amended initial decision ordering relief against the Estate of Thomas H. Doss. The original notice of enforcement was issued against Relco, Inc. and Thomas H. Doss individually and as an officer of the corporation. The record reflects that, at the time the notice of enforcement was issued and prior thereto, Mr. Doss was the sole shareholder and chief operating officer of respondent Relco, Inc. In camera proceedings were conducted concerning,

inter alia, the financial condition of the corporation and Mr. Doss personally. Shortly after Mr. Doss's death, enforcement counsel filed a motion to amend the heading of the notice of enforcement naming the Estate of Thomas H. Doss. Counsel for respondents, although not opposing the motion insofar as it sought to reflect the death of Mr. Doss, objected to the request insofar as it sought to hold the Estate liable. Counsel for the Estate on October 14, 1975 sent a letter to the Office of the Secretary of the Commission advising of the death of Mr. Doss and seeking to extend the time to respond to an appeal to the first initial order (August 11, 1975). In the amended initial decision of April 5, 1976, the motion to amend was granted and relief was ordered jointly against the corporation and the Estate.

The Commission's review of the In camera record demonstrates a sufficient intertwinement between the personal finances of Mr. Doss and those of the corporation to render the Estate liable for the relief ordered herein. The Commission also notes that the Estate, having full notice of the proceeding, has failed to note an appeal of the amended initial decision and apparently has acquiesed in the order and will assume liability. Accordingly, the Commission will not disturb the order in this regard.

In accordance with the foregoing, the Commission has altered the amended initial order in the following manner: (1) to require tender from persons in possession of the welder who seek a refund; (2) to provide that only those claimants not in possession who disposed of the product for safety related purposes and who execute appropriate affidavits and submit proof of purchase are to be entitle to a refund; and (3) to clarify and amend the notice requirements and the provisions permitting returns to Commission offices.

SERVED: April 5, 1976

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C.

In the Matter of: RELCO, INC., a corporation doing business in its own name and as WEL-DEX WELDER MFG. CO. and the estate of THOMAS H. DOSS, deceased, formerly an officer of the corporation.	CPSC DOCKET NO. 74-4

ORDER

This proceeding was initiated by a Notice of Enforcement issued July 17, 1974, which announced that a hearing would be held pursuant to Section 15(f) of the Consumer Product Safety Act (15 U.S.C. 2064[f]) (the Act) to consider whether Wel-Dex Electric Arc Welders manufactured by Relco, Inc., and Thomas Doss, individually and an officer thereof, present a substantial product hazard as the term is used in Section 15(a)(2), and whether Respondents should be ordered to cease manufacturing the welder, give public notice of the substantial hazard involved, and elect to replace, repair or refund to their customers pursuant to Sections 15(c) and (d) of the said Act.

Respondents filed an answer generally denying the allegations in the Notice of Enforcement. Thereafter, a stipulation of proposed settlement was submitted and subsequently rejected by the Commission on January 17, 1975. Public hearings were held on February 14, May 13, and June 10, 1975. The Commission reopened the record for further hearing, concerning an injury, which was held on February 18, 1976. By stipulation between counsel accepted for the record at the hearing, but not as an admission that the law had been violated, it was agreed that the Wel-Dex Electric Arc Welders present a substantial product hazard as the term is used in Section 15(a)(2) of the Act. Respondents have ceased manufacturing the welders and have waived their right to elect to repair those outstanding. No election has as yet been made between replacement and refund to consumers. Respondent Thomas Doss died on September 30, 1975, and the Notice of Enforcement has been amended to substitute the Estate of Thomas Doss, deceased, for the individual Respondent.

An Interim Initial Decision was issued April 29, 1975, and an Addendum thereto was released August 11, 1975. An Amended Initial Decision based on the reopened hearing of February 18, 1976, is being issued concurrently herewith.

On the basis of the stipulation and all the evidence of record, it is hereby found:

1. That the electrical output circuit in the welders is not isolated from the electrical input circuit by a transformer or other device;

2. That the electrical terminals were exposed on the outside of the welders manufactured before February 22, 1974, but are covered on those manufactured thereafter;

3. That the welder cases were made of metal;

4. That the amperage flowing through the welders substantially exceeded the amount allowable for the wiring installed therein according to the standards set forth in the National Electrical Code;

5. That the welders lack thermal insulation on the top and sides, but the bottom consists of asbestos;

6. That the Commission has a report of one injury but no deaths from the use of either design of the welder;

7. That it is impractical to repair the welder;

8. That the welder is inexpensive relative to other welders on the market; is cheaply constructed; and, under normal use two or three times monthly and in accordance with the accompanying instruction manual could be expected to last approximately one year;

9. That the welder performs minor welding, brazing, soldering and thin steel-cutting in a manner reasonably related to its design and cost;

10. That the welder may be used intermittently over a period of several years, thereby precluding time of possession as an adequate measure of the use received by the consumer;

11. That a more reasonable test of the amount of use received by the consumer is the degree of consumption of the welding rods supplied with the device.

In view of the foregoing, IT IS HEREBY CONCLUDED that the Wel-Dex Electric Arc Welder presents a substantial product hazard pursuant to Section 15(a)(c) and (d) of the Act, that further manufacture of this product or its distribution in commerce should be prohibited; that public notification is required to adequately protect consumer safety; and that an action by Respondents electing to replace the welder or refund its purchase price plus shipping charges, less a reasonable allowance for use as provided herein, is in the public interest.

IT IS THEREFORE ORDERED that Respondent, Relco, Inc., a corporation doing business in its own name or under any other name, its successors and assigns, and its officers, and the Estate of Thomas H. Doss, formerly an officer of the corporation:

1. Refrain from manufacturing and distributing in commerce or any manner affecting commerce, as defined in Section 3 of the Act, the Wel-Dex Electric Arc Welder, or any other electric welder of similar design or construction, containing any of the defects alleged to create a substantial product hazard in the Notice of Enforcement.

2. Give public notice immediately upon receipt of this order in the name of Wel-Dex Welder Mfg. Co., which notice shall state that Respondents and Commission Enforcement Counsel have agreed and an Administrative Law Judge has determined, on the basis of the stipulation

and the evidence of record, that the Wel-Dex Electric Arc Welder presents a substantial product hazard which could cause electric shock, burns or fire; that Respondents hereby offer to replace those Wel-Dex Electric Arc Welders with substitutes whose design has been approved by the Commission or refund the purchase price in percentages as provided herewith, plus shipping charges to all consumers who possessed such welders.

Such notice shall be given immediately in the following manner:

(a) by issuing a joint press release with the Commission upon this Order being issued;

(b) by inserting an advertisement of at least the same size and prominence in the same publications as the advertisements in which Respondents offered the defective welder for sale, including: Columbia, Farmer Stockman, Complete Mens Group, Eagle Magazine, Field and Stream, Fur, Fish, Game, Mechanix World, Popular Mechanics, Popular Science, Official Detective Group, Outdoor Life, Sports Afield, Western Publications, Woodmen of the World, Workbench, Progressive Farmer, Rustan's Men's Group, Adventure for Men, Real Detective, Police Detective, Men in Adventure, Science & Mechanics, and Spare Time; and

(c) by mailing a letter to all known purchasers, including dealers, of the defective welder, warning them of the alleged hazards and informing them of Respondents' election under this Order;

3. Offer refunds to consumers according to the following schedule:

(a) Consumers who possessed the welder for one year or less shall receive a refund of 10C of their purchase price, plus shipping cos upon tender of the welder.

(b) All consumers who tender the welder and its welding rods, either unused or partially used, shall receive a refund of 100% of the purchase price plus shipping costs regardless of the length of time they possessed the welder.

(c) All consumers who have possessed the welder for more than one year at the time of actual notice of its hazardous nature and who tender the welder, without its welding rods shall receive a refund of 50% of the purchase price, plus shipping costs.

(d) All consumers who have possessed the welder for more than one year at the time of actual notice of its hazardous nature and who tender an affidavit, under oath, properly notarized, that they disposed of the welder after learning, through their own inspection, or otherwise, of its dangerous characteristics, shall receive a refund of 50% of the purchase price.

4. Accept as tender of the welder the delivery of the asbestos sole plate of the welder with its attached resistance elements and welding rods, if available, to the Respondent corporation or any Commission office.

5. Make expenditures according to the following priorities, in the event of limited funds:

(a) Letter notice to all known purchasers; magazine advertisements.

(b) Refunds to consumers who tender the welder.

(c) Refunds to consumers who tender affidavits. Within this group refunds shall be made on a first-come, first-served basis after all group (b) refunds are made.

6. All payments due to consumers shall be made within six (6) months of the request for refund by the consumer.

7. File compliance reports, as follows: A preliminary report of compliance must be filed within fifteen (15) days after service of this Order upon Respondents, detailing fully and specifically what measures they have taken to comply with this Order. Compliance reports shall be filed every thirty (30) days thereafter, until submission of a final report, summarizing all actions taken by Respondents pursuant to this Order.

8. Notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this Order.

IT IS FURTHER ORDERED that if Respondents elect to replace the welder, the replacement welder unit shall be submitted with all supporting technical data, electrical drawings and component material information, to the Commission's Staff to enable it to determine, before the welder is placed in the hands of consumers, that any defects will be corrected and that the replacement welder will not create a substantial product hazard.

Paul N. Pfeiffer

PAUL N. PFEIFFER
Administrative Law Judge

DATE: April 2, 1976

CONSUMER PRODUCT SAFETY COMMISSION
Washington, D.C. 20207

In the Matter of:

RELCO, INC., a corporation doing business in its own name and as WEL-DEX WELDER MFG. CO., and THOMAS H. DOSS, individually, and as an officer of the corporation.	)	CPSC DOCKET NO. 74-4

ORDER

This proceeding was initiated by a Notice of Enforcement issued July 17, 1974, which announced that a hearing would be held pursuant to Section 15(f) of the Consumer Product Safety Act (15 U.S.C. 2064(f)) (the Act) to consider whether Wel-Dex Electric Arc Welders manufactured by Relco, Inc., and Thomas Doss, individually and an officer thereof, present a substantial product hazard as the term is used in Section 15 (a)(2), and whether Respondents should be ordered to cease manufacturing the welder, give public notice of the substantial hazard involved, and elect to replace, repair or refund to their customers pursuant to Sections 15(c) and (d) of the said Act.

A prehearing conference was held on September 18, 1974, after which a stipulation of proposed settlement was submitted

and subsequently rejected by the Commission on January 17, 1975. An evidentiary hearing was held in Washington on February 14, 1975. By stipulation between counsel accepted for the record at the hearing, but not as an admission that the law had been violated, it was agreed that the Wel-Dex Electric Arc Welders present a substantial product hazard as the term is used in Section 15(a)(2) of the Act. Respondents have ceased manufacturing the welders and have waived their right to elect to repair those outstanding. No election has as yet been made between replacement and refund to consumers. On the basis of said stipulation and the undisputed evidence of record which shows:

1. That the electrical output circuit in the welders is not isolated from the electrical input circuit by a transformer or other device;

2. That the electrical terminals were exposed on the outside of the welders manufactured before February 22, 1974 but are covered on those manufactured thereafter;

3. That the welder cases were made of metal;

4. That the amperage flowing through the welders substantially exceeded the amount allowable for the wiring installed therein according to the standards set forth in the National Electrical Code;

5. That the welders lack thermal insulation on the top and sides, but the bottom consists of asbestos;

6. That the Commission has no report of injuries or deaths from the use of either design of the welder;

7. That it is impractical to repair the welder;

8. That the welder is inexpensive relative to other welders on the market; is cheaply constructed; and, under normal use two or three times monthly and in accordance with the accompanying instruction manual could be expected to last approximately one year; and

9. That a purchaser who had the opportunity to use the welder for one year prior to actual notification of the substantial shock, burn and fire hazards inherent in the device would have received full value for the purchase price of $18.95.

IT IS HEREBY DETERMINED pursuant to Section 15(a)(c) and (d) of the Act that the Wel-Dex Electric Arc Welder presents a substantial product hazard; that further manufacture of this product or its distribution in commerce should be prohibited; that public notification is required to adequately protect consumer safety; and that the action by Respondents to elect to replace the welder or refund its purchase price plus shipping charges, less a reasonable allowance for use as provided herein, is in the public interest.

IT IS THEREFORE ORDERED that Respondent, Relco, Inc., a corporation, doing business in its own name or under any other name, its successors and assigns, and its officers, and Respondent, Thomas H. Doss, individually, and as an officer of said corporation:

1. Refrain from manufacturing and distributing in commerce or any manner affecting commerce,

as defined in Section 3 of the Act, the Wel-Dex Electric Arc Welder, or any other electric welder of similar design or construction, containing any of the defects alleged to create a substantial product hazard in the Notice of Enforcement.

2. Give public notice immediately upon receipt of this order in the name of Wel-Dex Welder Mfg. Co., which notice shall state that Respondents and Commission Enforcement Counsel have agreed, and an Administrative Law Judge has determined, on the basis of the stipulation and the undisputed evidence of record, that the Wel-Dex Electric Arc Welder contains a substantial product hazard which could cause electric shock, burns or fire; that Respondents hereby offer to replace those Wel-Dex Electric Arc Welders with substitutes whose design has been approved by the Commission or refund their purchase price to all consumers who purchased such welders within one year of actual notice of the existence of the substantial product hazards determined herein; provided that the welders, together with proof of purchase and actual notice are returned to Respondents; and that consumers who accept Respondents' offer shall be reimbursed for shipping charges incurred in returning the welders to Respondents.

Such notice shall be given in the following manner:

(a) by issuing a joint press release with the Commission upon this Order being issued;

(b) by inserting an advertisement of at least the same size and prominence in the same publications as the advertisements in which Respondents offered the defective welder for sale, including: Columbia, Farmer Stockman, Complete Mens Group, Eagle Magazine, Field and Stream, Fur, Fish, Game, Mechanix Illustrated, National Insider, Cycle World, Popular Hot Rodding, Popular

Mechanics, Popular Science, Official Detective Group, Outdoor Life, Sports Afield, Western Publications, Woodmen of the World, Workbench, Progressive Farmer, Rustan's Men's Group, Adventure for Men, Real Detective, Police Detective, Men in Adventure, Science & Mechanics, and Spare Time; and

(c) by mailing a certified letter, return receipt requested, to all known purchasers, including dealers, of the defective welder, warning them of the alleged hazards and informing them of Respondents' election under this Order;

3. File compliance reports, as required by the Commission. A preliminary report of compliance must be filed within fifteen (15) days after service of this Order upon Respondents, detailing fully and specifically what they have done to comply with this Order. Compliance reports shall be filed every thirty (30) days thereafter, until submission of a final report, summarizing all actions taken by Respondents pursuant to this Order, which shall be due seven (7) months after service; and

4. Notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this Order.

IT IS FURTHER ORDERED that if Respondents elect to replace the welder, the replacement welder unit shall be submitted with all supporting technical data, electrical drawings and component material information, to the Commission to enable it to determine, before the welder is placed in the hands of consumers, that any defects will be corrected and that the replacement welder will not create a substantial product hazard.

Paul N. Pfeiffer

PAUL N. PFEIFFER
Administrative Law Judge

August 8, 1975

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of RELCO, INC., a corporation doing business in its own name and as the WEL-DEX WELDER MFG. COMPANY and Estate of THOMAS H. DOSS (deceased) formerly an officer of the corporation	CPSC DOCKET NO. 74-

Relco

ORDER

Respondents, Relco, Inc., a corporation doing business in its own name or under any other name, its successors and assigns, and its officers, and the Estate of Thomas H. Doss, are hereby ordered as follows:

1. Respondents are to refrain from manufacturing and distributing in commerce or any manner affecting commerce, as defined in Section 3 of the Consumer Product Safety Act, 15 U.S.C. 2052, the Wel-Dex Electric Arc Welder, or any other electric welder of similar design or construction, containing any of the defects alleged to create a substantial product hazard in the Notice of Enforcement issued herein on July 17, 1974.

2(a) Respondents are to give the following public notice immediately upon receipt of this order in the name of Wel-Dex Welder Mfg. Co:

NOTICE TO ALL PURCHASERS AND PERSONS IN POSSESSION OF WEL-DEX ELECTRIC ARC WELDER.

The United States Consumer Product Safety Commission has found that the Wel-Dex Electric Arc Welder presents a substantial product hazard which could cause electric shock, burns or fires. The Wel-Dex Electric Arc Welder, manufactured by Wel-Dex Welder Mfg. Co., was sold primarily by mail order from 1968 to 1974. All persons in possession of a Wel-Dex Electric Arc Welder, purchased during this period, are advised to immediately stop using the product. The manufacturer has been ordered to replace the product with a substitute whose design has been approved by the Commission or to refund the purchase price in percentages based on the period of possession and use of the product. Due to potentially limited assets, replacement or refunds may only be made on a first-come, first-serve basis. For further information, concerning the return of the product and the requirements for obtaining a refund, call or write the United States Consumer Product Safety Commission, Washington, D.C. 20207, toll free number 800-638-2666 or write Wel-Dex Welder Mfg. Co, P.O. Box 10839, Houston, Texas 77018.

(b) The aforesaid notice shall be given immediately in the following manner:

(1) by issuing a joint press release with the Commission upon this Order being issued;

(2) by inserting an advertisement of at least the same size and prominence in the same publications as the advertise ments in which respondents offered the defective welder for sale, including: Columbia, Farmer Stockman, Complete Mens Group, Eagle Magazine, Field and Stream, Fur, Fish, Game, Mechanix World, Popular Mechanics, Popular Science, Official Detective Group, Outdoor Life, Sports Afield, Western Publications, Woodmen of the World, Workbench, Pro

gressive Farmer, Rustan's Men's Group, Adventure for Men, Real Detective, Police Detective, Men in Adventure, Science & Mechanics, and Spare Time; and

(3) by mailing a letter identical to that required under paragraph numbered 5 herein to all known purchasers, including dealers, of the defective welder, warning them of the alleged hazards and informing them of respondents' election under this Order;

3(a) Respondents shall have the option to replace the welder or provide a refund in accordance with the schedule set forth hereinafter.

(b) If respondents elect to replace the welder, a prototype of the replacement welder unit shall be submitted with all supporting technical data, electrical drawings and component material information, to the Commission's staff to enable it to determine, before the welder is placed in the hands of consumers, that any defects have been corrected and that the replacement welder will not create a substantial product hazard.

(c) In the event that respondents do not elect to refund, then replacements shall be given without charge to all persons who either tender the welder or an affidavit and proof of purchase under the provisions of paragraph numbered 4 herein irrespective of the time of possession or the percentage amount of refund which would have been allowed under other provisions of this order.

4. If respondents elect to offer refunds, said refunds shall be made according to the following schedule:

(a) Consumers who possessed the welder for one year or less at the time of notice under paragraph numbered 2 above or at the time of actual notice of the defect, whichever occurred first, shall upon tender of the welder receive a refund of 100% of the purchase price paid, plus shipping costs.

(b) All consumers who tender the welder and its welding rods, either unused or partially used, shall receive a refund of 100% of the purchase price paid, plus shipping costs, regardless of the length of time they possessed the welder.

(c) All consumers who have possessed the welder for more than one year at the time of notice under paragraph numbered 2 above or actual notice of its hazardous nature and who tender the welder, without its welding rods, shall receive a refund of 50% of the purchase price, plus shipping costs.

(d) All consumers who possessed the welder for less than one year at the time of actual notice of its hazardous nature and who tender an affidavit, under oath, properly notarized, stating that they disposed of the welder after learning, through their own inspection or otherwise of its dangerous characteristics and have not sold or transfered the welder to anyone shall receive a refund of 100% of the purchase price if their claim is accompanied by a copy of a sales receipt, shipping receipt or cancelled check or money order.

(e) All consumers who possessed the welder for more than one year at the time of actual notice of its hazardous nature and who submit an affidavit, under oath, properly notarized, stating that they disposed of the welder after learning, through their own inspection, or otherwise of its dangerous characteristics and that they have not sold or transfered the welder to anyone, shall receive a refund of 50% of the purchase price if their claim is accompanied by a copy of a sales receipt, shipping receipt or cancelled check or money order.

5. Respondents or their attorneys together with enforcement counsel, shall immediately draft a letter designed to advise persons responding to the notice under paragraph numbered 2 herein of the dangers of the welder, the provisions of this Order and the manner and form for tendering the product or components or otherwise submitting a claim. Said letter shall include a provision that the U.S. Consumer Product Safety Commission assumes no responsibility for the refund or replacement of the subject welder. Said letter

shall contain precise illustrated instructions for dismantling the components for tender under paragraph numbered 6.

6. Respondents shall accept as tender of the welder the delivery of the asbestos sole plate of the welder with its attached resistance elements and welding rods, if the rods are available.

7. Tender of the welder or components hereunder shall be made to the respondent corporation or agents retained by respondents.

8. Respondents shall make expenditures according to the following order of priorities, in the event of limited funds:

(a) Letter notice to all known purchasers; magazine advertisements.

(b) Refunds or replacements to claimants who tender the welder or components specified in paragraph numbered 6 on a first-come, first-serve basis.

(c) Refunds or replacements to claimants who tender affidavits on a first-come, first-serve basis after all group (b) claims have been satisfied.

9. Respondents shall make all payments due to consumers under this order within six (6) months of the request for refund by the consumer.

10. Respondents shall file compliance reports as follows: A preliminary report of compliance must be filed within fifteen (15) days after service of this Order upon respondents, detailing fully and specifically what measures they have taken to comply with this Order. Compliance reports shall be filed every thirty (30) days thereafter, until submission of a final report, summarizing all actions taken by respondents pursuant to this Order.

10. Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this Order.

12. Respondents shall notify the Commission at least thirty (30) days prior to any proposed or actual distribution of the assets of the Estate of Thomas H. Doss other than routine maintenance expenses or costs.

BY THE COMMISSSION

Sadye E. Dunn

SADYE E. DUNN
Secretary
Consumer Product Safety Comm

DATED: OCT 27 1975

1/18/74

Newman

Docket 74-5

Concurring Opinion
In The Matter of
Cone Mills Corporation

SUMMARY STATEMENT:

The motion by Cone Mills Corporation to dismiss the complaint should be granted. The Commission decision in this case should be based on the merits of the case drawn from the findings and conclusions of the Administrative Law Judge rather than on the retroactive application of the CPSC interpretive regulation clarifying CS 191-53.

DISCUSSION:

The basis for my ruling is that the Administrative Law Judge's decision should be upheld if based on relevant evidence sufficient to support the conclusion.

Basic to the ALJ's decision is the following requirement of Section 3.43 of the FTC's Rules of Practice for Adjudicative Proceedings:

"Counsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.

If the ALJ adheres to the requirement re burden of proof and

-- hears complete testimony from both the respondent and complaint counsel; allowing both to cross-examine.

-- outlines for review the findings of fact and reasonable conclusions.

then the conclusion should be upheld.

* * *

In the Cone Mills case the ALJ's decision did appear to be based on sufficient evidence to support the conclusion to dismiss the complaint. The principal findings accepted by the ALJ as being adequately supported by credible, reliable evidence were as follows.

1. The test reports in support of the complaint against Cone Mills failed to record or otherwise indicate a determination of the cause of the base fabric ignition;

2. The complaint was based on excessive brushing resulting from the use of an improper "template" in the brushing device;

3. The complaint was based on tests where the stop cord was not maintained in the proper position.

The burden of proof was on the complaint counsel to show that the interpretation given CS 191-53 by the laboratory staff of FTC was not only correct, but further, that the test procedures used were free of material fault and erroneous conclusions. It appears from a review of the record that the burden of proof was not met by the complainant, hence the initial decision of the ALJ should be affirmed.

* * *

I disagree with the majority opinion in that the Consumer Product Safety Commission must not apply the subject interpretive regulation retroactively.

I subscribe to the principle that only in extreme cases should regulations of any type be applied retroactively. The case in point does not require retroactivity.

Generally speaking retroactivity is unfair. Unfair where:

. the new revised law, rule or regulation makes an action done before the passing of the regulation, punishable where it was not punishable prior to the promulgation of the regulation.

. the new or revised law, rule or regulation changes the punishment and inflicts a greater punishment.

. the new or revised rule or regulation alters the legal rules of evidence and receives less or different testimony than the rule required at the time of the commission of the offense.

The unfairness is not limited to those cases in which a more oppressive law is applied and results in punishment. Unfairness of a retroactive law, rule or regulation also applies when the new rule is less stringent to the field of persons previously found in violation of a previous rule and who are not really in a position to benefit from the new, retroactive law. In this case, if the interpretive

regulation were found to be less stringent, retroactive application would be unfair because:

- consent orders and attendant publicity have already in effect adversely affected those charged under the previous rule.
- the cost of relitigating could be prohibitive;

(Note also that the majority opinion suggests a bar to re-opening cases previously decided.)

Retroactivity should be barred irrespective of the nature of the administrative rule -- legislative or interpretative. The conception that interpretative rules do not embody new law but merely interprets previous law seldom accords with reality. Different results do flow from interpretations.

In the instant case, the clarification does alter the rules of evidence previously followed in similar cases.

Constance B. Lewis
Commissioner
Jan. 15, 1974

CONSUMER PRODUCT SAFETY COMMISSION

In The Matter Of

CONE MILLS CORPORATION

OPINION IN REGARD TO THE ALLEGED VIOLATION OF THE FLAMMABLE FABRICS ACT

FTC Docket 8900 Complaint, October 4, 1972 - Decision January 18, 1974

OPINION OF THE COMMISSION

January 18, 1974

Per Curiam

On October 4, 1972, the Federal Trade Commission (FTC) issued a complaint alleging that the Cone Mills Corporation violated Commercial Standard 191-53 (CS 191-53) under the Flammable Fabrics Act in the manufacture and sale of its Eureka style cotton flannelette fabric. Shortly thereafter, proceedings before an Administrative Law Judge were commenced.

Effective May 14, 1973, functions under the Flammable Fabrics Act were transferred to the Consumer Product Safety Commission by section 30(b) of the Consumer Product Safety Act (15 U.S.C. 2079(b)); and in accordance with section 30(e)(3) of the Act, the proceedings before the Administrative Law Judge were continued under the jurisdiction of the Consumer Product Safety Commission.

On August 29, 1973, the Administrative Law Judge issued his initial decision which found that the complaint should be dismissed for failure of proof because complaint counsel did not establish that the interpretation given the applicable standard, CS 191-53, by the laboratory staff of the FTC was correc or that the FTC's laboratory tests of the fabrics in question were performed in accordance with the provisions of CS 191-53. Specifically, the Administrative Law Judge found that the FTC's interpretation of CC 191-53 and tests conducted thereunder were deficient in three aspects:

(1) in the positioning of the stopcord,
(2) in its interpretation of what constitutes a "base burn" (criterion for failure), and
(3) in the appropriate thickness of the template used in the brushing device.

Subsequent to the Administrative Law Judge's Initial Decision, the Consumer Product Safety Commission, by notice in the Federal Register of November 13, 1973 (38 F.R. 31289), issued an interpretive regulation concerning the same three issues which were the basis for the Administrative Law Judge's finding. This regulation is consistent with the findings of the Administrative Law Judge insofar as the positioning of the stop cord, and the interpretation of what constitutes a base burn is concerned. It differs in regard to the thickness of the template to be used in the brushing device during the brushing stage of the test. The Admistrative Law Judge found that a template of one-sixteenth of an inch was proper under the standard whereas the Consumer Product Safety Commission interpreted the standard to require a template of one-eighth of an inch.

Thereafter, Cone Mills Corporation filed a motion to dismiss the complaint against it contending that the Commission's interpretive regulation insofar as it was consistant with the ALJ's finding, was dispositive of the adjudicative matters in this case.

The Commission, in view of its interpretive regulation, and without ruling upon the merits of the controversy, hereby declines to adopt the findings and conclusions of the Administrative Law Judge on the merits therof; and concludes that as a matter of policy the motion to dismiss the Complaint should be granted and the proceeding terminated.

Further, the Commission intends that its interpretive regulation of November 13, 1973 be applicable to this matter and to all cases now pending before the Commission; and that the disposition of these cases be guided by this decision. However, it is not intended that this decision have any effect on previou

accepted consent agreements.

In accordance with the foregoing the Commission grants the motion of Cone Mills Corporation to dismiss the complaint against it.

By the Commission.

Sadye E. Dunn

SADYE E. DUNN
Secretary, Consumer Product
Safety Commission

ISSUED: May 9, 1974

U. S. CONSUMER PRODUCT SAFETY COMMISSION
Washington, D. C.

In the matter of WHITE CONSOLIDATED INDUSTRIES, INC., a corporation, doing business as KELVINATOR, INC. a wholly owned subsidiary, and as G.R. MANUFACTURING CO., and EDWARD S. REDDIG, individually and as an officer of WHITE CONSOLIDATED INDUSTRIES, INC. and KELVINATOR, INC., and THOMAS I. DOLAN, individually and as an officer of KELVINATOR, INC., and ROY H. HOLDT. as an officer of WHITE CONSOLIDATED INDUSTRIES, INC. Respondents	CPSC DOCKET NO. 75-1

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U.S. CONSUMER PRODUCT SAFETY COMMISSION
Washington, D. C.

In the matter of WHITE CONSOLIDATED INDUSTRIES, INC., a corporation, doing business as KELVINATOR, INC., a wholly owned subsidiary, and as G.R. MANUFACTURING CO., and EDWARD S. REDDIG, individually and as an officer of WHITE CONSOLIDATED INDUSTRIES, INC. and KELVINATOR, INC., and THOMAS I. DOLAN, individually and as an officer of KELVINATOR, INC., and ROY H. HOLDT. as an officer of WHITE CONSOLIDATED INDUSTRIES, INC. Respondents	CPSC DOCKET NO. 75-1

INITIAL DECISION

Introduction

By Notice of Enforcement issued by the U.S. Consumer Product Safety Commission on March 10, 1975, Respondents were informed of the Commission Staff's opinion that "approximately 336,000" refrigerators manufactured by Respondents from late 1970 through early 1974 presented a "substantial product hazard" within the meaning of Section 15(a) (2) of the Consumer Product Safety Act (15 U.S.C. §2064(a)(2)) because the Staff believed that certain design defects in those refrigerators could cause fire and resultant injury. The Staff urged that Respondents be

ordered by the Commission to notify the public, in general, and the purchasers of these refrigerators, in particular, of this substantial product hazard, and further, that Respondents be required by the Commission to elect to repair, replace, or refund the purchase price of the affected refrigerator models, as provided for in Sections 15 (c) and (d) of the Consumer Product Safety Act (15 U.S.C. §2064(c), (d)). 1/ Attached to the Notice of Enforcement were the principle items of written evidence which the Commission Staff considered to constitute a prima facie case, and, in conformity with Commission's Rules of Practice, 2/ the form of Order which the Staff believed should issue if the facts were found to be as alleged in the Notice of Enforcement.

Respondents filed their Answer to the Notice of Enforcement on March 31, 1975. (Docket #2). 3/ On April 28, 1975, the

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1/ The text of Section 15 of the Act is reproduced in the Appendix.

2/ In accordance with Section 15(f) of the Consumer Product Safety Act, 15 U.S.C. 2064(f), such an Order may be issued only after an opportunity for a hearing generally in accordance with Section 554 of the Administrative Procedure Act, 5. U.S.C. §554 The Commission has published Proposed and Interim Rules of Practice for such adjudicatory hearings. See 39 F.R. 26848 (July 23, 1974) (hereinafter "Rules of Practice").

3/ The "Official Docket" in this case is maintained under the authority of the Office of the Commission's Chief (and currently sole) Administrative Law Judge in the Commission Secretary's Office, 1750 K Street, N. W., Washington, D.C. 20207. See Rules of Practice, Section 1025.23. It is available for public inspection. "Docket #2" refers to the second document in the official docket listing on file in this case.

Commission formally designated Commissioner Constance B. Newman as Presiding Officer in this case. (Docket #3). That same day, the Presiding Officer issued a Notice of Prehearing Conference to be held on May 16, 1975. 4/ That Prehearing Conference Notice summarized the factual allegations in the Notice of Enforcement, announced the Presiding Officer's preliminary decisions to convene a full hearing in this case, if necessary, no later than June 2, 1975, and to make liberal use of written direct testimony prepared and served in advance of the full hearing, and invited all interested persons to participate in the prehearing conference or testify at the hearing. 5/

At the Prehearing Conference of May 16, 1975, at which Respondents appeared through counsel, motions were filed and taken under advisement pending further briefing, no intervenors came forward, issues in the proceeding were discussed, and a schedule was established. 6/ A Prehearing

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4/ The Notice of Prehearing Conference (Docket #6), prepared by the Presiding Officer, was published in the Federal Register on May 2, 1975 (40 F.R. 19233), and referred to in the Commission's weekly Public Calendars of that period.

5/ Two full weeks between the publication of the Federal Register announcement of the Prehearing Conference and the Conference itself was deemed an adequate period for third parties to reach a decision about the possibility of their participation in this case without unduly delaying a full hearing on the serious Staff allegations about the substantial product hazard posed by Respondents' products.

6/ Tr. of the Prehearing Conference (Docket #24).

Conference Order (Docket #23) confirming the timetable for this proceeding was issued later that day, and subsequently amended on May 27, 1975 (Docket #40) in response to comments received from the parties. The Hearing commenced, as re-scheduled, on the morning of July 14, 1975, and was completed, after slightly more than five days of testimony and argument, in the morning of July 21, 1975. 7/ In accordance with the Rules of Practice (Section 1025.66), the parties were given thirty days to file, simultaneously, proposed findings of fact, conclusions of law, an order, and briefs, and an additional fifteen days thereafter to file appropriate replies. These filings were completed on September 4, 1975.

After having carefully considered all of the evidence admitted into the record in this proceeding, and the motions, responses, and arguments of counsel related thereto, it is the INITIAL DECISION of the Presiding Officer, for the

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7/ The transcript of the hearing contains 805 pages. Enforcement Counsel proferred 20 exhibits, with subparts, and 12 additional exhibits containing the direct and rebuttal testimony of their witnesses. Respondents proferred 36 exhibits, with subparts, in addition to 5 exhibits containing the direct and rebuttal testimony of their witnesses.

Under the contract between the Commission and its reporting service, the Commission pays the premium cost for overnight transcription of hearings if the Presiding Officer authorizes such expedited service instead of the ordinary three or ten day completion period. The Presiding Officer denied Respondents request for such authorization, believing the additional cost for overnight instead of three day service to be unjustified. Respondents, disagreeing, absorbed this cost. Tr., p. 14.

reasons discussed in detail below, that the refrigerators specified in the Commission's Notice of Enforcement do not present a substantial product hazard within the meaning of Section 15(a) (2) of the Consumer Product Safety Act. Accordingly, an Order entering judgment in favor of Respondents and dismissing the Notice of Enforcement is appended hereto.

Preliminary Legal Matters

The parties have raised a number of difficult and important legal questions throughout the course of this proceeding, only some of which have been decided by the Presiding Officer to date. Before turning to the merits of the controversy, these questions and their resolution are discussed below.

(a) Objections to the Presiding Officer

On April 29, 1975, the day following the designation by the Commission of the Presiding Officer, Respondents filed an objection to a Commissioner being so designated urging that such a procedure deprived them of a fair hearing and constitutional due process, and violated the Administrative Procedure Act, 5 U.S.C. §§ 551-59 (A.P.A.). Respondents urged the full Commission to defer all proceedings in this case until an Administrative Law Judge, instead of a Commissioner, became available to act as Presiding Officer. On May 1, 1975, Chairman Simpson, then Vice-Chairman Kushner, and Commissioners Franklin and Pittle, in accordance with Section 1025.62 (e)(2)

of the Rules of Practice, permitted the Presiding Officer ten days to reply to Respondents' objection prior to their decision. (Docket #5).

In her Reply, the Presiding Officer, noting that her participation in this case as a Commissioner prior to her designation as Presiding Officer was limited to her approval on the basis of written briefing packages of the issuance of a Notice of Enforcement, declined to play any role in any Commission decision on any interlocutory or other appeals from any ruling or decisions the Presiding Officer might issue. However, placing reliance on the explicit authorization for such a designation as Presiding Officer in Section 554 (d) of the A.P.A., as well as on United States v Litton Indus., 462 F. 2d 14, 16-17 (9th Cir. 1972) and the comments of Professor Davis, [8] and distinguishing Amos Treat v S.E.C., [9] upon which Respondents had based their objection, the Presiding Officer respectfully suggested to the Commission that Respondents' objection to the designation of a Commissioner lacked merit. (Docket #8). By written order dated May 16, 1975 overruling Respondents' objection, the full Commission agreed. (Docket #11).

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[8] 2 Administrative Law Treatise § 13.10, p. 237. See also Withrow v Larkin, 95 S. Ct. 1456 (1975); Docket #s 37,41.

[9] 306 F. 2d 260 (D.C. Cir., 1962).

On May 15, 1975, Respondents also filed a complaint for injunctive and declaratory relief in the United States District Court for the District of Delaware raising this same objection to the designation of a Commissioner as Presiding Officer, and others. [10/] In dismissing Respondents' Complaint, without prejudice, for want of jurisdiction and indicating that even had he jurisdiction, Respondents' motion for preliminary injunction would be denied, District Judge Schwartz found

> no matter in the Complaint which could be subject to judicial consideration as a matter of law outside the context of the ongoing administrative proceeding [nor] . . . final agency action at this juncture,

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[10/] Other objections raised in Respondents' District Court Complaint were to the Rules of Practice which were to govern the adjudicatory proceedings before the Presiding Officer, the timetable that had been imposed, the attempt at retrospective application of the statutory provisions, the choice by the Commission of adjudicatory rather than rulemaking proceedings, the constitutionality of the underlying statutes, and the failure of the Commission to comply with the National Environmental Policy Act. These objections are discussed, infra.

either within the meaning of 5 U.S.C. Section 704 or the common law definition thereof. 11/

(b) The Notice of Enforcement

In a motion filed May 16, 1975, Respondents also argued that the Notice of Enforcement must be amended to provide a

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11/ White Consolidated Industries, Inc. v Consumer Product Safety Commission, Civ. Action No. 75-135 (D. Del.), unreported decision of May 23, 1975, tr. at pp. 69-72 (citations omitted). Moreover, Judge Schwartz further found that

> as a matter of judicial restraint, [he] could not exercise jurisdiction in this case . . . because [Respondents] have administrative remedies which have not been exhausted . . . and no clear showing [has] been made that the prescribed administrative procedure is inadequate to prevent irreparable injury.

Finally, the Court concluded that

> this action is not ripe for judicial intervention. The issues tendered are not purely legal, there has been no final agency action, and the balance of hardships involved is found not to weigh in [Respondents] favor. In fact, at this juncture, it's literally impossible because the matter is so far from being ripe to weigh the cost of compliance against the cost of noncompliance . . . (T)he expenses of participation in allegedly unlawful proceedings do not state a claim of irreparable injury [and] . . . the risk of a bad decision or an adverse decision, is in and of itself not enough to constitute irreparable injury. The outcome of the decision is entirely speculative and at this point in the record is not supported by a showing that any harm whatsoever will accrue to [Respondents] until the administrative process has resulted in a final order. Even after such an order should be entered [Respondents] would have to demonstrate pre-enforcement harm to obtain injunctive relief.

Id.

more definite statement of the allegations of Enforcement Counsel [12] because, as presented, the Notice did not state Enforcement Counsel's actual allegations "with sufficient specificity to permit Respondents to determine (their) exact nature, to fully and reliably define the issues the allegations raise, and to prepare Respondents' position regarding those issues." (Docket #16). [13]

In an Order issued July 2, 1975 (Docket #61), the Presiding Officer denied Respondents' motion, holding that the Notice of Enforcement in this case had indeed specified "with reasonable definiteness . . . the type of acts or practices alleged to be in violation of the law," [14] and thus having been given a "reasonable opportunity to know the claims of

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[12] An adjudicative or adjudicatory proceeding is commenced by the issuance and service upon Respondent of a Notice of Enforcement in a form specified in Section 1025.31 of the Rules of Practice. Enforcement Counsel are counsel for the Commission Staff in any such adjudicative proceeding. Rules of Practice, Section 1025.4.

[13] Respondents also moved on May 16, 1975 that the three exhibits attached to the Notice of Enforcement as part of the Staff's prima facie case be stricken as inadmissable evidence not properly included in the record. Docket #17. Since the Rules of Practice (Section 1025.31(b)) explicitly required the attachment of such internal memoranda to the Notice, as an aid to Respondents in further illuminating the dimensions of the Staff's case, the Presiding Officer ruled that these documents would remain in the "Official Docket," though they were not to become "part of the record upon which the final decision is to be predicated" unless and until such evidence was offered by a party and met the tests for admissability established in Section 1025.63 of the Rules of Practice and other appropriate provisions of the law. Docket #61.

[14] Rules of Practice, Section 1025.31 (b) (2).

the opposing party and to meet them" 15/ Respondents had been afforded all that the A.P.A., the Constitution and fairness demanded. 16/

In this Order, the Presiding Officer emphasized the relatively insignificant role played by the Notice of Enforcement in educating Respondents about the nature of Enforcement Counsel's case. Embracing Davis' observation that "(t)he most important characteristic of pleadings in the administrative process is their unimportance," 17/ the Order stressed that

> (t)he key to pleading in the administrative process is nothing more than opportunity to prepare. Pleading is only one of many ways of providing opportunity to prepare. Deficiencies in a pleading may be cured by informal communication, by formal amendment, by a bill of particulars, by pre-hearing conferences, or by ample continuances at the hearing. And the question on review is not the adequacy of the original notice or pleading but is the fairness of the whole procedure. 18/

15/ Morgan v United States, 304 U.S. 1, 18 (1938).

16/ See Section 554(b) of the A.P.A.; L.G. Balfour v F.T.C., 442 F. 2d 1, 19 (7th Cir. 1971).

17/ Davis, 1 Administrative Law Treatise § 8.04, p. 523. See also 2 Moore, Federal Practice (2d ed.) 1607 (1948), as quoted in Davis id. ("pleadings . . . do little more than indicate generally the type of litigation that is involved. . . . A generalized summary of the case that affords fair notice is all that can be expected.").

18/ Davis, supra n. 17, at p. 525 (citations omitted). If it were otherwise -- if it were impermissable to sharpen the issues in a case through the type of informal discovery subsequent to the issuance of the Notice of Enforcement engaged in in this case, and instead the Notice itself became the sole gauge of the adequacy of pre-hearing disclosure -- then it seems inevitable that massive delays would be experienced before such a "comprehensive" Notice could be issued. Such delays would be intolerable in the face of the potentially serious human injuries at stake in proceedings of this nature.

(c) The National Environmental Policy Act

Respondents also urged that the Notice of Enforcement be rescinded and that all proceedings be terminated on the ground that the Commission had failed to comply with the National Environmental Policy Act (42 U.S.C. §§ 4321 et seq.) (NEPA). (Docket #s 14 and 33). They stressed that since "it cannot be realistically argued that the disposal of large numbers of major appliances would not significantly affect the quality of the human environment," the Commission, in accordance with NEPA, should have "prepared and considered the required environmental impact statement prior to the commencement of this case," and that its failure to do so required that the proceedings not go forward.

The Presiding Officer, in a lengthy Opinion and Order filed on July 14, 1975 (Docket #74), held otherwise. Acknowledging that the Commission, in issuing its Notice of Enforcement against Respondents, had neither formulated a "negative declaration" nor drafted, circulated and considered an environmental impact statement, and that NEPA itself contained no express exemptions from the impact statement requirements of Section 4332(2) of the Act, the Presiding Officer ruled that nevertheless an examination of NEPA's legislative

history, 19/ the cases decided under it, 20/ and the statutory framework for adjudicatory hearings established by Section 15 of the Consumer Product Safety Act 21/ provided persuasive evidence that Congress did not intend that the

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19/ See H.R. Rep. No. 91-765, 91st Cong., 1st Sess. (compliance with Section 4332 (2) (C) required unless existing law "expressly prohibits or makes full compliance with one of the directives impossible"); S. Rep. No. 91-296, 91st Cong., 1st Sess. ("project proposals for new legislation, regulations, policy statements, or expansion or revision of on-going programs," but not "adjudications," listed as the types of actions to which the impact analysis requirement might apply).

20/ See, e.g., Amoco Oil Co. v E.P.A. 501 F. 2d 722, 749-50 (D.C. Cir. 1974) (certain EPA action under Clean Air Act exempted from NEPA); Gulf Oil Co. v Simon, 373 F. Supp. 1102, 1105 (D.D.C. 1974) (exempting energy office from NEPA requirements for emergency oil allocation regulations since to force compliance therewith "would disarm the FEO of its ability and authority to take necessary action with the required degree of speed"). See also Cohen v Price Comm., 337 F. Supp. 1236 (S.D.N.Y. 1972). But see Calvert Cliffs Coor. Comm. v A.E.C., 449 F.2d 1109 (D.C. Cir. 1971).
Of particular significance is Gifford-Hill and Co. v F.T.C., 389 F. Supp. 167, appeal pending, No. 74-2024 (D.C. Cir., 1974), exempting from "the range of decisions to which NEPA was intended to apply" the FTC decision to proceed against Gifford-Hill, by administrative complaint seeking divestiture after an adjudicatory hearing, for its alleged violations of the antitrust laws.

21/ "The allegations of 'substantial risk of injury to the public,' which are to be expeditiously adjudicated in a Section 15(f hearing, can not possibly be timely decided if prior even to the commencement of such a proceeding, the delicate, complex, and very time-consuming environmental impact statement requirements of NEPA must be followed . . . (A)pplication of the NEPA impact statement requirements to Section 15(f) adjudications is especially inappropriate in view of the "election" remedy given a Respondent [since] . . . it is the Respondent, and not the Commission, who is able to structure the environmental consequences of an Order, because it is only the Respondent who can elect at the conclusion of a hearing whether to repair, replace, or refund the purchase price of the hazardous products." Presiding Officer's Order, Docket #74.

environmental impact statement requirements of NEPA apply to adjudicatory proceedings commenced by the Commission under Section 15 of the Act.

Accordingly, Respondents' motion to dismiss the proceedings on this ground was denied.

(d) The Rules of Practice

The Commission's Rules of Practice are in proposed and interim, rather than final, form. 22/ Because of this, Respondents argued that this proceeding must be deferred until after these rules were finalized. (Docket #5). Respondents' argument was rejected by the Presiding Officer, who held that the Commission, given its publication in the Federal Register of interim rules to govern this adjudicative proceeding and the fact that Respondents had actual timely notice thereof, had fully complied with its statutory mandate. That the Commission went beyond A.P.A. requirements for the promulgation of rules of practice, and formally invited public comment thereon, or that such rules might be amended at some unspecified time

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22/ See note 2, supra, at p. 2.

in the future did not, in the judgment of the Presiding Officer, alter this conclusion.23/

(e) The Timetable

Respondents vigorously and repeatedly argued 24/ that the pre-hearing schedule, as suggested, 25/ amended, 26/ and imposed 27/ by the Presiding Officer, was unworkable and unfair. The Presiding Officer disagreed, ruling that Respondents had ample time to prepare their case when measured from the most important date in the proceeding -- the date the Notice of Enforcement issued -- and had more than adequate

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23/ Docket #25. See A.P.A., Sections 552(a)(1)(C), 553(b); Fargo Packing Corp. v Hardin, 312 F. Supp. 942, 949 (S.W.D.N.D., 1970). But see American College of Neuropsychopharmachology v Weinberger, No. 75-1187 (D.D.C., July 21, 1975).

Respondents' similar complaints about the failure of the Commission, contrary to the requirements of the A.P.A., to publish a description of its central and field organization and the "general course and method by which its functions are channeled and determined," were also rejected by the Presiding Officer. Docket #25.

24/ Docket #s 5, 24, 37, and 78.

25/ Docket #6.

26/ Docket #23.

27/ Docket #40.

notice of the intention of the Presiding Officer to reflect in these proceedings the sense of urgency inherent in the statutory scheme and Rules of Practice issued by the Commission. 28/

In fact, due in large measure to the professionalism and dedication of counsel and witnesses for both parties, it is the judgment of the Presiding Officer that despite the compact schedule adopted, 29/ all legal and factual issues in this proceeding have been fully developed by the parties, and in a

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28/ Docket #40. The Rules of Practice, though they require "due" regard for the convenience of the parties, place a heavy emphasis on expedition. In their opening paragraph (Section 1025.1), they state:

> The Commission believes that administrative adjudicative proceedings should be an expeditious manner of settling disputes. Delay does not benefit the public or any party. Therefore, in the conduct of such proceedings, the Presiding Officer and all parties and their representatives shall make every effort at each stage of a proceeding to avoid unnecessary delay.

29/ The pre-hearing schedule issued by the Presiding Officer on May 27, 1975 (Docket #40) required Enforcement Counsel to file their responses to Respondents' May 16 motions by June 4. By June 11, Enforcement Counsel were to file all of their direct testimony, in question/answer format, and were cautioned that "absent extraordinary cause shown, Enforcement Counsel's written direct testimony, unless filed by June 11, will not be admitted." Respondents were instructed to similarly file their direct testimony no later than June 30, and similarly cautioned. Finally, both Enforcement Counsel and Respondents were to file all written rebuttal testimony, also in question/answer format, no later than July 11 with this same warning that absent extraordinary cause shown no further testimony by either party would be admitted at the hearing commencing July 14, which hearing was, in the absence of extraordinary circumstances, to be limited to oral cross-examination.

The use of written direct and rebuttal testimony, submitted in advance of the hearing as specified above, was quite successful as a device for permitting both expert and lay testimony to be developed fully, rapidly, and in a manner best calculated to enhance the quality of the live cross-examination at the hearing and the free flow of information between the parties prior to the hearing.

time frame which met the overriding public interest of securing a most prompt initial decision as to the presence of a substantial product hazard. 30/

(f) The Propriety of Adjudication

Respondents, asserting that defrost timers or motor switches are "the crucial components involved in the Notice of Enforcement," and that the timers in Respondents' refrigerators are found in at least 90% of the total of home refrigerators sold in the United States in 1975, moved that the Notice of Enforcement be rescinded on the ground that this should be a rulemaking rather than an adjudicatory proceeding. (Docket #s 12, 31). As Respondents phrased it, "(t)he question which CPSC has about defrost timers should not properly be directed only at Kelvinator, and the Commission's action in doing so is unlawfully discriminatory." (Docket #12).

Enforcement Counsel, though declining to challenge the accuracy of Respondents' factual assertions, urged that

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30/ The Rules of Practice (Section 1025.66) give the parties a right to submit proposed findings and conclusions generally within 30 days after the close of reception of evidence, with replies thereto to be filed within another fifteen days. That the Presiding Officer permitted this full period of time for such submissions, rather than her earlier stated intention to foreshorten this period to fifteen and seven days, respectively was due to her preliminary assessment of the likelihood of Enforcement Counsel prevailing on the merits. Had this assessment instead favored the position presented by Enforcement Counsel, neither the parties nor the Presiding Officer would have had the luxury of utilizing as leisurely a pace as employed herein for presenting and deciding the important safety questions that had been raised.

Respondents' motion be denied anyway because the real issue in this case was said to be not the safety of the design of a component part of refrigerators (their defrost timers), but rather the safety of the refrigerators as a whole. And, with respect to refrigerators as a whole, Enforcement Counsel state:

> There is no information presently available to Enforcement Counsel that would lead us to believe that other manufacturers of refrigerators attach the defrost motor switch neon gas tube and insulator, and refrigerators in the same configuration as Respondents did in the models in question . . . To date, the Commission has received no information from any of [its] sources which would lead the staff to believe that all refrigerators as a class, or any sub-class of refrigerators, could present the same hazard to the public that the staff alleges Respondents' refrigerators present. (Docket #43, pp. 2, 5.)

Believing that development of a more complete factual record might be helpful in resolving this motion, a decision on it was deferred until the hearing was completed For the reasons discussed below, the Presiding Officer now denies Respondents' aforementioned motion to rescind the Notice of Enforcement. 31/

Even if there was evidentiary support for a choice in this instance between rulemaking and adjudication, it has been clearly and consistently held that such a choice "is one that

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31/ This ruling on this motion, as well as all other rulings on legal issues discussed in this INITIAL DECISION, are, for convenience, reflected in the attached ORDER.

lies primarily in the informed discretion of the administrative agency." S.E.C. v Chenery Corp., 332 U.S.194, 203 (1947). As the Court of Appeals stated, in a slightly different context, in Philadelphia Television Broadcasting v. F.C.C., 359 F.2d 282, 284 (D.C. Cir., 1969):

> In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective.

See also American Machinery Corp. v. N.L.R.B., 424 F.2d 1321, 1330 (5th Cir., 1970). 32/

In fact, though, as the staff response to Respondents' motion quoted above accurately notes, from its inception this proceeding has been concerned with the design of

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32/ And, having lawfully chosen to proceed by adjudication, "in the absence of a patent abuse of discretion" it is permissable for the staff to proceed against Respondents, first, before turning to others -- if any -- against whom the law may also be enforced. Regina Corp. v F.T.C., 322 F.2d 765, 769 (3rd Cir., 1963).

Moreover, nothing in the split opinions in N.L.R.B. v Wyman - Gordon, 394 U.S. 759 (1969), relied upon by Respondents, would have prohibited the application of a "rule", even unlawfully developed in an adjudicatory proceeding, to the Respondent in that proceeding. Nor are the facts in this case even remotely analogous to those involved in the invidious class discrimination of Yick Wo v Hopkins, 118 U.S. 356 (1886), also cited by Respondents.

refrigerators and not just one of their parts,[33] and the Presiding Officer finds, on the basis of the evidence in the record, that (1) there does not exist any other refrigerator of design closely similar to those at issue herein. [34]

For all these reasons then, Respondents' motion, arguing for the necessity for a rulemaking rather than an adjudicatory proceeding, must be denied.

(g) The Proper Respondents

The Notice of Enforcement (Docket #1) names as Respondents in this proceeding the following individuals and entities:

(A) White Consolidated Industries, Inc., Cleveland, Ohio;
(B) Kelvinator, Inc., Grand Rapids, Michigan;
(C) G.R. Manufacturing Co., Grand Rapids, Michigan;
(D) Edward S. Reddig;
(E) Thomas I. Dolan; and
(F) Roy H. Holdt.

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33 / The Notice of Enforcement alleges that "approximately 336,000 refrigerators . . . present a substantial product hazard . . . because the staff believes the following design defects could cause . . . injury, (emphasis added)."

34/ Findings of Fact are numbered sequentially throughout this INITIAL DECISION. Support in the record for each Finding is discussed in the text and footnotes accompanying that Finding, and the rulings of the Presiding Officer on related findings proposed by Enforcement Counsel and Respondents are referenced in the Appendix. With respect to Finding (1), Respondent Dolan, an official of Respondent Kelvinator, Inc., testified that he did not know of any models of refrigerator duplicating exactly the design of the Respondents' refrigerators at issue herein (Tr., pp. 505-06), and Enforcement Counsel witness Honnoll, also with years of experience in the home refrigeration industry, added that he had never known a refrigerator with components even similarly arranged. Tr., pp. 110-11.

Respondents have asserted that the inclusion of the names of White Consolidated Industries, Inc. (hereinafter "WCI") and the three individuals Reddig, Dolan, and Holdt[35/] "constituted unjustified harassment and abuse of process." (Docket #34). They urged that these names be stricken and that any Order which might issue name as Respondents only Kelvinator, Inc. and G.R. Manufacturing Co.

Agreeing with Enforcement Counsel, however, that the resolution of the issues raised by Respondents would be aided substantially by a fully developed record illuminating the precise relationships among and between the parties named in the Notice of Enforcement, the Presiding Officer deferred a ruling on Respondents' motion until after the hearing had concluded. (Docket #60).

35/ Respondents Reddig and Dolan were named in this Notice of Enforcement both as corporate "officers" and "individually."

On the basis of the Findings of Fact 36/ and reasons discussed below, the Presiding Officer, with two exceptions as noted, denies Respondents' Motion to strike the names of certain Respondents in the Notice of Enforcement.

(2) Respondent Kelvinator's business is the design, manufacture and sale of household appliances including refrigerators, freezers, ranges and refrigerant compressors. 37/ (3) Kelvinator is the corporation that designed, manufactured, and distributed the refrigerators which are the subject of this proceeding. 38/ (4) Respondent Kelvinator does business under the name of Respondent G.R. Manufacturing Co., and when Kelvinator

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36/ Much of the factual record relating to the corporate status of the named Respondents was developed during an in camera hearing held under procedures established by the Presiding Officer in an Order dated July 9, 1975. Docket #68a. In accordance with the procedures outlined in that Order, the Presiding Officer has issued this date, for reasons discussed infra, a separate order granting in part Respondents' Motion requesting indefinite in camera treatment for selected, rather limited, portions of the transcript prepared during this in camera hearing and for several of the exhibits introduced therein. All other portions of the record in this case will be included in the public "Official Docket," and the Findings of Fact discussed herein relate solely to such publicly available information.

37/ Tr., p. 199; Respondents' Exhibit (hereinafter "R. Ex.") A, pp. 2,3.

38/ Dauscher affidavit (Docket #35); R. Ex. A, p. 6.

manufactured refrigerators they were produced by G.R., a division of Kelvinator and its manufacturing arm. 39/

(5) Kelvinator is, in effect, a "pseudonym" for Respondent G.R. Manufacturing. 40/

Given these facts, Respondents acknowledge, as they must, that Kelvinator and G.R. Manufacturing have been properly named as the "manufacturers" of the products at issue. 41/ Respondents nevertheless object to the naming as additional Respondents, among others, Kelvinator's corporate officers Reddig and Dolan.

Respondent Edward S. Reddig is named in the Notice of Enforcement "individually and as an officer of White Consolidated Industries, Inc., and Kelvinator, Inc." (Docket #1).

(6) Edward S. Reddig is not currently an officer of Respondent Kelvinator. 42/ Accordingly, that portion of the Notice of Enforcement naming Mr. Reddig in his capacity as an officer of Kelvinator, Inc., must be stricken.

39/ Tr., pp. 213-24.

40/ Tr., p. 214.

41/ Though originally objecting to the naming of G.R. Manufacturing Co. as a Respondent (Docket #18), Respondents subsequently withdrew that objection. (Docket #34). But see Docket #78, p. D-21.

42/ Enforcement Counsel's Exhibit (hereinafter "E.C. Ex.") 12.

improper, urge Respondents, since there is

> no reason to name a corporate officer in his individual capacity unless (1) the officer has himself as an individual engaged in the conduct which is the subject of the proceeding or (2) the corporation involved is a sham or an "alter ego" of the officer and there would therefore be a substantial likelihood of evasion of a Commission order if the individual were not named. See Doyle v Federal Trade Commission, supra. (Docket #34).

Although Respondents, in forumulating their arguments, have isolated some of the factors that have been considered under a variety of statutory schemes in determining the propriety of naming persons in their corporate and individual capacities, their reliance exclusively on such factors to set similar standards f orders issued under Section 15 of the Consumer Product Safety Act is misplaced for several reasons.

First, orders issued under Section 15 are unlike the cease and desist orders involved in Doyle v F.T.C., supra, and similar cases cited by Respondents. With cease and desist orders or prospective injunctions, "future corporate activities are the sole concern . . . ." Doyle v. F.T.C., supra, 356 F.2d at 383. Section 15 orders, however, do not look solely to the future. Instead, they focus on corporate activities, the ill effects of which they seek to remedy by requiring action aimed with precision at the very persons

(7) Respondent Thomas I. Dolan, however, is an officer of Kelvinator, having been its President since 1969. As President, Mr. Dolan is responsible for all day to day operating decisions, such as production manufacturing control and refrigerator design, as well as for some policy decisions.43/

Respondents argue that Mr. Dolan is not properly named as a Respondent in his corporate capacity because any orders directed to corporate Respondent Kelvinator "are automatically binding on the officials 'responsible for the conduct of its affairs' . . . and these individuals may be punished by contempt if they prevent compliance . . . ." Doyle v. F.T.C., 356 F.2d 381, 384 (5th Cir., 1966), quoting Wilson v United States, 221 U.S. 361 (1911). Since Respondents therefore conclude that naming such officials in their corporate capacity is "totally useless," they contend that "the only purpose it can serve is one of harassment, which is not a proper basis for an administrative agency to proceed upon." (Docket #34).

Further, Kelvinator corporate officer Dolan has also been named "individually" as a Respondent. This, too, was

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43/ Tr., pp. 204, 231-32.

who suffered those past effects. Moreover, in contrast to the cease and desist order entered under the Clayton Act in Doyle, no similar promise of future forebearance from unlawful conduct is expressly authorized by the statutory language of Section 15 of the Consumer Product Safety Act as a remedy for the violations it encompasses.44/ Rather, the Section 15 order is more closely akin to one intended to "exact compensatory damages for past acts." But it is this type of order, as opposed to a cease and desist order designed to prevent "illegal practices in the future," which the Doyle Court believed does legitimately name corporate officials. Doyle v. F.T.C., supra, 356 F.2d at 382.

Second, and as a result of this difference in the nature of the relief secured by a Section 15 order as distinguished from a cease and desist order, there need be little fear that

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44/ The Order proposed by the Staff in this case and attached to the Notice of Enforcement does include a requirement that the named Respondents "stop manufacturing . . . [these] refrigerator models . . . or any other refrigerator of similar design or construction, containing any of the defects found to create a substantial product hazard." Further, the proposed order also requires of individual Respondents that they "notify the Commission of the discontinuance of [their] present business or employment and of [their] affiliation with a new business or employment." Even assuming, without deciding, that the Commission has the inherent power to augment its statutory remedies under Section 15 of the Act with the additional requirements enunciated in these provisions of the proposed order, their inclusion does not alter the principal purposes of such an order which remain the institution of notice and of product repair, replacement or refund.

the Section 15 order could constitute the "brand for life," or the "albatross" around a Respondent's neck, that so obviously troubled the Doyle Court as it declined to extend that order's reach to Mr. Doyle in his individual capacity. 356 F.2d at 385.

Finally, it has been recognized that there are situations, even in the context of prospective cease and desist orders or injunctions, where individuals as well or corporations are appropriately named. Thus, in Doyle itself, the court merely indicated that under the circumstances it presented "there seems to be little reason for including corporate officers as individuals in the orders unless there is a possibility of evasion. 356 F.2d at 384 (emphasis added). Similarly, in Hartford-Empire Co. v United States, 323 U.S. 386, 434 (1945) (emphasis added), also relied upon by Respondents, the Court noted: "There is no apparent necessity for including them individually in each paragraph of the decree which is applicable to the corporate defendants whose agreements and cooperation constitute the gravamen of the complaint."

Here, however, that "necessity" is "apparent." As has been previously emphasized, 45/ there is a sense of urgency that

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45/ See note 28, infra, at p. 15, and accompanying text.

pervades the substantial product hazard provisions of Section 15 which argues persuasively for granting to the Staff and, ultimately the Commission, the discretion to identify and name in these proceedings specific individuals whom it can hold responsible for formulating and directing an immediate and effective remedial action program.46/ As Enforcement Counsel aptly note (Docket #77, p.83):

> When a corporation is slow to act, there is not time to enter into the corporate morass in an attempt to find the officer responsible for carrying out the Commission's order. Moreover, the Commission is more likely to ensure immediate and strict compliance with its Order simply by virtue of fact that the Order is against named individuals who, if they fail to comply with the Commission's Order, will be summarily liable for civil and criminal penalties under Sections 20 and 21 of the Consumer Product Safety Act.

In addition, in Benrus Watch Co., Inc. v. F.T.C., 352 F.2d 313 (8th Cir., 1965) and Standard Distributors, Inc. v. F.T.C., 211 F.2d 7 (2d Cir., 1954), it was held that even F.T.C. cease and desist orders, prospective though they be, may nevertheless properly name corporate officers as individuals, notwithstanding the absence of a sham corporation, the lack of a threat of

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46/ The Order proposed by Enforcement Counsel and attached to the Notice of Enforcement would require Respondents to submit their remedial plan to the Commission within "5 days" of the issuance of the Order, with the additional requirement that a sample of each corrected model be made "immediately" available to the Commission for its evaluation "before" such units are placed in the hands of consumers. Docket #1.

possible evasion of an order extending only to the corporation, or the departure of those named officers from the corporation subsequent to the completion of the illegal acts, as long as such individuals as are named were, as the Doyle Court phrased it, "officers in top control of the corporation; formulating, directing, and controlling corporate policies and practices." 356 F.2d at 385.

In short, because orders entered under Section 15, with their focus on past conduct, are so unlike prospective cease and desist orders and injunctions and do not stigmatize the individuals they name, and because, in any event, even in such prospective orders, officers in "top control" of a named corporation may still properly be named, it is clear that the cases relied upon by Respondents do not fully establish the controlling principles for deciding when persons may lawfully be named as officers and individuals in a proceeding under Section 15 of the Consumer Product Safety Act. Further guidance is necessary. That guidance may be found in the decisions the Supreme Court in United States v Park, 95 S. Ct. 1903 (1975) and United States v Dotterweich, 320 U.S. 277 (1943).

In United States v Dotterweich, both the company and Dotterweich, its President and general manager, had been charged with criminal violations of the Federal Food, Drug and Cosmetic Act (21 U.S.C. §§301-392). Dotterweich had been convicted. Section 301(a) of that Act "prohibited the introduction . . . into interstate commerce of any . . . drug . . . that is adulterated or misbranded." Section 303(a) of the Act established a misdemeanor penalty for "any person" violating this provision.

On appeal, the Supreme Court upheld Dotterweich's conviction, rejecting the contrary view of the lower court that "only the corporation was the 'person' subject to prosecution unless, perchance, [the company] was a counterfeit corporation serving as a screen for Dotterweich." 47/

In support of its judgment, the Supreme Court observed that the "only way in which a corporation can act is through the individuals who act on its behalf," 48/ and emphasized that the Food, Drug and Cosmetic Act "is concerned not with the proprietory relation to a misbranded or an adulterated drug but with its distribution. In the case of a corporation such

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47/ United States v Dotterweich, 320 U.S. at 279. The Court of Appeals had held that where the drug proprietor was a corporation, an individual connected therewith might be held personally only if he was operating the corporation "as his 'alter ego.'" United States v Buffalo Pharmacal Co., 131 F.2d 500, 503 (2d Cir., 1942).

48/ 320 U.S. at 281.

distribution must be accomplished, and may be furthered by persons standing in various relations to the incorporeal proprietor." 49/ The key inquiry, therefore, was whether "an accused shares responsibility in the business process resulting in unlawful distribution," and an offense was committed "by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs." 50/

The purposes of the Food, Drug, and Cosmetic Act, emphasized the Court, "touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection . . . . Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless." The Court stressed that "(r)egard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words." 51/

49/ Id., at 283.

50/ Id., at 284.

51/ Id., at 280, 285.

These same points were given renewed force and vitality in United States v Park, supra. In Park, as in Dotterweich both the corporation and its President and chief executive officer (Park) had been charged with criminal violations of the Federal Food, Drug and Cosmetic Act. Park, like Dotterweich, had been convicted. Section 301 (k) of the Act "prohibited . . . the doing of any . . . act with respect to a food . . . if such act is done while such article is held for sale . . . after shipment in interstate commerce and results in such article being adulterated . . . ." 52/ Again, the same section as in Dotterweich, Section 303(a), established the penalty for "any person" who violates this provision.

On appeal, the Supreme Court, as it had in Dotterweich, upheld the conviction. It stated:

> Dotterweich and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission--and this is by no means necessarily confined to a single corporate agent or employee--the act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them. 53/

52/ Section 402 of the Act, 21 U.S.C. §342, provided in part that "A food shall be deemed to be adulterated . . . if it has been prepared, packed, or held under insanitary conditions . . . whereby it may have been rendered injurious to health."

53/ 95 S. Ct. at 1911.

It was not, stressed the Court in Park, knowledge, intent, consciousness or wrongdoing, or personal participation that was determinative of the liability of Park as a managerial officer, but rather

> that the fact the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so. 54/

The parallels between the situation confronting the Court in Park and Dotterweich, and that before the Presiding Officer in this proceeding under Section 15 of the Consumer Product Safety Act, are striking. In Dotterweich, the statutory concern was with the distribution of offending products. This same concern is expressed in the finding that must accompany an order issued pursuant to Section 15(d) that the "product distributed in commerce presents a substantial product hazard." In neither situation need there be any consciousness of wrongdoing to invoke the sanctions of the Acts. In both situations, corporate distribution must be accomplished and may be furthered by persons standing in various relations to the corporation.

54/ 95 S. Ct. at 1912.

different form of civil administrative sanctions in another, does not alter the common obligation of the Presiding Officer and "of the Courts to give [such sanctions] full effect so long as they do not violate the Constitution." 56/

Given these striking similarities, and relatively unimportant differences, the Presiding Officer has concluded that the principles of managerial corporate responsibility enunciated in Park are equally applicable to proceedings commenced under Section 15 of the Consumer Product Safety Act. It is the holding of the Presiding Officer, therefore, that where, as here, a corporation is properly named as the "manufacturer, distributor, or retailer" of the product alleged to present the substantial product hazard, the corporate officials associated with that properly named corporation may also be named in their corporate capacity in the Notice of Enforcement commencing the proceedings under Section 15 of the Act if they are in "top control" of that corporation "formulating, directing and controlling [corporate] policies and practices," 57/ or, alternatively, "by reason of [their] position in the corporation, [they have the]

56/ United States v Park, supra, 95 S. Ct. at 1912. Nor, given the civil nature of the Section 15 proceeding, will the "stigma of a criminal conviction" that attached to Dotterweich (Murphy, J., dissenting, 320 U.S. at 286) similarly follow individuals named as respondents in their corporate capacity, upon the entry of an administrative order.

57/ Benrus Watch Co., Inc. v F.T.C., 352 F.2d 313, 324 (8th Cir., 1965), cert. denied 384 U.S. 939 (1966).

responsibility and authority either to prevent in the first instance, or promptly to correct," 58/ the alleged substantial product hazard at issue.

In light of this holding and his duties at Kelvinator, 59/ Respondents' Motion to strike Mr. Dolan from the list of Respondents named in their corporate capacity must be denied.

Also denied is Respondents' Motion to strike Mr. Dolan from the list of Respondents named "individually." This ruling follows not from the conclusion that Respondent Kelvinator is but a sham or "alter ego" of Respondent Dolan, though if it were, as Respondents correctly note, his inclusion in his individual capacity would have been proper. Rather, it follows from the necessity of bringing Mr. Dolan "individually" under those terms of the Order which would personally bind him in the future should he leave his present corporate employment. 60/

Similar considerations govern the disposition of Respondents Motion to strike WCI and its corporate officers Reddig and Holdt from the list of Respondents in this proceeding.

58/ United States v Park, Supra, 95 S. Ct. at 1912 (1975).

59/ See note 43, infra, at p. 23, and accompanying text.

60/ See note 44, infra, at p. 25.

(8) Respondent White Consolidated Industries, Inc. (WCI) is engaged, principally through wholly-owned subsidiaries, in the manufacture and distribution of a broad range of products and services. 61/ (9) WCI acquired Kelvinator in 1968 and subsequent thereto it has been wholly-owned by WCI. 62/ (10) WCI does not permit its subsidiaries, such as Respondent Kelvinator, to transfer assets (other than excess assets) among themselves. When excess assets are transferred, no cash changes hands; rather, a book transfer is arranged crediting the fixed asset account at Kelvinator, debiting the cash account at the subsidiary to which the asset was sent, and, at the end of the year, balancing all books at the WCI level. 63/ (11) Normally, for day to day capital needs, Kelvinator does not raise its own capital, but WCI, instead, acts as its banker, going to the money markets on its behalf. 64/ (12) Each year, Kelvinator submits its capital budget to WCI for approval by the senior corporate management group at WCI. Kelvinator's annual capital budget is not automatically approved by WCI.

61/ E.C. Ex. 11, p.26.

62/ Tr., p. 198; Dauscher affidavit, Docket #35.

63/ Tr., pp. 221-22.

64/ Tr., pp. 210-11.

Like any banker, WCI will approve or disapprove or modify the Kelvinator budget based on what it conceives necessary to the protection of its investment and loan interest.65/

(13) Kelvinator does not submit an operating budget to WCI, but Kelvinator's financial officers report Kelvinator's cash position on a daily basis to WCI, and submit monthly operating and profit-and-loss statements to WCI. Kelvinator does not have the freedom to withdraw funds from its own bank deposit accounts. Instead, to withdraw funds from its deposit accounts, it must get express approval for other than routine payables from WCI for a cash transfer. This arrangement serves WCI's need to control Kelvinator's cash assets and thus protect its security interest. 66/

(14) WCI charges each of its subsidiaries, including Respondent Kelvinator, on a formula basis for corporate general and administrative expenses in rendering services to them. Among the charges billed to subsidiaries by WCI are those for insurance, financial, executive and legal services. When Kelvinator realized that there might be a proceeding in this matter, it came to WCI's legal department

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65/Tr., pp. 210-11.

66/Tr., pp. 211, 219-20.

to ask for direction on what to do, and turned to another WCI subsidiary for product testing in connection therewith. 67/

(15) WCI consolidates the profits of all of its subsidiaries for reporting and tax purposes and it is WCI that declares dividends for WCI stockholders; Kelvinator does not declare its own dividends. Kelvinator's profits all eventually accrue to the benefit of WCI's stockholders, and WCI has a strong interest in Kelvinator's trade name as well as the public's acceptance of products sold under the Kelvinator label. 68/

WCI and Kelvinator are also linked through their officers and directors. (16) Respondent Roy H. Holdt is President and Chief Operating Officer of WCI, a member of WCI's Board of Directors, Executive Vice-President of Kelvinator and a member of Kelvinator's Board of Directors. 69/ (17) Respondent Holdt is one of three members of Kelvinator's Board of Directors; the other two members are Messrs. Ward Smith and Karl Ware. Respondent Holdt, and Messrs. Smith and Ware, in addition to comprising Kelvinator's Board of Directors, are each also directors and officers of WCI. 70/

67/ Tr., pp. 222-24, 216-17, 218; E.C. Ex. 11, p. 26.

68/ Tr., pp. 213, 227.

69/ Tr., p. 203.

70/ Tr., pp. 196, 197; E.C. Ex. 12.

(18) WCI's Board of Directors is the ultimate determiner of WCI corporate policy and as a matter of practice, makes all major policy decisions relating to the total operation, like whether or not to acquire Kelvinator as a WCI subsidiary. In 1974, when Kelvinator discontinued its refrigerator manufacturing operation in favor of its relocation elsewhere within the WCI organization, that decision was orginated by Kelvinator's operating officers (among them Respondents Dolan and Holdt, and Messrs. Smith and Ware), all of whom are also WCI officers and three of whom (Holdt, Smith and Ware) are WCI board directors. 71/ (19) Furthermore, Respondent Dolan, Kelvinator's President responsible for all of Kelvinator's day to day operating decisions including refrigerator production manufacturing control and design, 72/ is also an officer of WCI serving as a Senior-Group Vice-President. 73/

(20) WCI considers its greatest strength to be the ability to transform losing companies into efficient moneymakers. That strength was exercised by WCI officers and employees to transform Kelvinator from a money loser at the time of its acquisition by WCI, into a money maker at the present time.

71/ Tr., pp. 199, 200; E.C. Ex. 11, 12.

72/ See note 43, supra, at p. 23, and accompanying text.

73/ Tr., pp. 203-04.

Those WCI employees and officers accomplishing that "turn around" task for Kelvinator are still available to Kelvinator "on a quasi-permanent basis." 74/

(21) Finally, in the event the refrigerators involved in this proceeding were found to present a substantial product hazard, it would be necessary for Kelvinator to submit an interim budget to WCI outlining the comparative cost of invoking each of the alternatives of repair, replacement, or refund, after which a final decision as to the alternative to choose would be made by WCI. 75/

While it is clear from these findings of fact that Respondent Kelvinator is not a "mere tool" of Respondent WCI, and that the corporate identity of the subsidiary is not a "mere fiction," 76/ they are nevertheless adequate to support the conclusion that WCI and Kelvinator "were transacting an integrated business through a maze of interrelated

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74/ Tr., pp. 227-28; E.C. Ex. 11, p. 3.)

75/ Tr., pp. 229-31.

76/ See generally National Lead Co. v. F.T.C., 227 F. 2d 825, 829 (7th Cir., 1955) rev'd on other grounds, 352 U.S. 419 (1957). Had either of these more traditional criteria been met, of course, the authority to name both parent and subsidiary would be unquestionable. Id.

companies." 77/ It was, therefore, permissible for the Staff, in its discretion, to fashion a remedy naming both as corporate Respondents in this proceeding and thereby avoiding any possibility of evasion of a Commission order.

Moreover, even if Respondents WCI and Kelvinator had not been so closely linked as to warrant this finding concerning their intimate interrelationship, the thrust of Park and Dotterweich, supra, is that there may be circumstances where even two corporations -- and not just a single corporation and its officers -- may both properly be named as Respondents in a Section 15 proceeding despite the fact that they are clearly separate legal entities. After all, in Dotterweich liability was said to attach to anyone who "shares responsibility in the business process resulting in unlawful distribution" and extend to "all who do have such a responsible share in the furtherance of the transaction which the statute outlaws." 78/ Every reason discussed favoring the extension of Park and Dotterweich to authorize

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77/ Delaware Watch Co. v F.T.C., 332 F.2d 745, 746 (2d Cir., 1964). There, both corporations had their offices and principal places of business located at the same address, and shared common officers with the President and majority stockholder of the first corporation in turn owning all of the stock of the second. Id.

78/ United States v Dotterweich, supra, 320 U.S. at 284 (emphasis added).

the naming of both a corporation and its officers as corporate Respondents in a Section 15 case applies with equal force where, as here, the parent Respondent WCI had, by virtue of its relationship with subsidiary Respondent Kelvinator, the "responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of." United States v Park, supra, 95. S. Ct. at 1912.

For both of these reasons, then, Respondents' motion to strike WCI from the list of corporations named as Respondents in this proceeding must be denied.

And, having concluded that Respondent WCI was properly named, it follows that Respondent Edward S. Reddig, WCI's Chief Executive Officer -- just like his counterpart Respondent Dolan at Kelvinator -- 79/ has also been properly named in both his corporate and individual capacities. 80/

Lastly, the status of Respondent Roy H. Holdt, named solely in his corporate capacity as an officer of WCI, must be resolved. Mr. Holdt is President and Chief Operating Officer of WCI, a member of WCI's Board of Directors,

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79/ See notes 59, 60 , supra, at p.35, and accompanying text; Tr., p.204

80/ (22) Respondent Reddig is Chairman of the Board and Chief Executive Officer of WCI, serving as its senior executive responsible for its day to day management. Tr., p. 203; E.C. Ex. 11, p. 28; R. Ex. A, p. 7.

Executive Vice-President of Kelvinator, and a member of Kelvinator's Board of Directors. 81/ (23) Despite his position as an officer of Kelvinator, Mr. Holdt has no day to day functional responsibilities for Kelvinator, serving instead merely as a statutory officer signing documents like patent applications and tax returns on behalf of Kelvinator. 82/ Mr. Holdt's responsibilities and authority at WCI are unknown beyond the title of the positions he occupies.

Under these circumstances, it is impossible to conclude that Respondent Holdt meets the tests established earlier, in light of Park and Dotterweich, for including as Respondents in their corporate capacity officers of respondent corporations such as WCI which have been properly named. 83/ Therefore, Respondents' Motion to strike Roy H. Holdt from the list of Respondents named in the Notice must be granted.

In sum, and for the reasons discussed above, the Presiding Officer has concluded that the corporate Respondents WCI and Kelvinator, and Respondents Reddig and Dolan have been properly named in each of the individual and corporate capacities listed for them with the exception of Respondent Reddig who was improperly named as an officer of Kelvinator. Respondent Holdt, however, was improperly listed, and his name must be deleted.

81/ See note 69 , supra, at p.38 , and accompanying text.

82/ Tr., p. 232-33.

83/ Had the jury in Park found Park guilty "solely on the basis of [his] position in the corporation," its error would have been patent. United States v. Park, supra, 95 S. Ct. at 1912.

(h) The In Camera Material

Section 1025.65 of the Rules of Practice permit in camera proceedings "only in . . . unusual and exceptional circumstances when good cause is found on the record . . . ." Expecting that parts of the testimony of Enforcement Counsel witness and corporate officer Ward Smith would involve "highly confidential commercial and financial information relating to the status of Kelvinator," but unable to predict in advance which portions of Mr. Smith's testimony might appropriately require protection, respondents requested that Mr. Smith's testimony be heard in camera. (Docket #68).

To accommodate the strong Commission policy favoring public accessibility to all evidence in this matter absent "unusual and exceptional circumstances," and the obvious merit of Respondents' request in light of the nature of witness Smith's expected testimony, the Presiding Officer received his testimony under the following conditions:

(A) Mr. Smith's testimony and associated documentary evidence related to Respondents' corporate structure and responsibilities were temporarily received in camera in their entirety in accordance with the provisions of Section 1025.65 of the Rules of Practice;

(B) Within 10 days of the filing by the Reporter under seal of the transcript of Mr. Smith's testimony,

Respondents were required to file under seal, and serve, a motion isolating the particular portions of the transcript and documentary evidence for which confidentiality was claimed, supporting their claims with a discussion of the "unusual and exceptional circumstances" involved and with citation to appropriate legal authority, and requesting the entry of a final in camera order to protect such material; and

(C) After considering Respondents' motion and any response thereto by Enforcement Counsel, the Presiding Order was to issue a final in camera order, if appropriate, removing from the protection of such an order all transcript or other documentary evidence and motions for which confidentiality had not been claimed by Respondents or for which Respondents' claims could not be sustained. (Docket #68a).

The transcript of Mr. Smith's in camera testimony totalled 48 pages (Tr. pp. 191-239) and embraced five Enforcement Counsel Exhibits (numbers 11-15). 84/ Respondents, in accordance with these procedures, moved the Presiding Officer for a final in camera order only for Enforcement Counsel Exhibits 13, 14, and 15, and for certain questions and answers found on pages 206, 207, 226, 227, 238, and 239 of the transcript. Enforcement Counsel opposed this request in its entirety, which opposition drew a Supplemental submission from Respondents.

84/ Thus, even this temporary in camera protection extended only to very minor portion of the record. See note 7 , supra, at p. 4 , and accompanying text.

Each of these filings are presently being held under seal in camera. Since neither party has requested that a final in camera order be entered to protect either their respective motion, opposition or supplement, or the pages of transcript or Enforcement Counsel Exhibits not listed above, the Presiding Officer, in a separate order issued this date, has provided for the prompt entry of these materials into the publicly available Official Docket.

The documents and testimony for which Respondents do claim confidentiality may be described in general terms as follows:

(A) A listing of some individuals or groups owning voting shares of WCI, the number of shares they own, and certain security position listings (Tr., pp. 206-07; E.C. Ex. 13, 15 and E.C. Ex. 14, in part);

(B) The percentage of WCI's total income received from the sale of Kelvinator refrigerators (Tr., pp. 226-27, 238-39); 85/ and

(C) Kelvinator, Inc.'s comparative balance sheets for January 1, and December 31, 1974 (E.C. Ex. 14, in part).

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85 / Enforcement Counsel Proposed Finding of Fact No. 26, filed under seal, also concerns this same information.

The Commission policy favoring public accessability to all evidence in this matter absent "unusual and exceptional circumstances when good cause is found on the record" places a very heavy burden on those seeking to deny such public access. The Commission is entitled to scrupulous adherence to this policy by those who implement and enforce it. See generally F.C.C. v Schreiber, 381 U.S. 279 (1965); Graber Manu. Co. v Dixon, 223 F. Supp. 1020, 1023 (D.D.C., 1963). Without a full statement of the reasons for granting final in camera treatment to any of the evidence submitted during the course of the proceedings, a specification of the date on which such in camera treatment is to expire, and a full statement of the reasons for selecting that particular expiration date, no final in camera order may issue. 86/

It is also clear, however, that any decision by the Presiding Officer, or ultimately the Commission, granting in camera protection to evidence submitted is of limited scope and finality. Such a decision would settle the status of this evidence for purposes of this proceeding only; even material protected by a "final" in camera order entered in this proceeding may nevertheless be released by the Commission "subject to the provisions of the Commission's procedures under the Freedom of Information Act." 87/

86/ Rules of Practice, Section 1025.65(b).

87/ Rules of Practice, Section 1025.65(d).

Therefore, in deciding whether Respondents have met their heavy burden, it is important that the inquiry center not only on the evidence at issue and the necessity for secrecy, but also on the role that evidence played in this proceeding. 88/

Respondents, purported showing of "unusual and exceptional circumstances," unadorned even with a supporting affidavit, consists of the following statement by counsel in their Motion:

> The material involves two limited categories of confidential commercial and financial information relating to White Consolidated Industries, Inc. (WCI) and Kelvinator, Inc. (Kelvinator). Both categories of material are of a type which, for competitive or other reasons of substance, are not customarily released by business corporations. None of the material for which in camera treatment is requested relates to the safety issues in this case in which there may be a legitimate interest on the part of those not directly involved, but the material could have great potential significance in the business world for reasons having no relationship to this case. From the total material at the in camera session of July 15, 1975, Respondents are asking continuing and permanent in camera treatment for only very small selected portions.

88/ Thus, whether the Commission, if it ever does receive a request from a member of the public for access to any information protected by a final in camera order in this proceeding, would grant that request or instead invoke its authority under the Exemptions of the Freedom of Information Act, is not an issue before the Presiding Officer, and Respondents arguments concerning the reach of the Freedom of Information Act Exemptions are premature and presented in the wrong forum.

Nor does respondents emphasis on the restrictions of 18 U.S.C. 1905 fare any better. Even information described therein may befreely disclosed "when relevant in any proceeding under this Act." Section 6(a)(2) of the Consumer Product Safety Act.

In Respondents' Supplement to their Motion, counsel added "an example" of what "competitors might conceivably do with the information in question," as follows (emphasis added):

> Just as an example, using the figures at the botton of the page showing comparative balance sheets, a competent financial analyst might well be able to determine costs and margins in the segment of the refrigerator business involved. Costs and margins are customarily regarded as confidential items of information which it is important to keep out of the hands of competitors in order not to reveal the basis and potential for price competition.
>
> Similarly the information on the estimated percentage of total sales by overall White operations represented by Kelvinator sales is a type of information which competitors might well attempt to exploit to the disadvantage of Respondents in financial and merchandising circles.

Providing any further "detail" was eschewed by Respondents, however, as "unproductive," since" this is not the place for writing a Fortune Magazine article on competitive forces at work in this major segment of the manufacturing business."

And with respect to the appropriate date of expiration for any order holding material in camera, a date whose selection by the Presiding Officer must be supported with a "full statement of reasons," Respondents counsel offered only the following:

> In camera treatment for the above material is requested for the indefinite future for the reason that the specific items will continue to be of a confidential nature and it is not possible to estimate at what date, if ever, in the future the material might cease to have need for confidential treatment.

This showing, viewed in isolation, is of course hardly adequate. The presence of information about a corporation, in a proceeding concerning corporations, is neither "unusual" nor "exceptional." Yet, in essence, it is merely because such information is present, which "might" be of interest to competitors, that Respondents seek to set aside this strong Commission policy favoring open records. Nowhere is the injury Respondents fear "clearly defined;" nowhere is it shown to be "serious." See Graber Manu. Co. v Dixon, supra. 89/

89/ Nor, contrary to Respondents' suggestion, would it be appropriate for the Presiding Officer or the Commission to make the principle of open records and open hearings contingent upon the "legitimacy" of the interest the public might have in them, since this "would require a degree of foreknowledge which the Commission does not possess." Crown Cork and Seal Co., 71 F.T.C. 1714, 1717 (1967).

However, when the material at issue is viewed in the context of the whole proceeding, reasons adequate to support a severely restricted final in camera order[90/] do emerge.

Out of an 805 page transcript, the final in camera order will place under seal selected testimony totalling less than 1-1/2 pages. Though the wisdom of the decision with respect to those 1-1/2 pages is unrelated to the quantity of material that has been released, its reasonableness is not. More importantly, the evidence at issue had no bearing on the Presiding Officer's INITIAL DECISION in this matter. It does not form the basis for any Findings

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90/ In the transcript, for example, although certain answers given by Respondents' witness have been protected, Enforcement Counsel's suggestion that their questions which prompted those answers not be similarly protected, has been accepted. So, too, has Enforcement Counsel's suggestion that in view of Respondent's failure to show the necessity for an indefinite termination date for an in camera order, that a two year time limitation be imposed.

of Fact or Conclusions of Law. 92/ Yet, the likelihood that competitive harm could result from the release of at least some of the financial balance sheet and profit and sales information at issue, if it is truly not available to the public from other sources, would appear -- despite Respondents' unimpressive showing on this point--to be not insubstantial. Additionally, the possibility of future access to even this limited information, if any member of the public so requests it under the Commission's Freedom of Information Act procedures, would remain unimpaired by a "final" in camera order entered in this proceeding. Finally, and of a strictly equitable and therefore largely irrelevant nature, counsel for Respondents have made the representation in their Supplemental submission that Respondents' corporate officers "held back nothing and imposed no time constraints in their efforts to answer questions by Enforcement Counsel" related to this material and may not have clearly understood the Commission's procedures with respect to such information.

For all of these reasons, then, Respondents' Motion for in camera treatment for certain transcript pages and three Enforcement Counsel Exhibits is granted, in part, and a severely restricted, separate, final in camera order has been issued this date.

92/ Had the decision on the merits been otherwise, however, it might have played a more important role.

(i) Miscellany

(A) Enforcement Counsel Exhibit 7 is a damaged refrigerator channel. At the hearing, Respondents vigorously objected to its admission into evidence on a variety of grounds, all of which were equally as vigorously resisted by Enforcement Counsel. 92/ The Presiding Officer overruled Respondents objection, however, holding that the technical rules of evidence applicable in jury trials do not apply to proceedings before Federal agencies in the absence of a statutory requirement that such rules be observed, 93/ and that problems of chain of custody and possible alterations of the exhibit were matters going to the weight or degree to which reliance may be placed on the exhibit in the INITIAL DECISION rather than to its admissibility. 94/

92/ See Tr., pp. 636-43.

93/ See, e.g., Richardson v Perales, 402 U.S. 389,410 (1971); F.T.C. v Cement Institute, 333 U.S. 683, 705-06 (1948); Opp Cotton Mills v Administrator, 312 U.S. 126, 155 (1941); Rosedale Coal Co. v Director, 247 F.2d 299 (4th Cir., 1957); 5 U.S.C. § 556(d); Section 1025.63 of the Rules of Practice.

94/ Tr., p. 643. Similar principles were invoked by the Presiding Officer at an earlier point in the hearing to admit disputed testimony offered by Respondents. See Tr., pp. 11-12; Docket #s 64, 65, 69, 70.

Respondents' objection to the admission of two damaged refrigerator timers, Enforcement Counsel Exhibits 10-A and 10-B, was also overruled on the same grounds. 95/

Subsequent to these rulings, at closing argument, Enforcement Counsel substantially altered its position with respect to the identity, origin and integrity of the damaged channel, E.C. Ex. 7. Enforcement Counsel stated:

> Upon further inquiry into the circumstances surrounding the receipt at the CPSC on July 9, 1974 of physical evidence offered in this proceeding, . . . although the gray metal channel [E.C. Ex. 7] was taken from the Salazar refrigerator, we now have doubts that the Salazar timer was contained in the channel at the time it was presented to the Commission. In fact, from what we have been able to piece together, it is likely that the timer was not attached to the channel when it was submitted to the Commission. What appears to have happened is that when the physical exhibits were sent to the Commission's Bureau of Engineering Sciences for evaluation, the engineers placed the Salazar timer in the channel . . . .
>
> Because we believe this may have happened, Enforcement Counsel do not intend to rely on any physical observations by our experts which specifically concern the condition of the individual timer and its relationship to the timer (sic). However, we do intend to rely on observations that have been made concerning the individual condition of the timer itself and the channel itself. 96/

95/ Tr., pp. 644-46.

96/ Tr., pp. 787-88 (emphasis added).

In view of the lateness and substance of this admission by Enforcement Counsel, the confused status of this exhibit, and the inadequacy of the belated proposal by Enforcement Counsel "not to rely" on portions of the testimony and evidence offered concerning this exhibit, 97/ the Presiding Officer has concluded that despite the liberal standard for the admissability of evidence alluded to above, Enforcement Counsel has failed in this instance to satisfy its burden of persuasion as to the relevancy and reliability of this exhibit. 98/

Accordingly, the prior ruling of the Presiding Officer admitting Enforcement Counsel Exhibit 7 into evidence is withdrawn, and Respondent's objection thereto is sustained. None of the testimony offered by Enforcement Counsel witnesses based upon their observations of this exhibit have been relied upon by the Presiding Officer in reaching her INITIAL DECISION in this matter.

(B) An employee of the Consumer Product Safety Commission, who had acted as an investigator in this case, also served as the translator for the testimony of two

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97/ See Docket #78, pp. E-1 through E-29.

98/ "(T)he proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto . . . Irrelevant, immaterial, unreliable . . . evidence shall be excluded." Sections 1025.63(a), (b) of the Rules of Practice.

witnesses who had earlier figured in her investigation. For this reason, Respondents urge that the testimony of these witnesses be struck. 99/

Commission employees may properly serve as interpreters in Commission proceedings as long as they are qualified to interpret, and do so accurately and with impartiality. See Lujan v United States, 209 F.2d 190, 192 (10th Cir., 1953). See also United States v. Lozano, 511 F.2d 1, 6 (7th Cir., 1975); Chee v United States, 449 F.2d 747, 748 (9th Cir., 1971). Here, given the presence of an independent interpretator available to Respondents who was repeatedly offered the opportunity to object, clarify or play back the tape made of the witnesses' testimony, 100/ and the opportunity of the Presiding Officer to observe the qualifications, accuracy and professionalism of the translator, the Presiding Officer concludes that there "is nothing in the record to indicate or from which it can be inferred that any part of any witness'

99/ Docket #78, pp. F-16 through F-26.

100/ See, e.g., Tr., pp. 24-25, 34.

testimony was misinterpreted to convey an erroneous meaning or impression . . . . ." 101/ Therefore, Respondents' motion is denied. 102/

101/ United States v Lujan, supra, 209 F.2d at 192.

102/ Of course, had Enforcement Counsel utilized the services of a Commission employee who, unlike the interpreter in this case, had had no prior involvement with the investigation of this matter, even the possibility of a suggested impropriety in the interpreter's selection would have been avoided.

(C) In view of the problems encountered in this proceeding related to the procedures to be utilized by the parties in securing subpoenas ad testificandum and duces tecum, [103] and the questions that have been raised about the authority underlying the Commission's delegation through the Rules of Practice of its subpoena power to the Presiding Officer and the parties, [104] the Commission may wish to provide further clarification of Sections 1025.53 and 1025.54 of its Rules of Practice. [105]

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[103] See Docket #s 27, 40, 51, 56, 58, 62, 63 and 67.

[104] Compare Sections 27(b)(3) and 27(b)(8) of the Consumer Product Safety Act with Section 27(b)(4) and Sections 1025.53 and 1025.54 of the Rules of Practice.

[105] At the request of Enforcement Counsel, subpoenas ad testificandum were issued to Enforcement Counsel witnesses Mr. and Mrs. Archer and Mr. Morgan. Prior to the hearing, direct testimony from each of these witnesses had been filed (Docket #53), and further direct testimony by Respondent witness Clarkson related to the testimony of the Archers and Mr. Morgan had also been filed. Docket #71. After the subpoenas had been issued by the Presiding Officer and served, Enforcement Counsel decided not to offer the testimony of these witnesses, and apparently advised them that the subpoenas issued by the Presiding Officer need not be obeyed. See Tr., pp. 287-93. As a result, neither the direct testimony of the Archers and Mr. Morgan, nor the related direct testimony of Mr. Clarkson, was either admitted into evidence or considered by the Presiding Officer in reaching her INITIAL DECISION. The Commission may wish to consider, however, whether further amendment to the Rules of Practice directed to this type of situation would be appropriate.

Having fully considered, with the two exceptions listed below 106/, all of the preliminary legal matters raised in this case, the merits of this controversy are next addressed.

106/ Respondents also moved to rescind the Notice of Enforcement on the ground that Section 15 of the Consumer Product Safety Act upon which it is based is unconstitutionally vague (Docket #s 15, 29) and the ground that the remedies of Section 15 may not constitutionally be applied restrospectively. Docket #s 13, 30. Enforcement Counsel opposed both Motions. Docket #s 44, 46. In view of the Presiding Officer's decision on the merits, the firmly established judicial preference for avoiding unnecessary adjudication of constitutional questions, and the absence of authority in the Commission in any event to declare this congressional enactment unconstitutional, the Presiding Officer should not, need not, and does not reach the merits of either of these Motions, except to note that the restrospectivity question has been decided adversely to Respondents by Commission Administrative Law Judge Pfieffer in his Interim Initial Decision in the Matter of Relco, Inc., CPSC Docket No. 74-4. An appeal in that matter is presently pending before the Commission.

Merits of the Controversy

(a) Decision Elements

(Facts and Law to be Considered)

The first level decision required in this case is: Does the Kelvinator refrigerator present a substantial product hazard. If the decision is affirmative, the Presiding Officer must determine whether notification under Section 15(c) of the Consumer Product Safety Act and/or an order for action under 15(d) of that Act is required.

"Substantial product hazard" is defined in Section 15 (a) (2) of the Consumer Product Safety Act as a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

The Report of the House Commerce Committee sheds some light on the Congressional intent. According to that Report, the definition of substantial product hazard "looks to the extent of the public exposure to the hazard. A few defective products will not normally provide a proper basis for compelling notification under this section.[107]

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[107] Report No. 92-1153, 92nd Congress, Second Session, June 20, 1972, p. 42.

In order to be able to conclude as a matter of law whether the Kelvinator refrigerator does or does not present a substantial product hazard the two issues which must be resolved are:

Issue I: Is there evidence in the record to support the finding that a product defect exists?

Issue II. Does a proven defect create a substantial risk of injury to the public because of

- the pattern of the defect
- the number of defective products distributed in commerce
- the severity of the risk
- or, otherwise.

As far as the resolution of these issues is concerned, Enforcement Counsel shall have the burden of proof to sustain the violations alleged in the notice of enforcement, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.[108]

In order to resolve Issue I (Is there evidence on the record to support the finding that a product defect exists), it is necessary to consider: (1) product defect analyses in the form of test data and/or scientific judgement; (2) field incidents analyses.

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[108] The Rules of Practice (Section 1025.63(a)).

In order to resolve Issue II (Is there evidence to support the contention that a proven defect creates a substantial risk of injury to the public?), it is necessary to consider in toto: (1) the probability of the defect existing in a given product; (2) the number of defective products in distribution; and (3) the severity of the risk;

(b) Findings of Fact

Issue I: Is there evidence in the record to support the finding that a product defect exists?

Prior to discussing findings relative to a possible defect in the Kelvinator refrigerator, it is necessary to outline the findings relative to the design and operation of refrigerators in general and the Kelvinator refrigerator in particular. 109/

(A) General Theory of Operation of a Refrigerator

(24) In a refrigerator, "cold" is produced by the ability of the liquid refrigerant -- called freon -- to absorb heat from the surrounding atmosphere when it evaporates within a hermetically-sealed refrigeration system. In an electric refrigerator, the freon is circulated througout the refrigeration system by an electrically-operated pump called a "compressor". The liquid freon is forced through a narrow

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109/ The refrigerators subject to this proceeding have been referred to as the "first generation" refrigerators by Mr. Dolan President of Kelvinator, Inc., because these were the refrigerators of Model 140, 160 and 180 manufactured between 1970 and 1973. R. Ex. A, p. 6. The phrase "Kelvinator refrigerator," as used in this DECISION, refers to the refrigerators subject to this proceeding.

capillary tube about the size of a hypodermic needle into a substantially more voluminous "evaporator" resembling a car radiator located within the insulated refrigerator cabinet. As the freon enters the evaporator, it expands into a cold gas, absorbing heat from the refrigerator's interior. This heat laden freon gas is then sucked out of the evaporator through a gas suction tube by the compressor located outside of the refrigerator cabinet. The compressor compresses the freon gas and forces it through the cooling condensor located on the back and outside of the refrigerator cabinet. During this process of compression and cooling, the freon gives up its heat and is changed back into a liquid. It is then transmitted through the capillary tube back to the evaporator where it once again evaporates into a gas, absorbing more heat from the interior of the refrigerator. The degree of refrigeration is controlled by the operation of the compressor which in turn is governed by a thermostat located within the refrigerator. 110/

(25) The function of the automatic defrost system employed in modern refrigerators is to remove, on a regular, automatic basis, the frost which collects on the evaporator's cooling surfaces within the refrigerator. In most refrigerators -- including those under consideration in this case -- defrosting is accomplished by use of an electric heating element mounted within the evaporator. After a

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110/ R. Ex. A, p. 4.

predetermined length of time (some five hours, forty-three minutes, in the refrigerators in question), the timer activated defrost switch simultaneously de-energizes the compressor and energizes the electric heating elements in the evaporator. During the "defrost cycle" -- which lasts for 17 minutes in the refrigerators in question -- the heating element melts any frost which has accumulated on the surfaces of the evaporator. This melted frost is carried away from the evaporator by a drain tube which runs out of and down the back of the refrigerator cabinet. At the end of the defrost cycle, the defrost timer switch de-energizes the electric heating element and re-energizes the compressor, returning the refrigerator to its normal refrigeration cycle. 111/

(B) Design and Operation of the "First Generation" Kelvinator Refrigerator

Relevant Design Features:

(26) A metal channel which was placed on the back of the refrigerator provides a passageway for the group of electric wires which connect the power cord to the various electrical components within the refrigerator. The wires are grouped together as an assembly called a "wire harness". A heat exchanger, consisting of a capillary tube and a freon suction tube, is also placed within the metal channel, and

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111/ R. Ex. A, p. 5.

is covered by a tube of foam insulation. A defrost timer switch controlling both the defrost and cooling cycles is installed at the bottom of the channel. 112/

(27) The defrost timers used in the Kelvinator refrigerators in this proceeding are placed in close proximity to, and immediately below, a wiring harness as well as polyolefin foam insulation surrounding a freon tube. 113/

(28) The defrost timers used in Kelvinator's model refrigerators are not sufficiently enclosed so as to bar access of contaminants. 114/

(29) A chemical analysis performed by the National Bureau of Standards revealed that the defrost timer switch used contains three plastic components (i) the main switch housing made of a phenolformaldehyde resin; (ii) a back cover plate made of poly phenyleneoxide; and (iii) a shield over the terminals made of nylon-66. In addition, analysis of the insulation on the wiring in the switch revealed that it was poly (vinyl chloride). The terminals inside the casing are separated by cavities molded of the

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112/ R. Ex. A, pp. 7-9.

113/ R. Ex. A, p. 13; R. Ex. A-2.

114/ R. Ex. A, pp. 21-22.

phenol-formaldehyde resin and are sealed within these cavities by an epoxy resin. 115/

Through spectrographic analysis, the polyolefin foam insulation surrounding the freon tube was determined to be ethylene vinyl acetate (EVA). 116/

Relevant Operating Features

(30) The basic operation of the Kelvinator refrigerator subject to this proceeding and its defrost system is identical to that outlined in findings 24 and 25. 117/

(31) The refrigeration cycle in Kelvinator's first generation model refrigerators operates on a six hour basis. After five hours and forty-three minutes, the timer activated defrost switch in these refrigerators simultaneously de-energizes the compressor and energizes the electric heating elements in the evaporator. The "defrost cycle" thus lasts for a maximum of 17 minutes of every six-hour period of operation in the refrigerators involved in this proceeding. Upon completion of this period, the defrost timer de-energizes the electric heating element

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115/ E.C. Ex. 109.

116/ Tr., 330

117/ R. Ex. A, pp. 4, 5.

and re-energizes the compressor, returning the refrigerator to its normal refrigeration cycle. 118/

(32) A schematic diagram 119/ is inserted in the Appendix to the Initial Decision in order to illustrate the manner in which a defrost timer controls the flow of electric current during both the refrigerator cycle and the defrost cycle of a 1st generation model Kelvinator refrigerator. The four male terminals in the timer are numbered (starting at the top and going downward) as No.'s 2, 3, 4 and 1. The 120 volt power supply (from a household wall recepticle) goes to terminal No. 3. The power to terminal No. 3 also supplies 120 volts to operate the defrost timer (an electric motor). A cam (located alongside and to the right of terminal No. 3) is controlled by the defrost timer, which automatically cycles the cam between contact 2 and contact 4. As further illustrated in the diagram terminal No. 2 supplies current to the heater, while terminal No. 4 supplies current to the compressor. During normal operation, when current is being supplied to the heater, there is no current to the compressor. Likewise, during normal operation, when current is being supplied to the compressor, there is no current to the heater. 120/

118/ R. Ex. A, p. 5.

119/ E.C. Ex. 18.

120/ Tr., pp. 420-23.

(33) Terminal No. 1 in the defrost timer supplies the ground path - or common return - for electric current that is being provided the defrost timer. The connection between terminal No. 1 and the defrost timer motor completes the necessary circuit that allows the defrost timer to operate.

(34) During normal operation, with the refrigeration cycle operating on a six hour basis, the cam is in contact with the blade from terminal No. 4 for five hours and forty-three minutes. With the circuit thus "closed" between terminal No. 3 and 4, 120 volts is supplied for this period of time through the supply wire terminal (No. 3), then through the contact, and back through terminal No. 4 to operate the compressor. During this same period of time, the circuit is "open" between terminal No. 2 and 3. Thus, since current is being supplied to the compressor, there is no current to the heater. 12/

(35) At the end of the five hour and forty-three minute period, the defrost timer automatically cycles the cam away from the blade extending from terminal No. 4 (thus opening the circuit between terminal No. 3 and 4) and toward the blade extending from terminal No. 2, so that contact with the blade from terminal No. 2 permits current to flow through the supply wire terminal (No. 3), then through

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12/ Tr., pp. 420-23.

terminal No. 2 to operate the heater. The circuit is "closed" between terminal No. 2 and 3, permitting current to flow to the heater, for a maximum period of 17 minutes. 122/

(36) A thermostat, located between terminal No. 4 and the compressor, closes the contacts to a thermostat switch when the refrigerator is too warm. This allows current to flow to the compressor in order to cool the refrigerator. Then, when the refrigerator is cold, the thermostat to the compressor will open the contacts to the thermostat switch so as not to operate the compressor needlessly. Thus, the compressor does not necessarily operate the entire five hours and forty-three minutes allotted it by the timer motor for the refrigeration cycle. 123/

(37) A thermostat is also located between terminal No. 2 and the heater to close contacts to a thermostat switch when the freezer is too cold. This allows current to flow to the heater in order to defrost the freezer. Then, when the freezer is warm (defrosted), the thermostat to the heater will open the contacts to the thermostat switch so as not to operate the heater needlessly. Thus, the heater does not necessarily operate the entire 17 minutes allotted it by the timer motor for the defrost cycle. The contacts to the termostat switch close at 20°F (permitting current

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122/ Tr., pp. 420-23.

123/ R. Ex. G-7. E. C. Ex. 18. Tr. p. 421-23

to flow to the heater so that the freezer is defrosted) and open at 50°F (opening the circuit so that the heater will not operate needlessly. 124/

C. Product Defect Description (Evidence Provided in the Record)

(38) A product defect exists because: Moisture forms and builds up on the insulation surrounding the freon tube in the channel and adjacent wiring harness. That moisture drips onto the area between the terminals in the defrost timer. Contaminants enter the terminal area. When that moisture and contamination are present in the area between the terminals, arcing takes place resulting in a heat build-up. The heat build-up leads to carbonization which leads to further heat build-up. That condition is sufficient to blacken, shrink, melt, or ignite the component materials within the channel. Ignition of the component materials leads to fire and/or smoke. When there is fire it is possible for the flames and/or smoke to escape the confines of the channel.

124/ R. Ex. G-7; E. C. Ex. 18, Tr. p. 421-23.

Evidence in the record in support of this finding:

(38)(a) Moisture forms and builds up on the insulation surrounding the freon tube in the channel and adjacent wiring harnesses.

. Based on an observation of damaged timers and laboratory tests, Davock, of the Detroit Testing Laboratory (DTL), concluded that moisture came from condensation on the insulation tubing covering the freon suction tube. According to Davock the condensation build-up could be visually observed. 125/

(38)(b) That moisture drips onto the area between the terminals in the defrost timer.

. An extension of the observation made by Davock (DTL) was that the moisture which forms on the insulation tube and wiring harness might drip onto the area between the terminals in the defrost timer. Specifically, Detroit Testing Laboratory concluded that if the refrigerator was operated in a moist warm environment, moisture would condense on the suction tube insulation and wiring harness. Under such circumstances, the condensation would drip off the insulation or wires; and depending upon

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125/ R. Ex. D, p. 8; Tr., pp. 623-25.

the alignment of the insulated freon tube and the harness within the channel, if this condensation dripped off, it would drip into the timer terminal area. 126/

(38)(c) Contaminants enter the terminal area

. According to Mr. Thomas Dolan, President of Kelvinator, Inc., in 1972 when the company became aware of a problem within the timer area of the refrigerators they "found evidence of bugs, or moisture, or both in the terminal area. They hypothesized that [they] were caused by insect contamination and/or moisture. It was thought that the warmth of the timer attracted roaches and they and their secretions and moisture might be conductive enough to cause a current leakage between the timer terminals." 127/

. Detroit Testing Laboratory reached the conclusion that contaminants enter the area and so stated in drawing the following conclusion: "Our tracking tests confirmed our original hypothesis that these timer failures were most probably caused by moisture and contaminants finding their way into the timer terminals . . . " 128/

126/ R. Ex. D, p. 9.

127/ R. Ex. A, p. 21-22.

128/ R. Ex. D, p. 11.

(38)(d) When that moisture and contamination are present in the area between the terminals, arcing takes place resulting in heat build-up. The heat build-up leads to carbonization which leads to further heat build-up

. According to Dolan, some timers installed have failed due to moisture and contamination around the four male terminals which protrude from the timer mechanism. He further testified that moisture and contamination has led to current leakage and a "short" resulting in carbonization at the terminals of the timer. 129/

. Davock concluded based on scientific judgment and tests that moisture accumulated on the material which holds, separates, and insulates the four brass terminals. The moisture established a conductive path between two or more of the terminals with the path permitting current to leak between the terminals. The leakage caused carbonization, the carbonization increased conductivity which increased the current leakage bringing about more carbonization. 130/

129/ R. Ex. A, p. 21.

130/ R. Ex. D, p. 6.

. Greenville Products Corporation initiated a test which consisted of dripping a weak salt solution of distilled water into the area between terminals #2 and #3 of the defrost timer. Power was initiated at the same time the salt solution was started. Seven of the eight refrigerators had timers short circuit within the first 20 hours and the area conducting the current between the terminals was carbonzied. Prior to removing the power (70 hours after the test was initiated) Greenville measured 3.5. amps flowing through the carbonized path between terminals #2 and #3. 131/

(38)(e) That condition is sufficient to blacken, melt, shrink or ignite the component materials within the channel

. The test results from the Detroit Testing Laboratory in one of the refrigerators subjected to a timer failure mode were as follows: In the area from 20 inches to 29 inches above the timer, the insulation tubing had melted, blackened and shrunk. The remaining tubing on up the channel was "slightly melted and shrunk". Moreover the insulation on the wires coming from the

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131/ E.C. Ex. 20, Report 7846, p. 2.

top of the timer was melted and carbonized for a distance of approximately 15 inches from the timer. 132/

. The Enforcement Counsel presented support for the proposition that since polyolefin foams are heat sensitive they may soften shrink, or melt during a slow rising subignition temperature. On the other hand, a high initial temperature causes the polyolefin foam to ignite. 133/

132/ R. Ex. D, p. 26.

133/ E.C. Ex. 9, p. 2; Tr., p. 348.

(38)(f) Ignition of the component materials leads to fire and/or smoke. When there is fire it is possible for the flames and/or smoke to escape the confines of the channel

. In the Greenville Products Corporation tests seven of the eight refrigerators had timers short circuit and the area conducting the current between the terminals was carbonized. There was visible smoke from all eight refrigerators as well as visible burning from all eight with the duration of the burning ranging from 2 minutes and 30 seconds to 2 hours intermittently.134/

. By artificially "tracking" between the terminals of defrost timers in 12 operational refrigerators Davock obtained one timer failure within 41 hours which produced "considerable smoke"135/

The interior of the channel itself was covered with black condensed smoke for a distance of approximately 15 inches above the timer.136/

134/ Ex. 20, Report 7846

135/ R. Ex. D., p. 17

136/ Id.

. The damaged Sonnier refrigerator had charred marks running along the channel area and in the area of the defrost timer. There were char-marks along the wiring above the defrost timer and the timer itself "was charred and to some extent had melted". 137/ The wiring insulation above the defrost timer was burned and the insulation around the freon tube was charred. 138/

The Sonnier timer failure resulted in sufficient ignition of the component materials to lead to fire and/or smoke. This conclusion is based not only on the physical examination of the refrigerator by Zevola 139/ and Honnell, 140/ but also on the testimony of

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137/ E.C. Ex. 108, p.10

138/ E.C. Ex. 103, p. 6

139/ E.C. Ex. 108, p.10

140/ E.C. Ex. 103, p. 6.

Ms. Sonnier: 141/

Q. Was the wall behind your refrigerator burned?

A. It was smoky, you know stain smoke. You know, it had just turned the wall black that is about all.

and

Q. Was the cabinet above the refrigerator burned?

A. Just a little smoke stained but most of the damage was where the refrigerator was against the wall.

141/ The Sonnier and the Salazar incidents were the only field incidentsof the three presented by the Enforcement Counsel which carried any weight in this proceeding. In the other field incident, the Enforcement Counsel failed to establish the cause and effect. In other words in the Solorzano (E.C. Ex. 101, 102, TR. p.p. 27-83) incident there was insufficient showing that the fire and/or smoke associated with the incidents was as a result of the kind of timer failure described in this proceeding. For example, in the Sonnier incident, Honnell, a supervisor of the repair of appliances, testified that the mode of failure in the Sonnier incident was that moisture created by the suction line forms, runs down the channel to the defrost timer, shorting the timer and causing fire. Further as to the Sonnier incident he testified that the timer was charred as was the wiring harness and little insulation material was intact.
E.C. Ex. 103, p. 6; TR. p.100.

D. Substantial Risk of Injury (Evidence Provided in the Record)

In order to resolve Issue II (Is there evidence to support the contention that a proven defect creates a substantial risk of injury to the public) it is necessary to consider the following elements in toto: 1) the nature and probability of the defect existing in a given product;142/ 2) the number of defective products in distribution; and 3) the severity of the risk presented by these products. Based on a consideration of the necessary elements, the Presiding Officer concludes that:

(39) A high probability of defect existing in any given Kelvinator refrigerator was not proven in light of a series of circumstances which must be present before a defect exists. Those circumstances are: heat and humidity over a sustained period of time, contaminants, and the wiring in a special configuration.

142/ Section 15(a)(2) defines "substantial product hazard" among other things as a product defect which because of the pattern of defect . . ." creates a substantial risk of injury to the public. In the view of the Presiding Officer in considering the "pattern of the defect" there should be consideration of: 1) the nature of the defect (that consideration was discussed above in Section C); and 2) the probability of the defect existing in a given product (which discussion will be below in connection with finding number 39). See In the matter of: McCullouch Corp., CPSC Docket No. 74-1 (1974); "CPSC: An Agency Manual", The George Washington Law Review, Volume 43, Number 4, p. 1152 (May 1975).

(40) Almost all of the 270,000 refrigerators manufactured by Kelvinator of the 1st generation model design have been "entered into commerce".

(41) The high severity of the risk was not proven by either scientific analyses or field incidents in light of the proven effect of the defrost termination switch, the self-extinguishing characteristics of the insulation material, the failure mode when the refrigerator is grounded, the failure mode under the worst possible set of circumstances, and the absence of reported injuries.

(42) Given findings 39 - 41 in toto, there is not sufficient evidence on the record to support a finding that the product defect associated with the Kelvinator refrigerator present a substantial risk of injury to the public.

Findings 39-42 are discussed in detail below:

(39) A high probability of a defect existing in any given Kelvinator refrigerator was not proven in light of a series of circumstances which must be present before a defect exists

(39)(a) High heat and humidity are necessary

The failure mechanism operative here requires the accumulation of moisture on the heat exchanger. In order to have the temperature differential needed to cause significant condensation on the heat exchanger, the environment in which the refrigerator is operated must be unusually hot. In addition, it must be very humid if significant amounts of moisture are to accumulate.

The record is filled with evidence that substantiates these findings. The two refrigerators on which Detroit Testing Laboratories (DTL) observed condensation build-up on the heat exchanger insulation and the wiring harness were being operated in an environmental test chamber in daily average temperatures ranging from 104° to 118° and 95% relative humidity. In the refrigerator that DTL tested at laboratory ambient temperature and humidity, no failures were achieved,

despite the fact that the insulation separating the timer terminals on those refrigerators had previously been broken down by the tracking procedure.143/

(39(b) High heat and humidity must be sustained over a long period of time

. This finding is supported by the testing and analysis performed by DTL which indicated that". . . "it is very difficult, even under extreme and accelerated conditions, to cause one of these timer failures. Davock testified that it was apparent to us that this breakdown process took a considerable length of time in an unusually warm, humid environment . . . ."144/

143/ R. Ex. D, pp. 8-9; Tr. p. 622

144/ R. Ex. D, p. 10, p. 33

(39)(c) There must be contaminants present within the timer terminal area

. Mr. Toner, expert witness for the Enforcement Counsel, conducted a series of cyclic tests at the National Bureau of Standards using uncontaminated distilled water and was unsuccessful in creating timer failure. 145/ In fact, Mr. Toner was able to achieve no change whatsoever in the resistance between the timer terminals. 146/ The Detroit Testing Laboratory, General Environments Corporation, and Kelvinator each successfully simulated the failure mode using contamination by ionized moisture. It is apparent that moisture alone, in the absence of contaminants, will not cause failures of this type.

145/ E.C. Ex. 109, pp.14-16.

146/ E.C. Ex. 109, p.15

(39)(d) <u>There must be a particular configuration of the wires in the wiring harness which appears very infrequently</u>

The testimony of the experts supported the conclusion that steady accumulation of moisture and contaminants alone is not enough. Moisture on the heat exchanger or the wiring harness will not cause a timer failure. Rather, moisture and contaminants must consistently accumulate on the tiny stretches of phenolic insulating material separating the timer terminals.

. Mr. Anikis computed the surface to be about .6 of a square inch total surface area. 147/

. The particular alignment of the wires in the wiring harness must be such that the moisture consistently runs from the heat exchanger onto the wires and drips steadily from some bend in the wiring directly into the tiny surface area separating timer terminals. 148/

147/ Tr. p. 439

148/ R. Ex. D. pp. 7, 9

An important consideration is the fact that there is a great variation in the configuration of the wiring harness in the channel. 149/ The configuration of the wiring harness from which the moisture must drip is apparently random. 150/

(40) Today, almost all of the 270,000 refrigerators manufactured by Kelvinator of the first generation model design have been "entered into commerce" and have been sold at retail. 151/

(41) The high severity of the risk was not proven by either scientific analysis or field incidents in light of:

(41)(a) the effect of the defrost termination switch

. Assuming a defect leading to a timer failure which results in the compressor stopping operation, according to Davock, the freezing compartment necessarily warms up causing the defrost termination

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149/ Tr. pp. 626-628

150/ Tr. pp. 626-628

151/ Tr., p. 524; R. Ex A, p. 15

thermostat to automatically shut off any flow of current between terminals 2 and 3 thereby reducing the possibility of any further carbonization of the timer.152/ According to Tarosky, the sequence of events with a defective timer is: The overheating of the defrost timer resulting in the deforming of the switch contacts within the timer housing. This causes the compressor either to cease functioning or to perform erratically creating a need for servicing.153/ When the compressor stops, the freezing compartment necessarily warms up causing the defrost termination thermostat to automatically shut off any flow of current between terminals 2 & 3 thereby preventing any further carbonization of the timer.

152/ Tr. pp. 767-768; Resp. Reply Brief, p. 18

153/ R. Ex. E, p. 12.

(41)(b) The self-extinguishing characteristics of the insulation material

. Using strained methods Kelvinator in its tests was able to create charring within the channel but not nearly enough heat to start a fire outside the channel. In most cases, the charring extinguished itself a few inches above the timer terminal. 154/

. Kelvinator ran two series of tests on the refrigerator in which various artificial sources of ignition ranging from acetylene torches to carbon arcs were applied to the materials in the channel. Despite the artificial and extreme measures employed, in every case, the materials in the channel self-extinguished. 155/

. Davock found that every material and all combinations of materials self-extinguished. There was no continuous burning. 156/

154/ E.C. Ex. 19; E.C. Ex 20 (Report 7842)

155/ E.C. Ex. 19; E.C. Ex 20 (Report 7842)

156/ R. EX. D, pp. 12-16; TR. pp.702-04

(41)(c) The failure mode when the refrigerator is grounded (a status generally expected given the manufacturers explicit instructions)

. A total of 25 refrigerators were tested (by Detroit Testing Laboratory, General Environment Corporation, and Kelvinator). In every case, without exception, in which a properly grounded refrigerator was tested, the timer failure incident which occurred (a) terminated with an open fuse or open circuit; and (b) caused little damage beyond the timer terminals and, in some instances a very small segment of the insulation materials immediately adjacent. The one refrigerator which experienced significant damage within the channel was ungrounded. 157/

. It is proper to expect that generally the refrigerator will be grounded because of the manufacturers explicit instructions regarding what must be done where a two prong wall receptacle is encountered. The instructions provide that there must be a replacement with a properly grounded three-prong receptacle. 158/

157/ R. Ex. D, p. 29; R. Ex. E.; E.C. Ex. 20

158/ R. Ex. G-1, p. 2; R. Ex. G-2, Sec. 3/2-3/3. Regarding the responsibility of the retailer/installer, the Commission also has the authority to commence Section 15(f) hearings in order to determine their responsibilities under the Act. The Commission is not, however, required by law to join the manufacturer and retailer if there is a question about separable responsibilities as to the identical product, nor is the Commission estopped from requiring certain actions of the manufacturer under Section 15(c) and 15(d) when a retailer/installer may also have a responsibility.

(41)(d) The failure mode under the worst possible set of circumstances (e.g., without grounding)

. If a refrigerator is not grounded and arcing occurred in the wires above the timer there would not be sufficient heat or flame to start a fire at the top of the channel. Jablonsky drew this conclusion because of the slow-burning, self-extinguishing characteristics of the insulation material, plus the fact that the foam and wire insulation does not extend above the top of the channel. 159/

. Irrespective of the failure mode, according to Thornhill, there is little chance of damage outside of the channel. The reasons: there is not much combustible material within the channel; when the foam insulation is exposed to moderate heat it shrinks and there is not much heat potential. The plastic within the channel is hard to ignite and once ignited quickly self-extinguishes. The channel is shallow and relatively congested at the top which would tend to reduce ventilation in the channel. Finally the metal components would act as a heat sink. 160/

159/ R. Ex. B, p. 33.

160/ R. Ex. C, p. 15.

. In none of the tests conducted by the Respondent did any flame escape -- in some instances the refrigerators were not grounded, in some the defrost termination switches were shunted. 161/

. Specifically, in the tests conducted by Tarosky, where he succeeded in inducing five timer failures involving overheating and carbonization, no damage whatever was sustained by any of the plywood enclosures as the result of these failures. Further at no time during the tests was any significant temperature rise recorded by any of the thermocouples surrounding the channels on the refrigerators tested. 162/

(41)(e) The absence of reported injuries

. None of the field incidents reported by the Enforcement Counsel resulted in an injury. 163/

161/ R. Ex. D, pp. 24-28; E.C. Ex. 20, Report 7846; E.C. Ex. 19; E.C. Ex. 20; Report 7842; R. Ex. E, p. 12

162/ R. Ex. E, pp. 13-14; Tr., pp. 777-79

163/ E.C. Ex. 101, 102, 105, and 106

. The President of Kelvinator testified that they knew of no case where an over heated defrost switch resulted in a personal injury. 164/

. The manufacturer indicated that there had been no product liability claims involving timer failures. 165/

(42) There is not sufficient evidence on the record to support a finding that the product defect associated with the Kelvinator refrigerator presents a substantial risk of injury to the public. 166/

164/ R. Rx. A, p. 23

165/ E.C. Ex. 20, p. 6

166/ Presiding Officer's Findings 39-41.

(c) Conclusions of Law

This proceeding was for the purpose of determining whether certain Kelvinator refrigerators present a substantial product hazard. The Consumer Product Safety Act defines "substanial product hazard" as a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of risk, or otherwise) creates a substantial risk of injury to the public. 167/

As a matter of law then two major issues must be resolved before a determination can be made as to whether a product presents a substantial product hazard. The two issues are:

Issue I. Does a product defect exist?

Issue II. If a product defect exists, does it create a substantial risk of injury to the public? In resolving this issue it is necessary to consider in toto: the nature and probability of the defect existing in a given product;. the number of defective products in distribution; and the severity of the risk.

167/ 15 U.S.C. § 2064.

In the case of Kelvinator refrigerators subject to this proceeding, the following major findings of fact were made:

. A product defect exists. 168/

. There was insufficient evidence in the record to support a finding that the product defect created a substantial risk of injury to the public. 169/

If there is not a proven product defect then as a matter of law there is no substantial product hazard. If there is a product defect, but that defect does not create a substantial risk to the public, then as a matter of law there is no substantial product hazard.

In this proceeding there was a proven product defect, but there was insufficient proof that the defect creates a substantial risk of injury to the public. Therefore, the Presiding Officer reached following conclusions of law:

. The Kelvinator refrigerators specified in the Notice of Enforcement do not present a substantial product hazard within the meaning of Section 15(a)(2) of the Consumer Product Safety Act.

168/ Presiding Officer Finding #38.

169/ Presiding Officer Findings #39-42.

No action on the part of any of the Respondents is required under Sections 15(c) and 15(d) of the Consumer Product Safety Act.

An appropriate INITIAL ORDER is attached hereton.

Date: November 3, 1975

Constance B. Newman
Presiding Officer

APPENDIX

NOTIFICATION AND REPAIR, REPLACEMENT, OR REFUND

SEC. 15. (a) For purposes of this section, the term "substantial product hazard" means—

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

(b) Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product—

(1) fails to comply with an applicable consumer product safety rule; or

(2) contains a defect which could create a substantial product hazard described in subsection (a)(2),

shall immediately inform the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

(c) If the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f) of this section) that a product distributed in commerce presents a substantial product hazard and that notification is required in order to adequately protect the public from such substantial product hazard, the Commission may order the manufacturer or any distributor or retailer of the product to take any one or more of the following actions:

(1) To give public notice of the defect or failure to comply.

(2) To mail notice to each person who is a manufacturer, distributor, or retailer of such product.

(3) To mail notice to every person to whom the person required to give notice knows such product was delivered or sold.

Any such order shall specify the form and content of any notice required to be given under such order.

(d) If the Commission determines (after affording interested parties, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f)) that a product distributed in commerce presents a substantial product hazard and that action under this subsection is in the public interest, it may order the manufacturer or any distributor or retailer of such product to take whichever of the following actions the person to whom the order is directed elects:

(1) To bring such product into conformity with the requirements of the applicable consumer product safety rule or to repair the defect in such product.

(2) To replace such product with a like or equivalent product which complies with the applicable consumer product safety rule or which does not contain the defect.

(3) To refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (A) at the time of public notice under subsection (c), or (B) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs).

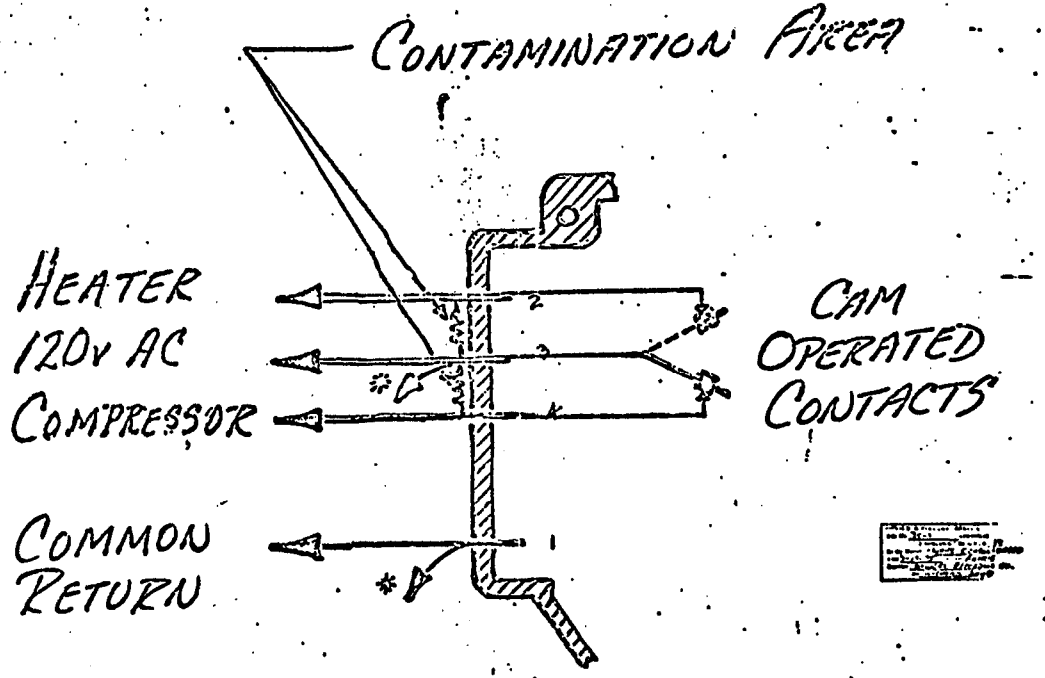
An order under this subsection may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking action under whichever of the preceding paragraphs of this subsection under which such person has elected to act. The Commission shall specify in the order the persons to whom refunds must be made if the person to whom the order is directed elects to take the action described in paragraph (3). If an order under this subsection is directed to more than one person, the Commission shall specify which person has the election under this subsection.

(e)(1) No charge shall be made to any person (other than a manufacturer, distributor, or retailer) who avails himself of any remedy provided under an order issued under subsection (d), and the person subject to the order shall reimburse each person (other than a manufacturer, distributor, or retailer) who is entitled to such a remedy for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy.

(2) An order issued under subsection (c) or (d) with respect to a product may require any person who is a manufacturer, distributor, or retailer of the product to reimburse any other person who is a manufacturer, distributor, or retailer of such product for such other person's expenses in connection with carrying out the order, if the Commission determines such reimbursement to be in the public interest.

(f) An order under subsection (c) or (d) may be issued only after an opportunity for a hearing in accordance with section 554 of title 5, United States Code, except that, if the Commission determines that any person who wishes to participate in such hearing is a part of a class of participants who share an identity of interest, the Commission may limit such person's participation in such hearing to participation through a single representative designated by such class (or by the Commission if such class fails to designate such a representative).

COMPRESSOR/HEATER TIMER SWITCH CONNECTION DIAGRAM



*TIMER MOTOR CONNECTION

APPENDIX

CROSS-REFERENCE CHART COVERING THE PARTIES' FINDINGS OF FACT

In deciding this matter, the Presiding Officer considered all proposed findings of fact submitted by the Enforcement Counsel and Respondent. Rulings on the relevant and significant issues raised by the parties may be found in the Initial Decision. Where appropriate, the proposed findings have been incorporated in this Decision. On the other hand, irrelevant or unsupported findings of fact have been rejected.

This chart is provided to assist in the identification of the relationship between the Presiding Officer's Findings and selected Findings proposed by the parties.

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3	7	16
4	8	16
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6		
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8	6	
9	6	
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c.	38, 104	5c
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U. S. CONSUMER PRODUCT SAFETY COMMISSION
Washington, D. C.

In the matter of WHITE CONSOLIDATED INDUSTRIES, INC., a corporation, doing business as KELVINATOR, INC. a wholly owned subsidiary, and as G.R. MANUFACTURING CO., and EDWARD S. REDDIG, individually and as an officer of WHITE CONSOLIDATED INDUSTRIES, INC. and KELVINATOR, INC., and THOMAS I. DOLAN, individually and as an officer of KELVINATOR, INC., and ROY H. HOLDT. as an officer of WHITE CONSOLIDATED INDUSTRIES, INC. Respondents	CPSC DOCKET NO. 75-1

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THE INITIAL DECISION

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U.S. CONSUMER PRODUCT SAFETY COMMISSION
Washington, D. C.

In the matter of WHITE CONSOLIDATED INDUSTRIES, INC., a corporation, doing business as KELVINATOR, INC., a wholly owned subsidiary, and as G.R. MANUFACTURING CO., and EDWARD S. REDDIG, individually and as an officer of WHITE CONSOLIDATED INDUSTRIES, INC. and KELVINATOR, INC., and THOMAS I. DOLAN, individually and as an officer of KELVINATOR, INC., and ROY H. HOLDT. as an officer of WHITE CONSOLIDATED INDUSTRIES, INC. Respondents	CPSC DOCKET NO. 75-1

INITIAL DECISION

Introduction

By Notice of Enforcement issued by the U.S. Consumer Product Safety Commission on March 10, 1975, Respondents were informed of the Commission Staff's opinion that "approximately 336,000" refrigerators manufactured by Respondents from late 1970 through early 1974 presented a "substantial product hazard" within the meaning of Section 15(a) (2) of the Consumer Product Safety Act (15 U.S.C. §2064(a)(2)) because the Staff believed that certain design defects in those refrigerators could cause fire and resultant injury. The Staff urged that Respondents be

ordered by the Commission to notify the public, in general, and the purchasers of these refrigerators, in particular, of this substantial product hazard, and further, that Respondents be required by the Commission to elect to repair, replace, or refund the purchase price of the affected refrigerator models, as provided for in Sections 15 (c) and (d) of the Consumer Product Safety Act (15 U.S.C. §2064(c), (d)). 1/ Attached to the Notice of Enforcement were the principle items of written evidence which the Commission Staff considered to constitute a prima facie case, and, in conformity with Commission's Rules of Practice, 2/ the form of Order which the Staff believed should issue if the facts were found to be as alleged in the Notice of Enforcement.

Respondents filed their Answer to the Notice of Enforcement on March 31, 1975. (Docket #2). 3/ On April 28, 1975, the

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1/ The text of Section 15 of the Act is reproduced in the Appendix.

2/ In accordance with Section 15(f) of the Consumer Product Safety Act, 15 U.S.C. 2064(f), such an Order may be issued only after an opportunity for a hearing generally in accordance with Section 554 of the Administrative Procedure Act, 5. U.S.C. §554 The Commission has published Proposed and Interim Rules of Practice for such adjudicatory hearings. See 39 F.R. 26848 (July 23, 1974) (hereinafter "Rules of Practice").

3/ The "Official Docket" in this case is maintained under the authority of the Office of the Commission's Chief (and currently sole) Administrative Law Judge in the Commission Secretary's Office, 1750 K Street, N. W., Washington, D.C. 20207. See Rules of Practice, Section 1025.23. It is available for public inspection. "Docket #2" refers to the second document in the official docket listing on file in this case.

Commission formally designated Commissioner Constance B. Newman as Presiding Officer in this case. (Docket #3). That same day, the Presiding Officer issued a Notice of Prehearing Conference to be held on May 16, 1975. 4/ That Prehearing Conference Notice summarized the factual allegations in the Notice of Enforcement, announced the Presiding Officer's preliminary decisions to convene a full hearing in this case, if necessary, no later than June 2, 1975, and to make liberal use of written direct testimony prepared and served in advance of the full hearing, and invited all interested persons to participate in the prehearing conference or testify at the hearing. 5/

At the Prehearing Conference of May 16, 1975, at which Respondents appeared through counsel, motions were filed and taken under advisement pending further briefing, no intervenors came forward, issues in the proceeding were discussed, and a schedule was established. 6/ A Prehearing

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4/ The Notice of Prehearing Conference (Docket #6), prepared by the Presiding Officer, was published in the Federal Register on May 2, 1975 (40 F.R. 19233), and referred to in the Commission's weekly Public Calendars of that period.

5/ Two full weeks between the publication of the Federal Register announcement of the Prehearing Conference and the Conference itself was deemed an adequate period for third parties to reach a decision about the possibility of their participation in this case without unduly delaying a full hearing on the serious Staff allegations about the substantial product hazard posed by Respondents' products.

6/ Tr. of the Prehearing Conference (Docket #24).

Conference Order (Docket #23) confirming the timetable for this proceeding was issued later that day, and subsequently amended on May 27, 1975 (Docket #40) in response to comments received from the parties. The Hearing commenced, as re-scheduled, on the morning of July 14, 1975, and was completed, after slightly more than five days of testimony and argument, in the morning of July 21, 1975. 7/ In accordance with the Rules of Practice (Section 1025.66), the parties were given thirty days to file, simultaneously, proposed findings of fact, conclusions of law, an order, and briefs, and an additional fifteen days thereafter to file appropriate replies. These filings were completed on September 4, 1975.

After having carefully considered all of the evidence admitted into the record in this proceeding, and the motions, responses, and arguments of counsel related thereto, it is the INITIAL DECISION of the Presiding Officer, for the

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7/ The transcript of the hearing contains 805 pages. Enforcement Counsel proferred 20 exhibits, with subparts, and 12 additional exhibits containing the direct and rebuttal testimony of their witnesses. Respondents proferred 36 exhibits, with subparts, in addition to 5 exhibits containing the direct and rebuttal testimony of their witnesses.

Under the contract between the Commission and its reporting service, the Commission pays the premium cost for overnight transcription of hearings if the Presiding Officer authorizes such expedited service instead of the ordinary three or ten day completion period. The Presiding Officer denied Respondents request for such authorization, believing the additional cost for overnight instead of three day service to be unjustified. Respondents, disagreeing, absorbed this cost. Tr., p. 14.

reasons discussed in detail below, that the refrigerators specified in the Commission's Notice of Enforcement do not present a substantial product hazard within the meaning of Section 15(a) (2) of the Consumer Product Safety Act. Accordingly, an Order entering judgment in favor of Respondents and dismissing the Notice of Enforcement is appended hereto.

Preliminary Legal Matters

The parties have raised a number of difficult and important legal questions throughout the course of this proceeding, only some of which have been decided by the Presiding Officer to date. Before turning to the merits of the controversy, these questions and their resolution are discussed below.

(a) Objections to the Presiding Officer

On April 29, 1975, the day following the designation by the Commission of the Presiding Officer, Respondents filed an objection to a Commissioner being so designated urging that such a procedure deprived them of a fair hearing and constitutional due process, and violated the Administrative Procedure Act, 5 U.S.C. §§ 551-59 (A.P.A.). Respondents urged the full Commission to defer all proceedings in this case until an Administrative Law Judge, instead of a Commissioner, became available to act as Presiding Officer. On May 1, 1975, Chairman Simpson, then Vice-Chairman Kushner, and Commissioners Franklin and Pittle, in accordance with Section 1025.62 (e)(2)

of the Rules of Practice, permitted the Presiding Officer ten days to reply to Respondents' objection prior to their decision. (Docket #5).

In her Reply, the Presiding Officer, noting that her participation in this case as a Commissioner prior to her designation as Presiding Officer was limited to her approval on the basis of written briefing packages of the issuance of a Notice of Enforcement, declined to play any role in any Commission decision on any interlocutory or other appeals from any ruling or decisions the Presiding Officer might issue. However, placing reliance on the explicit authorization for such a designation as Presiding Officer in Section 554 (d) of the A.P.A., as well as on United States v Litton Indus., 462 F. 2d 14, 16-17 (9th Cir. 1972) and the comments of Professor Davis, [8] and distinguishing Amos Treat v S.E.C., [9] upon which Respondents had based their objection, the Presiding Officer respectfully suggested to the Commission that Respondents' objection to the designation of a Commissioner lacked merit. (Docket #8). By written order dated May 16, 1975 overruling Respondents' objection, the full Commission agreed. (Docket #11).

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[8] 2 Administrative Law Treatise § 13.10, p. 237. See also Withrow v Larkin, 95 S. Ct. 1456 (1975); Docket #s 37,41.

[9] 306 F. 2d 260 (D.C. Cir., 1962).

On May 15, 1975, Respondents also filed a complaint for injunctive and declaratory relief in the United States District Court for the District of Delaware raising this same objection to the designation of a Commissioner as Presiding Officer, and others. [10/] In dismissing Respondents' Complaint, without prejudice, for want of jurisdiction and indicating that even had he jurisdiction, Respondents' motion for preliminary injunction would be denied, District Judge Schwartz found

> no matter in the Complaint which could be subject to judicial consideration as a matter of law outside the context of the ongoing administrative proceeding [nor] . . . final agency action at this juncture,

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[10/] Other objections raised in Respondents' District Court Complaint were to the Rules of Practice which were to govern the adjudicatory proceedings before the Presiding Officer, the timetable that had been imposed, the attempt at retrospective application of the statutory provisions, the choice by the Commission of adjudicatory rather than rulemaking proceedings, the constitutionality of the underlying statutes, and the failure of the Commission to comply with the National Environmental Policy Act. These objections are discussed, infra.

either within the meaning of 5 U.S.C. Section 704 or the common law definition thereof. 11/

(b) The Notice of Enforcement

In a motion filed May 16, 1975, Respondents also argued that the Notice of Enforcement must be amended to provide a

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11/ White Consolidated Industries, Inc. v Consumer Product Safety Commission, Civ. Action No. 75-135 (D. Del.), unreported decision of May 23, 1975, tr. at pp. 69-72 (citations omitted). Moreover, Judge Schwartz further found that

> as a matter of judicial restraint, [he] could not exercise jurisdiction in this case . . . because [Respondents] have administrative remedies which have not been exhausted . . . and no clear showing [has] been made that the prescribed administrative procedure is inadequate to prevent irreparable injury.

Finally, the Court concluded that

> this action is not ripe for judicial intervention. The issues tendered are not purely legal, there has been no final agency action, and the balance of hardships involved is found not to weigh in [Respondents] favor. In fact, at this juncture, it's literally impossible because the matter is so far from being ripe to weigh the cost of compliance against the cost of noncompliance . . . (T)he expenses of participation in allegedly unlawful proceedings do not state a claim of irreparable injury [and] . . . the risk of a bad decision or an adverse decision, is in and of itself not enough to constitute irreparable injury. The outcome of the decision is entirely speculative and at this point in the record is not supported by a showing that any harm whatsoever will accrue to [Respondents] until the administrative process has resulted in a final order. Even after such an order should be entered [Respondents] would have to demonstrate pre-enforcement harm to obtain injunctive relief.

Id.

more definite statement of the allegations of Enforcement Counsel [12] because, as presented, the Notice did not state Enforcement Counsel's actual allegations "with sufficient specificity to permit Respondents to determine (their) exact nature, to fully and reliably define the issues the allegations raise, and to prepare Respondents' position regarding those issues." (Docket #16). [13]

In an Order issued July 2, 1975 (Docket #61), the Presiding Officer denied Respondents' motion, holding that the Notice of Enforcement in this case had indeed specified "with reasonable definiteness . . . the type of acts or practices alleged to be in violation of the law," [14] and thus having been given a "reasonable opportunity to know the claims of

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[12] An adjudicative or adjudicatory proceeding is commenced by the issuance and service upon Respondent of a Notice of Enforcement in a form specified in Section 1025.31 of the Rules of Practice. Enforcement Counsel are counsel for the Commission Staff in any such adjudicative proceeding. Rules of Practice, Section 1025.4.

[13] Respondents also moved on May 16, 1975 that the three exhibits attached to the Notice of Enforcement as part of the Staff's prima facie case be stricken as inadmissable evidence not properly included in the record. Docket #17. Since the Rules of Practice (Section 1025.31(b)) explicitly required the attachment of such internal memoranda to the Notice, as an aid to Respondents in further illuminating the dimensions of the Staff's case, the Presiding Officer ruled that these documents would remain in the "Official Docket," though they were not to become "part of the record upon which the final decision is to be predicated" unless and until such evidence was offered by a party and met the tests for admissability established in Section 1025.63 of the Rules of Practice and other appropriate provisions of the law. Docket #61.

[14] Rules of Practice, Section 1025.31 (b) (2).

the opposing party and to meet them" 15/ Respondents had been afforded all that the A.P.A., the Constitution and fairness demanded. 16/

In this Order, the Presiding Officer emphasized the relatively insignificant role played by the Notice of Enforcement in educating Respondents about the nature of Enforcement Counsel's case. Embracing Davis' observation that "(t)he most important characteristic of pleadings in the administrative process is their unimportance," 17/ the Order stressed that

> (t)he key to pleading in the administrative process is nothing more than opportunity to prepare. Pleading is only one of many ways of providing opportunity to prepare. Deficiencies in a pleading may be cured by informal communication, by formal amendment, by a bill of particulars, by pre-hearing conferences, or by ample continuances at the hearing. And the question on review is not the adequacy of the original notice or pleading but is the fairness of the whole procedure. 18/

15/ Morgan v United States, 304 U.S. 1, 18 (1938).

16/ See Section 554(b) of the A.P.A.; L.G. Balfour v F.T.C., 442 F. 2d 1, 19 (7th Cir. 1971).

17/ Davis, 1 Administrative Law Treatise § 8.04, p. 523. See also 2 Moore, Federal Practice (2d ed.) 1607 (1948), as quoted in Davis id. ("pleadings . . . do little more than indicate generally the type of litigation that is involved. . . . A generalized summary of the case that affords fair notice is all that can be expected.").

18/ Davis, supra n. 17, at p. 525 (citations omitted). If it were otherwise -- if it were impermissable to sharpen the issues in a case through the type of informal discovery subsequent to the issuance of the Notice of Enforcement engaged in in this case, and instead the Notice itself became the sole gauge of the adequacy of pre-hearing disclosure -- then it seems inevitable that massive delays would be experienced before such a "comprehensive" Notice could be issued. Such delays would be intolerable in the face of the potentially serious human injuries at stake in proceedings of this nature.

(c) The National Environmental Policy Act

Respondents also urged that the Notice of Enforcement be rescinded and that all proceedings be terminated on the ground that the Commission had failed to comply with the National Environmental Policy Act (42 U.S.C. §§ 4321 et seq.) (NEPA). (Docket #s 14 and 33). They stressed that since "it cannot be realistically argued that the disposal of large numbers of major appliances would not significantly affect the quality of the human environment," the Commission, in accordance with NEPA, should have "prepared and considered the required environmental impact statement prior to the commencement of this case," and that its failure to do so required that the proceedings not go forward.

The Presiding Officer, in a lengthy Opinion and Order filed on July 14, 1975 (Docket #74), held otherwise. Acknowledging that the Commission, in issuing its Notice of Enforcement against Respondents, had neither formulated a "negative declaration" nor drafted, circulated and considered an environmental impact statement, and that NEPA itself contained no express exemptions from the impact statement requirements of Section 4332(2) of the Act, the Presiding Officer ruled that nevertheless an examination of NEPA's legislative

history, 19/ the cases decided under it, 20/ and the statutory framework for adjudicatory hearings established by Section 15 of the Consumer Product Safety Act 21/ provided persuasive evidence that Congress did not intend that the

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19/ See H.R. Rep. No. 91-765, 91st Cong., 1st Sess. (compliance with Section 4332 (2) (C) required unless existing law "expressly prohibits or makes full compliance with one of the directives impossible"); S. Rep. No. 91-296, 91st Cong., 1st Sess. ("project proposals for new legislation, regulations, policy statements, or expansion or revision of on-going programs," but not "adjudications," listed as the types of actions to which the impact analysis requirement might apply).

20/ See, e.g., Amoco Oil Co. v E.P.A. 501 F. 2d 722, 749-50 (D.C. Cir. 1974) (certain EPA action under Clean Air Act exempted from NEPA); Gulf Oil Co. v Simon, 373 F. Supp. 1102, 1105 (D.D.C. 1974) (exempting energy office from NEPA requirements for emergency oil allocation regulations since to force compliance therewith "would disarm the FEO of its ability and authority to take necessary action with the required degree of speed"). See also Cohen v Price Comm., 337 F. Supp. 1236 (S.D.N.Y. 1972). But see Calvert Cliffs Coor. Comm. v A.E.C., 449 F.2d 1109 (D.C. Cir. 1971).
Of particular significance is Gifford-Hill and Co. v F.T.C., 389 F. Supp. 167, appeal pending, No. 74-2024 (D.C. Cir., 1974), exempting from "the range of decisions to which NEPA was intended to apply" the FTC decision to proceed against Gifford-Hill, by administrative complaint seeking divestiture after an adjudicatory hearing, for its alleged violations of the antitrust laws.

21/ "The allegations of 'substantial risk of injury to the public,' which are to be expeditiously adjudicated in a Section 15(f hearing, can not possibly be timely decided if prior even to the commencement of such a proceeding, the delicate, complex, and very time-consuming environmental impact statement requirements of NEPA must be followed . . . (A)pplication of the NEPA impact statement requirements to Section 15(f) adjudications is especially inappropriate in view of the "election" remedy given a Respondent [since] . . . it is the Respondent, and not the Commission, who is able to structure the environmental consequences of an Order, because it is only the Respondent who can elect at the conclusion of a hearing whether to repair, replace, or refund the purchase price of the hazardous products." Presiding Officer's Order, Docket #74.

environmental impact statement requirements of NEPA apply to adjudicatory proceedings commenced by the Commission under Section 15 of the Act.

Accordingly, Respondents' motion to dismiss the proceedings on this ground was denied.

(d) The Rules of Practice

The Commission's Rules of Practice are in proposed and interim, rather than final, form. 22/ Because of this, Respondents argued that this proceeding must be deferred until after these rules were finalized. (Docket #5). Respondents' argument was rejected by the Presiding Officer, who held that the Commission, given its publication in the Federal Register of interim rules to govern this adjudicative proceeding and the fact that Respondents had actual timely notice thereof, had fully complied with its statutory mandate. That the Commission went beyond A.P.A. requirements for the promulgation of rules of practice, and formally invited public comment thereon, or that such rules might be amended at some unspecified time

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22/ See note 2, supra, at p. 2.

in the future did not, in the judgment of the Presiding Officer, alter this conclusion.23/

(e) The Timetable

Respondents vigorously and repeatedly argued 24/ that the pre-hearing schedule, as suggested, 25/ amended, 26/ and imposed 27/ by the Presiding Officer, was unworkable and unfair. The Presiding Officer disagreed, ruling that Respondents had ample time to prepare their case when measured from the most important date in the proceeding -- the date the Notice of Enforcement issued -- and had more than adequate

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23/ Docket #25. See A.P.A., Sections 552(a)(1)(C), 553(b); Fargo Packing Corp. v Hardin, 312 F. Supp. 942, 949 (S.W.D.N.D., 1970). But see American College of Neuropsychopharmachology v Weinberger, No. 75-1187 (D.D.C., July 21, 1975).

Respondents' similar complaints about the failure of the Commission, contrary to the requirements of the A.P.A., to publish a description of its central and field organization and the "general course and method by which its functions are channeled and determined," were also rejected by the Presiding Officer. Docket #25.

24/ Docket #s 5, 24, 37, and 78.

25/ Docket #6.

26/ Docket #23.

27/ Docket #40.

notice of the intention of the Presiding Officer to reflect in these proceedings the sense of urgency inherent in the statutory scheme and Rules of Practice issued by the Commission. 28/

In fact, due in large measure to the professionalism and dedication of counsel and witnesses for both parties, it is the judgment of the Presiding Officer that despite the compact schedule adopted, 29/ all legal and factual issues in this proceeding have been fully developed by the parties, and in a

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28/ Docket #40. The Rules of Practice, though they require "due" regard for the convenience of the parties, place a heavy emphasis on expedition. In their opening paragraph (Section 1025.1), they state:

> The Commission believes that administrative adjudicative proceedings should be an expeditious manner of settling disputes. Delay does not benefit the public or any party. Therefore, in the conduct of such proceedings, the Presiding Officer and all parties and their representatives shall make every effort at each stage of a proceeding to avoid unnecessary delay.

29/ The pre-hearing schedule issued by the Presiding Officer on May 27, 1975 (Docket #40) required Enforcement Counsel to file their responses to Respondents' May 16 motions by June 4. By June 11, Enforcement Counsel were to file all of their direct testimony, in question/answer format, and were cautioned that "absent extraordinary cause shown, Enforcement Counsel's written direct testimony, unless filed by June 11, will not be admitted." Respondents were instructed to similarly file their direct testimony no later than June 30, and similarly cautioned. Finally, both Enforcement Counsel and Respondents were to file all written rebuttal testimony, also in question/answer format, no later than July 11 with this same warning that absent extraordinary cause shown no further testimony by either party would be admitted at the hearing commencing July 14, which hearing was, in the absence of extraordinary circumstances, to be limited to oral cross-examination.

The use of written direct and rebuttal testimony, submitted in advance of the hearing as specified above, was quite successful as a device for permitting both expert and lay testimony to be developed fully, rapidly, and in a manner best calculated to enhance the quality of the live cross-examination at the hearing and the free flow of information between the parties prior to the hearing.

time frame which met the overriding public interest of securing a most prompt initial decision as to the presence of a substantial product hazard. 30/

(f) The Propriety of Adjudication

Respondents, asserting that defrost timers or motor switches are "the crucial components involved in the Notice of Enforcement," and that the timers in Respondents' refrigerators are found in at least 90% of the total of home refrigerators sold in the United States in 1975, moved that the Notice of Enforcement be rescinded on the ground that this should be a rulemaking rather than an adjudicatory proceeding. (Docket #s 12, 31). As Respondents phrased it, "(t)he question which CPSC has about defrost timers should not properly be directed only at Kelvinator, and the Commission's action in doing so is unlawfully discriminatory." (Docket #12).

Enforcement Counsel, though declining to challenge the accuracy of Respondents' factual assertions, urged that

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30/ The Rules of Practice (Section 1025.66) give the parties a right to submit proposed findings and conclusions generally within 30 days after the close of reception of evidence, with replies thereto to be filed within another fifteen days. That the Presiding Officer permitted this full period of time for such submissions, rather than her earlier stated intention to foreshorten this period to fifteen and seven days, respectively was due to her preliminary assessment of the likelihood of Enforcement Counsel prevailing on the merits. Had this assessment instead favored the position presented by Enforcement Counsel, neither the parties nor the Presiding Officer would have had the luxury of utilizing as leisurely a pace as employed herein for presenting and deciding the important safety questions that had been raised.

Respondents' motion be denied anyway because the real issue in this case was said to be not the safety of the design of a component part of refrigerators (their defrost timers), but rather the safety of the refrigerators as a whole. And, with respect to refrigerators as a whole, Enforcement Counsel state:

> There is no information presently available to Enforcement Counsel that would lead us to believe that other manufacturers of refrigerators attach the defrost motor switch neon gas tube and insulator, and refrigerators in the same configuration as Respondents did in the models in question . . . To date, the Commission has received no information from any of [its] sources which would lead the staff to believe that all refrigerators as a class, or any sub-class of refrigerators, could present the same hazard to the public that the staff alleges Respondents' refrigerators present. (Docket #43, pp. 2, 5.)

Believing that development of a more complete factual record might be helpful in resolving this motion, a decision on it was deferred until the hearing was completed For the reasons discussed below, the Presiding Officer now denies Respondents' aforementioned motion to rescind the Notice of Enforcement. 31/

Even if there was evidentiary support for a choice in this instance between rulemaking and adjudication, it has been clearly and consistently held that such a choice "is one that

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31/ This ruling on this motion, as well as all other rulings on legal issues discussed in this INITIAL DECISION, are, for convenience, reflected in the attached ORDER.

lies primarily in the informed discretion of the administrative agency." S.E.C. v Chenery Corp., 332 U.S.194, 203 (1947). As the Court of Appeals stated, in a slightly different context, in Philadelphia Television Broadcasting v. F.C.C., 359 F.2d 282, 284 (D.C. Cir., 1969):

> In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective.

See also American Machinery Corp. v. N.L.R.B., 424 F.2d 1321, 1330 (5th Cir., 1970). 32/

In fact, though, as the staff response to Respondents' motion quoted above accurately notes, from its inception this proceeding has been concerned with the design of

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32/ And, having lawfully chosen to proceed by adjudication, "in the absence of a patent abuse of discretion" it is permissable for the staff to proceed against Respondents, first, before turning to others -- if any -- against whom the law may also be enforced. Regina Corp. v F.T.C., 322 F.2d 765, 769 (3rd Cir., 1963).

Moreover, nothing in the split opinions in N.L.R.B. v Wyman - Gordon, 394 U.S. 759 (1969), relied upon by Respondents, would have prohibited the application of a "rule", even unlawfully developed in an adjudicatory proceeding, to the Respondent in that proceeding. Nor are the facts in this case even remotely analogous to those involved in the invidious class discrimination of Yick Wo v Hopkins, 118 U.S. 356 (1886), also cited by Respondents.

refrigerators and not just one of their parts,[33] and the Presiding Officer finds, on the basis of the evidence in the record, that (1) there does not exist any other refrigerator of design closely similar to those at issue herein. [34]

For all these reasons then, Respondents' motion, arguing for the necessity for a rulemaking rather than an adjudicatory proceeding, must be denied.

(g) The Proper Respondents

The Notice of Enforcement (Docket #1) names as Respondents in this proceeding the following individuals and entities:

(A) White Consolidated Industries, Inc., Cleveland, Ohio;
(B) Kelvinator, Inc., Grand Rapids, Michigan;
(C) G.R. Manufacturing Co., Grand Rapids, Michigan;
(D) Edward S. Reddig;
(E) Thomas I. Dolan; and
(F) Roy H. Holdt.

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33 / The Notice of Enforcement alleges that "approximately 336,000 refrigerators . . . present a substantial product hazard . . . because the staff believes the following design defects could cause . . . injury, (emphasis added)."

34/ Findings of Fact are numbered sequentially throughout this INITIAL DECISION. Support in the record for each Finding is discussed in the text and footnotes accompanying that Finding, and the rulings of the Presiding Officer on related findings proposed by Enforcement Counsel and Respondents are referenced in the Appendix. With respect to Finding (1), Respondent Dolan, an official of Respondent Kelvinator, Inc., testified that he did not know of any models of refrigerator duplicating exactly the design of the Respondents' refrigerators at issue herein (Tr., pp. 505-06), and Enforcement Counsel witness Honnoll, also with years of experience in the home refrigeration industry, added that he had never known a refrigerator with components even similarly arranged. Tr., pp. 110-11.

Respondents have asserted that the inclusion of the names of White Consolidated Industries, Inc. (hereinafter "WCI") and the three individuals Reddig, Dolan, and Holdt[35/] "constituted unjustified harassment and abuse of process." (Docket #34). They urged that these names be stricken and that any Order which might issue name as Respondents only Kelvinator, Inc. and G.R. Manufacturing Co.

Agreeing with Enforcement Counsel, however, that the resolution of the issues raised by Respondents would be aided substantially by a fully developed record illuminating the precise relationships among and between the parties named in the Notice of Enforcement, the Presiding Officer deferred a ruling on Respondents' motion until after the hearing had concluded. (Docket #60).

35/ Respondents Reddig and Dolan were named in this Notice of Enforcement both as corporate "officers" and "individually."

On the basis of the Findings of Fact 36/ and reasons discussed below, the Presiding Officer, with two exceptions as noted, denies Respondents' Motion to strike the names of certain Respondents in the Notice of Enforcement.

(2) Respondent Kelvinator's business is the design, manufacture and sale of household appliances including refrigerators, freezers, ranges and refrigerant compressors. 37/ (3) Kelvinator is the corporation that designed, manufactured, and distributed the refrigerators which are the subject of this proceeding. 38/ (4) Respondent Kelvinator does business under the name of Respondent G.R. Manufacturing Co., and when Kelvinator

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36/ Much of the factual record relating to the corporate status of the named Respondents was developed during an in camera hearing held under procedures established by the Presiding Officer in an Order dated July 9, 1975. Docket #68a. In accordance with the procedures outlined in that Order, the Presiding Officer has issued this date, for reasons discussed infra, a separate order granting in part Respondents' Motion requesting indefinite in camera treatment for selected, rather limited, portions of the transcript prepared during this in camera hearing and for several of the exhibits introduced therein. All other portions of the record in this case will be included in the public "Official Docket," and the Findings of Fact discussed herein relate solely to such publicly available information.

37/ Tr., p. 199; Respondents' Exhibit (hereinafter "R. Ex.") A, pp. 2,3.

38/ Dauscher affidavit (Docket #35); R. Ex. A, p. 6.

manufactured refrigerators they were produced by G.R., a division of Kelvinator and its manufacturing arm. 39/

(5) Kelvinator is, in effect, a "pseudonym" for Respondent G.R. Manufacturing. 40/

Given these facts, Respondents acknowledge, as they must, that Kelvinator and G.R. Manufacturing have been properly named as the "manufacturers" of the products at issue. 41/ Respondents nevertheless object to the naming as additional Respondents, among others, Kelvinator's corporate officers Reddig and Dolan.

Respondent Edward S. Reddig is named in the Notice of Enforcement "individually and as an officer of White Consolidated Industries, Inc., and Kelvinator, Inc." (Docket #1).

(6) Edward S. Reddig is not currently an officer of Respondent Kelvinator. 42/ Accordingly, that portion of the Notice of Enforcement naming Mr. Reddig in his capacity as an officer of Kelvinator, Inc., must be stricken.

39/ Tr., pp. 213-24.

40/ Tr., p. 214.

41/ Though originally objecting to the naming of G.R. Manufacturing Co. as a Respondent (Docket #18), Respondents subsequently withdrew that objection. (Docket #34). But see Docket #78, p. D-21.

42/ Enforcement Counsel's Exhibit (hereinafter "E.C. Ex.") 12.

improper, urge Respondents, since there is

> no reason to name a corporate officer in his individual capacity unless (1) the officer has himself as an individual engaged in the conduct which is the subject of the proceeding or (2) the corporation involved is a sham or an "alter ego" of the officer and there would therefore be a substantial likelihood of evasion of a Commission order if the individual were not named. See Doyle v Federal Trade Commission, supra. (Docket #34).

Although Respondents, in forumulating their arguments, have isolated some of the factors that have been considered under a variety of statutory schemes in determining the propriety of naming persons in their corporate and individual capacities, their reliance exclusively on such factors to set similar standards f orders issued under Section 15 of the Consumer Product Safety Act is misplaced for several reasons.

First, orders issued under Section 15 are unlike the cease and desist orders involved in Doyle v F.T.C., supra, and similar cases cited by Respondents. With cease and desist orders or prospective injunctions, "future corporate activities are the sole concern . . . ." Doyle v. F.T.C., supra, 356 F.2d at 383. Section 15 orders, however, do not look solely to the future. Instead, they focus on corporate activities, the ill effects of which they seek to remedy by requiring action aimed with precision at the very persons

(7) Respondent Thomas I. Dolan, however, is an officer of Kelvinator, having been its President since 1969. As President, Mr. Dolan is responsible for all day to day operating decisions, such as production manufacturing control and refrigerator design, as well as for some policy decisions.43/

Respondents argue that Mr. Dolan is not properly named as a Respondent in his corporate capacity because any orders directed to corporate Respondent Kelvinator "are automatically binding on the officials 'responsible for the conduct of its affairs' . . . and these individuals may be punished by contempt if they prevent compliance . . . ." Doyle v. F.T.C., 356 F.2d 381, 384 (5th Cir., 1966), quoting Wilson v United States, 221 U.S. 361 (1911). Since Respondents therefore conclude that naming such officials in their corporate capacity is "totally useless," they contend that "the only purpose it can serve is one of harassment, which is not a proper basis for an administrative agency to proceed upon." (Docket #34).

Further, Kelvinator corporate officer Dolan has also been named "individually" as a Respondent. This, too, was

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43/ Tr., pp. 204, 231-32.

who suffered those past effects. Moreover, in contrast to the cease and desist order entered under the Clayton Act in Doyle, no similar promise of future forebearance from unlawful conduct is expressly authorized by the statutory language of Section 15 of the Consumer Product Safety Act as a remedy for the violations it encompasses.44/ Rather, the Section 15 order is more closely akin to one intended to "exact compensatory damages for past acts." But it is this type of order, as opposed to a cease and desist order designed to prevent "illegal practices in the future," which the Doyle Court believed does legitimately name corporate officials. Doyle v. F.T.C., supra, 356 F.2d at 382.

Second, and as a result of this difference in the nature of the relief secured by a Section 15 order as distinguished from a cease and desist order, there need be little fear that

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44/ The Order proposed by the Staff in this case and attached to the Notice of Enforcement does include a requirement that the named Respondents "stop manufacturing . . . [these] refrigerator models . . . or any other refrigerator of similar design or construction, containing any of the defects found to create a substantial product hazard." Further, the proposed order also requires of individual Respondents that they "notify the Commission of the discontinuance of [their] present business or employment and of [their] affiliation with a new business or employment." Even assuming, without deciding, that the Commission has the inherent power to augment its statutory remedies under Section 15 of the Act with the additional requirements enunciated in these provisions of the proposed order, their inclusion does not alter the principal purposes of such an order which remain the institution of notice and of product repair, replacement or refund.

the Section 15 order could constitute the "brand for life," or the "albatross" around a Respondent's neck, that so obviously troubled the Doyle Court as it declined to extend that order's reach to Mr. Doyle in his individual capacity. 356 F.2d at 385.

Finally, it has been recognized that there are situations, even in the context of prospective cease and desist orders or injunctions, where individuals as well or corporations are appropriately named. Thus, in Doyle itself, the court merely indicated that under the circumstances it presented "there seems to be little reason for including corporate officers as individuals in the orders unless there is a possibility of evasion. 356 F.2d at 384 (emphasis added). Similarly, in Hartford-Empire Co. v United States, 323 U.S. 386, 434 (1945) (emphasis added), also relied upon by Respondents, the Court noted: "There is no apparent necessity for including them individually in each paragraph of the decree which is applicable to the corporate defendants whose agreements and cooperation constitute the gravamen of the complaint."

Here, however, that "necessity" is "apparent." As has been previously emphasized, 45/ there is a sense of urgency that

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45/ See note 28, infra, at p. 15, and accompanying text.

pervades the substantial product hazard provisions of Section 15 which argues persuasively for granting to the Staff and, ultimately the Commission, the discretion to identify and name in these proceedings specific individuals whom it can hold responsible for formulating and directing an immediate and effective remedial action program.46/ As Enforcement Counsel aptly note (Docket #77, p.83):

> When a corporation is slow to act, there is not time to enter into the corporate morass in an attempt to find the officer responsible for carrying out the Commission's order. Moreover, the Commission is more likely to ensure immediate and strict compliance with its Order simply by virtue of fact that the Order is against named individuals who, if they fail to comply with the Commission's Order, will be summarily liable for civil and criminal penalties under Sections 20 and 21 of the Consumer Product Safety Act.

In addition, in Benrus Watch Co., Inc. v. F.T.C., 352 F.2d 313 (8th Cir., 1965) and Standard Distributors, Inc. v. F.T.C., 211 F.2d 7 (2d Cir., 1954), it was held that even F.T.C. cease and desist orders, prospective though they be, may nevertheless properly name corporate officers as individuals, notwithstanding the absence of a sham corporation, the lack of a threat of

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46/ The Order proposed by Enforcement Counsel and attached to the Notice of Enforcement would require Respondents to submit their remedial plan to the Commission within "5 days" of the issuance of the Order, with the additional requirement that a sample of each corrected model be made "immediately" available to the Commission for its evaluation "before" such units are placed in the hands of consumers. Docket #1.

possible evasion of an order extending only to the corporation, or the departure of those named officers from the corporation subsequent to the completion of the illegal acts, as long as such individuals as are named were, as the Doyle Court phrased it, "officers in top control of the corporation; formulating, directing, and controlling corporate policies and practices." 356 F.2d at 385.

In short, because orders entered under Section 15, with their focus on past conduct, are so unlike prospective cease and desist orders and injunctions and do not stigmatize the individuals they name, and because, in any event, even in such prospective orders, officers in "top control" of a named corporation may still properly be named, it is clear that the cases relied upon by Respondents do not fully establish the controlling principles for deciding when persons may lawfully be named as officers and individuals in a proceeding under Section 15 of the Consumer Product Safety Act. Further guidance is necessary. That guidance may be found in the decisions the Supreme Court in United States v Park, 95 S. Ct. 1903 (1975) and United States v Dotterweich, 320 U.S. 277 (1943).

In United States v Dotterweich, both the company and Dotterweich, its President and general manager, had been charged with criminal violations of the Federal Food, Drug and Cosmetic Act (21 U.S.C. §§301-392). Dotterweich had been convicted. Section 301(a) of that Act "prohibited the introduction . . . into interstate commerce of any . . . drug . . . that is adulterated or misbranded." Section 303(a) of the Act established a misdemeanor penalty for "any person" violating this provision.

On appeal, the Supreme Court upheld Dotterweich's conviction, rejecting the contrary view of the lower court that "only the corporation was the 'person' subject to prosecution unless, perchance, [the company] was a counterfeit corporation serving as a screen for Dotterweich." 47/

In support of its judgment, the Supreme Court observed that the "only way in which a corporation can act is through the individuals who act on its behalf," 48/ and emphasized that the Food, Drug and Cosmetic Act "is concerned not with the proprietory relation to a misbranded or an adulterated drug but with its distribution. In the case of a corporation such

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47/ United States v Dotterweich, 320 U.S. at 279. The Court of Appeals had held that where the drug proprietor was a corporation, an individual connected therewith might be held personally only if he was operating the corporation "as his 'alter ego.'" United States v Buffalo Pharmacal Co., 131 F.2d 500, 503 (2d Cir., 1942).

48/ 320 U.S. at 281.

distribution must be accomplished, and may be furthered by persons standing in various relations to the incorporeal proprietor." 49/ The key inquiry, therefore, was whether "an accused shares responsibility in the business process resulting in unlawful distribution," and an offense was committed "by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs." 50/

The purposes of the Food, Drug, and Cosmetic Act, emphasized the Court, "touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection . . . . Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless." The Court stressed that "(r)egard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words." 51/

49/ Id., at 283.

50/ Id., at 284.

51/ Id., at 280, 285.

These same points were given renewed force and vitality in United States v Park, supra. In Park, as in Dotterweich both the corporation and its President and chief executive officer (Park) had been charged with criminal violations of the Federal Food, Drug and Cosmetic Act. Park, like Dotterweich, had been convicted. Section 301 (k) of the Act "prohibited . . . the doing of any . . . act with respect to a food . . . if such act is done while such article is held for sale . . . after shipment in interstate commerce and results in such article being adulterated . . . ." 52/ Again, the same section as in Dotterweich, Section 303(a), established the penalty for "any person" who violates this provision.

On appeal, the Supreme Court, as it had in Dotterweich, upheld the conviction. It stated:

> Dotterweich and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission--and this is by no means necessarily confined to a single corporate agent or employee--the act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them. 53/

52/ Section 402 of the Act, 21 U.S.C. §342, provided in part that "A food shall be deemed to be adulterated . . . if it has been prepared, packed, or held under insanitary conditions . . . whereby it may have been rendered injurious to health."

53/ 95 S. Ct. at 1911.

It was not, stressed the Court in Park, knowledge, intent, consciousness or wrongdoing, or personal participation that was determinative of the liability of Park as a managerial officer, but rather

> that the fact the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so. 54/

The parallels between the situation confronting the Court in Park and Dotterweich, and that before the Presiding Officer in this proceeding under Section 15 of the Consumer Product Safety Act, are striking. In Dotterweich, the statutory concern was with the distribution of offending products. This same concern is expressed in the finding that must accompany an order issued pursuant to Section 15(d) that the "product distributed in commerce presents a substantial product hazard." In neither situation need there be any consciousness of wrongdoing to invoke the sanctions of the Acts. In both situations, corporate distribution must be accomplished and may be furthered by persons standing in various relations to the corporation.

54/ 95 S. Ct. at 1912.

different form of civil administrative sanctions in another, does not alter the common obligation of the Presiding Officer and "of the Courts to give [such sanctions] full effect so long as they do not violate the Constitution." 56/

Given these striking similarities, and relatively unimportant differences, the Presiding Officer has concluded that the principles of managerial corporate responsibility enunciated in Park are equally applicable to proceedings commenced under Section 15 of the Consumer Product Safety Act. It is the holding of the Presiding Officer, therefore, that where, as here, a corporation is properly named as the "manufacturer, distributor, or retailer" of the product alleged to present the substantial product hazard, the corporate officials associated with that properly named corporation may also be named in their corporate capacity in the Notice of Enforcement commencing the proceedings under Section 15 of the Act if they are in "top control" of that corporation "formulating, directing and controlling [corporate] policies and practices," 57/ or, alternatively, "by reason of [their] position in the corporation, [they have the]

56/ United States v Park, supra, 95 S. Ct. at 1912. Nor, given the civil nature of the Section 15 proceeding, will the "stigma of a criminal conviction" that attached to Dotterweich (Murphy, J., dissenting, 320 U.S. at 286) similarly follow individuals named as respondents in their corporate capacity, upon the entry of an administrative order.

57/ Benrus Watch Co., Inc. v F.T.C., 352 F.2d 313, 324 (8th Cir., 1965), cert. denied 384 U.S. 939 (1966).

responsibility and authority either to prevent in the first instance, or promptly to correct," 58/ the alleged substantial product hazard at issue.

In light of this holding and his duties at Kelvinator, 59/ Respondents' Motion to strike Mr. Dolan from the list of Respondents named in their corporate capacity must be denied.

Also denied is Respondents' Motion to strike Mr. Dolan from the list of Respondents named "individually." This ruling follows not from the conclusion that Respondent Kelvinator is but a sham or "alter ego" of Respondent Dolan, though if it were, as Respondents correctly note, his inclusion in his individual capacity would have been proper. Rather, it follows from the necessity of bringing Mr. Dolan "individually" under those terms of the Order which would personally bind him in the future should he leave his present corporate employment. 60/

Similar considerations govern the disposition of Respondents Motion to strike WCI and its corporate officers Reddig and Holdt from the list of Respondents in this proceeding.

58/ United States v Park, Supra, 95 S. Ct. at 1912 (1975).

59/ See note 43, infra, at p. 23, and accompanying text.

60/ See note 44, infra, at p. 25.

(8) Respondent White Consolidated Industries, Inc. (WCI) is engaged, principally through wholly-owned subsidiaries, in the manufacture and distribution of a broad range of products and services. 61/ (9) WCI acquired Kelvinator in 1968 and subsequent thereto it has been wholly-owned by WCI. 62/ (10) WCI does not permit its subsidiaries, such as Respondent Kelvinator, to transfer assets (other than excess assets) among themselves. When excess assets are transferred, no cash changes hands; rather, a book transfer is arranged crediting the fixed asset account at Kelvinator, debiting the cash account at the subsidiary to which the asset was sent, and, at the end of the year, balancing all books at the WCI level. 63/ (11) Normally, for day to day capital needs, Kelvinator does not raise its own capital, but WCI, instead, acts as its banker, going to the money markets on its behalf. 64/ (12) Each year, Kelvinator submits its capital budget to WCI for approval by the senior corporate management group at WCI. Kelvinator's annual capital budget is not automatically approved by WCI.

61/ E.C. Ex. 11, p.26.

62/ Tr., p. 198; Dauscher affidavit, Docket #35.

63/ Tr., pp. 221-22.

64/ Tr., pp. 210-11.

Like any banker, WCI will approve or disapprove or modify the Kelvinator budget based on what it conceives necessary to the protection of its investment and loan interest.65/

(13) Kelvinator does not submit an operating budget to WCI, but Kelvinator's financial officers report Kelvinator's cash position on a daily basis to WCI, and submit monthly operating and profit-and-loss statements to WCI. Kelvinator does not have the freedom to withdraw funds from its own bank deposit accounts. Instead, to withdraw funds from its deposit accounts, it must get express approval for other than routine payables from WCI for a cash transfer. This arrangement serves WCI's need to control Kelvinator's cash assets and thus protect its security interest. 66/

(14) WCI charges each of its subsidiaries, including Respondent Kelvinator, on a formula basis for corporate general and administrative expenses in rendering services to them. Among the charges billed to subsidiaries by WCI are those for insurance, financial, executive and legal services. When Kelvinator realized that there might be a proceeding in this matter, it came to WCI's legal department

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65/Tr., pp. 210-11.

66/Tr., pp. 211, 219-20.

to ask for direction on what to do, and turned to another WCI subsidiary for product testing in connection therewith. 67/

(15) WCI consolidates the profits of all of its subsidiaries for reporting and tax purposes and it is WCI that declares dividends for WCI stockholders; Kelvinator does not declare its own dividends. Kelvinator's profits all eventually accrue to the benefit of WCI's stockholders, and WCI has a strong interest in Kelvinator's trade name as well as the public's acceptance of products sold under the Kelvinator label. 68/

WCI and Kelvinator are also linked through their officers and directors. (16) Respondent Roy H. Holdt is President and Chief Operating Officer of WCI, a member of WCI's Board of Directors, Executive Vice-President of Kelvinator and a member of Kelvinator's Board of Directors. 69/ (17) Respondent Holdt is one of three members of Kelvinator's Board of Directors; the other two members are Messrs. Ward Smith and Karl Ware. Respondent Holdt, and Messrs. Smith and Ware, in addition to comprising Kelvinator's Board of Directors, are each also directors and officers of WCI. 70/

67/ Tr., pp. 222-24, 216-17, 218; E.C. Ex. 11, p. 26.

68/ Tr., pp. 213, 227.

69/ Tr., p. 203.

70/ Tr., pp. 196, 197; E.C. Ex. 12.

(18) WCI's Board of Directors is the ultimate determiner of WCI corporate policy and as a matter of practice, makes all major policy decisions relating to the total operation, like whether or not to acquire Kelvinator as a WCI subsidiary. In 1974, when Kelvinator discontinued its refrigerator manufacturing operation in favor of its relocation elsewhere within the WCI organization, that decision was orginated by Kelvinator's operating officers (among them Respondents Dolan and Holdt, and Messrs. Smith and Ware), all of whom are also WCI officers and three of whom (Holdt, Smith and Ware) are WCI board directors. 71/ (19) Furthermore, Respondent Dolan, Kelvinator's President responsible for all of Kelvinator's day to day operating decisions including refrigerator production manufacturing control and design, 72/ is also an officer of WCI serving as a Senior-Group Vice-President. 73/

(20) WCI considers its greatest strength to be the ability to transform losing companies into efficient moneymakers. That strength was exercised by WCI officers and employees to transform Kelvinator from a money loser at the time of its acquisition by WCI, into a money maker at the present time.

71/ Tr., pp. 199, 200; E.C. Ex. 11, 12.

72/ See note 43, supra, at p. 23, and accompanying text.

73/ Tr., pp. 203-04.

Those WCI employees and officers accomplishing that "turn around" task for Kelvinator are still available to Kelvinator "on a quasi-permanent basis." 74/

(21) Finally, in the event the refrigerators involved in this proceeding were found to present a substantial product hazard, it would be necessary for Kelvinator to submit an interim budget to WCI outlining the comparative cost of invoking each of the alternatives of repair, replacement, or refund, after which a final decision as to the alternative to choose would be made by WCI. 75/

While it is clear from these findings of fact that Respondent Kelvinator is not a "mere tool" of Respondent WCI, and that the corporate identity of the subsidiary is not a "mere fiction," 76/ they are nevertheless adequate to support the conclusion that WCI and Kelvinator "were transacting an integrated business through a maze of interrelated

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74/ Tr., pp. 227-28; E.C. Ex. 11, p. 3.)

75/ Tr., pp. 229-31.

76/ See generally National Lead Co. v. F.T.C., 227 F. 2d 825, 829 (7th Cir., 1955) rev'd on other grounds, 352 U.S. 419 (1957). Had either of these more traditional criteria been met, of course, the authority to name both parent and subsidiary would be unquestionable. Id.

companies." 77/ It was, therefore, permissible for the Staff, in its discretion, to fashion a remedy naming both as corporate Respondents in this proceeding and thereby avoiding any possibility of evasion of a Commission order.

Moreover, even if Respondents WCI and Kelvinator had not been so closely linked as to warrant this finding concerning their intimate interrelationship, the thrust of Park and Dotterweich, supra, is that there may be circumstances where even two corporations -- and not just a single corporation and its officers -- may both properly be named as Respondents in a Section 15 proceeding despite the fact that they are clearly separate legal entities. After all, in Dotterweich liability was said to attach to anyone who "shares responsibility in the business process resulting in unlawful distribution" and extend to "all who do have such a responsible share in the furtherance of the transaction which the statute outlaws." 78/ Every reason discussed favoring the extension of Park and Dotterweich to authorize

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77/ Delaware Watch Co. v F.T.C., 332 F.2d 745, 746 (2d Cir., 1964). There, both corporations had their offices and principal places of business located at the same address, and shared common officers with the President and majority stockholder of the first corporation in turn owning all of the stock of the second. Id.

78/ United States v Dotterweich, supra, 320 U.S. at 284 (emphasis added).

the naming of both a corporation and its officers as corporate Respondents in a Section 15 case applies with equal force where, as here, the parent Respondent WCI had, by virtue of its relationship with subsidiary Respondent Kelvinator, the "responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of." United States v Park, supra, 95. S. Ct. at 1912.

For both of these reasons, then, Respondents' motion to strike WCI from the list of corporations named as Respondents in this proceeding must be denied.

And, having concluded that Respondent WCI was properly named, it follows that Respondent Edward S. Reddig, WCI's Chief Executive Officer -- just like his counterpart Respondent Dolan at Kelvinator -- 79/ has also been properly named in both his corporate and individual capacities. 80/

Lastly, the status of Respondent Roy H. Holdt, named solely in his corporate capacity as an officer of WCI, must be resolved. Mr. Holdt is President and Chief Operating Officer of WCI, a member of WCI's Board of Directors,

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79/ See notes 59, 60 , supra, at p.35, and accompanying text; Tr., p.204

80/ (22) Respondent Reddig is Chairman of the Board and Chief Executive Officer of WCI, serving as its senior executive responsible for its day to day management. Tr., p. 203; E.C. Ex. 11, p. 28; R. Ex. A, p. 7.

Executive Vice-President of Kelvinator, and a member of Kelvinator's Board of Directors. 81/ (23) Despite his position as an officer of Kelvinator, Mr. Holdt has no day to day functional responsibilities for Kelvinator, serving instead merely as a statutory officer signing documents like patent applications and tax returns on behalf of Kelvinator. 82/ Mr. Holdt's responsibilities and authority at WCI are unknown beyond the title of the positions he occupies.

Under these circumstances, it is impossible to conclude that Respondent Holdt meets the tests established earlier, in light of Park and Dotterweich, for including as Respondents in their corporate capacity officers of respondent corporations such as WCI which have been properly named. 83/ Therefore, Respondents' Motion to strike Roy H. Holdt from the list of Respondents named in the Notice must be granted.

In sum, and for the reasons discussed above, the Presiding Officer has concluded that the corporate Respondents WCI and Kelvinator, and Respondents Reddig and Dolan have been properly named in each of the individual and corporate capacities listed for them with the exception of Respondent Reddig who was improperly named as an officer of Kelvinator. Respondent Holdt, however, was improperly listed, and his name must be deleted.

81/ See note 69 , supra, at p.38 , and accompanying text.

82/ Tr., p. 232-33.

83/ Had the jury in Park found Park guilty "solely on the basis of [his] position in the corporation," its error would have been patent. United States v. Park, supra, 95 S. Ct. at 1912.

(h) The In Camera Material

Section 1025.65 of the Rules of Practice permit in camera proceedings "only in . . . unusual and exceptional circumstances when good cause is found on the record . . . ." Expecting that parts of the testimony of Enforcement Counsel witness and corporate officer Ward Smith would involve "highly confidential commercial and financial information relating to the status of Kelvinator," but unable to predict in advance which portions of Mr. Smith's testimony might appropriately require protection, respondents requested that Mr. Smith's testimony be heard in camera. (Docket #68).

To accommodate the strong Commission policy favoring public accessibility to all evidence in this matter absent "unusual and exceptional circumstances," and the obvious merit of Respondents' request in light of the nature of witness Smith's expected testimony, the Presiding Officer received his testimony under the following conditions:

(A) Mr. Smith's testimony and associated documentary evidence related to Respondents' corporate structure and responsibilities were temporarily received in camera in their entirety in accordance with the provisions of Section 1025.65 of the Rules of Practice;

(B) Within 10 days of the filing by the Reporter under seal of the transcript of Mr. Smith's testimony,

Respondents were required to file under seal, and serve, a motion isolating the particular portions of the transcript and documentary evidence for which confidentiality was claimed, supporting their claims with a discussion of the "unusual and exceptional circumstances" involved and with citation to appropriate legal authority, and requesting the entry of a final in camera order to protect such material; and

(C) After considering Respondents' motion and any response thereto by Enforcement Counsel, the Presiding Order was to issue a final in camera order, if appropriate, removing from the protection of such an order all transcript or other documentary evidence and motions for which confidentiality had not been claimed by Respondents or for which Respondents' claims could not be sustained. (Docket #68a).

The transcript of Mr. Smith's in camera testimony totalled 48 pages (Tr. pp. 191-239) and embraced five Enforcement Counsel Exhibits (numbers 11-15). 84/ Respondents, in accordance with these procedures, moved the Presiding Officer for a final in camera order only for Enforcement Counsel Exhibits 13, 14, and 15, and for certain questions and answers found on pages 206, 207, 226, 227, 238, and 239 of the transcript. Enforcement Counsel opposed this request in its entirety, which opposition drew a Supplemental submission from Respondents.

84/ Thus, even this temporary in camera protection extended only to very minor portion of the record. See note 7 , supra, at p. 4 , and accompanying text.

Each of these filings are presently being held under seal in camera. Since neither party has requested that a final in camera order be entered to protect either their respective motion, opposition or supplement, or the pages of transcript or Enforcement Counsel Exhibits not listed above, the Presiding Officer, in a separate order issued this date, has provided for the prompt entry of these materials into the publicly available Official Docket.

The documents and testimony for which Respondents do claim confidentiality may be described in general terms as follows:

(A) A listing of some individuals or groups owning voting shares of WCI, the number of shares they own, and certain security position listings (Tr., pp. 206-07; E.C. Ex. 13, 15 and E.C. Ex. 14, in part);

(B) The percentage of WCI's total income received from the sale of Kelvinator refrigerators (Tr., pp. 226-27, 238-39); 85/ and

(C) Kelvinator, Inc.'s comparative balance sheets for January 1, and December 31, 1974 (E.C. Ex. 14, in part).

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85 / Enforcement Counsel Proposed Finding of Fact No. 26, filed under seal, also concerns this same information.

The Commission policy favoring public accessability to all evidence in this matter absent "unusual and exceptional circumstances when good cause is found on the record" places a very heavy burden on those seeking to deny such public access. The Commission is entitled to scrupulous adherence to this policy by those who implement and enforce it. See generally F.C.C. v Schreiber, 381 U.S. 279 (1965); Graber Manu. Co. v Dixon, 223 F. Supp. 1020, 1023 (D.D.C., 1963). Without a full statement of the reasons for granting final in camera treatment to any of the evidence submitted during the course of the proceedings, a specification of the date on which such in camera treatment is to expire, and a full statement of the reasons for selecting that particular expiration date, no final in camera order may issue. 86/

It is also clear, however, that any decision by the Presiding Officer, or ultimately the Commission, granting in camera protection to evidence submitted is of limited scope and finality. Such a decision would settle the status of this evidence for purposes of this proceeding only; even material protected by a "final" in camera order entered in this proceeding may nevertheless be released by the Commission "subject to the provisions of the Commission's procedures under the Freedom of Information Act." 87/

86/ Rules of Practice, Section 1025.65(b).

87/ Rules of Practice, Section 1025.65(d).

Therefore, in deciding whether Respondents have met their heavy burden, it is important that the inquiry center not only on the evidence at issue and the necessity for secrecy, but also on the role that evidence played in this proceeding. 88/

Respondents, purported showing of "unusual and exceptional circumstances," unadorned even with a supporting affidavit, consists of the following statement by counsel in their Motion:

> The material involves two limited categories of confidential commercial and financial information relating to White Consolidated Industries, Inc. (WCI) and Kelvinator, Inc. (Kelvinator). Both categories of material are of a type which, for competitive or other reasons of substance, are not customarily released by business corporations. None of the material for which in camera treatment is requested relates to the safety issues in this case in which there may be a legitimate interest on the part of those not directly involved, but the material could have great potential significance in the business world for reasons having no relationship to this case. From the total material at the in camera session of July 15, 1975, Respondents are asking continuing and permanent in camera treatment for only very small selected portions.

88/ Thus, whether the Commission, if it ever does receive a request from a member of the public for access to any information protected by a final in camera order in this proceeding, would grant that request or instead invoke its authority under the Exemptions of the Freedom of Information Act, is not an issue before the Presiding Officer, and Respondents arguments concerning the reach of the Freedom of Information Act Exemptions are premature and presented in the wrong forum.

Nor does respondents emphasis on the restrictions of 18 U.S.C. 1905 fare any better. Even information described therein may befreely disclosed "when relevant in any proceeding under this Act." Section 6(a)(2) of the Consumer Product Safety Act.

In Respondents' Supplement to their Motion, counsel added "an example" of what "competitors might conceivably do with the information in question," as follows (emphasis added):

> Just as an example, using the figures at the botton of the page showing comparative balance sheets, a competent financial analyst might well be able to determine costs and margins in the segment of the refrigerator business involved. Costs and margins are customarily regarded as confidential items of information which it is important to keep out of the hands of competitors in order not to reveal the basis and potential for price competition.
>
> Similarly the information on the estimated percentage of total sales by overall White operations represented by Kelvinator sales is a type of information which competitors might well attempt to exploit to the disadvantage of Respondents in financial and merchandising circles.

Providing any further "detail" was eschewed by Respondents, however, as "unproductive," since" this is not the place for writing a Fortune Magazine article on competitive forces at work in this major segment of the manufacturing business."

And with respect to the appropriate date of expiration for any order holding material in camera, a date whose selection by the Presiding Officer must be supported with a "full statement of reasons," Respondents counsel offered only the following:

> In camera treatment for the above material is requested for the indefinite future for the reason that the specific items will continue to be of a confidential nature and it is not possible to estimate at what date, if ever, in the future the material might cease to have need for confidential treatment.

This showing, viewed in isolation, is of course hardly adequate. The presence of information about a corporation, in a proceeding concerning corporations, is neither "unusual" nor "exceptional." Yet, in essence, it is merely because such information is present, which "might" be of interest to competitors, that Respondents seek to set aside this strong Commission policy favoring open records. Nowhere is the injury Respondents fear "clearly defined;" nowhere is it shown to be "serious." See Graber Manu. Co. v Dixon, supra. 89/

89/ Nor, contrary to Respondents' suggestion, would it be appropriate for the Presiding Officer or the Commission to make the principle of open records and open hearings contingent upon the "legitimacy" of the interest the public might have in them, since this "would require a degree of foreknowledge which the Commission does not possess." Crown Cork and Seal Co., 71 F.T.C. 1714, 1717 (1967).

However, when the material at issue is viewed in the context of the whole proceeding, reasons adequate to support a severely restricted final in camera order[90/] do emerge.

Out of an 805 page transcript, the final in camera order will place under seal selected testimony totalling less than 1-1/2 pages. Though the wisdom of the decision with respect to those 1-1/2 pages is unrelated to the quantity of material that has been released, its reasonableness is not. More importantly, the evidence at issue had no bearing on the Presiding Officer's INITIAL DECISION in this matter. It does not form the basis for any Findings

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90/ In the transcript, for example, although certain answers given by Respondents' witness have been protected, Enforcement Counsel's suggestion that their questions which prompted those answers not be similarly protected, has been accepted. So, too, has Enforcement Counsel's suggestion that in view of Respondent's failure to show the necessity for an indefinite termination date for an in camera order, that a two year time limitation be imposed.

of Fact or Conclusions of Law. 92/ Yet, the likelihood that competitive harm could result from the release of at least some of the financial balance sheet and profit and sales information at issue, if it is truly not available to the public from other sources, would appear -- despite Respondents' unimpressive showing on this point--to be not insubstantial. Additionally, the possibility of future access to even this limited information, if any member of the public so requests it under the Commission's Freedom of Information Act procedures, would remain unimpaired by a "final" in camera order entered in this proceeding. Finally, and of a strictly equitable and therefore largely irrelevant nature, counsel for Respondents have made the representation in their Supplemental submission that Respondents' corporate officers "held back nothing and imposed no time constraints in their efforts to answer questions by Enforcement Counsel" related to this material and may not have clearly understood the Commission's procedures with respect to such information.

For all of these reasons, then, Respondents' Motion for in camera treatment for certain transcript pages and three Enforcement Counsel Exhibits is granted, in part, and a severely restricted, separate, final in camera order has been issued this date.

92/ Had the decision on the merits been otherwise, however, it might have played a more important role.

(i) Miscellany

(A) Enforcement Counsel Exhibit 7 is a damaged refrigerator channel. At the hearing, Respondents vigorously objected to its admission into evidence on a variety of grounds, all of which were equally as vigorously resisted by Enforcement Counsel. 92/ The Presiding Officer overruled Respondents objection, however, holding that the technical rules of evidence applicable in jury trials do not apply to proceedings before Federal agencies in the absence of a statutory requirement that such rules be observed, 93/ and that problems of chain of custody and possible alterations of the exhibit were matters going to the weight or degree to which reliance may be placed on the exhibit in the INITIAL DECISION rather than to its admissibility. 94/

92/ See Tr., pp. 636-43.

93/ See, e.g., Richardson v Perales, 402 U.S. 389,410 (1971); F.T.C. v Cement Institute, 333 U.S. 683, 705-06 (1948); Opp Cotton Mills v Administrator, 312 U.S. 126, 155 (1941); Rosedale Coal Co. v Director, 247 F.2d 299 (4th Cir., 1957); 5 U.S.C. § 556(d); Section 1025.63 of the Rules of Practice.

94/ Tr., p. 643. Similar principles were invoked by the Presiding Officer at an earlier point in the hearing to admit disputed testimony offered by Respondents. See Tr., pp. 11-12; Docket #s 64, 65, 69, 70.

Respondents' objection to the admission of two damaged refrigerator timers, Enforcement Counsel Exhibits 10-A and 10-B, was also overruled on the same grounds. 95/

Subsequent to these rulings, at closing argument, Enforcement Counsel substantially altered its position with respect to the identity, origin and integrity of the damaged channel, E.C. Ex. 7. Enforcement Counsel stated:

> Upon further inquiry into the circumstances surrounding the receipt at the CPSC on July 9, 1974 of physical evidence offered in this proceeding, . . . although the gray metal channel [E.C. Ex. 7] was taken from the Salazar refrigerator, we now have doubts that the Salazar timer was contained in the channel at the time it was presented to the Commission. In fact, from what we have been able to piece together, it is likely that the timer was not attached to the channel when it was submitted to the Commission. What appears to have happened is that when the physical exhibits were sent to the Commission's Bureau of Engineering Sciences for evaluation, the engineers placed the Salazar timer in the channel . . . .
>
> Because we believe this may have happened, Enforcement Counsel do not intend to rely on any physical observations by our experts which specifically concern the condition of the individual timer and its relationship to the timer (sic). However, we do intend to rely on observations that have been made concerning the individual condition of the timer itself and the channel itself. 96/

95/ Tr., pp. 644-46.

96/ Tr., pp. 787-88 (emphasis added).

In view of the lateness and substance of this admission by Enforcement Counsel, the confused status of this exhibit, and the inadequacy of the belated proposal by Enforcement Counsel "not to rely" on portions of the testimony and evidence offered concerning this exhibit, 97/ the Presiding Officer has concluded that despite the liberal standard for the admissability of evidence alluded to above, Enforcement Counsel has failed in this instance to satisfy its burden of persuasion as to the relevancy and reliability of this exhibit. 98/

Accordingly, the prior ruling of the Presiding Officer admitting Enforcement Counsel Exhibit 7 into evidence is withdrawn, and Respondent's objection thereto is sustained. None of the testimony offered by Enforcement Counsel witnesses based upon their observations of this exhibit have been relied upon by the Presiding Officer in reaching her INITIAL DECISION in this matter.

(B) An employee of the Consumer Product Safety Commission, who had acted as an investigator in this case, also served as the translator for the testimony of two

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97/ See Docket #78, pp. E-1 through E-29.

98/ "(T)he proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto . . . Irrelevant, immaterial, unreliable . . . evidence shall be excluded." Sections 1025.63(a), (b) of the Rules of Practice.

witnesses who had earlier figured in her investigation. For this reason, Respondents urge that the testimony of these witnesses be struck. 99/

Commission employees may properly serve as interpreters in Commission proceedings as long as they are qualified to interpret, and do so accurately and with impartiality. See Lujan v United States, 209 F.2d 190, 192 (10th Cir., 1953). See also United States v. Lozano, 511 F.2d 1, 6 (7th Cir., 1975); Chee v United States, 449 F.2d 747, 748 (9th Cir., 1971). Here, given the presence of an independent interpretator available to Respondents who was repeatedly offered the opportunity to object, clarify or play back the tape made of the witnesses' testimony, 100/ and the opportunity of the Presiding Officer to observe the qualifications, accuracy and professionalism of the translator, the Presiding Officer concludes that there "is nothing in the record to indicate or from which it can be inferred that any part of any witness'

99/ Docket #78, pp. F-16 through F-26.

100/ See, e.g., Tr., pp. 24-25, 34.

testimony was misinterpreted to convey an erroneous meaning or impression . . . . ." 101/ Therefore, Respondents' motion is denied. 102/

101/ United States v Lujan, supra, 209 F.2d at 192.

102/ Of course, had Enforcement Counsel utilized the services of a Commission employee who, unlike the interpreter in this case, had had no prior involvement with the investigation of this matter, even the possibility of a suggested impropriety in the interpreter's selection would have been avoided.

(C) In view of the problems encountered in this proceeding related to the procedures to be utilized by the parties in securing subpoenas ad testificandum and duces tecum, [103] and the questions that have been raised about the authority underlying the Commission's delegation through the Rules of Practice of its subpoena power to the Presiding Officer and the parties, [104] the Commission may wish to provide further clarification of Sections 1025.53 and 1025.54 of its Rules of Practice. [105]

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[103] See Docket #s 27, 40, 51, 56, 58, 62, 63 and 67.

[104] Compare Sections 27(b)(3) and 27(b)(8) of the Consumer Product Safety Act with Section 27(b)(4) and Sections 1025.53 and 1025.54 of the Rules of Practice.

[105] At the request of Enforcement Counsel, subpoenas ad testificandum were issued to Enforcement Counsel witnesses Mr. and Mrs. Archer and Mr. Morgan. Prior to the hearing, direct testimony from each of these witnesses had been filed (Docket #53), and further direct testimony by Respondent witness Clarkson related to the testimony of the Archers and Mr. Morgan had also been filed. Docket #71. After the subpoenas had been issued by the Presiding Officer and served, Enforcement Counsel decided not to offer the testimony of these witnesses, and apparently advised them that the subpoenas issued by the Presiding Officer need not be obeyed. See Tr., pp. 287-93. As a result, neither the direct testimony of the Archers and Mr. Morgan, nor the related direct testimony of Mr. Clarkson, was either admitted into evidence or considered by the Presiding Officer in reaching her INITIAL DECISION. The Commission may wish to consider, however, whether further amendment to the Rules of Practice directed to this type of situation would be appropriate.

Having fully considered, with the two exceptions listed below 106/, all of the preliminary legal matters raised in this case, the merits of this controversy are next addressed.

106/ Respondents also moved to rescind the Notice of Enforcement on the ground that Section 15 of the Consumer Product Safety Act upon which it is based is unconstitutionally vague (Docket #s 15, 29) and the ground that the remedies of Section 15 may not constitutionally be applied restrospectively. Docket #s 13, 30. Enforcement Counsel opposed both Motions. Docket #s 44, 46. In view of the Presiding Officer's decision on the merits, the firmly established judicial preference for avoiding unnecessary adjudication of constitutional questions, and the absence of authority in the Commission in any event to declare this congressional enactment unconstitutional, the Presiding Officer should not, need not, and does not reach the merits of either of these Motions, except to note that the restrospectivity question has been decided adversely to Respondents by Commission Administrative Law Judge Pfieffer in his Interim Initial Decision in the Matter of Relco, Inc., CPSC Docket No. 74-4. An appeal in that matter is presently pending before the Commission.

Merits of the Controversy

(a) Decision Elements

(Facts and Law to be Considered)

The first level decision required in this case is: Does the Kelvinator refrigerator present a substantial product hazard. If the decision is affirmative, the Presiding Officer must determine whether notification under Section 15(c) of the Consumer Product Safety Act and/or an order for action under 15(d) of that Act is required.

"Substantial product hazard" is defined in Section 15 (a) (2) of the Consumer Product Safety Act as a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

The Report of the House Commerce Committee sheds some light on the Congressional intent. According to that Report, the definition of substantial product hazard "looks to the extent of the public exposure to the hazard. A few defective products will not normally provide a proper basis for compelling notification under this section.[107]

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[107] Report No. 92-1153, 92nd Congress, Second Session, June 20, 1972, p. 42.

In order to be able to conclude as a matter of law whether the Kelvinator refrigerator does or does not present a substantial product hazard the two issues which must be resolved are:

Issue I: Is there evidence in the record to support the finding that a product defect exists?

Issue II. Does a proven defect create a substantial risk of injury to the public because of

- the pattern of the defect
- the number of defective products distributed in commerce
- the severity of the risk
- or, otherwise.

As far as the resolution of these issues is concerned, Enforcement Counsel shall have the burden of proof to sustain the violations alleged in the notice of enforcement, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.[108]

In order to resolve Issue I (Is there evidence on the record to support the finding that a product defect exists), it is necessary to consider: (1) product defect analyses in the form of test data and/or scientific judgement; (2) field incidents analyses.

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[108] The Rules of Practice (Section 1025.63(a)).

In order to resolve Issue II (Is there evidence to support the contention that a proven defect creates a substantial risk of injury to the public?), it is necessary to consider in toto: (1) the probability of the defect existing in a given product; (2) the number of defective products in distribution; and (3) the severity of the risk;

(b) Findings of Fact

Issue I: Is there evidence in the record to support the finding that a product defect exists?

Prior to discussing findings relative to a possible defect in the Kelvinator refrigerator, it is necessary to outline the findings relative to the design and operation of refrigerators in general and the Kelvinator refrigerator in particular. 109/

(A) General Theory of Operation of a Refrigerator

(24) In a refrigerator, "cold" is produced by the ability of the liquid refrigerant -- called freon -- to absorb heat from the surrounding atmosphere when it evaporates within a hermetically-sealed refrigeration system. In an electric refrigerator, the freon is circulated througout the refrigeration system by an electrically-operated pump called a "compressor". The liquid freon is forced through a narrow

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109/ The refrigerators subject to this proceeding have been referred to as the "first generation" refrigerators by Mr. Dolan President of Kelvinator, Inc., because these were the refrigerators of Model 140, 160 and 180 manufactured between 1970 and 1973. R. Ex. A, p. 6. The phrase "Kelvinator refrigerator," as used in this DECISION, refers to the refrigerators subject to this proceeding.

capillary tube about the size of a hypodermic needle into a substantially more voluminous "evaporator" resembling a car radiator located within the insulated refrigerator cabinet. As the freon enters the evaporator, it expands into a cold gas, absorbing heat from the refrigerator's interior. This heat laden freon gas is then sucked out of the evaporator through a gas suction tube by the compressor located outside of the refrigerator cabinet. The compressor compresses the freon gas and forces it through the cooling condensor located on the back and outside of the refrigerator cabinet. During this process of compression and cooling, the freon gives up its heat and is changed back into a liquid. It is then transmitted through the capillary tube back to the evaporator where it once again evaporates into a gas, absorbing more heat from the interior of the refrigerator. The degree of refrigeration is controlled by the operation of the compressor which in turn is governed by a thermostat located within the refrigerator. 110/

(25) The function of the automatic defrost system employed in modern refrigerators is to remove, on a regular, automatic basis, the frost which collects on the evaporator's cooling surfaces within the refrigerator. In most refrigerators -- including those under consideration in this case -- defrosting is accomplished by use of an electric heating element mounted within the evaporator. After a

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110/ R. Ex. A, p. 4.

predetermined length of time (some five hours, forty-three minutes, in the refrigerators in question), the timer activated defrost switch simultaneously de-energizes the compressor and energizes the electric heating elements in the evaporator. During the "defrost cycle" -- which lasts for 17 minutes in the refrigerators in question -- the heating element melts any frost which has accumulated on the surfaces of the evaporator. This melted frost is carried away from the evaporator by a drain tube which runs out of and down the back of the refrigerator cabinet. At the end of the defrost cycle, the defrost timer switch de-energizes the electric heating element and re-energizes the compressor, returning the refrigerator to its normal refrigeration cycle. 111/

(B) Design and Operation of the "First Generation" Kelvinator Refrigerator

Relevant Design Features:

(26) A metal channel which was placed on the back of the refrigerator provides a passageway for the group of electric wires which connect the power cord to the various electrical components within the refrigerator. The wires are grouped together as an assembly called a "wire harness". A heat exchanger, consisting of a capillary tube and a freon suction tube, is also placed within the metal channel, and

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111/ R. Ex. A, p. 5.

is covered by a tube of foam insulation. A defrost timer switch controlling both the defrost and cooling cycles is installed at the bottom of the channel. 112/

(27) The defrost timers used in the Kelvinator refrigerators in this proceeding are placed in close proximity to, and immediately below, a wiring harness as well as polyolefin foam insulation surrounding a freon tube. 113/

(28) The defrost timers used in Kelvinator's model refrigerators are not sufficiently enclosed so as to bar access of contaminants. 114/

(29) A chemical analysis performed by the National Bureau of Standards revealed that the defrost timer switch used contains three plastic components (i) the main switch housing made of a phenolformaldehyde resin; (ii) a back cover plate made of poly phenyleneoxide; and (iii) a shield over the terminals made of nylon-66. In addition, analysis of the insulation on the wiring in the switch revealed that it was poly (vinyl chloride). The terminals inside the casing are separated by cavities molded of the

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112/ R. Ex. A, pp. 7-9.

113/ R. Ex. A, p. 13; R. Ex. A-2.

114/ R. Ex. A, pp. 21-22.

phenol-formaldehyde resin and are sealed within these cavities by an epoxy resin. 115/

Through spectrographic analysis, the polyolefin foam insulation surrounding the freon tube was determined to be ethylene vinyl acetate (EVA). 116/

Relevant Operating Features

(30) The basic operation of the Kelvinator refrigerator subject to this proceeding and its defrost system is identical to that outlined in findings 24 and 25. 117/

(31) The refrigeration cycle in Kelvinator's first generation model refrigerators operates on a six hour basis. After five hours and forty-three minutes, the timer activated defrost switch in these refrigerators simultaneously de-energizes the compressor and energizes the electric heating elements in the evaporator. The "defrost cycle" thus lasts for a maximum of 17 minutes of every six-hour period of operation in the refrigerators involved in this proceeding. Upon completion of this period, the defrost timer de-energizes the electric heating element

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115/ E.C. Ex. 109.

116/ Tr., 330

117/ R. Ex. A, pp. 4, 5.

and re-energizes the compressor, returning the refrigerator to its normal refrigeration cycle. 118/

(32) A schematic diagram 119/ is inserted in the Appendix to the Initial Decision in order to illustrate the manner in which a defrost timer controls the flow of electric current during both the refrigerator cycle and the defrost cycle of a 1st generation model Kelvinator refrigerator. The four male terminals in the timer are numbered (starting at the top and going downward) as No.'s 2, 3, 4 and 1. The 120 volt power supply (from a household wall recepticle) goes to terminal No. 3. The power to terminal No. 3 also supplies 120 volts to operate the defrost timer (an electric motor). A cam (located alongside and to the right of terminal No. 3) is controlled by the defrost timer, which automatically cycles the cam between contact 2 and contact 4. As further illustrated in the diagram terminal No. 2 supplies current to the heater, while terminal No. 4 supplies current to the compressor. During normal operation, when current is being supplied to the heater, there is no current to the compressor. Likewise, during normal operation, when current is being supplied to the compressor, there is no current to the heater. 120/

118/ R. Ex. A, p. 5.

119/ E.C. Ex. 18.

120/ Tr., pp. 420-23.

(33) Terminal No. 1 in the defrost timer supplies the ground path - or common return - for electric current that is being provided the defrost timer. The connection between terminal No. 1 and the defrost timer motor completes the necessary circuit that allows the defrost timer to operate.

(34) During normal operation, with the refrigeration cycle operating on a six hour basis, the cam is in contact with the blade from terminal No. 4 for five hours and forty-three minutes. With the circuit thus "closed" between terminal No. 3 and 4, 120 volts is supplied for this period of time through the supply wire terminal (No. 3), then through the contact, and back through terminal No. 4 to operate the compressor. During this same period of time, the circuit is "open" between terminal No. 2 and 3. Thus, since current is being supplied to the compressor, there is no current to the heater. 12/

(35) At the end of the five hour and forty-three minute period, the defrost timer automatically cycles the cam away from the blade extending from terminal No. 4 (thus opening the circuit between terminal No. 3 and 4) and toward the blade extending from terminal No. 2, so that contact with the blade from terminal No. 2 permits current to flow through the supply wire terminal (No. 3), then through

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12/ Tr., pp. 420-23.

terminal No. 2 to operate the heater. The circuit is "closed" between terminal No. 2 and 3, permitting current to flow to the heater, for a maximum period of 17 minutes. 122/

(36) A thermostat, located between terminal No. 4 and the compressor, closes the contacts to a thermostat switch when the refrigerator is too warm. This allows current to flow to the compressor in order to cool the refrigerator. Then, when the refrigerator is cold, the thermostat to the compressor will open the contacts to the thermostat switch so as not to operate the compressor needlessly. Thus, the compressor does not necessarily operate the entire five hours and forty-three minutes allotted it by the timer motor for the refrigeration cycle. 123/

(37) A thermostat is also located between terminal No. 2 and the heater to close contacts to a thermostat switch when the freezer is too cold. This allows current to flow to the heater in order to defrost the freezer. Then, when the freezer is warm (defrosted), the thermostat to the heater will open the contacts to the thermostat switch so as not to operate the heater needlessly. Thus, the heater does not necessarily operate the entire 17 minutes allotted it by the timer motor for the defrost cycle. The contacts to the termostat switch close at 20°F (permitting current

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122/ Tr., pp. 420-23.

123/ R. Ex. G-7. E. C. Ex. 18. Tr. p. 421-23

to flow to the heater so that the freezer is defrosted) and open at 50°F (opening the circuit so that the heater will not operate needlessly. 124/

C. Product Defect Description (Evidence Provided in the Record)

(38) A product defect exists because: Moisture forms and builds up on the insulation surrounding the freon tube in the channel and adjacent wiring harness. That moisture drips onto the area between the terminals in the defrost timer. Contaminants enter the terminal area. When that moisture and contamination are present in the area between the terminals, arcing takes place resulting in a heat build-up. The heat build-up leads to carbonization which leads to further heat build-up. That condition is sufficient to blacken, shrink, melt, or ignite the component materials within the channel. Ignition of the component materials leads to fire and/or smoke. When there is fire it is possible for the flames and/or smoke to escape the confines of the channel.

124/ R. Ex. G-7; E. C. Ex. 18, Tr. p. 421-23.

Evidence in the record in support of this finding:

(38)(a) Moisture forms and builds up on the insulation surrounding the freon tube in the channel and adjacent wiring harnesses.

. Based on an observation of damaged timers and laboratory tests, Davock, of the Detroit Testing Laboratory (DTL), concluded that moisture came from condensation on the insulation tubing covering the freon suction tube. According to Davock the condensation build-up could be visually observed. 125/

(38)(b) That moisture drips onto the area between the terminals in the defrost timer.

. An extension of the observation made by Davock (DTL) was that the moisture which forms on the insulation tube and wiring harness might drip onto the area between the terminals in the defrost timer. Specifically, Detroit Testing Laboratory concluded that if the refrigerator was operated in a moist warm environment, moisture would condense on the suction tube insulation and wiring harness. Under such circumstances, the condensation would drip off the insulation or wires; and depending upon

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125/ R. Ex. D, p. 8; Tr., pp. 623-25.

the alignment of the insulated freon tube and the harness within the channel, if this condensation dripped off, it would drip into the timer terminal area. 126/

(38)(c) Contaminants enter the terminal area

. According to Mr. Thomas Dolan, President of Kelvinator, Inc., in 1972 when the company became aware of a problem within the timer area of the refrigerators they "found evidence of bugs, or moisture, or both in the terminal area. They hypothesized that [they] were caused by insect contamination and/or moisture. It was thought that the warmth of the timer attracted roaches and they and their secretions and moisture might be conductive enough to cause a current leakage between the timer terminals." 127/

. Detroit Testing Laboratory reached the conclusion that contaminants enter the area and so stated in drawing the following conclusion: "Our tracking tests confirmed our original hypothesis that these timer failures were most probably caused by moisture and contaminants finding their way into the timer terminals . . . " 128/

126/ R. Ex. D, p. 9.

127/ R. Ex. A, p. 21-22.

128/ R. Ex. D, p. 11.

(38)(d) When that moisture and contamination are present in the area between the terminals, arcing takes place resulting in heat build-up. The heat build-up leads to carbonization which leads to further heat build-up

. According to Dolan, some timers installed have failed due to moisture and contamination around the four male terminals which protrude from the timer mechanism. He further testified that moisture and contamination has led to current leakage and a "short" resulting in carbonization at the terminals of the timer. 129/

. Davock concluded based on scientific judgment and tests that moisture accumulated on the material which holds, separates, and insulates the four brass terminals. The moisture established a conductive path between two or more of the terminals with the path permitting current to leak between the terminals. The leakage caused carbonization, the carbonization increased conductivity which increased the current leakage bringing about more carbonization. 130/

129/ R. Ex. A, p. 21.

130/ R. Ex. D, p. 6.

. Greenville Products Corporation initiated a test which consisted of dripping a weak salt solution of distilled water into the area between terminals #2 and #3 of the defrost timer. Power was initiated at the same time the salt solution was started. Seven of the eight refrigerators had timers short circuit within the first 20 hours and the area conducting the current between the terminals was carbonzied. Prior to removing the power (70 hours after the test was initiated) Greenville measured 3.5. amps flowing through the carbonized path between terminals #2 and #3. 131/

(38)(e) That condition is sufficient to blacken, melt, shrink or ignite the component materials within the channel

. The test results from the Detroit Testing Laboratory in one of the refrigerators subjected to a timer failure mode were as follows: In the area from 20 inches to 29 inches above the timer, the insulation tubing had melted, blackened and shrunk. The remaining tubing on up the channel was "slightly melted and shrunk". Moreover the insulation on the wires coming from the

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131/ E.C. Ex. 20, Report 7846, p. 2.

top of the timer was melted and carbonized for a distance of approximately 15 inches from the timer. 132/

. The Enforcement Counsel presented support for the proposition that since polyolefin foams are heat sensitive they may soften shrink, or melt during a slow rising subignition temperature. On the other hand, a high initial temperature causes the polyolefin foam to ignite. 133/

132/ R. Ex. D, p. 26.

133/ E.C. Ex. 9, p. 2; Tr., p. 348.

(38)(f) Ignition of the component materials leads to fire and/or smoke. When there is fire it is possible for the flames and/or smoke to escape the confines of the channel

. In the Greenville Products Corporation tests seven of the eight refrigerators had timers short circuit and the area conducting the current between the terminals was carbonized. There was visible smoke from all eight refrigerators as well as visible burning from all eight with the duration of the burning ranging from 2 minutes and 30 seconds to 2 hours intermittently.134/

. By artificially "tracking" between the terminals of defrost timers in 12 operational refrigerators Davock obtained one timer failure within 41 hours which produced "considerable smoke"135/

The interior of the channel itself was covered with black condensed smoke for a distance of approximately 15 inches above the timer.136/

134/ Ex. 20, Report 7846

135/ R. Ex. D., p. 17

136/ Id.

. The damaged Sonnier refrigerator had charred marks running along the channel area and in the area of the defrost timer. There were char-marks along the wiring above the defrost timer and the timer itself "was charred and to some extent had melted". 137/ The wiring insulation above the defrost timer was burned and the insulation around the freon tube was charred. 138/

The Sonnier timer failure resulted in sufficient ignition of the component materials to lead to fire and/or smoke. This conclusion is based not only on the physical examination of the refrigerator by Zevola 139/ and Honnell, 140/ but also on the testimony of

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137/ E.C. Ex. 108, p.10

138/ E.C. Ex. 103, p. 6

139/ E.C. Ex. 108, p.10

140/ E.C. Ex. 103, p. 6.

Ms. Sonnier: 141/

Q. Was the wall behind your refrigerator burned?

A. It was smoky, you know stain smoke. You know, it had just turned the wall black that is about all.

and

Q. Was the cabinet above the refrigerator burned?

A. Just a little smoke stained but most of the damage was where the refrigerator was against the wall.

141/ The Sonnier and the Salazar incidents were the only field incidentsof the three presented by the Enforcement Counsel which carried any weight in this proceeding. In the other field incident, the Enforcement Counsel failed to establish the cause and effect. In other words in the Solorzano (E.C. Ex. 101, 102, TR. p.p. 27-83) incident there was insufficient showing that the fire and/or smoke associated with the incidents was as a result of the kind of timer failure described in this proceeding. For example, in the Sonnier incident, Honnell, a supervisor of the repair of appliances, testified that the mode of failure in the Sonnier incident was that moisture created by the suction line forms, runs down the channel to the defrost timer, shorting the timer and causing fire. Further as to the Sonnier incident he testified that the timer was charred as was the wiring harness and little insulation material was intact.
E.C. Ex. 103, p. 6; TR. p.100.

D. Substantial Risk of Injury (Evidence Provided in the Record)

In order to resolve Issue II (Is there evidence to support the contention that a proven defect creates a substantial risk of injury to the public) it is necessary to consider the following elements in toto: 1) the nature and probability of the defect existing in a given product;142/ 2) the number of defective products in distribution; and 3) the severity of the risk presented by these products. Based on a consideration of the necessary elements, the Presiding Officer concludes that:

(39) A high probability of defect existing in any given Kelvinator refrigerator was not proven in light of a series of circumstances which must be present before a defect exists. Those circumstances are: heat and humidity over a sustained period of time, contaminants, and the wiring in a special configuration.

142/ Section 15(a)(2) defines "substantial product hazard" among other things as a product defect which because of the pattern of defect . . ." creates a substantial risk of injury to the public. In the view of the Presiding Officer in considering the "pattern of the defect" there should be consideration of: 1) the nature of the defect (that consideration was discussed above in Section C); and 2) the probability of the defect existing in a given product (which discussion will be below in connection with finding number 39). See In the matter of: McCullouch Corp., CPSC Docket No. 74-1 (1974); "CPSC: An Agency Manual", The George Washington Law Review, Volume 43, Number 4, p. 1152 (May 1975).

(40) Almost all of the 270,000 refrigerators manufactured by Kelvinator of the 1st generation model design have been "entered into commerce".

(41) The high severity of the risk was not proven by either scientific analyses or field incidents in light of the proven effect of the defrost termination switch, the self-extinguishing characteristics of the insulation material, the failure mode when the refrigerator is grounded, the failure mode under the worst possible set of circumstances, and the absence of reported injuries.

(42) Given findings 39 - 41 in toto, there is not sufficient evidence on the record to support a finding that the product defect associated with the Kelvinator refrigerator present a substantial risk of injury to the public.

Findings 39-42 are discussed in detail below:

(39) A high probability of a defect existing in any given Kelvinator refrigerator was not proven in light of a series of circumstances which must be present before a defect exists

(39)(a) High heat and humidity are necessary

The failure mechanism operative here requires the accumulation of moisture on the heat exchanger. In order to have the temperature differential needed to cause significant condensation on the heat exchanger, the environment in which the refrigerator is operated must be unusually hot. In addition, it must be very humid if significant amounts of moisture are to accumulate.

The record is filled with evidence that substantiates these findings. The two refrigerators on which Detroit Testing Laboratories (DTL) observed condensation build-up on the heat exchanger insulation and the wiring harness were being operated in an environmental test chamber in daily average temperatures ranging from 104° to 118° and 95% relative humidity. In the refrigerator that DTL tested at laboratory ambient temperature and humidity, no failures were achieved,

despite the fact that the insulation separating the timer terminals on those refrigerators had previously been broken down by the tracking procedure.143/

(39(b) High heat and humidity must be sustained over a long period of time

. This finding is supported by the testing and analysis performed by DTL which indicated that". . . "it is very difficult, even under extreme and accelerated conditions, to cause one of these timer failures. Davock testified that it was apparent to us that this breakdown process took a considerable length of time in an unusually warm, humid environment . . . ."144/

143/ R. Ex. D, pp. 8-9; Tr. p. 622

144/ R. Ex. D, p. 10, p. 33

(39)(c) There must be contaminants present within the timer terminal area

. Mr. Toner, expert witness for the Enforcement Counsel, conducted a series of cyclic tests at the National Bureau of Standards using uncontaminated distilled water and was unsuccessful in creating timer failure. 145/ In fact, Mr. Toner was able to achieve no change whatsoever in the resistance between the timer terminals. 146/ The Detroit Testing Laboratory, General Environments Corporation, and Kelvinator each successfully simulated the failure mode using contamination by ionized moisture. It is apparent that moisture alone, in the absence of contaminants, will not cause failures of this type.

145/ E.C. Ex. 109, pp.14-16.

146/ E.C. Ex. 109, p.15

(39)(d) <u>There must be a particular configuration of the wires in the wiring harness which appears very infrequently</u>

The testimony of the experts supported the conclusion that steady accumulation of moisture and contaminants alone is not enough. Moisture on the heat exchanger or the wiring harness will not cause a timer failure. Rather, moisture and contaminants must consistently accumulate on the tiny stretches of phenolic insulating material separating the timer terminals.

. Mr. Anikis computed the surface to be about .6 of a square inch total surface area. 147/

. The particular alignment of the wires in the wiring harness must be such that the moisture consistently runs from the heat exchanger onto the wires and drips steadily from some bend in the wiring directly into the tiny surface area separating timer terminals. 148/

147/ Tr. p. 439

148/ R. Ex. D. pp. 7, 9

An important consideration is the fact that there is a great variation in the configuration of the wiring harness in the channel. 149/ The configuration of the wiring harness from which the moisture must drip is apparently random. 150/

(40) Today, almost all of the 270,000 refrigerators manufactured by Kelvinator of the first generation model design have been "entered into commerce" and have been sold at retail. 151/

(41) The high severity of the risk was not proven by either scientific analysis or field incidents in light of:

(41)(a) the effect of the defrost termination switch

. Assuming a defect leading to a timer failure which results in the compressor stopping operation, according to Davock, the freezing compartment necessarily warms up causing the defrost termination

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149/ Tr. pp. 626-628

150/ Tr. pp. 626-628

151/ Tr., p. 524; R. Ex A, p. 15

thermostat to automatically shut off any flow of current between terminals 2 and 3 thereby reducing the possibility of any further carbonization of the timer.152/ According to Tarosky, the sequence of events with a defective timer is: The overheating of the defrost timer resulting in the deforming of the switch contacts within the timer housing. This causes the compressor either to cease functioning or to perform erratically creating a need for servicing.153/ When the compressor stops, the freezing compartment necessarily warms up causing the defrost termination thermostat to automatically shut off any flow of current between terminals 2 & 3 thereby preventing any further carbonization of the timer.

152/ Tr. pp. 767-768; Resp. Reply Brief, p. 18

153/ R. Ex. E, p. 12.

(41)(b) The self-extinguishing characteristics of the insulation material

. Using strained methods Kelvinator in its tests was able to create charring within the channel but not nearly enough heat to start a fire outside the channel. In most cases, the charring extinguished itself a few inches above the timer terminal. 154/

. Kelvinator ran two series of tests on the refrigerator in which various artificial sources of ignition ranging from acetylene torches to carbon arcs were applied to the materials in the channel. Despite the artificial and extreme measures employed, in every case, the materials in the channel self-extinguished. 155/

. Davock found that every material and all combinations of materials self-extinguished. There was no continuous burning. 156/

154/ E.C. Ex. 19; E.C. Ex 20 (Report 7842)

155/ E.C. Ex. 19; E.C. Ex 20 (Report 7842)

156/ R. EX. D, pp. 12-16; TR. pp.702-04

(41)(c) The failure mode when the refrigerator is grounded (a status generally expected given the manufacturers explicit instructions)

. A total of 25 refrigerators were tested (by Detroit Testing Laboratory, General Environment Corporation, and Kelvinator). In every case, without exception, in which a properly grounded refrigerator was tested, the timer failure incident which occurred (a) terminated with an open fuse or open circuit; and (b) caused little damage beyond the timer terminals and, in some instances a very small segment of the insulation materials immediately adjacent. The one refrigerator which experienced significant damage within the channel was ungrounded. 157/

. It is proper to expect that generally the refrigerator will be grounded because of the manufacturers explicit instructions regarding what must be done where a two prong wall receptacle is encountered. The instructions provide that there must be a replacement with a properly grounded three-prong receptacle. 158/

157/ R. Ex. D, p. 29; R. Ex. E.; E.C. Ex. 20

158/ R. Ex. G-1, p. 2; R. Ex. G-2, Sec. 3/2-3/3. Regarding the responsibility of the retailer/installer, the Commission also has the authority to commence Section 15(f) hearings in order to determine their responsibilities under the Act. The Commission is not, however, required by law to join the manufacturer and retailer if there is a question about separable responsibilities as to the identical product, nor is the Commission estopped from requiring certain actions of the manufacturer under Section 15(c) and 15(d) when a retailer/installer may also have a responsibility.

(41)(d) The failure mode under the worst possible set of circumstances (e.g., without grounding)

. If a refrigerator is not grounded and arcing occurred in the wires above the timer there would not be sufficient heat or flame to start a fire at the top of the channel. Jablonsky drew this conclusion because of the slow-burning, self-extinguishing characteristics of the insulation material, plus the fact that the foam and wire insulation does not extend above the top of the channel. 159/

. Irrespective of the failure mode, according to Thornhill, there is little chance of damage outside of the channel. The reasons: there is not much combustible material within the channel; when the foam insulation is exposed to moderate heat it shrinks and there is not much heat potential. The plastic within the channel is hard to ignite and once ignited quickly self-extinguishes. The channel is shallow and relatively congested at the top which would tend to reduce ventilation in the channel. Finally the metal components would act as a heat sink. 160/

159/ R. Ex. B, p. 33.

160/ R. Ex. C, p. 15.

. In none of the tests conducted by the Respondent did any flame escape -- in some instances the refrigerators were not grounded, in some the defrost termination switches were shunted. 161/

. Specifically, in the tests conducted by Tarosky, where he succeeded in inducing five timer failures involving overheating and carbonization, no damage whatever was sustained by any of the plywood enclosures as the result of these failures. Further at no time during the tests was any significant temperature rise recorded by any of the thermocouples surrounding the channels on the refrigerators tested. 162/

(41)(e) The absence of reported injuries

. None of the field incidents reported by the Enforcement Counsel resulted in an injury. 163/

161/ R. Ex. D, pp. 24-28; E.C. Ex. 20, Report 7846; E.C. Ex. 19; E.C. Ex. 20; Report 7842; R. Ex. E, p. 12

162/ R. Ex. E, pp. 13-14; Tr., pp. 777-79

163/ E.C. Ex. 101, 102, 105, and 106

. The President of Kelvinator testified that they knew of no case where an over heated defrost switch resulted in a personal injury. 164/

. The manufacturer indicated that there had been no product liability claims involving timer failures. 165/

(42) There is not sufficient evidence on the record to support a finding that the product defect associated with the Kelvinator refrigerator presents a substantial risk of injury to the public. 166/

164/ R. Rx. A, p. 23

165/ E.C. Ex. 20, p. 6

166/ Presiding Officer's Findings 39-41.

(c) Conclusions of Law

This proceeding was for the purpose of determining whether certain Kelvinator refrigerators present a substantial product hazard. The Consumer Product Safety Act defines "substanial product hazard" as a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of risk, or otherwise) creates a substantial risk of injury to the public. 167/

As a matter of law then two major issues must be resolved before a determination can be made as to whether a product presents a substantial product hazard. The two issues are:

Issue I. Does a product defect exist?

Issue II. If a product defect exists, does it create a substantial risk of injury to the public? In resolving this issue it is necessary to consider in toto: the nature and probability of the defect existing in a given product;. the number of defective products in distribution; and the severity of the risk.

167/ 15 U.S.C. § 2064.

In the case of Kelvinator refrigerators subject to this proceeding, the following major findings of fact were made:

. A product defect exists. 168/

. There was insufficient evidence in the record to support a finding that the product defect created a substantial risk of injury to the public. 169/

If there is not a proven product defect then as a matter of law there is no substantial product hazard. If there is a product defect, but that defect does not create a substantial risk to the public, then as a matter of law there is no substantial product hazard.

In this proceeding there was a proven product defect, but there was insufficient proof that the defect creates a substantial risk of injury to the public. Therefore, the Presiding Officer reached following conclusions of law:

. The Kelvinator refrigerators specified in the Notice of Enforcement do not present a substantial product hazard within the meaning of Section 15(a)(2) of the Consumer Product Safety Act.

168/ Presiding Officer Finding #38.

169/ Presiding Officer Findings #39-42.

No action on the part of any of the Respondents is required under Sections 15(c) and 15(d) of the Consumer Product Safety Act.

An appropriate INITIAL ORDER is attached hereton.

Date: November 3, 1975

Constance B. Newman
Presiding Officer

APPENDIX

NOTIFICATION AND REPAIR, REPLACEMENT, OR REFUND

SEC. 15. (a) For purposes of this section, the term "substantial product hazard" means—

(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

(b) Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product—

(1) fails to comply with an applicable consumer product safety rule; or

(2) contains a defect which could create a substantial product hazard described in subsection (a)(2),

shall immediately inform the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

(c) If the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f) of this section) that a product distributed in commerce presents a substantial product hazard and that notification is required in order to adequately protect the public from such substantial product hazard, the Commission may order the manufacturer or any distributor or retailer of the product to take any one or more of the following actions:

(1) To give public notice of the defect or failure to comply.

(2) To mail notice to each person who is a manufacturer, distributor, or retailer of such product.

(3) To mail notice to every person to whom the person required to give notice knows such product was delivered or sold.

Any such order shall specify the form and content of any notice required to be given under such order.

(d) If the Commission determines (after affording interested parties, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f)) that a product distributed in commerce presents a substantial product hazard and that action under this subsection is in the public interest, it may order the manufacturer or any distributor or retailer of such product to take whichever of the following actions the person to whom the order is directed elects:

(1) To bring such product into conformity with the requirements of the applicable consumer product safety rule or to repair the defect in such product.

(2) To replace such product with a like or equivalent product which complies with the applicable consumer product safety rule or which does not contain the defect.

(3) To refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (A) at the time of public notice under subsection (c), or (B) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs).

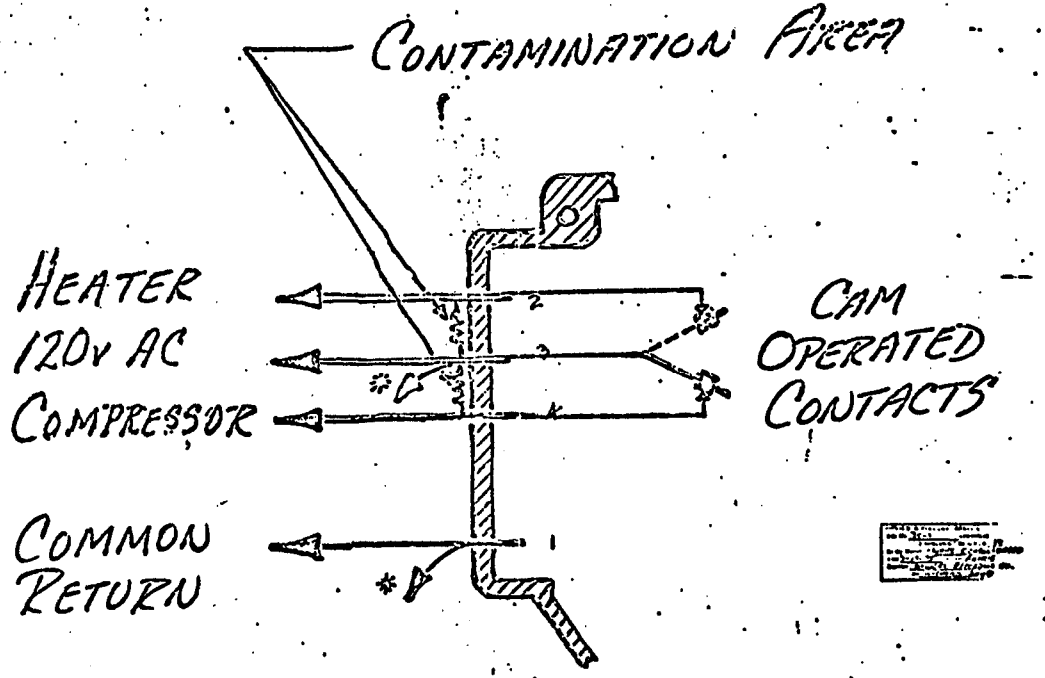
An order under this subsection may also require the person to whom it applies to submit a plan, satisfactory to the Commission, for taking action under whichever of the preceding paragraphs of this subsection under which such person has elected to act. The Commission shall specify in the order the persons to whom refunds must be made if the person to whom the order is directed elects to take the action described in paragraph (3). If an order under this subsection is directed to more than one person, the Commission shall specify which person has the election under this subsection.

(e)(1) No charge shall be made to any person (other than a manufacturer, distributor, or retailer) who avails himself of any remedy provided under an order issued under subsection (d), and the person subject to the order shall reimburse each person (other than a manufacturer, distributor, or retailer) who is entitled to such a remedy for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy.

(2) An order issued under subsection (c) or (d) with respect to a product may require any person who is a manufacturer, distributor, or retailer of the product to reimburse any other person who is a manufacturer, distributor, or retailer of such product for such other person's expenses in connection with carrying out the order, if the Commission determines such reimbursement to be in the public interest.

(f) An order under subsection (c) or (d) may be issued only after an opportunity for a hearing in accordance with section 554 of title 5, United States Code, except that, if the Commission determines that any person who wishes to participate in such hearing is a part of a class of participants who share an identity of interest, the Commission may limit such person's participation in such hearing to participation through a single representative designated by such class (or by the Commission if such class fails to designate such a representative).

COMPRESSOR/HEATER TIMER SWITCH CONNECTION DIAGRAM



*TIMER MOTOR CONNECTION

APPENDIX

CROSS-REFERENCE CHART COVERING THE PARTIES' FINDINGS OF FACT

In deciding this matter, the Presiding Officer considered all proposed findings of fact submitted by the Enforcement Counsel and Respondent. Rulings on the relevant and significant issues raised by the parties may be found in the Initial Decision. Where appropriate, the proposed findings have been incorporated in this Decision. On the other hand, irrelevant or unsupported findings of fact have been rejected.

This chart is provided to assist in the identification of the relationship between the Presiding Officer's Findings and selected Findings proposed by the parties.

Presiding Officer's Finding	Enforcement Counsel's Proposed Findings	Respondents' Proposed Findings
1	37, 36	
2	7	
3	7	16
4	8	16
5		
6		
7	10	
8	6	
9	6	
10	18	

APPENDIX

Presiding Officer's Finding	Enforcement Counsel's Proposed Findings	Respondents' Proposed Finding
34	54	
35	55	
36	56	
37	57	
38		
a.	64,65	
b.	64, 102, 103	
c.	38, 104	5c
d.	38, 63, 64, 72	
e.	67, 75	13, 14
f.	60, 62, 66, 80	4, 8, 12, 13, 14
39a.	88	5a
b.		5b
c.	38, 104	5c
d.		5d
40	4, 40, 48	17
41		
a.	70, 72	
b.	60, 73-76, 84 97, 98, 100	13, 14
c.	60, 61, 62, 63	9, 11
d.	65, 66, 67, 68 69, 72, 80 81, 83, 106	4, 7, 8, 10, 12
e.	77	2, 6, 8, 1
42		1

APPENDIX

Presiding Officer's Finding	Enforcement Counsel's Proposed Findings	Respondents' Proposed Findings
11	19	
12	20	
13	21, 22	
14	17, 24	
15	23, 27	
16	9	
17	12	
18	16	
19	10	
20	25	
21	28	
22	9	
23		
24	32	
25	33	
26	35	
27	103	
28	104	5c
29	58, 73	
30	49, 50	
31	51	
32	52	
33	53	

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

IN THE MATTER OF:	)	
	)	
White Consolidated Industries, Inc. et al.	)	CPSC Docket No. 75-1
	)	
	)	
	)	

NOTICE OF DECISION

The Initial Decision of the Presiding Officer was filed on November 3, 1975, and was served on all parties to the proceeding that same day. No party to the proceeding has filed a Notice of Appeal within the specified time set forth in the Commission's Rules of Practice (16 CFR 1025.71). The Commission has not placed the matter on its own docket for review nor has it stayed the effective date of the Initial Decision pursuant to 16 CFR 1025.71. Therefore, in accordance with 16 CFR 1025.71 on December 3, 1975, thirty days after service, the Initial Decision of the Presiding Officer became the decision of the Commission.

75-1 White Consolid. Indust Inc

Sheldon D. Butts
Assistant Secretary

Date: July 23, 1976

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

IN THE MATTER OF:	)	
	)	
White Consolidated Industries, Inc. et al.	)	CPSC Docket No. 75-1
	)	
	)	
	)	

NOTICE OF DECISION

The Initial Decision of the Presiding Officer was filed on November 3, 1975, and was served on all parties to the proceeding that same day. No party to the proceeding has filed a Notice of Appeal within the specified time set forth in the Commission's Rules of Practice (16 CFR 1025.71). The Commission has not placed the matter on its own docket for review nor has it stayed the effective date of the Initial Decision pursuant to 16 CFR 1025.71. Therefore, in accordance with 16 CFR 1025.71 on December 3, 1975, thirty days after service, the Initial Decision of the Presiding Officer became the decision of the Commission.

75-1 White Consolid. Indust Inc

Sheldon D. Butts
Assistant Secretary

Date: July 23, 1976

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C.

RECEIVED
SECRETARY
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CONSUMER PRODUCT SAFETY COMMISSION

In the matter of WHITE CONSOLIDATED INDUSTRIES, INC. a corporation, doing business as KELVINATOR, INC., a wholly owned subsidiary, and as G.R. MANUFACTURING CO., and EDWARD S. REDDIG, individually and as an officer of WHITE CONSOLIDATED INDUSTRIES, INC. and KELVINATOR, INC., and THOMAS I. DOLAN, individually and as an officer of KELVINATOR, INC., and ROY H. HOLDT, as an officer of WHITE CONSOLIDATED INDUSTRIES, INC. Respondents	CPSC DOCKET NO. 75-1

INITIAL ORDER

For the reasons discussed in the INITIAL DECISION issued this date, and on the basis of the Findings of Fact enumerated therein, the evidence admitted into the record, and the motions, responses and arguments of counsel related thereto, the Presiding Officer reaches the following Conclusions of Law:

(1) The Consumer Product Safety Commission has subject matter jurisdiction in this proceeding.

(2) A Commissioner was properly designated as Presiding Officer in this proceeding.

(3) The Notice of Enforcement was definite and certain, and was properly accompanied by internal memorandum outlining what Enforcement Counsel believed to be their prima facie case.

(4) Congress did not intend that the environmental impact statement requirements of the National Environmental Policy Act apply to adjudicatory proceedings commenced by the Consumer Product Safety Commission under Section 15 of the Act.

(5) The Rules of Practice published by the Commission in proposed and interim form properly establish the procedural rules governing this proceeding.

(6) Respondents' objection to the failure of the Commission to publish a description of its central and field organization and the method by which its functions are channeled cannot be sustained.

(7) This proceeding was properly convened as an adjudicatory rather than a rulemaking proceeding.

(8) Corporate Respondents White Consolidated Industries, Inc., and Kelvinator, Inc., and Respondents Edward S. Reddig and Thomas I. Dolan, have been properly named in each of the individual and corporate capacities listed for them in the Notice of Enforcement with the exception of Respondent Reddig who was improperly named as an officer of Kelvinator, Inc. Respondent Roy H. Holdt, however, was improperly named, and his name must be deleted from the list of Respondents.

(9) Respondents properly obtained a restricted final in camera order for certain limited portions of the evidence admitted into the record.

(10) Enforcement Counsel Exhibit 7, a damaged refrigerator channel, was properly refused admission into evidence and testimony based on observations of it properly rejected.

(11) Testimony translated by a Commission employee was properly admitted into evidence.

(12) The refrigerators specified in the Notice of Enforcement do not present a substantial product hazard within the meaning of Section 15(a)(2) of the Consumer Product Safety Act.

(13) No action on the part of any of the Respondents is required under Sections 15(c) and 15(d) of the Consumer Product Safety Act.

In reaching these Conclusions of Law, the Presiding Officer has considered all proposed Conclusions of Law submitted by the parties. Rulings on the relevant and significant legal issues raised by the parties may be found in the INITIAL DECISION. Where appropriate, proposed Conclusions of Law have been incorporated in this Decision and this INITIAL ORDER. On the other hand, irrelevant or unsupported Conclusions of Law have been rejected.

In view of these Conclusions of Law, it is, this 3rd day of November, 1975, ORDERED that judgment is entered in favor of the Respondents in this proceeding, and it is FURTHER ORDERED that the Notice of Proceeding is dismissed.

Enforcement Counsel and Respondents may appeal the INITIAL DECISION and ORDER provided that within 10 days after completion of service such party files a notice of intention to appeal and within 30 days an appeal brief. Section 1025.72, Rules of Practice.

Constance B. Newman
Presiding Officer

The secretary will kindly serve copies of the INITIAL DECISION and ORDER on the following individuals who have entered their appearance in this proceeding:

J. Edward Day, Esq.

William D. Kramer, Esq.

Cox, Langford & Brown
Attorneys for Respondents

Anette B. Seltzer, Esq.

James Y. Wood, Esq.

Melvin I. Kramer, Esq.

Enforcement Counsel
Consumer Product Safety Commission

SERVED
September 22, 1975
CONSUMER PRODUCT SAFETY COMMISSION

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of CHARLES CASTRO, an individual trading as BAY AREA MATTRESS COMPANY and KEVA MATTRESS COMPANY	CPSC DOCKET 75-2

INITIAL DECISION AND ORDER

FOUND:

1. That Respondent is engaged in interstate commerce and therefore is subject to Federal jurisdiction under section 3 of the Flammable Fabrics Act by reason of his procurement of mattress components from interstate sources, although subsequent assembly, sale, and distribution of the completed product occurred entirely within the State of California.

2. That although Respondent failed to test, keep records of, and affix warning labels to, mattresses produced and sold to the public as required by section .4 and .5 (c)(3) of the Federal flammable fabrics standard, FF 4-72, he acted in good faith to protect his customers by utilizing only flame retardant material components which met the California flammable fabrics standard.

3. That additional mitigating factors present include (a) the fact that all assembled mattresses subsequently tested passed the Federal flammability standard; (b) that ambiguity in the language of section .2(d) of FF 4-72 mislead Respondent to conclude that he was exempt from regulation as a "one-of-a-kind"

mattress manufacturer; (c) the fact that the purchaser of 517 of the 616 mattresses in question, having been notified of the defect, has declined to return them for refund, replacement, or repair; and (d) that recall at this time would be unnecessary and inconvenient to the remaining purchasers.

4. That the limited election to give a full refund of the purchase price or replacement of the mattresses sought by Enforcement Counsel is not warranted under the circumstances presented and that adequate protection to the original and subsequent purchasers can be provided by permitting Respondent the alternative of affixing the required warning label to the mattresses in question at the purchasers' premises.

SERVED UPON:

Enid Rubenstein, Esquire, and Melvin I. Kramer, Esquire, Enforcement Attorneys, Consumer Product Safety Commission, 5401 Westbard Ave., Bethesda, Maryland 20207.

Myron R. Cataldo, Esquire, attorney for Respondent Charles Castro d/b/a Bay Area Mattress Company and Keva Mattress Company, 211 A Joaquin Avenue, San Leandro, California 94577.

*/ Pursuant to Rule 72 of the Commission's Interim Rules of Practice for Adjudicative Proceedings (Part 1025.72) a notice of appeal from this initial decision must be filed within 10 days of the service date above. An appeal brief may be filed 30 days after said service date.

I

Respondent Charles Castro, trading as Bay Area Mattress Company (Bay Area) and Keva Mattress Company, has been charged with failure (a) to carry out required flammability tests upon mattresses he manufactured and sold, (b) to maintain required records thereon, or (c) to affix to these mattresses warning labels allowable in lieu of testing, all in violation of the Commission's standard for the Flammability of Mattresses, (FF 4-72), as amended, 38 FR. 15095, a regulation promulgated under §§ 3 of the Flammable Fabrics Act, 15 U.S.C. 45(b) et. seq.

The Commission's Bureau of Compliance issued a Notice of Enforcement March 11, 1975,[1/] seeking an order requiring Respondent to give notice to all of his customers concerning the defect and to replace or refund the full purchase price of the mattresses. Respondent filed an answer admitting the violation but contesting the Commission's jurisdiction and the severity of the proposed remedies. A prehearing conference was conducted by telephone on May 2, 1975. Thereafter a public hearing was held in San Francisco, California, on June 19, 1975. After an opportunity was afforded for the filing of proposed findings and conclusions

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1/ An offer of settlement had been previously rejected by the Commission on June 27, 1974.

the matter was submitted for initial decision on August 8th, 1975.

The specific acts with which the Respondent is charged are the manufacture and sale of 600 mattresses[2/] between June 22 and December 22, 1973, which were neither tested nor labelled with a warning to this effect, as required by FF 4-72, sections .4 and .5(c)(3). During the June-December 1973 period the regulations in effect authorized[3/] the manufacture and sale of flammable mattresses, provided a warning label was affixed thereto.

2/ Upon careful examination of the evidence it appears that 616 mattresses were actually manufactured during the period in question. The error seems to derive from the failure to include 16 mattresses produced for the Southern Pacific Company on August 14, 1973, in the final count. Altogether, mattresses were manufactured for 71 individual customers including the County of Alameda, California which purchased 517 items.

3/ Section .5(c)(3) of the standard states:
(3) Temporary requirement for noncomplying mattresses, ----Mattresses which do not comply with all the provisions of this standard and are manufactured during the 6 months following the effective date of this standard shall, prior to introduction into commerce, be prominently and conspicuously labelled with the following statement:

> WARNING: This mattress does not meet the Consumer Product Safety Commission Flammability Standard for Mattresses (FF 4-72, as amended). It may be subject to ignition and hazardous smoldering from cigarettes.

The evidence presented by both parties at the hearing is not substantially in dispute. It established that Bay Area specializes in the repair and renovation of mattresses and also engages in custom manufacture for individual sale. The company advertises only in Alameda County, California.

Of the 616 mattresses produced between the dates in question, 517 were manufactured for the County of Alameda for institutional use. The remaining 99 [4/] were custom made in odd sizes and shapes as requested by individual customers, all of whom were California residents. Although neither tested nor labelled in accordance with FF 4-72, all of the mattresses were constructed with flame retardant materials and met the California requirements for manufacture and sale of flame retardant chemicals and fabrics. [5/] However, it is undisputed that even though components may be flame

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3/ cont'd. Such label must be affixed to the mattress in such a manner so as to remain on or affixed thereto until its sale or delivery to the ultimate consumer. The label must be displayed on the mattresses at the place of retail sale and the statement or the label must be prominently and conspicuously displayed on the invoice or other sales papers that accompany the mattress through commerce from the manufacturer to the final point of sale to a consumer.

This label must be at least 250 cm^2 (approximately 40 in^2) with no linear dimension less than 12.5 cm (approximately 5 in.) The wording of such label shall appear on a contrasting background with letters in the heading WARNING no less than 1.2 cm approximately 1/2 in.) in height.

4/ The figure 83 was used throughout the proceedings for the total of so-called custom-built mattresses. See fn 2, supra.

5/ Cal. Health & Saf. C. § 13120 et. seq., 19 Cal. Adv. C § 1171 et. seq.

retardant, it is conceivable that assembled mattresses might nevertheless be subject to smoldering ignition by a lighted cigarette. For this reason tests of assembled mattresses are mandated by the Regulation.

Following a visit by a CPSC investigator, one of the 517 Alameda County mattresses was tested by the Staff. In addition, three mattresses of the same construction as the 517, and three others using the same ticking and other components as the remaining 99, were prototype-tested for Bay Area by Hales Laboratories, an independent testing facility. All were found to meet the flammability test criteria of FF 4-72, a fact to which Enforcement Counsel have stipulated.

Although the mattresses were manufactured of fire retardant materials, Respondent's failure to perform the required tests or labelling prior to their sale violated the express terms of FF 4-72. Pursuant to an agreement between counsel executed prior to the hearing, Respondent admitted the violation. Respondent contests the Commission's jurisdiction over his enterprise, charges laches and invokes the doctrine of estoppel. A major issue to be decided is the nature of the remedy to be ordered.

II

Respondent has raised the threshold question of whether the Commission has jurisdiction over his admitted violation because manufacture and sale of the mattresses took place entirely within the confines of the State of California.

Respondent asserts that his activities were not "in commerce" within the meaning of §§ 3(a) and (b) of the Flammable Fabrics Act. In reply Enforcement Counsel maintains that since the components of the completed mattresses were admittedly produced and transported from outside California, Respondent is, indeed, engaged in interstate commerce in assembling and selling the product.

The Respondent constructs mattresses predominantly utilizing polyurethane foam, latex foam, or "pin core" (smaller-holed latex), fillers. He covers these with ticking received from various manufacturers, some out-of-state. It was established that the ticking used in the mattresses in question was supplied by Golding Bros. Textiles, a division of W.R. Grace & Co. of New York, and by Herculite Protective Fabrics Corporation of York, Pennsylvania.

The Flammable Fabrics Act is one of a series of consumer product safety laws whose administration and enforcement were transferred to the Commission by Section 30 of the Consumer Product Safety Act. It is also one of a general class of health and safety laws whose purpose is to minimize the exposure of the American public to hazards posed by various

substances and devices available in the marketplace, see, e.g., Federal Food, Drug, and Cosmetic Act, as amended, 21 U.S.C. §§ 301 et. seq.; National Traffic and Motor Vehicle Safety Act of 1966, as amended, 15 U.S.C. § 1381 et. seq.; Federal Hazardous Substances Act of 1966, as amended, 15 U.S.C. § 1261 et. seq; Poison Prevention Packaging Act of 1970, 15 U.S.C. §§ 1471 et. seq.; Refrigerator Safety Act of 1956, 15 U.S.C. § 1211 et. seq. Federal jurisdiction over their subject matter is based upon national control over interstate commerce.

In order to carry out the public safety purpose on a uniform basis, the term "interstate commerce" in safety enforcement legislation has been and should be liberally construed, see United States v. Urbutheit, 335 U.S. 355, 357-58; United States v. Dianovin Pharmaceuticals, Inc., 342 Fed. Supp. 724 (D. Puerto Rico, 1972), 728 aff'd 475 F.2d 100. The language of Section 3 of the Flammable Fabrics Act is clearly susceptible of broad interpretation. Thus subsection (a) provides that the "...causing to be transported, in commerce, or the sale or delivery after a sale or shipment in commerce, of any product, fabric or related material which fails to conform to any applicable

standard...shall be unlawful..." [Emphasis added]. Subsection (b) provides that, "The manufacture for sale, the sale, or the offering for sale, of any product made of fabric or related material which fails to conform to an applicable standard..., and...which has been received in commerce shall be unlawful... [Emphasis added].

Respondent expressly admitted that he constructed the mattresses at issue in part from materials which he purchased from out-of-state sources. By ordering such materials he caused them to be "transported in commerce" within the meaning of § 3(a), and by manufacturing the mattresses of "fabric or related material...which has been received in commerce" he clearly acted within the express wording of § 3(b). Where components of a product have been procured from across state lines, the circumstance of intra-state assembly and sale does not insulate the total process from Federal jurisdiction, U.S. v. Urbutheit and U.S. v. Dianovin Pharmaceuticals, supra. To hold otherwise as requested by Respondent would clearly defeat the legislative purpose and create a serious gap in the coverage afforded by the national health and safety laws.

In view of the foregoing considerations, it is concluded that the Commission has jurisdiction over Respondent's enterprise. The laches and estoppel arguments require no extended discussion since it is axiomatic that neither doctrine is applicable to Actions of the Federal Government, U.S. v. Firestone & Rubber Co. 374 F. Supp. 431(1974); U.S. v. Pennsalt

Chemicals Corp., 262 F. Supp. 101(E.D. Pa. 1967); Davis Administrative Law Treatise 1970 Supp. § 17.04 p. 591 et. seq.

III

In their brief, as amended, Enforcement Counsel have requested a CPSA form of remedy, a "recall, replacement, or refund of the full purchase price of each mattress at Respondent's option". The option "To bring such product into conformity with the requirements of the applicable consumer product safety rule or to repair the defect in such product" contained in section 15(d)(1) appears to have been omitted.

The rationale of this position is that because the mattresses were not tested, they may pose a flammability hazard and should therefore be subject to recall, etc., in order to remove them from the hands of consumers insofar as possible. Although not specifically available under the Flammable Fabrics, (FFA) and Federal Trade Commission Acts, (FTCA), Enforcement asserts that recall authority is inherent in the FFA because it is necessary to effectuate the statutory purpose of protecting consumers from the continuing risk of injury.

In support of this argument Enforcement cites the recent Commission decision, In the matter of Congoleum Industries, Inc., decided July 14, 1975, Docket No. 75-3 which upholds a recall order issued by an FTC Administrative Law Judge.[6/] Specifically, that order required that, where

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6/ The Commission was not unanimous, Chairman Simpson dissenting. A similar ruling by the FTC was reversed by the Ninth Circuit Court of Appeals in Heater v. FTC, 503 F.2d 321(1974).

samples from carpet rolls are tested and fail to meet the flammability standard, respondent must notify the affected purchasers of their flammable nature and endeavor in good faith to recall such carpets when they have not been installed.

Here, the violation is of a different and lesser nature. Assuming that a reviewing court will hold that the Commission has the power to order a recall for the purpose of implementing the Flammable Fabrics Act through implied FTCA remedies, such a serious sanction is not compelled by the nature of the offense described in the evidentiary record. Respondent merely failed to label untested mattresses constructed of flame retardant material. Even if he had, in fact, manufactured highly flammable mattresses but had labelled them in accordance with the standard he would not have been in violation during the period in question.

In Congoleum some of the carpet in question failed to meet applicable Federal flammability standards. Here, however, all 616 mattresses sold by Respondent were constructed of flame retardant materials which at least met applicable California flammability standards. Subsequently, seven fully assembled mattresses of substantially the same construction successfully passed the Federal standard. As a result, there is not a scintilla of proof that any purchaser was placed in jeopardy of even smoldering ignition. On the contrary, the evidence

that has been presented provides some proof that no such hazard exists. In short, Respondent appears to have endeavored to protect his customers from personal injury and property damage and consequently there is no need to recall the mattresses in order to remove flammable materials from circulation.

Furthermore, the cited order in Congoleum limited the recall requirement to carpet which has not yet been installed. Here, the mattresses in question have been in use since 1973 and presumably the purchasers still require them daily. A temporary recall for labelling purposes at this time would represent a substantial and unnecessary inconvenience to the consumer analogous to the situation in Congoleum supra. Moreover, the present condition of the mattresses sold to Alameda County for use in several penal institutions and one hospital is questionable to say the least. Perhaps for this reason the County, having been notified of the failure to label the mattresses, has declared its intention not to return them for repair, replacement, or refund, even if the Commission imposes such an elective requirement.

In considering the severity of the remedy to be ordered as to the 99 mattresses manufactured for customers other than Alameda County, weight should also be given

to the unintentional nature of the admitted violation. With respect to these mattresses Mr. Castro testified that he believed he was exempt from the regulation under the "one-of-a-kind" exclusion clause in FF 4-72. Section .2(d) of the standard states in part as follows:

> One-of-a-kind mattresses, such as non-standard sizes or shapes, may be excluded from testing under this standard pursuant to rules and regulations established by the Consumer Product Safety Commission. [Emphasis added].

This language is susceptible to two differing interpretations: On the one hand, Enforcement takes the view that "may be excluded from testing" should be read in futuro and that "established" consequently means "to be established"; and that until such time as the Commission takes action to publish an express regulation excluding non-standard sizes and shapes, which has not been done, all mattresses are subject to the requirements of the standard.

On the other hand, the Respondent reads "may" as permissive and "established" as "in existence" and states without contradiction that as a renovator and custom manufacturer he failed to label the mattresses in question in reliance upon this interpretation, which was reinforced by the opinions of some of his colleagues expressed at a federally sponsored regional conference on the standard

held in San Francisco in May 1973. Indeed, the Commission's investigator was apparently similarly confused. In his report at page 3,[7/] he stated that "one-of-a-kind" and "special order" mattresses for individual customers "are exempt from the testing requirements of FF 4-72."

Respondent further suggests that the "permissive" reading is the one which makes more sense with regard to the 99 small-order mattresses in view of the considerable length of time which had elapsed after adoption of the standard without any Commission action to promulgate a "one-of-a-kind" exclusion.[8/] However, Enforcement Counsel has called attention to the fact that the regulatory posture with respect to "one-of-a-kind" mattresses was clarified through the issuance of an interpretation on November 30, 1973, which expressly

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7/ Exhibit 1 attached to the Notice of Enforcement.

8/ The Commission has only recently proposed an exemption in accordance with this section of the standard, but this excludes only physician-prescribed mattresses, which comprise "two or three" of the mattresses involved herein. 40 F.R. 32845 (August 5, 1975); Tr. 117.

stated that no exemption was in effect at that time.[9/]

Nevertheless, as of November 30, 1973, Respondent had already manufactured 94 of the 99 odd-shaped and odd-sized mattresses in question for numerous customers. Therefore, only 5 of these mattresses can be found to have been manufactured after the ambiguous "one-of-a-kind" exemption language had been officially clarified.

Respondent states that he read the standard as making it necessary to construct and test three additional mattresses of like design for each one custom-made and consequently has recently ceased this aspect of the business because it would have been prohibitively expensive. In June-December of 1973, he had assumed that such mattresses were exempt under the "permissive" reading of the regulation, believing that the Commission was not intending thereby to terminate the business of manufacturing custom-made mattresses.

9/ The notice published at 38.F.R. 33069-70 stated in pertinent part:

> "Comments received from the New York Consumer Protection Board expressed concern that one-of-a-kind mattresses might be excluded from testing under the Standard pursuant to .2(d) thereof. This paragraph provides that such mattresses "may be excluded...pursuant to rules and regulations established by the Consumer Product Safety Commission". One-of-a-kind mattresses are not presently excluded from testing under the Standard because the Commission has promulgated no regulations having that effect. Should such regulation be brought under consideration however, public comment would be invited on the subject at that time. The Commission does not consider the subject to be within the scope of this promulgation." [Emphasis added].

In rebuttal Enforcement presented a staff expert who testified that it is unnecessary to prototype-test for each custom-made mattress, provided the materials used and the methods of assembly are substantially similar and do not influence flammability.[10/] The size and shape of the mattresses are thus irrelevant and the regulation as thus construed is not oppressive. However, the interpretation as given on the witness stand was quite complex and appeared susceptible to misconstruction by a non-legal mind.

In considering the foregoing arguments, it is concluded that Respondent's assumption that because he is a renovator and custom manufacturer he was therefore exempt from FF 4-72, cannot be sustained. However, the ambiguous phraseology of the regulation and the delay in publication of a clarification deleting the proposed "one-of-a-kind" exemption until most of the mattresses at issue had been constructed provides substantial justification for mitigating the penalty for the admitted violations.

Enforcement Counsel seeks the remedy of replacement or full refund of the purchase price at Respondent's election.

10/ Tr. 146-9, FF 4-72, 1(h) and (i)

If it were intended that a CPSA form of remedy be adopted, Respondent is also entitled under Section 15(d)(1), to elect to bring the product into conformity with the standard or repair the defect.[11/] If Respondent chooses the latter option, he need only recall the 99 custom-made mattresses, label and return them to the purchasers; for, as previously indicated, the County of Alameda does not desire to return the 517 mattresses it purchased for repair, replacement or refund.

On the other hand, merely to impose an FTC style cease and desist order upon the Respondent would be meaningless in this case, since the violation is uniquely related to the June-December 1973 grace period and thus can never be repeated. Thereafter the prototype-testing requirement became mandatory.

While the labelling requirement is quite explicit, its purpose is to notify the consumer of possible danger in the most convenient and least expensive manner. To require the consumer to ship his mattress back to the factory to attach a label, thereby temporarily depriving him of its use, would be unreasonable and certainly inconvenient.

Respondent has offered to transmit a letter to the customers in question containing the same information as would have been stated on the label. But this is not sufficient because unless attached to the mattress, subsequent purchasers may not be protected.

11/ It would seem unreasonable to impose a more limited option requirement by implication under the FTC Act than would have been mandated under the express provisions of the CPSA.

Upon reflection it is concluded that the purpose of giving notice to the customer and subsequent purchasers of the fact that each mattress was not tested for flammability can be adequately served by giving written notice of the defect to the consumer and at the same time making arrangements to permanently affix the required warning label to the mattresses in question on the consumer's premises at his convenience.

A more stringent remedy would be mandated if this were a case in which Respondent had carelessly failed to label mattresses constructed of flammable components so as to place the ultimate user in jeopardy of personal injury or property damage. But, as previously indicated, this is not such a case. While ignorance of the law is no excuse, neither is there justification for the imposition of an unnecessarily harsh penalty which could substantially impair a small business enterprise[12/] where the regulation is susceptible of more than one reasonable interpretation, where the manufacturer made a good faith effort to protect his customers, and where there is no evidence that any of them are in jeopardy.

In view of the foregoing considerations and all the evidence of record, it is concluded that Respondent should be given the option, in addition to replacement and refund of the full purchase price, of notifying all 71 purchasers by certified mail, return receipt requested, of the fact that their mattresses were not

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12/ If Enforcement Counsel's full refund remedy were adopted for all 616 mattresses, the estimated cost to Respondent would be in excess of $4802. In 1973 Respondent had a net profit of $27,131; in 1974 this was reduced to $14,700.

tested for flammability--and making convenient arrangements for the attachment of the label required by FF 4-72, section .5(c)(3) on the customers' premises.

An appropriate order is attached.

Paul N. Pfeiffer
Administrative Law Judge

Decided September 19, 1975

CONSUMER PRODUCT SAFETY COMMISSION

OF THE

UNITED STATES OF AMERICA

In the Matter of CHARLES CASTRO, an individual trading as BAY AREA MATTRESS COMPANY AND KEVA MATTRESS COMPANY	)))))	CPSC Docket No. 75-2

OPINION

On March 11, 1975, the Commission's Bureau of Compliance issued a Notice of Enforcement against Respondent Charles Castro, trading as Bay Area Mattress Company and Keva Mattress Company (hereafter, Respondent) charging Respondent with violation of the Commission's Standard for Flammability of Mattresses, FF 4-72 (hereafter, mattress standard).

Respondent was charged, inter alia, with failing to test its mattresses for conformity with the requirements of the mattress standard, failing to maintain required records on those mattresses and failing to label noncomplying mattresses with conspicuous warnings of their possible flammability in lieu of testing.1/

1/ Section .5(c)(3) of the mattress standard (38 Fed. Reg. 15095, June 8, 1973) requires noncomplying mattresses manufactured between June 22 and December 22, 1973, to carry labels stating: "WARNING, this mattress does not meet the Consumer Product Safety Commission Flammability Standard for Mattresses (FF 4-72, as amended). It may be subject to ignition and hazardous smoldering from cigarettes."

On September 22, 1975, the Administrative Law Judge (hereafter, the Judge) issued an INITIAL DECISION AND ORDER. In this document, the Judge specifically found Respondent to have violated the mattress standard and, accordingly, the Flammable Fabrics Act.[2/]

The Judge, inter alia, ordered the Respondent to cease and desist from future violations of the mattress standard; to notify, by certified mail, customers that received mattresses manufactured during the period between June 22 and December 22, 1973, that such mattresses were sold in violation of the mattress standard; and to elect among offering all such customers a full refund to their purchase price, replacing the mattresses, or arranging for the attachment of the missing labels required by section .5(c)(3) of the mattress standard.

Shortly after the Judge's decision, the CPSC Enforcement Counsel filed a notice of intention to appeal and, on appeal, argued[3/] that the Judge erred in not requiring full recall of

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2/ In his order, the Judge found the Respondent admitted violating provisions of sections 3 and 5 of the Flammable Fabrics Act (as amended), 15 U.S.C. 1193; section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(b); and sections .4 and .5(c)(3) of the Standard for Flammability of Mattresses by failing to test for flammability, maintain records thereon, or, in lieu thereof, affixing a warning label to some 616 mattresses manufactured in commerce and sold between June 22 and December 22, 1973.

3/ By letter dated November 19, 1975, Counsel for Respondent requested that the Commission waive oral argument on appeal. Enforcement Counsel did not oppose this request. The Commission did not believe oral argument necessary and, accordingly, oral argument was waived. See Proposed and Interim Rules of Practice § 1025.72(f).

noncomplying mattresses. On December 11, 1975, the matter came before the Commission at its regularly scheduled Executive Session.

Upon consideration, the Commission affirms the Order issued by the Administrative Law Judge. In so doing, however, the Commission notes that it does not adopt certain of the Judge's findings. Specifically, the Commission does not believe that any claims that Respondent's violation of the law was unintentional or that Respondent acted in good faith are relevant with respect to the imposition of civil remedies under the Flammable Fabrics Act.4/ Nor does the Commission, having decided that an order contain provisions essential to protect the public health and safety, believe that those provisions should then be weakened for the purpose of minimizing the order's economic impact on one who has violated the Act.5/

Under Section 5 of the Flammable Fabrics Act, actions to obtain cease-and-desist orders are brought under the rules, regulations and procedures provided for in the Federal Trade

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4/ Throughout the Initial Decision, the Judge refers to the actions to be required under the cease-and-desist order as if they are penal sanctions and as if the Respondent's good will were relevant to consider in imposing a decision. He describes the Commission's power to order a recall for the purpose of implementing the Flammable Fabrics Act as a "serious sanction." Initial Decision, p. 11. He gives weight to the "unintentional nature of the admitted violations" in considering severity of the remedy. Initial Decision, pp. 12-13. And he mentions a "justification for mitigating the penalty for the admitted violations." Initial Decision, p. 16.

5/ At one point in the opinion, the Judge implies that the

Commission Act. It is a basic principle of law that cease-and-desist orders under the Federal Trade Commission Act are remedial and not punitive. F.T.C. v Ruberoid Co., 343 U.S. 470, 473 (1952); Niresk Industries, Inc. v F.T.C., 278 F. 2d 337, 343 (7th Cir., 1960); cert. denied, 364 U.S. 883 (1960). That is, these orders are not intended to "impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future." F.T.C. v Ruberoid, supra at p. 473.

Applying this principle in the context of the Flammable Fabrics Act has produced a degree of controversy. Some have argued that the authority to require recall of flammable fabrics from the marketplace is not remedial because it addresses past acts rather than future illegality. The Commission does not find this argument convincing. The purpose of a recall and repurchase order is to get violative products out of the hands of purchasers and, thereby, to prevent future personal injury.6/

Notwithstanding questions of the Commission's authority to order recalls under the FFA, the Commission understands

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fact that Respondent is a "small business enterprise" is relevant to the consideration of the choice of remedies to be imposed. See Initial Decision, p. 17.

6/ Heater v F.T.C., 503 F. 2d 321 (9th Cir., 1974), which held that the FTC Act does not permit restitution orders is not relevant to a recall order under the FFA. Recall orders are not intended as restitution for past conduct but rather are a necessary means for protecting the public health and safety.

that such orders are not intended to punish violators but rather to protect the public by removing dangerous products from the market. Should it be clear to the Commission that no dangerous products have been shipped or delivered in commerce as a result of a violation of the FFA, the Commission would not order a recall merely to punish one whom the Commission found to have violated the Act.7/

In addressing the instant case, therefore, the Commission has affirmed the order of the Judge because it is convinced by a careful reading of the record that, while the Respondent clearly violated the law, the violations apparently did not result in the placement in the hands of purchasers mattresses that fail the flammability test criteria of the mattress standard. Thus the imposition of a recall would have had no remedial value and would have been punitive only.

By the Commission:

Sadye Dunn
Secretary
Consumer Product Safety Commission

January 29, 1976

7/ Whether or not one should be punished for violating the law, while not relevant in the context of a recall order, is relevant when the Commission decides whether or not one should be prosecuted criminally or, if one were subject to a cease-and-desist order, when the Commission decides to impose civil penalties for violation of an order.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of CHARLES CASTRO, an individual trading as BAY AREA MATTRESS COMPANY and KEVA MATTRESS COMPANY	CPSC DOCKET NO. 75-2

ORDER

The Staff of the Consumer Product Safety Commission, having charged Respondent Charles Castro, an individual trading as Bay Area Mattress Company and Keva Mattress Company, with having violated provisions of section 3 and 5 of the Flammable Fabrics Act (as amended), 15 U.S.C. 1193, section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(b) and sections .4 and .5(c)(3) of the Standard for Flammability of Mattresses, FF 4-72 (38 FR 15095, June 8, 1973), by failing to test for flammability, maintain records thereon, or, in lieu thereof, affix a warning label to some 616 mattresses manufactured in commerce and sold between June 22 and December 22, 1973; and

Respondent having admitted the violations as charged, but having also alleged extenuating circumstances, challenged the jurisdiction of the Commission over the transactions, and opposed

the remedy of a full refund of purchase price or replacement of the mattresses as proposed by the Staff; and

A full, fair, and convenient public hearing having been held on the issues presented, IT IS HEREBY ORDERED

I

THAT Respondent Charles Castro, an individual trading as Bay Area Mattress Company and Keva Mattress Company or under any other name, and Respondent's agents, assigns, representatives and employees directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from manufacturing for sale, selling, offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, any product, fabric, or related material; or manufacturing for sale, selling or offering for sale, any product made of fabric or related material which has been shipped or received in commerce, as "commerce," "product," "fabric," and "related material" as defined in the Flammable Fabrics Act, as amended, which product, fabric or related material fails to conform to the requirements of an applicable standard or regulation continued in effect, issued or amended under the provisions of the aforesaid Act.

Specifically, Respondent is ordered to cease and desist from:

a. failing to conduct prototype flammability tests of each mattress prototype which he and his companies manufacture as required by section .4(b)(2)(1) of the Standard for the Flammability of Mattresses, FF 4-72, (Mattress Standard),

b. failing to conduct production testing on its mattresses at specified production intervals in the manner required by section .4(b)(2)(a)(2) of the Mattress Standard,

c. failing to establish production units and to randomly select a mattress or mattresses from each such unit for production testing as required by sections .4(b)(2)(a)(1) and .4(b)(2)(a)(2) of the Mattress Standard,

d. failing to label mattresses manufactured with a permanent, accessible and legible label containing the appropriate production unit identification, as required by 16 Code of Federal Regulations 303.20(b) of the rules and regulations under the Act and the Mattress Standard, and

e. failing to fully and completely maintain records which establish a line of continuity through the manufacturing and distribution process showing sampling plans used, production units, test results, details of sampling and testing procedures, disposition of rejected mattresses, manufacturing specifications, date and quantity of each sale, and name and address of each purchaser as required by 16 Code of Federal Regulations 303.20(c) of the Rules and Regulations under the Act and the Mattress Standard.

II

IT IS FURTHER ORDERED that Respondent shall, by certified mail, return receipt requested, notify all of his customers who have

purchased or to whom have been delivered, mattresses manufactured by Respondent between June 22 and December 22, 1973, that such mattresses were sold in violation of the Mattress Standard because (a) Respondent failed to test the mattress in accordance with the Mattress Standard, (b) such mattresses were required to have firmly affixed thereto, a conspicuously displayed warning label reading as follows:

> WARNING: This mattress does not meet the Consumer Product Safety Commission Flammability Standard for Mattresses (FF 4-72, as amended). It may be subject to ignition and hazardous smoldering from cigarettes.

(c) all invoices and sales papers relating to the mattresses were also required to have had such warning displayed thereon.

III

IT IS FURTHER ORDERED that Respondent elect between offering all such consumers a full refund of their purchase price or the replacement of said mattresses, or making arrangements for the attachment of the missing labels required by FF 4-72, section .5(c)(3) and actually attaching such labels on the mattresses in question at the consumers' premises at a time convenient to the latter, or, if any of said consumers declines the offer, or, after good faith efforts any of them cannot be located, Respondent shall file a detailed report of the circumstances with the Commission's Bureau of Compliance.

IV

IT IS FURTHER ORDERED that Respondent shall maintain records sufficient to establish the notification, refund, replacement or labelling of the products specified in Paragraph II and III.

V

IT IS FURTHER ORDERED that Respondent shall, within fifteen (15) days after service upon him of this Order, file with the Commission a special written and notarized report which:

(A) Sets forth the manner in which Respondent intends to comply with this Order and certifies that he will maintain the records listed in paragraphs IV and VII of this Order.

(B) Advises the Commission fully and specifically concerning (1) the identification and description of the mattresses manufactured between June 22 and December 22, 1973, (2) the identity of the purchasers of the mattresses, (3) the number of these mattresses on hand and in the channels of commerce, (4) any action taken and any further action proposed to be taken to notify customers of the requirement that warning labels be affixed to the mattresses and printed on related sales papers and of action taken to accomplish such labelling and the results thereof, (5) steps taken to insure that all mattresses manufactured will conform to the requirements of the Mattress Standard including affirmative statements showing, (a) the identification of the particular sampling plan selected, (b) the establishment of mattress production or batch units, (c) the labelling of each mattress to identify it with a production or batch unit, (d) the flammability testing

of mattress surfaces from each production or batch unit, and (e) the maintenance of records clearly relating sales to production or batch units and showing all unit sizes, test results, and the disposition of all rejected mattresses and units.

VI

IT IS FURTHER ORDERED for a period of 10 years from the date of the acceptance of this Order by the Commission that Respondent promptly notify the Commission as to any proposed sale of Respondent's business, any proposed change in the name under which Respondent does business, any change in the form of Respondent's business such as incorporation or formation of a business partnership, or the entry of Respondent into any other business partnership, or the entry of Respondent into any other business, individually or through a corporation, business partnership or other forms of doing business, or other change in Respondent's business status which may affect compliance obligations arising out of this order. Such notice shall include Respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

VII

The Commission may conduct inspections and/or require written reports to determine compliance with this Order and may direct Respondent to submit or permit the Commission to select mattresses sufficient to repeat the testing required by the Mattress Standard of any mattress prototype, production unit or batch unit which they are currently marketing. The Commission may examine and/or

require the submission of copies of the records required to be maintained by 16 CFR 302.20(c) and the Mattress Standard including (1) prototype test reports and related records including photographs which are identified to show their relationship to each test and each production or batch unit, (2) test reports and related records where there has been substitution of one or more materials going into mattresses manufactured, (3) records showing the basis for reduced sampling, if used, (4) description and manufacturing specifications of mattress prototypes and types of mattresses including size of each production or batch unit and details as to fiber content of ticking, thread, tape edge, core and upholstery materials, and type of flame retardant treatment, if any, (5) copies of any guarantees or certifications received from manufacturers of ticking thread, tape edge, core and upholstery materials, and also (6) records of notification, recall, and reprocessing or destruction of violative products.

VIII

The requirements of this Order are in addition to and not to the exclusion of other remedies such as criminal penalties which may be pursued under section 7 of the Flammable Fabrics Act, the rules, regulations and standards promulgated thereunder or any other provision of federal law

Paul N. Pfeiffer

PAUL N. PFEIFFER
Administrative Law Judge

DATE: September 19, 1975

READING ROOM COPY

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of CONGOLEUM INDUSTRIES, INC.	CPSC Docket No. 75-3

ORDER TO TERMINATE THE PROCEEDING

On August 14, 1979, the United States Court of Appeals for the Ninth Circuit filed and entered its judgment affirming in part and vacating in part the order issued by the Commission on July 14, 1975 in this proceeding under the Flammable Fabrics Act (FFA), 15 U.S.C. 1191 et seq., and remanded the matter to the Commission for further consideration in light of the Court's opinion, F.2d (No. 75-3112).

On January 8, 1980 the Commission issued an order in which it noted that several years have elapsed since the Commission issued its order on July 14, 1975, and many more since this proceeding was initiated on September 19, 1972 before the Federal Trade Commission. 1/ The Commission further noted that the positions taken in the past by the Respondent and Enforcement Counsel may now be changed raising doubts about the continuing viability of this matter and

1/ The Consumer Product Safety Commission began operations on May 14, 1973. Pursuant to 15 U.S.C. 2079(b), administration of the FFA was transferred to the Commission from the Federal Trade Commission.

forwarded the matter to the Administrative Law Judge to ascertain the current position of the parties and whether they could arrive at a voluntary settlement.

Since the commencement of this proceeding in 1972, Respondent has discontinued the manufacture and sale of carpet and is no longer in that business. The only Endureze 9113 carpet remaining is that in the possession of Congoleum. Such carpet has been held in storage pending the outcome of the Ninth Circuit appeal and of two seizure actions commenced in 1972, one in the United States District Court for the District of Rhode Island (C.A. No. 4977) and one in the United States District Court for the Eastern District of New York (C.A. No. 72-C-924). The seizure actions have been held in abeyance pending the outcome of the administrative proceedings against Congoleum and on December 13, 1979 the proceeding in the Rhode Island District Court was dismissed. A copy of that Order is attached.

Because Respondent is no longer engaged in the manufacture or sale of carpet, and has not been for quite some time, and due to the age and physical condition of the remaining Endureze carpet which has now been in storage for over seven years in one warehouse or another, Respondent believes it would be impractical to resell this carpet.

For that reason, Respondent plans to either have the carpet reprocessed to conform with 16 C.F.R. Part 1631, or to otherwise dispose of it by destruction. Because of the varied history of this proceeding and the changed circumstances since the institution of this action in 1972, the following Order is entered disposing of this action.

I

IT IS ORDERED that Respondent Congoleum Industries, Inc. a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, cease and desist from manufacturing for sale, selling, or offering for sale, in commerce, or importing into the United States, or transporting or importing into the United States, or transporting or causing to be transported, in commerce, any carpet or rugs made in whole or in part of fabric or related material, as "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which carpet or rugs fail to conform to an applicable standard or regulation issued, amended, or continued in effect, under the provisions of the aforesaid Flammable Fabrics Act;

II

IT IS FURTHER ORDERED that Respondent Congoleum Industries, Inc. will dispose of all Endureze 9113 carpet in its possession by either reprocessing it into compliance with 16 C.F.R. 1631, or by destruction; provided, however, that as a conditon precedent for those rolls of Endureze 9113 carpet subject to the jurisdiction of the United States District Court for the Eastern District of New York, the Court dismisses the pending seizure action upon the joint request of Respondent and the Commission staff; and

III

IT IS FURTHER ORDERED that prior to any destruction of the carpet or reprocessing into compliance with 16 C.F.R. 1631, Respondent will advise the Commission staff in writing of its intended means of disposition and provide ample opportunity for a representative of the Commission staff to verify such disposition.

IV

Upon the issuance of this Order, the proceeding is hereby terminated.

A copy of this Order will be submitted to the United States District Court for the District of New York, together with a request by Respondent and the Commission staff that the pending action be dismissed as moot.

FOR THE COMMISSION

Dated: April 7, 1980

Sadye E. Dunn

SADYE E. DUNN
Secretary

UNITED STATES GOVERNMENT

Memorandum

U.S. CONSUMER PRODUCT SAFETY COMMISSION

TO : Chairman
Commissioners

DATE: February 20, 1980

THRU: Sadye E. Dunn, Secretary

FROM :

Paul N. Pfeiffer, Administrative Law Judge

SUBJECT: Congoleum Industries, Inc., CPSC Docket No. 75-3, Order Terminating Proceeding With Consent of the Parties

On January 8, 1980, the Commission forwarded the above entitled proceeding to the undersigned for the purpose of ascertaining the current position of the parties and whether they could arrive at a voluntary settlement in view of the opinion of the U.S. Court of Appeals for the Ninth Circuit, filed August 14, 1979, affirming in part and vacating in part, the order issued by the Commission herein on July 14, 1975.

After considerable discussion, the parties have reached an agreement in the form of the attached Order to Terminate the Proceeding. The order in cease and desist form states that Respondent Congoleum has ceased the manufacturing of carpet and agrees to either reprocess or destroy the remaining Endurez 9113 carpet in its possession provided the U.S. District Court for the Eastern District of New York dismisses the pending seizure action upon the joint request of Respondent and the Commission staff.

In view of the forgoing, it appears that the above entitled administrative proceeding may be terminated upon the issuance of the agreed upon order to cease and desist.

Attachment

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of CONGOLEUM INDUSTRIES, INC.	)	CPSC Docket No. 75-3

ORDER TO TERMINATE THE PROCEEDING

On August 14, 1979, the United States Court of Appeals for the Ninth Circuit filed and entered its judgment affirming in part and vacating in part the order issued by the Commission on July 14, 1975 in this proceeding under the Flammable Fabrics Act (FFA), 15 U.S.C. 1191 et seq., and remanded the matter to the Commission for further consideration in light of the Court's opinion, F.2d (No. 75-3112).

On January 8, 1980 the Commission issued an order in which it noted that several years have elapsed since the Commission issued its order on July 14, 1975, and many more since this proceeding was initiated on September 19, 1972 before the Federal Trade Commission. 1/ The Commission further noted that the positions taken in the past by the Respondent and Enforcement Counsel may now be changed raising doubts about the continuing viability of this matter and

1/ The Consumer Product Safety Commission began operations on May 14, 1973. Pursuant to 15 U.S.C. 2079(b), administration of the FFA was transferred to the Commission from the Federal Trade Commission.

forwarded the matter to the Administrative Law Judge to ascertain the current position of the parties and whether they could arrive at a voluntary settlement.

Since the commencement of this proceeding in 1972, Respondent has discontinued the manufacture and sale of carpet and is no longer in that business. The only Endureze 9113 carpet remaining is that in the possession of Congoleum. Such carpet has been held in storage pending the outcome of the Ninth Circuit appeal and of two seizure actions commenced in 1972, one in the United States District Court for the District of Rhode Island (C.A. No. 4977) and one in the United States District Court for the Eastern District of New York (C.A. No. 72-C-924). The seizure actions have been held in abeyance pending the outcome of the administrative proceedings against Congoleum and on December 13, 1979 the proceeding in the Rhode Island District Court was dismissed. A copy of that Order is attached.

Because Respondent is no longer engaged in the manufacture or sale of carpet, and has not been for quite some time, and due to the age and physical condition of the remaining Endureze carpet which has now been in storage for over seven years in one warehouse or another, Respondent believes it would be impractical to resell this carpet.

For that reason, Respondent plans to either have the carpet reprocessed to conform with 16 C.F.R. Part 1631, or to otherwise dispose of it by destruction. Because of the varied history of this proceeding and the changed circumstances since the institution of this action in 1972, the following Order is entered disposing of this action.

I

IT IS ORDERED that Respondent Congoleum Industries, Inc. a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, cease and desist from manufacturing for sale, selling, or offering for sale, in commerce, or importing into the United States, or transporting or importing into the United States, or transporting or causing to be transported, in commerce, any carpet or rugs made in whole or in part of fabric or related material, as "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which carpet or rugs fail to conform to an applicable standard or regulation issued, amended, or continued in effect, under the provisions of the aforesaid Flammable Fabrics Act;

II

IT IS FURTHER ORDERED that Respondent Congoleum Industries, Inc. will dispose of all Endureze 9113 carpet in its possession by either reprocessing it into compliance with 16 C.F.R. 1631, or by destruction; provided, however, that as a conditon precedent for those rolls of Endureze 9113 carpet subject to the jurisdiction of the United States District Court for the Eastern District of New York, the Court dismisses the pending seizure action upon the joint request of Respondent and the Commission staff; and

III

IT IS FURTHER ORDERED that prior to any destruction of the carpet or reprocessing into compliance with 16 C.F.R. 1631, Respondent will advise the Commission staff in writing of its intended means of disposition and provide ample opportunity for a representative of the Commission staff to verify such disposition.

IV

Upon the issuance of this Order, the proceeding is hereby terminated.

A copy of this Order will be submitted to the United States District Court for the District of New York, together with a request by Respondent and the Commission staff that the pending action be dismissed as moot.

FOR THE COMMISSION

Dated:

SADYE E. DUNN
Secretary

COPY

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

CONSUMER PRODUCT SAFETY COMMISSION	)	
vs.	)	C.A. No. 4977
APPROXIMATELY 4562 SQUARE YARDS, MORE OR LESS, OF FLAMMABLE CARPETING, STYLE "ENDUREZE"	)	

ORDER

This Court having considered the Opinion of the United States Court of Appeals for the Ninth Circuit in that case entitled:

Congoleum Industries, Inc.

vs. No. 75-3112

Consumer Protection Safety Commission

and the parties hereto having previously stipulated:

1. To release the subject matter of this suit to Congoleum Industries, Inc., and it having been transferred to its plant in Wilburton, Oklahoma.
2. And also having stipulated to defer trial of this case pending the Appeal in the above-cited Ninth Circuit case, and it being stipulated therein that the ultimate resolution of the issues on appeal in that case would be determinative of the issues in this case.

It is hereby

O R D E R E D

that this case is hereby dismissed in that there are no issues remaining for this Court to decide.

By Order,

James E Welsh
Clerk

ENTER:

Edward W. Day
Senior District Judge - December 13, 1979.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
CONGOLEUM INDUSTRIES, INC.	)	CPSC Docket No. 75-3

ORDER

On August 14, 1979, the United States Court of Appeals for the Ninth Circuit filed and entered its judgment vacating the order issued by the Commission on July 14, 1975 in this proceeding under the Flammable Fabrics Act (FFA), 15 U.S.C. 1191 et seq., and remanded the matter to the Commission for further consideration in light of the Court's opinion,____ F. 2d____(No. 75-3112).

Several years have elapsed since the Commission issued its now-vacated order, and many more since this proceeding was initiated on September 19, 1972 before the Federal Trade Commission. 1/ The positions taken in the past by the Respondent and Enforcement Counsel may now be changed raising doubts about the continuing viability of this matter.

The Commission has decided to forward this matter to the Administrative Law Judge 2/ to ascertain the current position

1/ The Consumer Product Safety Commission began operations on May 14, 1973. Pursuant to 15 U.S.C. 2079(b), administration of the FFA was transferred to the Commission from the Federal Trade Commission.

2/ When initiated before the F.T.C., this proceeding was assigned to Chief Administrative Law Judge Daniel H. Hanscom, who continued as presiding officer after the proceeding was transferred to the Commission. The Commission does not believe this matter need be returned to Judge Hanscom.

of the parties and whether they can arrive at a voluntary settlement. In the event the parties cannot reach a voluntary agreement, the Adminsitrative Law Judge shall, in accordance with the procedure set forth in 16 C.F.R. Part 1025, Subpart F, prepare and file a proposed order. The order shall be based upon the findings of facts previously filed in this proceeding and shall reflect the decision of the Court of Appeals identified above.

FOR THE COMMISSION

Dated: January 8, 1980

Sadye E. Dunn

SADYE E. DUNN
Secretary

UNITED STATES OF AMERICA
BEFORE CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of CONGOLEUM INDUSTRIES, INC., a corporation.	DOCKET NO. 8896 WHEN BEFORE FEDERAL TRADE COMMISSION

INITIAL DECISION

By Daniel H. Hanscom, Administrative Law Judge.

Charles W. O'Connell
Counsel Supporting the Complaint.

J. Wallace Adair
Ray S. Bolze
Howrey, Simon, Baker & Murchison
1730 Pennsylvania Avenue, N.W.
Washington, D.C.
Counsel for Respondent.

ALLEGATIONS OF COMPLAINT

On September 7, 1972, the Federal Trade Commission issued a complaint in substance charging respondent Congoleum Industries, Inc. (hereinafter "Congoleum") a major manufacturer and seller of carpeting for wall-to-wall installation, with marketing carpet in interstate commerce which was flammable and violative of the Flammable Fabrics Act, as amended.

More particularly, the complaint charged that respondent Congoleum had been engaged in the manufacturing for sale, and had transported, sold and delivered "in commerce" carpet denominated Endureze 9113 which failed to conform to the Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1-70) promulgated by the Secretary of Commerce pursuant to the provisions of the Flammable Fabrics Act. In so doing, according to the complaint, respondent Congoleum engaged in acts and practices which were:

> ". . . in violation of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, and as such constituted, and now constitute unfair methods of competition and unfair and deceptive acts and practices in commerce . . ."

On November 16, 1972, Congoleum filed its answer denying that it had sold any carpet which failed "to conform to the Flammable Fabrics Act or to any standard or regulation relating thereto". Respondent further affirmatively alleged, among other things, that the procedures utilized by the Federal Trade Commission in concluding that samples of respondent's Endureze 9113 carpet had failed to meet the requirements of the Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1-70) were not in accord with the procedures permitted under such Act, or with the procedures, policies or announcements promulgated by the Federal Trade Commission, and were not statistically accurate or reliable as required by said Act.

HISTORY OF PROCEEDING

Prehearing conferences were held on December 12, 1972, and on January 19 and February 8, 1973. Many pretrial motions, applications, discovery requests, etc., were filed by one side or the other, and were ruled on by the administrative law judge.

On February 20, 1973, counsel supporting the complaint presented the case-in-chief consisting of a multi-page stipulation setting out the tests performed on respondent's Endureze 9113 style carpet, and the results thereof (Tr. 150-162). On receipt of the stipulation in evidence, complaint counsel rested. The case-in-defense was

commenced on April 9, 1973, and continued for four days until concluded on April 12, 1973. Respondent Congoleum was permitted to attack the validity of the Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1-70) and the procedures incorporated therein.

Upon conclusion of the case-in-defense, complaint counsel requested permission to offer rebuttal which was granted. Hearings on rebuttal commenced May 29, 1973, and continued for four days ending on June 1, 1973. Some evidence in surrebuttal was offered by respondent Congoleum on July 11, 1973. The record was then closed for the reception of evidence on July 20, 1973, and a briefing schedule for the submission of proposed findings and supporting memoranda was issued.

On August 2, 1973, however, counsel for respondent Congoleum moved the administrative law judge to dismiss the complaint with prejudice, and to certify such dismissal to the Commission with a recommendation for concurrence in it. In support of this motion, Congoleum argued (1) that the matter had been transferred to the newly formed Consumer Product Safety Commission during litigation 1/ and that the new Commission's "approach to the enforcement of the Flammable Fabrics Act may be different from that of the Federal Trade Commission"; (2) that the evidence showed "insufficient justification for the issuance of the complaint" and "insufficient justification for an order to cease and desist"; and (3) that there was "insufficient public interest" in the matter to warrant continuance thereof.

Although counsel supporting the complaint did not agree with the factual statements of respondent, they nevertheless concurred in the motion to dismiss. In view of such concurrence and the transfer of this proceeding to the Consumer Product Safety Commission in "midstream" so to speak, the undersigned concluded that certification of the motion to the new Commission was warranted.

1/ Transfer of this matter to the Consumer Product Safety Commission occurred on May 14, 1973, by operation of law pursuant to Section 30(b) of the Consumer Product Safety Commission Act, Public Law 92-573.

PROCEEDING BEFORE THE CONSUMER PRODUCT SAFETY COMMISSION

Accordingly, on August 2, 1973, the motion to dismiss was certified to the Consumer Product Safety Commission which took the matter under advisement and called for briefs and argument from both sides. Thereafter, on May 31, 1974, the proceeding was remanded to the undersigned administrative law judge "for issuance of an initial decision on the merits".

On August 27, 1974, on the representation of counsel for respondent Congoleum that it was impossible to file proposed findings and supporting memorandum until the middle of September 1974, the undersigned requested and was granted an extension of time to file the initial decision until November 26, 1974.

BASIS OF DECISION

The record consists of approximately 1,549 pages of transcript, two large volumes of pleadings, motions, applications, requests, rulings, and the like, and a substantial number of exhibits. The undersigned administrative law judge, having considered the entire record, makes the following findings and conclusions and issues the order set out at the end hereof:

FINDINGS OF FACT

THE FLAMMABLE FABRICS ACT AND THE STANDARD PROMULGATED THEREUNDER

1. The Flammable Fabrics Act, 15 U.S.C. 1191-1204, was approved June 30, 1953, and was amended and revised on December 14, 1967, 81 Stat. 568. The Act as amended prohibits the introduction or movement in interstate commerce of fabrics, including carpets and rugs, which are so highly flammable as to be dangerous. In order to provide a basis for determining whether particular fabrics are flammable within the prohibitions of the Act, Section 4 thereof delegates to the Secretary of Commerce authority, subject to applicable administrative procedures, to promulgate a standard of flammability.

2. Pursuant to such authority, the Secretary of Commerce, on April 15, 1970, promulgated the "Carpets and Rugs (Pill Test)", "Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1-70)". This Standard, attached hereto as Appendix 1, sets out in technical detail the test procedures to be utilized to determine the surface flammability of carpets and rugs. Section .3 "General requirements" states under "Summary of test method":

> "This method involves the exposure of each of eight conditioned, replicate specimens of a given carpet or rug to a standard igniting source in a draft-protected environment, and measurement of the proximity of the charred portion to the edge of the hole in the prescribed flattening frame."

Under "Acceptance Criterion" the Standard states:

> "At least seven of the eight specimens shall meet the test criterion in order to conform with this Standard."

Under "Test Procedure", the Standard gives detailed and specific instructions for conducting the test for flammability. In substance, the procedures require that eight specimens, each 9" X 9", be cut from a "sample of the material representative of the lot", and be tested by igniting with an incendiary pill, an "Eli Lilly No. 1588 methenamine timed burning tablet or an equal tablet", in the center of each. Under the controlled and prescribed conditions of the Standard, the burning of each specimen of the carpet from the center outward was then to be observed. The Standard provided that:

> "[i]f the charred area does not extend to within 2.54 cm. (1.0 in.) of the edge of the hole in the flattening frame at any point for at least seven of the eight specimens, the carpet or rug meets the acceptance criterion."

THE ENFORCEMENT POLICY PROMULGATED BY FEDERAL TRADE COMMISSION

3. On November 9, 1971, the Federal Trade Commission published a statement setting out its policy for enforcement

of the Flammable Fabrics Act (attached as Appendix 2). In essence it announced that every available resource would be brought to bear and that the Commission's efforts must be unyielding and unequivocal in protecting the public from "potentially dangerous flammable products covered by the Act". The objectives of the policy were declared to be: (1) to prevent entry into channels of interstate commerce of any fabrics failing the flammability standards set pursuant to the Act, (2) to stop immediately upon discovery the sale and distribution of any flammable fabric, (3) to notify the public of the potential danger of any flammable fabric, (4) to cause such flammable fabric to be taken out of the channels of commerce, and (5) to prevent the re-entry of any flammable fabric into the channels of commerce. The Enforcement Policy then outlined the procedures which the Commission's staff would follow on the failure of a product to pass the flammability test, and concluded by stating that, where tests by independent laboratories indicated that a product met flammability standards, the Federal Trade Commission would "confirm the results of the tests previously relied upon" before determining whether to continue to pursue the enforcement policy as to a particular respondent.

ENFORCEMENT PROCEDURES FOLLOWED BY THE FEDERAL TRADE COMMISSION'S STAFF

4. In carrying out the foregoing Enforcement Policy of the Commission, the following steps were taken (testimony of Mr. Edward Finch, then Assistant Director for Textiles and Furs, Bureau of Consumer Protection, particularly Tr. 263-275):

1. A sample of carpet representing a "style" would be obtained, either from the manufacturer or from a distributor in commerce, and tested pursuant to the Standard for flammability in the Commission's laboratory.

2. If one or more failing tests on the particular style occurred, the manufacturer would be notified and requested to (a) cease sale and distribution, (b) furnish the Commission with a customer list, (c) notify customers of test results, (d) recall the style from commerce, and (e) supply inventory data.

3. If the manufacturer could produce one or more passing tests, the last three of the foregoing procedures would be suspended, while one or more additional samples of the style were obtained and tested. Such tests were called "confirming tests". The practice was to test all of the samples obtained for this purpose.

4. If one or more of the "confirming tests" showed failing results, the manufacturer would be asked to continue carrying out all actions under 2. If all confirming tests showed passing results, closing would be recommended.

5. If there were one or more failing confirming tests and the manufacturer carried out the five actions listed under 2, the manufacturer would be offered an opportunity to execute a consent agreement.

6. If the manufacturer refused a consent agreement or refused to cooperate after failing initial and confirming tests, the issuance of a formal administrative complaint and possibly relief in a U.S. District Court would be recommended.

7. If an initial failing test were not followed by the submission of a conflicting test or tests, the Commission would proceed to require the voluntary actions listed under 2, and would, if cooperation were not shown, consider formal administrative action and possible action in a U.S. District Court.

RESPONDENT CONGOLEUM'S
ENDUREZE 9113 CARPET

5. Respondent Congoleum commenced manufacturing Endureze 9113 carpet in the early summer of 1971 at its plant in Wilburton, Oklahoma (Harrison, Tr. 607). A sample of this carpet is in the record (CX 1061). It is level loop carpet with a foam-rubber back. The carpet face is "olefin" (CX 1-3; RX 1-23).

6. Sales of Endureze 9113 during 1972 exceeded $465,527 (Stipulation between counsel of February 13, 1973, Tr. 162; reply of respondent Congoleum to Motion to Provide Documents and to Stipulate Facts filed January 16, 1973, with the Secretary of the Federal Trade Commission; and Respondent's Proposed Findings (p. 7)). 2/ Over ninety percent (90%) of sales of Endureze 9113 carpet were in interstate commerce (Stipulation between counsel of February 13, 1973).

7. On October 15, 1971, respondent Congoleum changed the formulation of the undercoat on the backing of Endureze 9113 carpet but did not change style name (RX 66; see also Respondent's Proposed Findings, pp. 29-33). Prior to October 15, 1971, "whiting filler" was used in the backing formulation; after that date alumina trihydrate was substituted for the "whiting filler". This change in formulation had no effect on the outward appearance of the carpet (Harrison, Tr. 610). Endureze 9113 with the "whiting filler" formulation is sometimes referred to herein as "old formulation" and Endureze 9113 made with alumina trihydrate as "new formulation".

8. Respondent Congoleum's Endureze 9113 carpet has not been manufactured since August 1973.

THE TESTING OF ENDUREZE 9113 CARPET BY THE FEDERAL TRADE COMMISSION

9. In February 1972 a Federal Trade Commission Consumer Protection Specialist from the Commission's Dallas, Texas, office obtained a sample of Endureze 9113 carpet from the manager of respondent's plant in Wilburton,

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2/ Annual sales by Congoleum Industries, Inc., of all carpet and rugs in 1972 approximated $16,700,000. In 1972 total sales of all products approximated $102,500,000. Congoleum Industries, Inc., is a subsidiary of Bath Industries, Inc., as a result of the merger into that firm on September 30, 1968, of Congoleum-Nairn, Inc. Consolidated sales of Bath and its subsidiaries in 1972 were approximately $345,000,000. Congoleum Industries, Inc., and its parent, Bath Industries, Inc., are incorporated in the State of Delaware. The complaint erroneously alleges the former to be a New Jersey corporation. (See Stipulation between counsel of February 13, 1973, Tr. 161-62).

Oklahoma. The sample came from roll 411362, 3/ and had been manufactured on October 13, 1971, prior to the change in formulation, and was thus "old formulation" carpet. The Commission's staff at that time, however, had no knowledge that Endureze 9113 carpet had been manufactured with two different formulations (see Complaint Counsel's Proposed Findings, p. 9).

10. The foregoing sample of Endureze 9113 was tested in the Commission's laboratory on April 7, 1972, and failed (CX 1). Four (4) out of eight (8) specimens burned unacceptably to within the prohibited distance of "the edge of the hole in the flattening frame" as specified in Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1-70).

11. On April 12, 1972, a member of the Federal Trade Commission staff informed respondent Congoleum by telephone of the failure of the sample of Endureze 9113, and requested Congoleum to stop the sale and distribution of Endureze 9113 and to supply the Commission with a customer list (see Stipulation of Facts filed November 6, 1973, with Consumer Product Safety Commission; Respondent's Proposed Findings, p. 9; Complaint Counsel's Proposed Findings, pp. 5, 10-11). This request was confirmed by letter the following day.

12. During the telephone call of April 12, 1972, the Federal Trade Commission staff was advised by Congoleum that the firm had in its possession passing tests of Endureze 9113. On April 25, 1972, counsel for respondent submitted by letter a passing test report (RX 24) on a sample from the same roll of Endureze 9113, 411362, which had been tested and found to fail by the Commission's laboratory on April 7, 1972.

3/ The first five digits of this number designate the master roll. As smaller rolls are cut from the master roll, usually up to four, an extra digit or letter is added to the roll number. Carpet roll number 411361, for example, is from the same master roll as 411362, and roll 47375D is from the same master roll as 473750 (Harrison, Tr. 550; Respondent's Proposed Findings, p. 8).

13. In May 1972 a Commission Consumer Protection Specialist from the Commission's Boston Regional Office obtained six samples of Endureze 9113 from an independent carpet distributor, G & M Company, in Cranston, Rhode Island.

14. On June 7, 1972, one of these six samples was tested in the Commission's laboratory and failed (CX 2). Two (2) out of the eight (8) specimens burned unacceptably. This sample of Endureze 9113 was of the same red and black color as the first failure (CX 1), and had also been manufactured by Congoleum's plant in Wilburton, Oklahoma, and came from roll 47375D. As it later developed, the undercoat of the backing of this carpet was of the "new formulation" type (RX 67A-B, test 36).

15. As a result of this second failure on Endureze 9113 carpet, respondent Congoleum, on June 13, 1972, was advised that a "confirming" test failure had been obtained by the Commission. Congoleum was requested to carry out the five steps of the Commission's Enforcement Policy of November 9, 1971 (Appendix 2), as follows: (1) stop sale and distribution of Endureze 9113, (2) furnish a customer list, (3) notify customers of test results, (4) seek removal or recall of Endureze 9113, (5) supply full inventory data (Stipulation filed November 6, 1973, with Consumer Product Safety Commission, pp. 7-8). Congoleum was also offered a consent settlement under the Commission's Rules of Practice provided the foregoing actions were taken (see Complaint Counsel's Proposed Findings, p. 10).

16. Within two days, on June 15, 1972, Congoleum submitted an additional conflicting passing test report (RX 27).

17. In August 1972, an independent carpet distributor in Cincinnati, Ohio, Acme Flooring Company, forwarded ten additional samples of Endureze 9113 carpet to the Federal Trade Commission. In the meantime, on July 12, 1972, the Commission began two seizure actions pursuant to the Flammable Fabrics Act, and quantities of Endureze 9113 carpet were seized by U.S. Marshals in the Eastern District of New York and the District of Rhode Island.

18. On August 24, 1972, one of the samples of Endureze 9113 forwarded by the distributor in Cincinnati, Ohio, was tested in the Commission's laboratory and seven (7) out of eight (8) specimens burned unacceptably (CX 3). Subsequent

evidence revealed that this was "old formulation" carpet (RX 70). The sample came from roll number 426721.

19. On September 7, 1972, the Commission's administrative complaint issued charging respondent Congoleum with marketing carpet in violation of the Flammable Fabrics Act. At this time the Commission had tested Endureze 9113 carpet 19 times (see Summary of Proceeding filed November 6, 1973, before Consumer Product Safety Commission, p. 10). Although in 16 of these tests the carpet met the Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1-70), there were three failures. Two of these failures were on "old formulation", master rolls 41136 and 42672, and one was on "new formulation", master roll 47375.

20. Thereafter, on March 6, 1973, three other tests on Endureze 9113 were made in the Commission's laboratory on samples which had been obtained from the Cincinnati, Ohio, distributor mentioned in finding 17 (CX 6). On one of these tests six (6) out of eight (8) of the specimens burned unacceptably. The two other tests showed passing results. This carpet was "new formulation" and came from roll 669422 (CX 6; RX 75).

THE COMMISSION'S TESTS WERE PROPERLY PERFORMED AND WERE VALID

21. Ms. Elaine Brophy, a textile technologist and co-supervisor of the Federal Trade Commission's laboratory, testified to the procedures followed by the Commission's laboratory in conducting these tests and in the flammability testing of carpet generally.

22. A comparison of the procedures set forth in the Standard with the testing procedures followed by the Commission's staff reveals the following (Brophy, Tr. 978-1005):

a. As a burning element the Standard calls for a methenamine tablet sold as Product No. 1588 in Catalog No. 79, December 1, 1969, by the Eli Lilly Company, or its equivalent. The Commission used the Eli Lilly product (Tr. 1002). The tablets were stored, as prescribed in the Standard, for 24 hours prior to being used in a test (Tr. 1002). Tablets that exhibited major fractures when ignited were discarded, and those test results ignored (Tr. 1003).

b. The Standard prescribes a test chamber of noncombustible material. The Commission used cubes made of asbestos for test chambers and of the dimensions called for in the Standard, each with a removable bottom. As recommended in the Standard, the Commission laboratory had two test chambers and two extra test chamber bottoms (Brophy, Tr. 1000-1001).

c. The Standard calls for a flattening frame to hold the carpet while it is being tested. The Commission used a metal plate with outer dimensions of 9" by 9", with an eight inch diameter circle cut out in the middle (Tr. 1001-1002).

d. Carpet samples were cut into eight 9" by 9" specimens as required by the Standard (Tr. 987-988).

e. The Standard calls for a circulating air oven. The Commission laboratory employed such an oven, with open wire shelves, and with a motor and fan in the bottom to circulate air around the carpet samples (Tr. 993).

f. As required by the Standard, the Commission laboratory had an air-tight, moisture-tight desiccating cabinet, for cooling specimens to room temperature prior to testing, constructed so that such specimens could be held horizontally without contacting each other. Silica gel, regenerated weekly, was used as a desiccant (Tr. 996-998).

g. The Standard requires specimens to be handled with nonhygroscopic gloves. The Commission technicians used neoprene gloves, which have that characteristic (Tr. 995).

h. The Standard requires a hood capable of being closed and having its draft turned off during each test, and capable of rapidly removing the products of combustion following each test. The Commission laboratory used such hoods. In lieu of an outside mirror for viewing the test, the hoods used had clear plexiglass doors (Tr. 999).

i. As called for by the Standard, a vacuum cleaner was used to remove all loose material from each specimen prior to conditioning (Tr. 988, 992).

j. The Standard requires the specimens to be placed in a drying oven in a manner that would permit free circulation of air around them at 105° centigrade for two hours. The Commission staff followed this procedure, checked the temperature and marked the time when the drying oven temperature reached 105° C. The specimens were removed with gloved hands after the required time, were placed in the desiccator, were timed for one hour, and were then checked to be sure they were at room temperature as the Standard requires (Tr. 988, 995-97).

k. The Standard requires that a specimen be removed from the desiccator and the methenamine tablet be lighted within two minutes. This was done (Tr. 998-99). The staff took care in all instances that the specimens were horizontal and flat on the test chamber floor, with the tablet in the precise center of each specimen. The test chamber, as required, was in a draft-free environment (Tr. 988, 1002-03, 1008).

l. As required by the Standard, the test was continued until the burning stopped, or until the burn extended to within one inch of the edge of the hole in the flattening frame. The shortest distance between the burn and the edge was measured. Before the next test, the chamber was exhausted and the oven floor was cooled to room temperature or was replaced (Tr. 988-89, 1001, 1006).

23. The Standard is not specific as to every detail of the testing procedure. The dimensions and component materials of the circulating air oven are not specified, nor is the arrangement of the samples within it; the desiccating cabinet is not described in detail; the frequency with which the desiccating material--the silica gel--must be changed is not given; the length of time a pair of nonhygroscopic gloves should be used before being washed or changed is not stated. The connection of the hood, whether its door should be closed or open and how much, is not specified. The type of vacuum cleaner to be used is not given, nor is the tester told of the exact procedure to be used in cutting the specimens. The manner in which the temperature in the oven and desiccator should be determined is not given. It is left to the tester to decide how to maintain a draft-free environment during the burning phase of the test, and when a major fracture in the methenamine tablet has occurred. It is also up to the

tester to determine when a testing cube has cooled sufficiently for another test to be conducted (see Bayliss, Tr. 358-368; Torrence, Tr. 416-418).

24. It is apparent that the Standard contemplates that the decisions enumerated in finding 23 and others like them can safely be left to the trained, experienced tester, and that some variation in details of the testing procedure will not prevent tests from falling within the bounds of the Standard. There is convincing expert testimony in the record that such variables contemplated by the Standard are not significant in terms of test results, and in fact are necessary in that a testing technician has to have discretion in certain areas in order to insure that the intent of the Standard is met (Greenfeld, Tr. 1348-1361). For example, Respondent's Proposed Findings suggest that the Commission's laboratory personnel were at fault for testing with the hood door open six inches or so, implying that this practice would be inconsistent with maintaining a "draft-protected environment". Mr. Greenfeld, who has a Master of Science degree from MIT and served as project engineer on the development of the technical base for carpet flammability standards, testified as to the effect of leaving the hood open (Tr. 1354):

> "Q. In your opinion if the door of the hood were left partly open during the test would that meet the standard?
>
> "A. Yes."

Mr. Greenfeld testified in a similar vein on other alleged variables or discrepancies (see Tr. 1348-1361).

25. Ms. Brophy, who supervised the testing of Endureze 9113 and the Commission's laboratory, is a well trained, highly qualified and competent technician. Ms. Brophy has a Bachelor's degree in Textile Technology, and was trained in the chemical and physical properties of textile fibers and products, physical testing, and the chemical analysis of textiles. Ms. Brophy had three years' experience in testing textile and wool products at the Federal Trade Commission's laboratory.

26. Comparison of the procedures followed in the Commission's laboratory and by the Commission's technicians with those set out in the Standard indicates that in testing Endureze 9113 carpet all elements of the testing procedure detailed in the Standard were followed. The Commission's staff, to the extent judgment was allowed by the Standard, relied on their experience in laboratory techniques and procedures to conform with the intent of the Standard.

27. The undersigned finds that the testing procedures followed by the Commission's laboratory in testing respondent's Endureze 9113 carpet, fully complied with the procedures set forth in the Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1-70).

PASSING TESTS ON ENDUREZE 9113 CONDUCTED BY THE COMMISSION AND RESPONDENT CONGOLEUM

28. The Commission's laboratory, as described, obtained many passing tests on Endureze 9113, both "old" and "new" formulations (see, "old formulation", RX 7-8, 14; "new formulation", RX 1-6, 9-13, 15-23, RX 45-46). In all, the Commission's laboratory conducted approximately 25 passing tests (RX 1-23, RX 45-46), obtaining 4 failures (CX 1-3, 6).

29. Respondent conducted, or had conducted by outside firms, a large number of tests of its Endureze 9113 carpet (see Stipulation of February 13, 1973, between counsel and Supplement to Stipulation of March 27, 1973; RX 1-43, RX 44a-f, RX 47-48). Congoleum performed 55 passing tests, outside firms hired by Congoleum performed another 34 and, as stated, the Commission's laboratory obtained 25 passing tests. In these tests, numbering about 114, respondent's Endureze 9113 carpet was found to have met the Standard.

THE SAMPLES OF ENDUREZE 9113 TESTED WERE "REPRESENTATIVE OF THE LOT" AS REQUIRED BY THE STANDARD

30. The Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1-70), as earlier quoted, directs the selection of a sample of carpet to be tested which is "representative of the lot and large enough to permit cutting eight test specimens". The Standard does not

define "lot". Insofar as the record discloses, however, all samples upon which tests were made, both passing and failing, were taken from ordinary production rolls of Endureze 9113.

31. Under "Test Procedure - (b) Sampling", the Standard (Appendix 2) directs that specimens selected for testing should contain the "most flammable parts of the traffic surface at their centers". In accordance with this directive, it was proper to cut samples from any portion of the rolls. If such samples were among the "most flammable" parts, the Standard was followed; if not, no one was prejudiced. Consistent with such rationale, it was proper to select red carpet for testing. If red carpet was more flammable than other colors of Endureze 9113 under the rationale of the Standard, it was permissible to select that color for testing. There is nothing whatever to indicate that the samples tested were obtained from a defective or improperly constructed portion of a roll or master roll.

32. Contrary to respondent's repeated and emphasized contentions, the Standard does not require that carpet samples be obtained totally by chance in a mathematical and statistical sense, i.e., utterly at "random". The samples need only be "representative" of the carpet. The Standard is designed to prevent the marketing of flammable carpet, to protect the public from the occurrence of fire from small ignition sources such as "glowing fireplace embers". To achieve this objective the Standard seeks to test the most flammable parts of the carpet under scrutiny. Indeed, the Standard even states that the:

> "most flammable area may be determined on the basis of experience or through pretesting."

33. The undersigned concludes that the samples of "old formulation" Endureze 9113 tested were representative, within the meaning of the Standard, of that formulation, and the samples of "new formulation" Endureze 9113 tested were representative, within the meaning of the Standard, of that formulation.

SIGNIFICANCE OF FAILING AND PASSING TESTS ON ENDUREZE 9113

34. The passing Federal Trade Commission tests, and the passing tests obtained by Congoleum and its outside firms, do not mean that the failing tests in the Commission's laboratory were mistakes, were improperly done, or that they are invalid in some manner. On the contrary, as already set out in prior findings, the failing tests were valid and properly done. The same Federal Trade Commission technician who obtained passing tests on Congoleum's Endureze 9113 also obtained significant failing tests. As described, in one instance of "new formulation" Endureze 9113, six (6) out of eight (8) specimens failed (CX 6). The failing tests were obtained on different dates, on carpet obtained from different sources, and manufactured at different times. Properly conducted failing tests, therefore, cannot be disregarded because other tests, even a large number, showed passing results.

35. What the record in this matter shows is that respondent's Endureze 9113 carpet is variable. Some failed to conform to the Standard, was flammable, and was manufactured, transported and sold in violation of the Flammable Fabrics Act. It is most improbable, if not impossible, that the Commission's investigators picked up or otherwise obtained the only samples of Endureze 9113 in the country which were not in conformity with the Standard and which were flammable or, at least, not sufficiently flame resistant. The chances against this having happened are so enormous, in the estimate of the undersigned, that such a possibility can be rejected. The conclusion is accordingly inescapable that quantities of Endureze 9113 were distributed in interstate commerce which failed to conform to the Standard and violated the Act, even though the probability is that most Endureze 9113, both "old formulation" and "new formulation", complied with the Standard and the Act.

CONCLUSIONS

1. Respondent Congoleum's Endureze 9113 carpet is a product within the meaning of the Flammable Fabrics Act, 15 U.S.C. 1191-1204, as amended and revised, 81 Stat. 568.

2. Respondent Congoleum manufactured, transported and sold quantities of Endureze 9113 carpet in interstate commerce which failed to conform to the requirements of

the Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1-70), and which violated the Flammable Fabrics Act.

3. Respondent's manufacture, transportation and sale in interstate commerce of Endureze 9113 carpet which failed to conform to the requirements of the Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1-70), and which violated the Flammable Fabrics Act, constituted unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act.

COMMENT

Respondent Congoleum emphasizes the large number of passing tests on both "old formulation" and "new formulation" Endureze 9113 carpet in contrast to the relatively few failures, pointing out that the latter were all obtained in the laboratory of the Federal Trade Commission. Respondent suggests that something was wrong with the procedures used in obtaining such failing tests (Proposed Findings, pp. 77-79; Tr. 196-97). Respondent argues that the Commission's failing results were "inconsistent" with the passing tests the Commission also obtained, and with the results reached by other laboratories (Proposed Findings, pp. 55-57, 70-71, 77-79; Tr. 196-97). In short, the suggestion is that since Congoleum and its outside laboratories obtained all "passes" and no failures, the laboratory of the Federal Trade Commission was "out of step" and its results suspect. The undersigned has given careful consideration to this argument, and finds no reason to disregard the tests on Endureze 9113 performed in the Commission's laboratory. The Commission's laboratory was equipped in accordance with the directions of the Standard, and the procedures there set out appear to have been conscientiously followed. The technician who conducted the tests, as previously set out, was a co-supervisor of the laboratory, and was competent, well trained and experienced. She not only found the failures shown by this record, but many "passes". There is no reason whatever to believe that there was anything wrong or aberrational in the tests resulting in failures. On March 6, 1973, six (6) out of eight (8) specimens of "new formulation" obtained from a roll in the possession of a distributor in Cincinnati, Ohio, burned impermissibly in

the C[redacted]ssion's laboratory and failed the Standard. 4/ There [redacted] absolutely no basis for disregarding such results. No other conclusion can be drawn from failing tests such as the foregoing than that the samples tested were flammable.

Furthermore, inconsistencies, if such there are, between the results obtained between the laboratory of the Federal Trade Commission, and the results of Congoleum and outside laboratories paid to conduct tests, would not necessarily mean that the Federal Trade Commission laboratory was in error. 5/ Rather, such inconsistencies could just as reasonably indicate bias and error in the testing procedures of Congoleum and commercial outside laboratories. And the "inconsistencies" among the tests conducted by the Commission, e.g., the Commission twice tested samples from roll 41136 with conflicting results, in the opinion of the undersigned, more probably reflect variabilities in respondent's Endureze 9113 carpet, than mistakes or deficiencies by the Commission in conducting tests.

4/ It may be noted that none of the alleged variations in tests among laboratories cited by Congoleum in questioning the Commission's failing tests (see Proposed Findings, pp. 55-56; RX 57, 58) approach six (6) out of eight (8) failing specimens.

5/ The Federal Trade Commission would not suspend enforcement procedures involving cessation of distribution, notification of customers, removal of carpet from the channels of commerce, etc., because the submission of passing Company tests provided:

> ". . . the test, relied upon by the Commission, performed in accordance with the applicable flammability standard, shows failure of the product."

And outside laboratory passing tests did not serve to suspend enforcement procedures if the Commission had a "confirming failure". See Appendix 2. These procedures were adhered to in this matter.

The failing tests were not invalidated because of the manner in which the Commission obtained samples for testing. As stated earlier, the use of a mathematically and statistically perfect system, as contended by Congoleum (see, e.g., Proposed Findings, pp. 33-54, 72, 75), by which each sample is selected for testing wholly by chance, is not required by the Standard. Rather, the Standard seeks to test the "most flammable parts" of a carpet's "traffic surface" (Appendix 1, Section .4(b), "Sampling"). The sample selected is to be "free from creases, fold marks, delaminations, or other distortions", and the "most flammable area" is to be determined by "experience" or even "pretesting". Such requirements would seem to the undersigned to be quite inconsistent with the selection of samples for testing wholly by chance, i.e., every portion of carpet having a mathematically and statistically equal chance of selection. Indeed, as a practical matter the Commission would seldom be able to obtain samples for testing in a totally, statistically and mathematically, random manner.

The mere journey by a Commission employee to a particular city, the selection of a particular distributor, and the taking of a carpet sample from a particular roll would seem in conflict with purely "random" selection. The undersigned concludes that the phrase "representative of the lot" occurring in the Standard, Section .4(b), "Sampling", does not mandate selection of samples in the manner insisted upon by respondent.

Nor is Congoleum's argument (see Proposed Findings, pp. 69-70) that the Commission erred in conducting a number of tests on Endureze 9113 any more cogent. Nothing in the Standard limited the Commission to one test of "old formulation" and to one test of "new formulation" Endureze 9113. The Standard, as just noted, even speaks of "pretesting" to determine the most flammable area of carpet. The Enforcement Policy of the Commission specifically contemplated a "confirming test" if a passing Company test was submitted (Appendix 2). Further, it seems to the undersigned incongruous to suggest that under the Standard a carpet style such as Endureze 9113, in production for months or even years, could only be tested for flammability once by an agency responsible for enforcing the Act. Human life could be at stake. Such a limitation would appear wholly inconsistent with the Congressional purpose to "prohibit the introduction or movement in interstate commerce of . . . fabrics which are so highly flammable as to be dangerous . . . ."

The fact that there were many passing tests does not mean that the failing tests should have been passing. On the contrary, the conclusion of the undersigned is that respondent's Endureze 9113 varied in its flammability characteristics. Most of it met the Standard and was not flammable, but significant and substantial quantities failed the Standard and were flammable. Under these circumstances, the undersigned is not prepared to find no violation of law and to dismiss the complaint. Brakes which fail a certain proportion of the time, however small, are not considered acceptable. Nor should carpet be considered acceptable, some percentage of which, even though small, is flammable. The Flammable Fabrics Act does not contemplate the movement of some dangerously flammable carpet in commerce provided most of it is safe. Nor does the Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1-70) contemplate such a result.

Respondent Congoleum contests this concept and asserts that "the present law and the Standard promulgated thereunder do not require all carpet on the market to pass the flammability test", and that "the Standard has a built-in 'acceptable failure rate' of 4.64 percent". Congoleum states (Proposed Findings, pp. 33-34):

> "The present law and the Standard promulgated thereunder do not require all carpet on the market to pass the flammability test and, therefore, do not place a manufacturer of carpet at its peril by requiring that 100 percent of the carpet shipped in interstate commerce pass the flammability test."

And further (p. 41):

> "The concept of a certain percentage of defective material being acceptable under the Standard can be seen most clearly from the acceptance criterion, i.e., that if seven out of eight specimens pass the flammability test, the lot of carpet or rug being tested is considered to have passed. The Standard does not by its own terms require all of the carpet to pass the test. While in any given test the percentage of defective material might be

12.5 percent (one specimen out of eight), the actual percent defective contemplated by the Standard in a statistical sense is actually only 4.64%."

If by these assertions Congoleum is contending that the Act and the Standard permit the marketing of flammable carpet provided it does not exceed 4.64 percent of the whole, the argument is rejected as without foundation or support. As noted, the Standard provides that, if seven out of eight replicate specimens cut from a sample of carpet do not burn within one inch of the edge of the flattening frame, the carpet passes and is not considered flammable. Allowing one out of eight specimens to fail does not constitute a system or plan by which 4.64 percent of the samples tested may fail the Standard. Stated more obviously, nothing in the Standard permits 4.64 percent of the carpet samples tested to have two or more specimens out of eight fail. All tests must be passing. In all tests seven of the eight replicate specimens must stop burning before the charred area reaches within one inch of the flattening frame.

The requirement of the Flammable Fabrics Act that no carpet be manufactured, transported or sold in interstate commerce which fails the Standard is not insistence on perfection. The Standard plainly allows for error by permitting one of the eight specimens in any given sample to burn, without causing the carpet to fail, i.e., such a result is not a failing test.

Respondent's arguments amount to an interpretation of the Standard and the Flammable Fabrics Act which would permit the marketing of carpet which passed the test in the Standard most of the time, but which failed some of the time. Such an interpretation, of course, would permit the manufacture and sale of quantities of flammable carpet. It would permit the routine manufacture and sale of carpet bordering the edge of flammability, so long as most of it did not cross the border and prove to be actually flammable. In the opinion of the undersigned, such a result was not the intent of Congress and is not permitted by the Standard or the Act.

REMEDY

Although respondent Congoleum's Endureze 9113 carpet is no longer manufactured, this proceeding is not academic. Respondent is a very large manufacturer of carpet and rugs. Having been found to have manufactured, transported and sold carpet in violation of the Flammable Fabrics Act, the public interest requires the entry of an order preventing such conduct in the future. Moreover, it is beyond question that quantities of Endureze 9113 carpet have been sold in interstate commerce which fail to meet the Standard and which are flammable, or at least which cannot be classified as resistant to flame.

Inasmuch as it appears probable that the preponderance of Endureze 9113 marketed, particularly the "new formulation", complied with the Standard, the problem presented is identification of the portion failing to meet the Standard. Accordingly, all rolls 6/ of Endureze 9113 manufactured, not previously tested by the Federal Trade Commission, must now be tested by, or to the satisfaction of, the Consumer Product Safety Commission to determine whether such carpet complies with the Standard. 7/ If samples of carpet from a particular roll are tested pursuant to the Standard and pass, all the carpet from that roll may be presumed to meet the Standard. Rolls of Endureze 9113 must be considered flammable where samples from such rolls fail the Standard.

Recall of carpet which has been installed is not at this juncture practicable because of the length of time most of it has been laid down, and the legal and practical problems presented by any order contemplating the taking up of carpet now on floors. Notification to members of the public in possession of the premises, however, is practical, will be of benefit, and should be accomplished. Endureze 9113 still in the possession of distributors, wholesalers, retailers, or the like, or purchased for installation but not yet installed, should be recalled to the extent possible.

6/ By "roll" is meant every roll cut from a "master roll", usually up to four.

7/ The undersigned recognizes that it may no longer be possible to obtain a sample from every roll of Endureze 9113 for testing. Respondent, however, must make every reasonable effort, in good faith, to obtain samples to the extent still possible.

Respondent contends that no order issued herein can require notification to customers or the recall of carpet which fails the Standard (Proposed Findings, pp. 109-122). Although the legislative history of the Act does not specifically indicate recall authority, it certainly does not negate such authority. Respondent argues that the specific inclusion of recall authority in the National Motor Vehicle Safety Act and in the Federal Hazardous Substances Act indicates a Congressional intent not to provide for recall in the Flammable Fabrics Act. But it can be argued with equal cogency that the inclusion of recall authority by Congress in more recent consumer protection measures indicates that Congress intends that enforcement agencies have such power rather than the reverse.

The purpose of the Flammable Fabrics Act is to keep the public from exposure to dangerously flammable products and the risk of death, injury or significant property damage. Although as indicated, the Act does not explicitly authorize recall, it does provide for seizure and condemnation, thereby indicating a stronger enforcement policy than mere use of the cease and desist order. For the Commission to carry out the purpose of the Act effectively, the recall of flammable carpet is a requisite.

If flammable carpet is in the channels of commerce, a remedy limited to an injunction against further manufacture is not only inadequate but completely fails to effectuate the purpose of the Act to "prohibit" the "movement in interstate commerce" of flammable fabrics including carpet. The undersigned concludes that the statutory scheme must contemplate recall. See Federal Trade Commission v. National Lead Company, 352 U.S. 419 (1957). Authority to require notification to customers or persons in possession of premises in which flammable carpet has been installed is assuredly included within authority to order recall.

Respondent objects to the notice order issued with the complaint, and proposed by complaint counsel in their findings, as impermissibly broad, on the ground that it extends to any product sold or distributed by respondent in commerce, not merely to those identified in the complaint.

To the extent that the order extends to products other than carpets and rugs, the objection of respondent under the circumstances herein is well taken. The order issued, however, should not be limited to prohibiting future violation only of the Standard (DOC FF 1-70). The precise violation in this proceeding was the manufacture, transportation and sale of Endureze 9113, both formulations, in commerce, in violation of the Flammable Fabrics Act and the Standard (DOC FF 1-70). Limiting the order to that precise violation would be an inadequate disposition of this matter, and futile inasmuch as Endureze 9113 is no longer being manufactured. Respondent should be prohibited from violating the Flammable Fabrics Act, and any standard promulgated thereunder, in the future manufacture, transportation, and sale of carpets and rugs. It is settled that the Commission is not limited to prohibiting an illegal practice in the precise form in which it is found to have existed. Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 473 (1952); Federal Trade Commission v. Colgate-Palmolive, 380 U.S. 374 (1965). All that is required is that the order bear a reasonable relation to the unlawful practice found to exist. Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608, 613 (1946).

ORDER

I

IT IS ORDERED that respondent Congoleum Industries, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, cease and desist from manufacturing for sale, selling, or offering for sale, in commerce, or importing into the United States, or transporting or causing to be transported, in commerce, any carpet or rugs made in whole or in part of fabric or related material, as "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which carpet or rugs fail to conform to an applicable standard or regulation issued, amended, or continued in effect, under the provisions of the aforesaid Flammable Fabrics Act.

II

IT IS FURTHER ORDERED that respondent shall obtain a sample from every roll 8/ of Endureze 9113, both "old formulation" and "new formulation", not previously tested by the Federal Trade Commission, and within 60 days from the date this order is served on respondent, shall submit all such samples to the Consumer Product Safety Commission for testing, either in its laboratory or in a laboratory or laboratories designated by it, pursuant to the Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1-70), and respondent shall bear the cost of all such tests.

III

IT IS FURTHER ORDERED that, where samples obtained from rolls of Endureze 9113 are tested under Part II hereof and fail to meet the Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1-70), the carpet in such rolls shall be deemed to be flammable and respondent shall take the following actions:

1. Where carpet from such rolls of Endureze 9113 has been installed, notify the purchaser thereof of the flammable nature of such carpet. In the event the original purchaser of such carpet is no longer in possession of the premises where it was installed, notify the person or firm in possession of the premises in lieu of the original purchaser.

2. Where carpet from such rolls of Endureze 9113 has been purchased for installation, but has not been installed, notify the person or firm in possession of such carpet and endeavor in good faith to recall it, making provision for the return to such person or firm of the purchase price of such carpet.

3. Where carpet from such rolls of Endureze 9113 remains in the possession of distributors, wholesalers, retailers, or the like, awaiting sale or delivery to the public, notify such persons of the flammable nature of the carpet and endeavor in good faith to recall it, making provision for the crediting to such distributor, wholesaler, retailer, or the like, of the invoice price of such carpet.

8/ For purposes of this order the term "roll" means any smaller roll cut from a "master roll" of Endureze 9113.

4. Where carpet from such rolls of Endureze 9113 remains in the possession of respondent, or is returned to respondent, reprocess such carpet so as to bring it into conformity with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy it.

IV

IT IS FURTHER ORDERED that respondent shall, within twenty (20) days after service upon it of this order, file with the Consumer Product Safety Commission a report, in writing, setting forth in good faith all the information known to respondent as to the disposition of every roll of Endureze 9113 manufactured by respondent, setting out in detail the proposed manner in which the samples referred to under Part II hereof are to be obtained, and setting out the manner in which compliance with the provisions of Part III will be effected.

IT IS FURTHER ORDERED that respondent notify the Consumer Product Safety Commission at least thirty (30) days prior to any proposed change with respect to it, such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change which may affect compliance obligations arising out of this order.

IT IS FURTHER ORDERED that respondent, within sixty (60) days after service upon it of this order, file with the Consumer Product Safety Commission a report, in writing, setting forth in detail the manner and form of its compliance with Part I of this order.

Daniel H. Hanscom
Administrative Law Judge

November 12, 1974

Office of the Secretary

CARPETS AND RUGS

Notice of Sta[illegible]

On December 18, 1969, there was published in the FEDERAL REGISTER (34 F.R. 19812) a notice of finding that a flammability standard was needed for carpets and rugs, to protect the public against unreasonable risk of the occurrence of fire leading to death, injury, or significant property damage, arising from the hazards of rapid flash burning or continuous slow burning or smoldering. A proposed standard, which was preliminarily found to protect the public against this unreasonable risk, was published in the same FEDERAL REGISTER. It was also preliminarily found that the proposed standard was reasonable, technologically practicable and appropriate and stated in objective terms, and that the proposed standard was limited to carpets and rugs which present unreasonable risk.

After review and consideration of the comments received pursuant to the above referenced publication of a proposed standard for the flammability of carpets and rugs; after review and consideration of the reports of the National Advisory Committee for the Flammable Fabrics Act on the proposed standard for the flammability of carpets and rugs; and upon having made appropriate changes in the proposed standard for the flammability of carpets and rugs based on those reviews and considerations, it is hereby found that the flammability standard as set out in full at the end hereof:

(a) Is needed for carpets and rugs to protect the public against unreasonable risk of the occurrence of fire arising from the hazards of rapid flash burning or continuous or slow burning or smoldering, and leading to death, personal injury, or significant property damage;

(b) Is reasonable, technologically practicable and appropriate and is stated in objective terms; and

(c) Is limited to carpets and rugs, which currently present the unreasonable risks specified in (a) above.

Intent of the Standard. There has heretofore existed no flammability standard for carpets and rugs affording protection to the general public from an unreasonable risk of the occurrence of fire. This Standard will provide a measure of that protection, in that it is particularly designed to protect the public from the occurrence of fire from small ignition sources, such as glowing fireplace embers or inadvertently discarded lighted cigarettes, cigars, or matches. These sources will usually affect only the surface of the carpet or rug, hence the Standard is one for the surface flammability of carpets or rugs. The Standard affords to the general public greater protection than is presently provided in federally owned or leased buildings, the rugs purchased for which must comply with Federal purchase specification DDD-C-95, Carpets and Rugs, Wool, Nylon, Acrylic, Modacrylic.

The effects of underlayments are not specifically considered in this Standard. Such effects, as well as the production of toxic fumes and the behavior of rugs in well-established fires in which drafts and heat transfer from walls and ceilings are important, will be the subject of further research and possibly other standards.

Small carpets and rugs. Several of the comments received in response to the notice of proposed flammability standard for carpets and rugs (34 F.R. 19812), including several from the National Advisory Committee for the Flammable Fabrics Act, pointed out that carpets and rugs of sizes less than 1.83 meters (6 feet) in major dimension and less than 2.23 square meters (24 square feet) in area may represent less risk to the public because of their smaller size and, thereby, less probability that they will be used in a manner whereby they could spread fire to other combustibles in the room, such as drapes, tablecloths, or furniture. For many uses, particularly as bath mats in bathrooms, they are not used under or near other combustible interior furnishings.

Therefore, carpets and rugs smaller than the above size limits are excluded from the definitions of "Carpet" and "Rug" given therein. Indiscriminate use of smaller carpets and rugs does represent unreasonable risk to the public, but the appended Standard is not appropriate for them. A notice of need and proposed complementary standard for small carpets and rugs is published in this issue of the FEDERAL REGISTER.

Effective date. The appended Standard, DOC FF 1-70, Standard for the Surface Flammability of Carpets and Rugs (Pill Test), shall become effective 12 months from the date of its publication in the FEDERAL REGISTER, and all carpets and rugs, as defined in the Standard, and all materials which may reasonably be expected to be used as carpets and rugs, manufactured for sale on or after that date shall comply with the Standard. Carpets and rugs, and materials which may reasonably be expected to be used as carpets and rugs, in inventory or with the trade as of the effective date shall be exempt from the Standard. All concerned parties may be required to provide records proving that carpets and rugs offered for sale after the effective date are eligible for the exemption.

Issued: April 10, 1970.

MAURICE H. STANS,
Secretary of Commerce.

CARPETS AND RUGS (PILL TEST)

STANDARD FOR THE SURFACE FLAMMABILITY OF CARPETS AND RUGS

DOC FF 1-70

.1 Definitions
.2 Scope and Application
.3 General Requirements
.4 Test Procedure
.5 Labeling

.1 *Definitions.* In addition to the definitions given in section 2 of the Flammable Fabrics Act, as amended (sec. 1, 81 Stat. 568; 15 U.S.C. 1191), and § 7.2 of the Procedures (33 F.R. 14812, Oct. 1, 1968), the following definitions apply for the purposes of this Standard:

(a) "Acceptance Criterion" means that at least seven of eight individual specimens of a given carpet or rug shall meet the test criterion [illegible]ed in this Standard.

(b) "Test Criterion" means the basis for judging whether or not a single specimen of carpet or rug has passed the test, i.e., the charred portion of a tested specimen shall not extend to within 2.54 cm. (1.0 in.) of the edge of the hole in the flattening frame at any point.

(c) "Carpet" means any type of finished product made in whole or in part of fabric or related material and intended for use or which may reasonably be expected to be used as a floor covering which is exposed to traffic in homes, offices, or other places of assembly or accommodation, and which may or may not be fastened to the floor by mechanical means such as nails, tacks, barbs, staples, adhesives, and which has one dimension greater than 1.83 m. (6 ft.) and a surface area greater than 2.23 m^2 (24 sq. ft.). Products such as "carpet squares", with one dimension less than 1.83 m. (6 ft.) and a surface area less than 2.23 m^2 (24 sq. ft.), but intended to be assembled upon installation into assemblies which may have one dimension greater than 1.83 m. (6 ft.) and a surface area greater than 2.23 m^2 (24 sq. ft.), are included in this definition. Mats, hides with natural or synthetic fibers, and other similar products in the above defined dimensions are included in this definition, but resilient floor coverings such as linoleum, asphalt tile and vinyl tile are not.

(d) "Rug" means the same as carpet and shall be accepted as interchangeable with carpet.

(e) "Traffic Surface" means a surface of a carpet or rug which is intended to be walked upon.

(f) "Timed Burning Tablet" (pill) means the methenamine tablet, weighing approximately 0.149 gram (2.30 grains), sold as Product No. 1568 in Catalog No. 79, December 1, 1969, by the Eli Lilly Company of Indianapolis, Ind. 46206, or an equal tablet.

(g) "Fire-Retardant Treatment" means any process to which a carpet or rug has been exposed which significantly decreases the flammability of that carpet or rug and enables it to meet the acceptance criterion of this Standard.

.2 *Scope and application.* This Standard provides a test method to determine the surface flammability of carpets and rugs when exposed to a standard small source of ignition under carefully prescribed draft-protected conditions. It is applicable to all types of carpets and rugs used as floor covering materials regardless of their method of fabrication or whether they are made of natural or synthetic fibers or films, or combinations of or substitutes for these.

One of a kind, carpet or rug, such as an antique, an Oriental, or a hide, may be excluded from testing under this Standard pursuant to conditions established by the Federal Trade Commission.

.3 *General requirements*—(a) *Summary of test method.* This method involves the exposure of each of eight conditioned, replicate specimens of a given carpet or rug to a standard igniting source in a draft-protected environment, and measurement of the proximity of the charred portion to the edge of the hole in the prescribed flattening frame.

(b) *Test criterion.* A specimen passes the test if the charred portion does not extend to within 2.54 cm. (1.0 in.) of the edge of the hole in the flattening frame at any point.

(c) *Acceptance criterion.* At least seven of the eight specimens shall meet the test criterion in order to conform with this Standard.

.4 *Test procedure*—(a) *Apparatus*—(1) *Test chamber.* The test chamber shall consist of an open top hollow cube made of

combustible material[4] with inside dimensions 30.48 x 30.48 x 30.48 cm. (12 x 12 x 12 in.) and a minimum of 6 [illegible] (¼ in.) wall thickness. The flat bottom of the box shall be made of the same material as the sides and shall be easily removable. The sides shall be fastened together with screws or brackets and taped to prevent air leakage into the box during use.

NOTE: A minimum of two chambers and two extra bottoms is suggested for efficient operation.

(2) *Flattening frame.* A steel plate, 22.86 x 22.86 cm. (9 x 9 in.), 6.35 mm. (¼ in.) thick with a 20.32 cm. (8 in.) diameter hole in its center is required to hold the carpet or rug flat during the course of the test. It is recommended that one be provided for each test chamber.

(3) *Standard igniting source.* No. 1566 methenamine timed burning tablet or an equal tablet. These tablets shall be stored in a desiccator over a desiccant for 24 hours prior to use. (Small quantities of sorbed water may cause the tablets to fracture when first ignited. If a major fracture occurs, any results from that test shall be ignored, and it shall be repeated.)

(4) *Test specimens.* Each test specimen shall be a 22.86 x 22.86 cm. (9 x 9 in.) section of the carpet or rug to be tested. Eight specimens are required.

(5) *Circulating air oven.* A forced circulation drying oven capable of removing the moisture from the specimens when maintained at 105° C. (221° F.) for 2 hours.[5]

(6) *Desiccating cabinet.* An airtight and moisturetight cabinet capable of holding the floor covering specimens horizontally without contacting each other during the cooling period following drying, and containing silica gel desiccant.

(7) *Gloves.* Nonhygroscopic gloves (such as rubber polyethylene) for handling the sample after drying, and raising the pile on specimens prior to testing.

(8) *Hood.* A hood capable of being closed [illegible] having its draft turned off during each test and capable of rapidly removing the products of combustion following each test. The front or sides of the hood should be transparent to permit observation of the tests in progress.

(9) *Mirror.* A small mirror mounted above each test chamber at an angle to permit observation of the specimen from outside of the hood.

(10) *Vacuum cleaner.* A vacuum cleaner to remove all loose material from each specimen prior to conditioning. All surfaces of the vacuum cleaner contacting the specimen shall be flat and smooth.

(b) *Sampling*—(1) *Selection of samples.* Select a sample of the material representative of the lot and large enough to permit cutting eight test specimens 22.86 x 22.86 cm. (9 x 9 in.), free from creases, fold marks, delaminations, or other distortions. The test specimens should contain the most flammable parts of the traffic surface at their centers. The most flammable area may be determined on the basis of experience or through pretesting.

If the carpet or rug has had a fire-retardant treatment, or is made of fibers which have had a fire-retardant treatment, the selected sample or oversized specimens thereof shall be washed, prior to cutting of test specimens either 10 times under the washing and drying procedure prescribed in Method 124-1967 of the American Association of Textile Chemists and Colorists [washing procedure 6.2(III) with a water temperature of 60° ± 2.8° C. (140° ± 5° F.), drying procedure 6.3.2(B)), maximum load 3.04 kg. (6 pounds)],[6] or such number of times under such other washing and drying procedure as shall previously have been found to be equivalent by the Federal Trade Commission. Alternatively, the selected sample or oversized specimens thereof may be washed, dry-cleaned, or shampooed 10 times, prior to cutting of test specimens, in such manner as the manufacturer or other interested party shall previously have established to the satisfaction of the Federal Trade Commission is normally used for that type of carpet or rug in service.

(2) *Cutting.* Cut eight 22.86 ± 0.64 cm. (9 ± ¼ in.) square specimens of each carpet or rug to be tested to comply with section .4(b)(1).

(c) *Conditioning.* Clean each specimen with the vacuum cleaner until it is free of all loose ends left during the manufacturing process and from any material that may have been worked into the pile during handling.[7] Care must be exercised to avoid "fuzzing" of the pile yarn.

Place the specimens in the drying oven in a manner that will permit free circulation of the air at 105° C. (221° F.) around them for 2 hours.[5] Remove the specimens from the oven with gloved hands and place them horizontally in the desiccator with traffic surface up and free from contact with each other until cooled to room temperature, but in no instance less than 1 hour.

(d) *Testing.* Place the test chamber in the draft-protected environment (hood with draft off) with its bottom in place. Wearing gloves, remove a test specimen from the desiccator and brush its surface with a gloved hand in such a manner as to raise its pile. Place the specimen on the center of the floor of the test chamber, traffic surface up, exercising care that the specimen is horizontal and flat. Place the flattening frame on the specimen and position a methenamine tablet on one of its flat sides in the center of the 20.32 cm. (8 in.) hole.

Ignite the tablet by touching a lighted match or an equivalent igniting source carefully to its top. If more than 2 minutes elapse between the removal of the specimen from the desiccator and the ignition of the tablet, the conditioning must be repeated.

Continue each test until one of the following conditions occurs:

(1) The last vestige of flame or glow disappears. (This is frequently accompanied by a final puff of smoke.)

(2) The flaming or smoldering has approached within 2.54 cm. (1.0 in.) of the edge of the hole in the flattening frame at any point.

When all combustion has ceased, ventilate the hood and measure the shortest distance between [illegible] of the hole in the flattening frame and [illegible] charred area. Record the distance measured for each specimen.

Remove the specimen from the chamber and remove any burn residue from the floor of the chamber. Before proceeding to the next test, the floor must be cooled to normal room temperature or replaced with one that is at normal room temperature.

(e) *Report.* The number of specimens of the eight tested in which the charred area does not extend to within 2.54 cm. (1.0 in.) of the edge of the hole in the flattening frame shall be reported.

(f) *Interpretation of results.* If the charred area does not extend to within 2.54 cm. (1.0 in.) of the edge of the hole in the flattening frame at any point for at least seven of the eight specimens, the carpet or rug meets the acceptance criterion.

.5 *Labeling.* If the carpet or rug has had a fire-retardant treatment or is made of fibers which have had a fire-retardant treatment, it shall be labeled with the letter "T" pursuant to conditions established by the Federal Trade Commission.

[F.R. Doc. 70-4657; Filed, Apr. 15, 1970; 8:50 a.m.]

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[4] 6.35 mm. (¼ in.) cement asbestos board is a suitable material.

[5] Option 1 of ASTM D 2654-67T, "Methods of Test for Amount of Moisture in Textile Materials," describes a satisfactory oven. ("1969 Book of ASTM Standards," Part 24, published by the American Society for Testing and Materials, 1916 Race Street, Philadelphia, Pa. 19103.)

[6] Technical Manual of the American Association of Textile Chemists and Colorists, Vol. 45, 1969, published by AATCC, Post Office Box 12215, Research Triangle Park, N.C. 27709.

[7] The vacuum cleaning described is not intended to simulate the effects of repeated vacuum cleaning in service.

[8] If the specimens are moist when received, permit them to air-dry at laboratory conditions prior to placement in the oven. A satisfactory preconditioning procedure may be found in ASTM D 1776-67, "Conditioning Textiles and Textile Products for Testing." ("1969 Book of ASTM Standards", Part 24, published by the American Society for Testing and Materials, 1916 Race Street, Philadelphia, Pa. 19103.)

UNITED STATES OF AMERICA
BEFORE CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of CONGOLEUM INDUSTRIES, INC., a corporation.	DOCKET NO. 8896 WHEN BEFORE FEDERAL TRADE COMMISSION

INITIAL DECISION

By Daniel H. Hanscom, Administrative Law Judge.

Charles W. O'Connell
Counsel Supporting the Complaint.

J. Wallace Adair
Ray S. Bolze
Howrey, Simon, Baker & Murchison
1730 Pennsylvania Avenue, N.W.
Washington, D.C.
Counsel for Respondent.

ALLEGATIONS OF COMPLAINT

On September 7, 1972, the Federal Trade Commission issued a complaint in substance charging respondent Congoleum Industries, Inc. (hereinafter "Congoleum") a major manufacturer and seller of carpeting for wall-to-wall installation, with marketing carpet in interstate commerce which was flammable and violative of the Flammable Fabrics Act, as amended.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of MAURICE A. DWECK an individual trading as M.A. DWECK	CPSC Docket No. 75-4

DECISION AND ORDER

On May 13, 1976, Administrative Law Judge David H. Allard submitted his Initial Decision On Further Hearing in this proceeding. It supplemented, and in part superseded, the Initial Decision previously filed on April 13, 1973. The Initial Decision on Further Hearing was accompanied by a proposed order directing the respondent, Maurice A. Dweck, generally to cease and desist from future violations of the Flammable Fabrics Act (FFA) (15 U.S.C. 1191 et seq.) and, as to the garments that are the subject of this proceeding, to process them so that they conform with the applicable standard of flammability under the FFA, or destroy them. For the reasons stated herein, the Commission adopts the findings of fact and conclusions of the Initial Decision, as amended by the Initial Decision on Further Hearing, and the order accompanying the Initial Decision on Further Hearing.

The subjects of this proceeding are approximately 995 dozen nylon scarves and 380 dozen boys jackets imported by the respondent in 1970 and 1971 respectively. Representative samples of these garments were tested by the Federal Trade Commission (FTC) and found not to comply with the Standard for the Flammability of Clothing Textiles (the "Standard") (CS 191-53, 16 CFR 1610.1 et seq.). Based upon the test results, the FTC filed a complaint on July 10, 1972 charging the respondent with violating the FFA and the Federal Trade Commission Act.

At the hearing held on the charges, a major issue was whether the tests conducted by the FTC complied with the requirements of the Standard. The Initial Decision, filed April 3, 1973 contained findings of fact that there were deviations from the Standard in the FTC testing procedures, and from the procedures used by commercial laboratories engaged by the respondent to independently test his garments. The Administrative Law Judge concluded that with respect to the nylon scarves only, the record was inconclusive and he dismissed the complaint. However, as to the boys jackets, he reached the conclusion that they violated the Standard notwithstanding the testing deviations.

On May 14, 1973, this proceeding was transferred to the Commission pursuant to sections 30(b) and (e) of the

Consumer Product Safety Act (15 U.S.C. 2079(b) and (e)). The appeals of the respondent and enforcement counsel from the Initial Decision were therefore filed with the Commission. Based upon information supplied by its staff, the Commission, on November 13, 1973, issued a clarification to provide guidance to those engaged in testing to determine compliance with the Standard (16 CFR 1610.61).

On December 3, 1973 the respondent moved to dismiss the remainder of the complaint on the ground that the FTC test method had not conformed to the Standard and the Commission's clarification. 1/ The motion was denied by the Commission and the Initial Decision affirmed on April 18, 1974. However, the Commission, on its own motion on September 5, 1974 determined to reconsider its denial of the respondent's motion to dismiss. The Commission also held an oral hearing on the motion to dismiss on June 6, 1975.

Thereafter, the Commission issued an order on July 25, 1975 directing the staff to retest the scarves and jackets in accordance with the clarified testing procedure. It was further ordered that the proceeding be remanded to the Administrative Law Judge to determine whether the garments violate the Standard and the FFA based upon the Commission-ordered tests.

1/ In the Matter of Cone Mills Corporation, another FFA case transferred to the Commission from the FTC, the Commission granted a motion to dismiss the complaint on substantially the same facts. That case will be discussed further herein.

Following completion of the tests conducted by the Commission staff, the results indicating that both the scarves and jackets failed the Standard were introduced into evidence. Also introduced were similar results from tests conducted by two private testing laboratories. One laboratory tested both the inner and outer surfaces of the jackets; while the outer surface of 5 garments passed, 3 of 5 failed when tested on the inner surface. The significance of this distinction will be discussed below.

Enforcement counsel moved for a summary decision before the Administrative Law Judge based upon the results of the additional testing. Following a hearing, Judge Allard filed his Initial Decision on Further Hearing. In it he found that there were no genuine issues as to any material fact in the proceeding and that the scarves and jackets fail to conform to the Standard. Having reached those conclusions, Judge Allard fashioned an order directing the respondent to cease and desist from future violations of the FFA and to bring the subject garments into compliance with the Standard by reworking them or destroy them.

The respondent contends in this appeal that the Administrative Law Judge has committed error on several matters of law and on an issue of fact. We will consider the latter first. Throughout this proceeding the respondent has

strongly taken issue with the characterization of the jackets as sweat shirts. The purpose has not been to engage in a semantic exercise but rather to limit the scope of testing of the jackets for compliance with the Standard. The Commission's staff obtained failing results principally when the jackets were tested on the fleecy inner surface. The respondent has urged that such testing was improper. This argument is based upon the provisions of 16 CFR 1610.35(e), which provides:

> Section 1610.35 Testing certain classes of fabrics.
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> * * * * *
>
> (e) Where an article of wearing apparel has a raised-fiber surface which is intended for use as a covered or unexposed part of the article of wearing apparel but the article of wearing apparel is, because of its design and construction, capable of being worn with the raised-fiber surface exposed, such raised-fiber surface shall be considered to be an uncovered or exposed part of the article of wearing apparel. Examples of the type of products referred to in this paragraph are athletic shirts or so-called "sweat shirts" with a raised-fiber inner side.

Because sweat shirts are the only garments specifically cited as illustrative of the type of garment to which the section applies, the respondent contends the provision is applicable to no other. Thus, he argues, if the garments

are cardigans and not sweat shirts, testing the inner surface was improper and the failing results are invalid.

The Commission does not accept the respondent's interpretation of section 1610.35(e). The language of the section is clear that if the covered or unexposed part, i.e. the inner surface, of a garment has a raised-fiber surface that is capable of being exposed when the garment is worn, it should be tested for compliance with the Standard. The jackets involved herein have such a raised-fiber surface 2 / and are capable of being worn with that surface exposed. 3 / Since the subject garments fall within the criteria of 16 CFR 1610.35, testing the inner surface was proper. The issue of whether the garments are or are not sweat shirts is illusory. 4 /

The provisions of 16 CFR 1610.34 independently justify testing the jackets' inner surface. That section provides:

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2 / The jackets are described in the invoice as "[b]oy's cotton knitted fleecy lined white cardigans with imprint designs, buttons on front, long sleeves." (Initial Decision, footnote 2, emphasis added.)

3 / The Administrative Law Judge found that "[t]he cardigan sweat shirts...have the capacity to be worn with the raised fiber surface [fleecy side] exposed,". Initial Decision, footnote 2.)

4 / Although it is without legal consequence, the Commission believes, based upon our inspection of the subject garment at the oral hearing on June 6, 1975 that it is what is commonly known as a sweat shirt, even though it is a cardigan style with buttons and has an emblazonment on it.

Section 1610.34 Only uncovered or exposed parts of wearing apparel to be tested.

> In determining whether an article of wearing apparel is so highly flammable as to be dangerous when worn by individuals, only the uncovered or exposed part of such article of wearing apparel shall be tested according to the applicable procedures set forth in section 4(a) of the act.

Thus, any part of a garment that is "uncovered or exposed" when worn must be tested. A part is "uncovered or exposed" if it "might during normal wear be open to flame or other means of ignition" (16 CFR 1610.31(e)). In view of the purpose of the Standard to protect consumers (in the instant case, children) from injury resulting from the accidental ignition of their clothing, the standard of "might be exposed" should be liberally applied. (See United States v. Jackets, 14,928 More or Less, etc., 2 Consumer Product Safety Decisions (CCH) para. 75,114 (W.D. Ky. July 1, 1976).)

The jackets imported by the respondent are cardigans that may be worn open or, by fastening the buttons, closed. The Administrative Law Judge made no finding as to whether the inner surface might be exposed if the jackets were worn completely or partially open. Based upon our observation of the jacket at the oral hearing on June 6, 1975 and inspection of a sample, we find that the inner fleecy surface may be so exposed. Accordingly, 16 CFR 1610.34 requires that the inner surface be tested for compliance with the Standard.

We now turn to the respondent's contention that the Administrative Law Judge, and the Commission erred as a matter of law in two respects.

The first is that it was improper to rely upon test results derived from test procedures adopted after the importation of the subject garments. The second is that the Commission's decision in the Matter of Cone Mills Corporation, FTC Docket No. 8900, (hereafter "Cone Mills") mandated dismissal of this proceeding 5/ We find respondent's contentions to be without merit.

The respondent claims that the decision of the Administrative Law Judge is in error in that it is "based upon facts which were determined and upon procedures which were adopted after the importation of the children's sweaters and of the scarves involved". Since the respondent has provided no further explanation, we infer that he is

5/ The respondent also claims error with respect to the Commission's order of October 26, 1976. That order conditionally granted a joint motion to amend the proposed order accompanying the Initial Decision on Further Hearing by adding an additional option for disposition of the non-complying garments. As submitted, the proposed order requires respondent to either reprocess the goods so that they conform to the Standard or to destroy them. The motion sought to allow respondent to export the garments to the foreign manufacturer to be reprocessed to meet the Standard in accord with the Commission's Policy on Exportation of Non-complying Goods (16 CFR 1602.2). The motion was granted conditioned upon respondent filing a performance bond to assure that the processing would be done and the garments reimported. The bond was not submitted and this appeal was pursued. Since the respondent failed to specify the nature of the error in the October 26, 1976 order, we are unable to comment. However, the Commission sees no error.

referring to the Commission's action in issuing a clarification of the testing procedure to insure that the letter and spirit of the FFA and the Standard were being met. As recited above, the Initial Decision concluded that the FTC test results were unreliable due to testing procedure irregularities. After the November, 1973 clarification of the test procedures, the Commission directed the staff to retest the subject garments in accordance with the clarification. We disagree with the respondent's contention that the testing procedures were adopted after the importation of the garments. The Standard became mandatory in 1954, 6/ when the Flammable Fabrics Act became effective. The clarification, now codified at 16 CFR 1610.61, merely interprets and clarifies the requirements of the Standard that have been mandatory since 1954.

Nevertheless, even if the respondent were correct in his implied characterization of the clarification as a new rule or procedure retroactively applied, his conclusion that it is thereby invalid is not correct. 7/ In Securities

6/ Flammable Fabrics Act of 1953, Ch. 164, 67 Stat. 111, as amended Ch. 833, 68 Stat. 770(1954).

7/ FFA section 4(d) (5 U.S.C. 1193(d)) provides that 5 U.S.C. 551-559 (Administrative Procedure Act) shall apply to the issuance of all standards and regulations under section 4 of the FFA. 5 U.S.C. 553(a) and (d)(2) exempt interpretive rules from the public comment and delayed effective date requirements. The effect of this appeal is to make a collateral attack upon the Commission's issuance of the clarification.

and Exchange Commission v. Chenery Corp., 332 U.S. 194, 203 (1964), the Supreme Court announced the following standard to serve as a guide in deciding whether to grant or deny retroactive force to newly adopted administrative rules:

> ...Every case of first impression has a retroactive effect, whether the new principle is announced by a court or an administrative agency, but such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal or equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

Thus, as applied to this case, it is necessary to consider whether the application of modified testing procedures that were not in existence when the subject goods were imported produces a result that is contrary to the design of the Flammable Fabrics Act, or offends legal or equitable principles. The Administrative Law Judge found that the testing procedures of both the FTC and the commercial laboratories deviated from requirements of the Standard. The Commission's clarification served to eliminate the deviations. The retesting in accordance with the clarification was harmonious with the statutory purpose, rather than contrary to it. The retesting worked no injustice or inequity. The respondent did not rely upon the old procedure to his detriment; rather, he attacked it. The clarification has resulted in a testing procedure that

is less stringent and thereby more favorable to the respondent. that the respondent's garments failed to meet the Standard under the new testing procedure is not a basis for rejecting the procedure. Thus, we do not find error in Judge Allard's reliance on test results produced by testing conducted in accordance with the clarification.

The respondent contends that both the Administrative Law Judge and the Commission erred in not dismissing the case either in response to his motion or in accord with our decision in Cone Mills. Since there is no legal argument nor are any cases cited, we are left to speculate as to respondent's theory. In Cone Mills, the respondent was charged with producing cotton flannelette fabric that failed to comply with the Standard. As here, the Administrative Law Judge, on August 29, 1973, issued an Initial Decision in which he found that the tests performed by the FTC laboratory were defective. Cone Mills moved to dismiss the complaint. By order dated January 18, 1974, the Commission, without ruling on the merits, dismissed the case for policy considerations. The order also provided that "the Commission intends that its interpretive regulation of November 13, 1973 be applicable to this [Cone Mills] and to all cases now pending before the Commission; and that the disposition of these cases be guided by this decision." The respondent argues that the Commission was obligated to grant his motion of December 3, 1973, to dismiss his case.

The record of this proceeding reflects that the Commission contemplated over a period of time what action would be appropriate. After first denying the motion and affirming the Initial Decision on April 18, 1974, the Commission, acting on its own motion, determined that it would reconsider the motion and would hear oral argument. The decision to order retesting and remand was issued thereafter on July 25, 1975. While we recognize that there is a value in consistency in opinions, it does not outweigh the need to fashion relief appropriate for the facts and circumstances of each proceeding. We believe that the latter was accomplished here, even at the price of some inconsistency. Since consistency is not judicially required, we find no error in the decision not to apply our holding in Cone Mills to this proceeding. See Virginian Rwy Co. v. United States, 272 U.S. 658, 47 S. Ct. 222 (1926); United Van Lines v. United States, 266 F. Supp. 586 (E.D. Mo. 1967).

The Commission has found no error in the Initial Decision as amended by the Initial Decision on Further Hearing, nor has it found any merit in respondent's contentions. Accordingly, it is

ORDERED that the Initial Decision as amended by the Initial Decision on Further Hearing is AFFIRMED. It is further

ORDERED that the proposed order attached to the Initial Decision on Further Hearing shall issue.

FOR THE COMMISSION

Richard E. Rapps

RICHARD E. RAPPS
Secretary
Consumer Product Safety Commission

DATED: August 24, 1977

4

Filed: April 13, 1973

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Scope of Order
D. 8452
March 26, 1973
82 FTC 229

In the Matter of

MAURICE A. DWECK,
an individual trading as
M. A. DWECK.

DOCKET NO. 8893

INITIAL DECISION

By David H. Allard, Administrative Law Judge.

MAILED
APR 23 1973
LEGAL RECORDS

Leonard H. Goldstein and
William H. Garber,
Counsel Supporting the Complaint.

Shapiro, Fried, Weil & Scheer,
Miami Beach, Florida,
by Herbert S. Shapiro,
Counsel for Respondent.

PRELIMINARY STATEMENT

On July 10, 1972, the Federal Trade Commission issued this complaint charging the respondent with violating the Federal Trade Commission Act and the Flammable Fabrics Act, as amended.

Hearings were held at Miami, Florida on October 31, 1972, and at New York, New York on January 17, 1973. At those hearings, testimony and documents were incorporated into the record in support of the complaint as well as in opposition thereto. This proceeding thus is before the Administrative Law Judge upon the complaint, answer, testimony and other evidence, proposed findings of fact, conclusions and briefs filed by complaint counsel and by counsel for respondent. The proposed findings of fact, conclusions and briefs in support thereof submitted by the parties have been carefully

considered by the Administrative Law Judge, and those findings not adopted either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matter.

Having heard and observed the witnesses and having carefully reviewed the entire record 1/ in this proceeding, together with the proposed findings, conclusions and briefs submitted by the parties as well as replies, the Administrative Law Judge makes the following findings as to the facts, conclusions, and order:

FINDINGS OF FACT

1. Respondent Maurice A. Dweck is an individual trading as M. A. Dweck. He is engaged in the importation and sale of novelty and souvenir items and wearing apparel, including but not limited to ladies' scarves and boys' cardigan type sweat shirts. The business address of respondent is 715 Washington Avenue, Miami Beach, Florida. (Comp. par. 1; Ans. par. 1).

2. Respondent is now and for some time past has been engaged in the sale and offering for sale, in commerce, and the importation into the United States and has introduced, delivered for introduction, transported and caused to be transported in commerce, products, as the terms "commerce" and "product" are defined in the Flammable Fabrics Act, as amended. Other findings proposed by complaint counsel and not objected to by respondent are set forth in Appendix 1, and incorporated herein.

A. Respondent imported a quantity of 995 dozen scarves from Japan under invoice No. 332-70, dated June 8, 1970 (Tr. 82, 84; CX 18). They are described as "Solid color Nylon Georgette with Gold Check (TA1877) Scarfs, Size: cut 28" x 28", 4 side machine hemmed.**** Color assorted." (CX 18).

1/ References to the record are made in parenthesis, and certain abbreviations are used as follows:

Comp. - Complaint	Tr. - Transcript Page
Ans. - Answer	CX - Commission Exhibit
	RX - Respondent Exhibit

B. Respondent imported a quantity of 380 dozen Style No. 6118 cardigan type sweat shirts from Hong Kong under invoice No. 7131-B, dated April 7, 1971. 2/ (Tr. 84, 85, 96; CX 19). The name of the manufacturer is Wang Ngai Garment Factory, Kowloon, Hongkong (CX 19). Sizes range from Boys Size 2 to 16 (CX 19).

3. The laboratory of the Federal Trade Commission has tested representative samples of the scarves and cardigan sweat shirts.

4. All of the parties agree that Commercial Standard 191-53 prescribes the method of testing for flammability, the subject cardigan sweat shirts and scarves imported by the respondent. 3/ (Tr. 108).

5. As a result of these tests, seven cardigan sweat shirts and three scarves were classified as dangerously flammable. 4/ (Tr. 104-06, 154, 155; CX 1-B, 2-B, 3-B, 10-B, 12-B, 13-B, 14-B, 15-B, 17).

2/ The cardigan sweat shirts, designed to be worn by young children, have the capacity to be worn with the raised fiber surface [fleece side] exposed (Tr. 97, 101). The description on the invoices read: "Boy's cotton knitted fleecy lined white cardigans with imprint designs, buttons on front, long sleeves." (Tr. 84-85). The cardigan type sweat shirts described in the complaint are the identical item.

3/ Rule 4 of the Rules and Regulations of the Flammable Fabrics Act requires that only the uncovered or exposed part of articles of wearing apparel be tested. The exception to the rule is set forth in Rule 6(e) which reads as follows:

> "Where an article of wearing apparel has a raised fiber surface which is intended for use as a covered or unexposed part of the article of wearing apparel but the article of wearing apparel is because of its design and construction, capable of being worn with the raised-fiber surface exposed, such raised-fiber surface shall be considered to be an uncovered or exposed part of the article of wearing apparel. Examples of the type of products referred to in this paragraph are athletic shirts or so-called 'sweat shirts' with a raised-fiber inner side."

4/ Raised surface fabrics such as the fleece side of the cardigan sweat shirts are classified as Class 3, rapid and intense burning, when the flame spread time is less than 4

A. The cardigan sweat shirts were tested on the fleece side by all laboratories, the Federal Trade Commission as well as independent, as required by Rule 6(e) under the Flammable Fabrics Act (Tr. 126, 210).

B. In testing products with a high nap such as the fleece side of the cardigan sweat shirts imported by respondent, the variability of the fabric causes inconsistent results not only from garment to garment but from comparisons of times obtained in testing swatches from the same garment. 5/ (Tr. 112, 251, 252).

C. Three of the scarves imported by respondent were tested in the Commission laboratory and each test resulted in a Class 3 rating with failing times of 3.3 seconds, 3.2 seconds and 3.3 seconds, respectively. 6/ (Tr. 155; CX 1-B, 2-B, 3-B).

(footnote continued)

seconds; Class 2, intermediate flammability, when the flame spread time is from 4 to 7 seconds; Class 1, normal flammability, when the flame spread time is more than 7 seconds. Textiles rated as "Class 3" are considered dangerously flammable and are subject to enforcement action under the Flammable Fabrics Act. (Commercial Standard 191-53; CX 20, Sec. 3.1) Plain surface fabrics such as the scarves in question have only two flammability classifications, Class 1, normal flammability, when the time of flame spread is three and one-half seconds or more, and Class 3, rapid and intense burning, when the time of flame spread is less than three and one-half seconds (67 Stat. 11; 15 U.S.C.A. 1191, Sec. 4(c)).

5/ For example, tests of these cardigan sweat shirts by the Commission laboratory show Class 3 (rapid and intense burning), Class 2 (intermediate flammability), and Class 1 (normal flammability) results (Tr. 112; CX 9-B, 10-B, 12-B, 13-B, 14-B, 17, 15-B, 20). Tests of these cardigan sweat shirts by independent laboratories disclosed Class 1 (normal flammability) and Class 2(intermediate flammability) ratings. (Test reports attached to respondent's Answer).

6/ A single test by Better Fabrics Testing Bureau, Inc., on one of the scarves imported by respondent disclosed a time of 3.8 seconds in the original state. (Test report attached to respondent's Answer). A single test by United States Testing Co., Inc. on an individual scarf imported by respondent disclosed a time of 3.87 seconds in the original state which is a marginal passing rate. This would tend to indicate the need for additional testing (Tr. 253, 254; Test report attached to respondent's Answer).

6. Differences in test results, Commission versus respondent, are caused by a number of imponderables.

A. Fabric Variability. 7/ With garments having a high nap, such as the fleece side of the cardigan sweat shirts here, there is a high degree of variability in the construction of the nap, not only from garment to garment but from one portion of a garment to another portion of the same garment. Because of this fact, tests of the independent laboratories introduced by respondent were very high times as well as very low times on the same garment (Tr. 112, 251, 252). Since Commercial Standard 191-53 requires that all the times be computed in arriving at the average burning rate, one extremely high time may cause a passing test even though all the other times are extremely low. Fabric variability is probably accountable for the fact that of the cardigan sweat shirts tested by the Commission laboratory, some passed while others failed even though the same test procedures were utilized by the same technologist. Although the independent laboratories did not obtain failing results on their exhibits tested, four of those garments were rated as "Class 2" (intermediate flammability). This again would appear to be in all likelihood due to the variability of napped fabrics. (See test reports attached to respondent's Answer; CX 21, 22).

B. Variance in Testing Equipment. The Federal Trade Commission laboratory testing procedures deviate from Commercial Standard 191-53, and the blueprints referenced therein for the construction of the flammability tester.

(1) The Commission uses plates on specimen holders that are matched while Commercial Standard 191-53 specification requires matched plates. So do independent laboratories (Tr. 259).

7/ The scarves here involved have a plain surface with no nap and therefore fabric variability would appear to be de minimus factor. This is apparent from the fact that all three of the scarves tested by the Commission failed, while each of the two scarves tested by the independent laboratories passed with results that were extremely close: only .67 seconds separating the highest passing from the lowest failure. While less than 3.5 seconds is considered failing for plain surface fabrics, the three Commission tests in the original state showed failing times of 3.3, 3.3 and 3.2 seconds while the two independent laboratory tests produced passing results of 3.87 and 3.8 seconds in the original state (CX 1-B, 2-B, 3-B; Respondent's test reports attached to Answer).

(2) The brush used in the brushing device was loose, ragged and irregular in September 1972 (Tr. 217). This brush had been in use only since May 1972, and was not the brush used in conducting the tests on the garments here involved in 1971 (Tr. 345).

(3) Rather than anhydrous chloride, the Commission uses silica gel as a dessicant. So do independent laboratories (Tr. 261, 262, 302).

(4) The Commission's laboratory has tension springs attached to the door of its flammability tester (Tr. 219). Independent laboratories use either tension springs or a pulley system modification on the doors of their testers (Tr. 259, 260, 295).

(5) There is no clamp on the brushing device in the Commission laboratory (Tr. 264). Apparently, independent laboratories do not have clamps on their brushing devices (Tr. 274, 295).

C. Deviations from the Standard and blueprints are also made by independent laboratories. The most significant and apparently the only ones appearing on the record that could have a meaningful effect on the results obtained from testing here, are the insertion of the sky hook 8/ in the tester as an additional thread guide and the use of L shaped thread guides in place of curved thread guides provided in the Standard and blueprints. So does the National Bureau of Standards (Appendix 2).

Neither Commercial Standard 191-53 nor the blueprints referenced therein provide for the use of a sky hook or L shaped thread guides (Tr. 114, 232, 294, 311, 312, 343). There is also no dispute that the use of the sky hook and L shaped thread guides have a substantive effect on the test

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8/ A sky hook is described as an additional thread guide which protrudes from the ceiling of the tester and has the effect of making the thread parallel (Tr. 114, 244). United States Testing Co., Inc. started placing a sky hook on its machines "somewhereas around" 1965 (Tr. 235).

results obtained. 9/ The apparent basis is their interpretation of the term "suitable thread guides" in Section 4.2.7 of the Standard (Tr. 223; CX 20). 10/

D. The record clearly establishes that the objective of the testing procedures set up by Commercial Standard 191-53 is to have the thread or stop cord parallel to the specimen surface in tests for flammability (Tr. 341-42).

9/ An expert witness emphasized that:

> "in testing raised surface fabrics, the use of a 'sky hook' and inverted 'L' shaped thread guides or hooks in a flammability testing apparatus, with all other things being equal, generally causes average burning times higher than would be the case with a testing apparatus not containing the so-called 'sky hook' and inverted 'L' shaped guides or hooks" (CX 21).

> "raised surface fabrics frequently exhibit a low but rapidly spreading flame (surface flash). Such flames have been observed to pass under and not burn the 'stop cord' where the latter is parallel and at the maximum possible height from the fabric which is accomplished by the use of the 'sky hook'."

> "where a produce is of a marginal nature from a flammability standpoint, the use of a 'sky hook' mechanism in the testing apparatus may cause passing results whereas failing results may be obtained in testing the same product without use of the 'sky hook'." (CX 22).

10/ That section reads as follows:

> "Stop cord (G, fig. 2) - This cord, stretched from the spool (P, fig. 2) through suitable thread guides provided on the specimen frame and chamber walls permits the lacing of the cord in the proper position exactly 5 inches from the point where the center of the ignitition flame impinges on the test specimen. The stop cord consists of a No. 50 mercerized sewing thread and measures the rise and spread of the flame from the test specimen." (emphasis added).

CONCLUSIONS

1. With regard to the cardigan sweat shirts, it is the considered judgment of the Administrative Law Judge that the fabric variability factor inherent in the nature of the Hong Kong manufactured cotton knitted, fleecy lined garments results more often than not in deviations in the testing results for flammability. In light of this, (the fact that representative samples tested by the Commission did not meet minimum standards) under the Flammability Act, as amended and the further fact that these garments are designed for wear by young children, the Administrative Law Judge reaches the inescapable conclusion that the aforesaid acts and practices of respondent were and are in violation of the Flammable Fabrics Act, as amended, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

2. With regard to the ladies' scarves, the record is inconclusive. Fabric variability is not a factor here in explaining the different test results by the Commission and by respondent's independent testing. In light of the fact that even Commission counsel recognize the fact that use of the sky hook or L shaped thread guides have a "substantive effect on the test results obtained," the test equipment and procedures would appear to be dominant in resolving the factual disputes here. That dominant factor leads one to the inescapable conclusion that this record will not demonstrate with substantial evidence that the acts and practices of respondent with regard to ladies' scarves, are in violation of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder. The complaint will be dismissed only to this extent.

3. The Federal Trade Commission has jurisdiction of and over respondent as well as the subject matter of this proceeding.

O R D E R

IT IS ORDERED that respondent Maurice A. Dweck, individually and trading as M. A. Dweck, or under any other name or names, his successors and assigns, and respondent's representatives, agents and employees, directly or through any

corporation, subsidiary, division or other device, do forthwith cease and desist from selling, offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, cardigan sweat shirts, which garments fail to conform to an applicable standard or regulation issued, amended or continued in effect, under the provisions of the aforesaid Act.

IT IS FURTHER ORDERED that respondent notify all of his customers who have purchased or to whom have been delivered the cardigan sweat shirts, of the flammable nature of said garments and effect the recall of said garments from such customers.

IT IS FURTHER ORDERED that the respondent herein either process the cardigan sweat shirts which gave rise to this complaint so as to bring them into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said garments.

IT IS FURTHER ORDERED that the respondent shall, within ten (10) days after service upon him of this Order, file with the Commission a special report in writing setting forth the respondent's intentions as to compliance with this Order. This special report shall also advise the Commission fully and specifically concerning (1) the cardigan sweat shirts

which gave rise to the complaint, (2) the number of said garments in inventory, (3) any action taken and any further actions proposed to be taken to notify customers of the flammability of said garments and effect the recall of said garments from customers, and of the results thereof, (4) any disposition of said garments since February 23, 1971 and (5) any action taken or proposed to be taken to bring said garments into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said garments and the results of such action.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to any proposed sale of respondent's business, any proposed change in the name under which respondent does business, any change in the form of respondent's business such as incorporation or formation of a business partnership, or the entry of respondent into any other business individually or through a corporation, business partnership, or other form of doing business, or other change in respondent's business status which may affect compliance obligations arising out of this Order.

David H. Allard,
Administrative Law Judge.

April 13, 1973

APPENDIX 1

Proposed Findings submitted by complaint counsel to which respondent does not object:

1. Respondent Maurice A. Dweck is an individual trading as M. A. Dweck. (Admitted by respondent's answer)

3. Respondent imported a quantity of 995 dozen scarves from Japan under invoice No. 332 - 70 dated June 8, 1970. (Admitted by Stipulation - Tr. Fudge 84, CX 18)

5. The Flammable Fabrics Act was enacted by Congress on June 30, 1953. (67 Stat. 111; 15 U.S.C.A. 1191)

6. The method of testing articles of wearing apparel for flammability is prescribed by Commercial Standard 191-53. (67 Stat. 111; 15 U.S.C.A. 1191, Sec. 4(a))

7. The Flammable Fabrics Act was amended and revised by Congress on December 14, 1967. (81 Stat. 568)

8. Commercial Standard 191-53 is a standard continued in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

(Public Law 90-189, S. 1003, 90th Congress, 1st Session (81 Stat. 568), approved December 14, 1967, which amended and revised the Flammable Fabrics Act, contains a savings clause (81 Stat. 574) which reads:

"Sec. 11. Notwithstanding the provisions of this Act, the standards of flammability in effect under the provisions of the Flammable Fabrics Act, as amended, on the day preceeding the date of enactment of this Act, shall continue in effect for the fabrics and articles of wearing apparel to which they are applicable until superseded or modified by the Secretary of Commerce pursuant to the authority conferred by the amendments made by this Act."

10. The apparatus used in testing for flammability under Commercial Standard 191-53 was developed by industry under the auspices of the American Association of Textile Colorists and Chemists (AATCC) and is manufactured by the United States Testing Co., Inc. (Tr. Krumholz 236-238)

12. Neither Commercial Standard 191-53 as it relates to the method of testing nor the blueprints referenced therein

have been revised or amended since the enactment of the Flammable Fabrics Act in 1953. (Tr. Neily 135, Baker 291, Krumholz 234)

17. Certain of subject garments imported by respondent were tested for flammability by United States Testing Co., Inc., Hoboken, New Jersey and Better Fabrics Testing Bureau, Inc., New York, New York. (Respondent's Answer)

25. Commercial Standard 191-53 permits the use of suitable thread guides on the specimen frame and "chamber walls". (CX 191-53, Sec. 4.2.7, CX 20)

29. The flammability testers utilized by the Commission laboratory contain neither a sky hook nor L shaped thread guides. (Tr. Ryan 335, Krumholz 220, Baker 282, 283)

46. The Federal Trade Commission is charged by Congress with the responsibility of enforcing and administering the Flammable Fabrics Act, as amended. (81 Stat. 568)

(Tr. 340).

THE ASSISTANT SECRETARY OF COMMERCE
Washington, D.C. 20230

SEP 22 1972

Honorable Sam J. Ervin, Jr.
Chairman, Committee on Government
Operations
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

We are pleased to provide you with the information you have requested on the flammability testing of cotton flannel in your letter of August 22. Your letter specifically concerns the testing of cotton flannel produced by Cone Mills and enclosed a letter and attachments from Mr. Lewis Morris, President of Cone Mills Corporation. This test method is the one specified in CS 191-53.

Before addressing your specific questions, we would like to clarify the role of the National Bureau of Standards in flammability testing. The Bureau does not conduct any testing for compliance with the Flammable Fabrics Act. The only testing done at the Bureau is in support of the Bureau's research and test development programs. For example, testing of fabrics from actual accident cases is conducted as a part of the collection of information and data used to place priorities and to provide the backup for standards.

Question 1: "To the best of your knowledge, is there a difference in either the method or equipment used in the FTC laboratory in making flammability tests on cotton flannel from the methods and equipment used by -- (a) The Bureau of Standards; (b) The United States Testing Company, the Better Fabrics Testing Bureau; or (c) The textile industry generally:"

(a) Testing at the National Bureau of Standards is usually conducted using the "sky hook" referred to in the Cone Mills letters. It is our understanding that the Federal Trade Commission does not use this modification. The

"sky hook" provides a more reproducible string-up in that the thread is positioned at the top of the thread guide on the specimen holder and parallel to the specimen surface. We also understand that the FTC does not position the "stop cord" parallel to the specimen surface, but positions the "stop cord" in a triangular configuration. Although CS 191-53 is ambiguous on correct "stop cord" positioning (see paragraph 4.7.4 of CS 191-53 (copy enclosed)) and several "stop cord" positions could result from this ambiguity, it is our opinion that the correct interpretation of the standard is to position the "stop cord" parallel to the specimen surface and at the top of the guides.

(b) (c) We have no valid information for comparing FTC equipment or procedures to those used by the United States Testing Company, the Better Fabrics Testing Bureau; or the textile industry in general.

Question 2: "In testing cotton flannel for flammability in the Bureau of Standards, is the 'stop cord' positioned parallel to the specimen?"

Yes, parallel and at the top of the guides.

Question 3: "If the 'stop cord' is not in a parallel position, is the likelihood of test failures increased in the case of cotton flannel?"

Conducting a test in the CS 191-53 apparatus with the "stop cord" not parallel to the surface of the specimen could either increase or decrease the likelihood of failure, depending on the nature of the fabric being tested. More important than parallelism is the distance the "stop cord" is away from the fabric surface. Neither of these parameters is specified in CS 191-53. Because of this and several other ambiguous features CS 191-53, we have initiated the development of a revision and clarification of this standard.

Cotton flannel (and other napped fabrics) frequently exhibit a low but rapidly spreading flame (surface flash). Such flames have been observed to pass under and not burn the "stop cord" where the latter is parallel and at the maximum possible height from the fabric.

Putting the "stop cord" nearer to the surface, either parallel and near all across or not parallel and nearest at one end, increases the likelihood that such flames will burn the "stop cord". If the fabric base burns rather than surface flashes, the precise positioning of the "stop cord" for this type fabric, will probably have little effect on the test results.

We hope this information will be of help to you.

Sincerely,

RICHARD O. SIMPSON

Richard O. Simpson
Acting Assistant Secretary
for Science and Technology

Enclosure

CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of MAURICE A. DWECK, an individual trading as M.A. DWECK	DOCKET NO. 8893 WHEN BEFORE THE FEDERAL TRADE COMMISSION CPSC Docket 75-4

ORDER

This matter is before the Commission on its own motion. The matter involves an alleged violation of Commercial Standard 191-53 under the Flammable Fabrics Act (15 U.S.C. 1191, et seq.).

The Federal Trade Commission (FTC) issued a formal complaint against the respondent on July 10, 1972, alleging that certain sweatshirts and scarves sold by respondent were dangerously flammable. On April 13, 1973, after hearings had been held, the Administrative Law Judge found in an initial decision that due to the fabric variability inherent in the nature of the sweatshirts and the fact that they were intended for children, those garments violated CS 191-53 and the Flammable Fabrics Act. With regard to the scarves, the Administrative Law Judge found that there was a significant deviation in the CS 191-53 testing procedure used by the FTC and independent laboratories which tested the items, in that the independent laboratories used a skyhook and L-shaped thread guides rather than the curved thread guides used by the FTC. Therefore, the Administrative Law Judge found that there was not substantial evidence to show that the acts and practices of the respondent as to the scarves were in violation of the Flammable Fabrics Act.

On May 14, 1973, this matter was transferred to the Consumer Product Safety Commission (CPSC) under section 30(b) and (e)(3) of the Consumer Product Safety Act (15 U.S.C. 2079(b) and (e)(3)). Both the respondent and complaint counsel appealed the decision of the Administrative Law Judge to the Consumer Product Safety Commission.

On December 3, 1973, the attorneys for the respondent filed a Motion to Dismiss the complaint on the ground that the FTC test method used in this matter did not conform to the method prescribed in Commercial Standard CS 191-53 as clarified by the Consumer Product Safety Commission in a notice published in the FEDERAL REGISTER on November 13, 1973 (38 FR 31289).

On April 18, 1974, the Commission denied the Motion of Counsel for Dweck to dismiss the complaint against him and affirmed the initial decision of the Administrative Law Judge. No written opinion was issued. On September 5, 1974, the Commission, on its own motion, determined to reconsider its decision to deny respondent's motion to dismiss the complaint and also decided to hold oral hearings on the motion to dismiss. Oral hearings in this matter were held on June 6, 1975.

The Commission, having considered the oral arguments of counsel, their briefs and the record in this matter, concludes that the matter must be remanded to Administrative Law Judge David H. Allard. It is clear that the Federal Trade Commission utilized a test procedure that differs from that specified in the CPSC's clarification of November 13, 1973. Therefore, the CPSC believes that the garments that are the subject matter of this proceeding should be tested in accordance with the provisions of CS 191-53 as clarified by the Consumer Product Safety Commission on November 13, 1973, and that Administrative Law Judge David H. Allard should render an initial decision in this matter on the basis of those test results. Accordingly:

IT IS ORDERED that the Consumer Product Safety Commission staff test garments that are the subject of this proceeding in accordance with the provisions of CS 191-53 as clarified by FEDERAL REGISTER notice of November 13, 1973 (38 FR 31289); and

IT IS FURTHER ORDERED that this matter be remanded to Administrative Law Judge David H. Allard so that a decision may be issued as to whether those garments violate the provisions of CS 191-53 and the Flammable Fabrics Act on the basis of CPSC tests.

By Order of the Commission

DATE: July 23, 1975

Sadye E. Dunn

Sadye E. Dunn, Secretary
Consumer Product Safety
Commission

UNITED STATES OF AMERICA
BEFORE THE CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of MAURICE A. DWECK, an individual trading as M.A. DWECK.	CPSC DOCKET No. 75-4

ORDER

On May 13, 1976, Administrative Law Judge David H. Allard filed his Initial Decision On Further Hearing with a proposed order which provided for the processing of the imported scarves and jackets or shirts which are the subject of this proceeding or their destruction. Subsequently, the parties filed a joint motion to modify the proposed order to allow exportation for the purpose of permitting the manufacturer to reprocess the garments so that they conform to standard CS 191-53. The motion further sought an extension of time in which the parties could file a notice of appeal from the initial decision in the event the request to export was denied.

By order dated June 16, 1976, implementation of the Commission stayed the initial decision and the parties were directed to submit data on the technical and economic feasibility of the processing and proposals for assurances

to guarantee that the goods would in fact be reprocessed and re-imported if exportation was permitted. Respondent's submission was received on July 9, 1976 and enforcement counsel filed its response on July 26, 1976. The joint motion and subsequent submissions of the parties having been considered, it is

ORDERED that the initial decision is modified so as to permit the respondent to export the shirts and/or scarves which are the subject of this proceeding to the foreign manufacturer to be reworked to bring them into conformity with standard CS 191-53 provided, however, that within 10 days of receipt of this order respondent shall file with the Commission a performance bond in an amount twice that of the current value of the goods that will be exported. The respondent is directed to submit such data as is necessary to establish the current value of the goods it seeks to export. The purpose of bond is to insure that the goods are reprocessed so as to comply with CS 191-53 and returned to the United States. It is further

ORDERED, alternatively, that during said 10 day period, the parties may file a notice of intention to appeal from the initial decision as provided in 16 CFR section 3.52.

Sadye E. Dunn

SADYE E. DUNN
Secretary
Consumer Product Safety Commission

DATED: October 19, 1976

to show in what respect the Commission has erred in considering his arguments previously made. Hence, the Commission finds no basis for reconsideration of its prior Decision and Order.

To the extent that the petition seeks a modification of the Decision and Order to allow the non-complying garments that are the subject of the proceeding to be exported to the foreign manufacturer, it is covered by the Commission's Policy on Exportation of Noncomplying Goods (16 CFR 1602.2) under the Flammable Fabrics Act. The Commission previously offered the Respondent the opportunity to return the goods to the foreign manufacturer on a basis consistent with the export policy (See Commission Order of October 19, 1976) by posting a bond to insure that the goods would be reprocessed to comply with the Standard. He failed to do so and pursued an appeal instead. The Respondent's reference to garments treated with TRIS is inappropriate since any action taken by the Commission in that regard is interpretive of the Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.). That statute has no relationship to this proceeding, which is brought under the Flammable Fabrics Act, and the Commission has not issued an export policy under the Federal Hazardous Substances Act as it has under the Flammable Fabrics Act. Accordingly, it is

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of MAURICE A. DWECK an individual trading as M.A. DWECK	CPSC Docket No. 75-4

ORDER

On August 24, 1977 the Commission issued a Decision and Order in the subject adjudicative proceeding holding that the Respondent had violated the FFA by importing certain nylon scarves and cotton cardigan-style jackets that failed to comply with the Standard for Flammability of Clothing Textiles (CS 191-53, 16 CFR 1610.1 et seq.) ("Standard"). The Order affirmed the Initial Decision of the Administrative Law Judge and, in part, directed the Respondent to reprocess the garments to comply with the Standard or destroy them.

The Respondent has petitioned the Commission to reconsider its decision and to allow him to return the non-complying goods to the foreign manufacturer.

The Respondent has failed to specify any new issue that he has not had an opportunity to argue and has failed

to show in what respect the Commission has erred in considering his arguments previously made. Hence, the Commission finds no basis for reconsideration of its prior Decision and Order.

To the extent that the petition seeks a modification of the Decision and Order to allow the non-complying garments that are the subject of the proceeding to be exported to the foreign manufacturer, it is covered by the Commission's Policy on Exportation of Noncomplying Goods (16 CFR 1602.2) under the Flammable Fabrics Act. The Commission previously offered the Respondent the opportunity to return the goods to the foreign manufacturer on a basis consistent with the export policy (See Commission Order of October 19, 1976) by posting a bond to insure that the goods would be reprocessed to comply with the Standard. He failed to do so and pursued an appeal instead. The Respondent's reference to garments treated with TRIS is inappropriate since any action taken by the Commission in that regard is interpretive of the Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.). That statute has no relationship to this proceeding, which is brought under the Flammable Fabrics Act, and the Commission has not issued an export policy under the Federal Hazardous Substances Act as it has under the Flammable Fabrics Act. Accordingly, it is

ORDERED that Respondent's Petition for Reconsideration And For Modification Of Order And For Authorization To Export Merchandise is DENIED.

FOR THE COMMISSION

/s/

RICHARD E. RAPPS
Secretary
Consumer Product Safety Commission

DATED: NOV 17 1977

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of BARRETT CARPET MILLS, INC., a corporation, and ROY C. BARRETT, individually and as an officer of the corporation. FLAMMABLE FABRICS ACT ENFORCEMENT PROCEEDING	CPSC DOCKET NO. 75-5

ORDER

The Staff of the Consumer Product Safety Commission having charged Respondents Barrett Carpet Mills Inc., a corporation, and Roy C. Barrett, individually and as an officer of Barrett Carpet Mills Inc., with violating provisions of the Federal Trade Commission Act [15 U.S.C. 41 et seq.], the Flammable Fabrics Act [15 U.S.C. 1191 et seq.], the Standard for the Surface Flammability of Carpets and Rugs (FF 1-70), and the rules and regulations promulgated pursuant thereto [16 CFR Part 1630; 40 F.R. 59931 Dec 30, 1975)]; a hearing on the charges having been

held during the weeks of February 2 and February 9, 1976; Proposed Findings of Fact, Conclusions of Law, and Order having been filed by Enforcement Counsel and counsel for Respondents, and an Initial Decision containing findings of fact and conclusions of law having been issued this day;

IT IS HEREBY ORDERED THAT

I

Respondent Barrett Carpet Mills Inc., a corporation, doing business under any other name or names, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, and Respondent Roy C. Barrett, an individual and officer of Barrett Carpet Mills Inc., shall give notice by certified mail, return receipt requested, to all known purchasers or persons in possession of Paradise Valley foam back carpet produced by Respondents on the failing days (July 18, 1973 and December 10, 1973) to the effect that said carpet failed the Commission's Flammability Carpet Standard;

II

Respondents shall cease and desist from further sales of Paradise Valley foam back carpet;

III

Respondents shall recall all carpet from failing finishing days from wholesalers and/or retailers;

IV

Respondents shall obtain a sample of Paradise Valley foam back from every finishing day not previously tested which remains in the channels of commerce and submit same to the Commission's Staff for testing; and

V

Respondents shall submit to the Commission's Staff complete production information concerning any other Barrett Carpet Mills Inc., foam carpet finished by Masterpiece Finishing Inc., on any failing days for appropriate remedial action.

VI

Respondents shall file reports, as required by the Bureau of Compliance, detailing fully and specifically what is proposed to be accomplished to comply with this Order. The Commission Staff may conduct inspections to determine compliance with this Order and it may direct Respondents to submit, or permit the Commission Staff to select, samples of any carpet or rug in Respondents' inventory or in production.

VII

For a period of ten (10) years from the date this Order becomes final within the meaning of the Federal Trade Commission Act, Respondents shall notify the Commission, at least thirty (30) days prior to the event, of any proposed change in the corporate Respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation; the creation or dissolution of subsidiaries; or any other change in the corporation which might affect compliance obligations arising out of this Order.

For a period of ten (10) years from the date this Order becomes final within the meaning of the Federal Trade Commission Act, the individual Respondent Roy C. Barrett shall notify the Commission of the discontinuance of his present employment or business and of his new employment or affiliation with a new business. Such notice shall include a description of the individual Respondent's employment or business as of the date of this Order, as well as his new business address and a description of his new duties and responsibilities.

Paul N. Pfeiffer

PAUL N. PFEIFFER
Administrative Law Judge

DATE: July 8, 1976

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of BARRETT CARPET MILLS INC., a corporation, and ROY C. BARRETT, individually and as an officer of the corporation. FLAMMABLE FABRICS ACT ENFORCEMENT PROCEEDING	CPSC DOCKET NO. 75-5

FINAL DECISION AND ORDER

This matter is before the Commission on its own order of August 5, 1976 placing the case on the Commission's docket for review pursuant to 16 CFR 1025.73. 1/ In this case the Commission has considered several issues of special

1/ None of the parties in this action sought an appeal of the administrative law judge's ruling. Subsequent to the Commission's sua sponte order setting the matter down for review, respondents filed a motion for clarification or to enlarge the issues to be presented. On September 7, 1976, the Commission issued an order enlarging the issues to be considered.

importance to the carpet industry and to consumers. In deciding these issues, the Commission in part affirms the initial decision and order of the administrative law judge and in part modifies or reverses that decision. We concur in the finding that the probable cause for the failure of respondents' carpets to comply with the Standard for the Surface Flammability of Carpets and Rugs (FF 1-70), 16 CFR 1630 (hereinafter referred to as the "Carpet Standard") was a defect in production rather than in the design. The Commission decides that the failure of the Carpet Standard's "pill test" may justify the recall of installed carpet but declines to order such action in this case. The Commission believes that a cease and desist order is necessary to protect the public but modifies the provisions of the order proposed by the administrative law judge. The reasons for the decisions will be described below.

On July 18, 1975 the Commission at the request of the Bureau of Compliance approved the issuance of a Notice of Enforcement against respondents alleging that respondents had manufactured and sold in interstate commerce carpet which was violative of the Carpet Standard and an unfair and deceptive practice under section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (FTCA). The relief sought in the

Notice of Enforcement included the issuance of a broadly worded cease and desist order, notice of the hazard to respondents' customers and recall of all violative carpet from distributors, retailers and ultimate purchasers.

Hearings were held before the Commission's administrative law judge who, on July 8, 1976, issued an initial decision and order denying any recall from ultimate consumers, limiting notice of the hazard to customers in possession of carpet produced on days corresponding to failing tests, requiring respondents to cease and desist from further sales of the specific carpet style in question, requiring respondents to obtain samples of the subject carpet in the hands of retailers and distributors for testing by the Commission, and requiring respondents to provide the Commission with production information on similar carpet manufactured by respondents which fails the Carpet Standard.

The evidence presented in this case shows that a style of respondents' carpet known as style 222, "Paradise Valley" (foam back) failed to comply with the Carpet Standard. The carpet in question was manufactured on 26 different days during the period 1972-1974. The record indicates that a total of 15,013.76 square yards of the style was manufactured over this period and that 13,430 square yards were sold. 2/

2/ The record does not indicate what happened to the carpet which was manufactured and not sold.

The record further indicates that respondents did not perform all aspects of the manufacture of the carpet but subcontracted out the finishing process which involves the application of the latex precoat and the foam backing. Two different finishing subcontractors were utilized, Reliance, which finished 3902.20 square yards on six different days and Masterpiece which finished 10,079.84 square yards on 18 different dates. The dates for the Reliance finishing were not available. Dates for Masterpiece finishing are in evidence. Carpet Standard tests were performed by the Commission's laboratory and by laboratories selected by respondents on various samples of carpet which were obtainable. 3/ The test results and the corresponding finishing dates are set out in the following chart prepared by the administrative law judge:

PARADISE VALLEY FOAM PRODUCTION

Reliance 3,902.20 square yards	Test Results
6 finishing days (dates not available)	7-1, 6-2 2 tests, 1 pass, 1 fail

3/ It appears that manufacture of the carpet style in question had ceased at the time the Commission began its investigation and there was considerable difficulty in obtaining uninstalled samples of the style for testing.

Masterpiece 10,079.84 square yards

18 finishing days

09-29-72	(100 sq yards)	
12-20-72	(312 sq yards)	
12-22-72	(547 sq yards)	The criteria for passing DOC 1-70 is that no more than 1 specimen out of 8 fails. All results labeled 8-0 or 7-1 are passes. All others fail.
12-28-72	(315 sq yards)	
01-05-73	(93 sq yards)	
01-05-73	(2207 sq yards)	
02-14-73	(297 sq yards)	
03-21-73	(308 sq yards)	
05-03-73	(287 sq yards)	
05-15-73	(309 sq yards)	
06-01-73	(401 sq yards)	
07-18-73	(1635 sq yards)	6-2, 6-2, 4-4, 6-2, 6-2, 5-3, 1-7, 6-2, 8-0, 5-3 10 tests - 9 fail, 1 pass
10-10-73	(913 sq yds)	8-0, 8-0, 8-0, 8-0, 8-0 5 tests - all pass
11-09-73	(817 sq yds)	8-0, 8-0, 8-0, 8-0, 8-0, 6-2 (Vest sample) 6 tests - 5 pass, 1 fail
12-05-73	(302 sq yds)	
12-10-73	(311 sq yds)	4-4, 1-7, 7-1 3 tests - 1 pass, 2 fail
01-24-74	(310 sq yds)	
01-31-74	(615 sq yds)	

As the chart demonstrates carpet finished by Masterpiece on 15 different finishing dates produced both passing and failing tests. The failure rate was most acute for carpet finished during the period September 29, 1972 to July 18, 1973. Only one finishing date for which test results were available produced all passing results. No test results were available for two of the Masterpiece finishing dates.

The test failures notwithstanding, the record indicates that the Paradise Valley carpet was designed to comply with the Carpet Standard. Alumina trihydrate (ATH), a commonly used flame retardant, was mixed into the latex precoat which is applied before the foam backing is attached. 4/ A Neutron Activation Analysis conducted by the Georgia Institute of Technology on two samples of each of two passing and two failing rolls of Paradise Valley foam backed carpet disclosed the presence of ATH in both the passing and failing samples. While the average levels of ATH were similar, the failing samples exhibited a marked lack of uniformity in ATH levels. 5/ The Georgia Institute of Technology concluded that the probable cause of the failure of the two rolls was the lack of uniformity including the uneven or irregular application of the ATH through settling out of the latex precoat in the holding tanks which could cause improper viscosity, a misaligned "doctor bar", looseness of the carpet weave and incomplete mixing of the precoat ingredients. The Commission agrees

4/ A detailed description of the manufacturing process for Paradise Valley carpet can be found at pages 7-10 of the Initial Decision.

5/ The average level of ATH in the passing samples was 10.9%; the average level in the failing samples was 9.4%. But the range in ATH levels in the passing rolls was 8.6% to 13.9%; the range in the failing samples was 3.2% to 26.3%.

with the administrative law judge that the evidence supports the conclusion that the probable cause of the failures occurred in the finishing process and that it is unnecessary to pinpoint the exact reason.

The record indicates that there were no quality control tests other than a viscosity check during the mixing of the latex precoat. Also there is no indication in the record that respondents conducted any flammability testing during the period the carpet was manufactured.

Having established that the respondents have manufactured and distributed carpet that failed to comply with the Carpet Standard, and that the probable cause was in the production process, as oppossed to the design, 6/ it is necessary to examine the appropriate remedy. The Commission believes that a cease and desist order prohibiting similarly-caused violations of the Carpet Standard in the future must issue. While the administrative law judge's proposed order directs that respondents cease and desist from further sales of Paradise Valley foam back carpet, the Commission believes that such a prohibition is too broad in view of the probable cause of the failure to comply with the Carpet Standard. Instead, respondents are directed to assure

6/ In Westland Carpet Mills, Inc., CPSC Docket No. 75-21, being decided at the same time as this case, the failure of the carpet to comply with the Carpet Standard probably resulted from the design of the carpet.

compliance with the Carpet Standard, by testing, before the sale of any existing inventory or future production of Paradise Valley foam back carpet. In addition, respondents are directed to submit a plan describing the steps they will take to develop a quality control program designed to eliminate or minimize to the maximum extend practicable, errors in the manufacturing process of the kind revealed in the record in this matter. Finally, the Commission believes that the owners of installed carpet finished on the dates on which samples failed to comply with the Carpet Standard are entitled to notice of that fact and the order shall provide for such notice.

Enforcement Counsel requested a recall of all violative carpet, not only in the distribution network, but installed carpet in the possession of consumers. In support of this position, Enforcement Counsel introduced the testimony of a statistical witness who opined that within a 95% level of certainty, 46% of Paradise Valley carpet would, if tested, fail to comply with the Carpet Standard. The respondents countered with videotape evidence of tests conducted by their expert, Dr. LeBlanc, intended to show that recalling failing carpet from consumers is an unnecessary and inappropriate remedy. In the tests, failing and passing samples of carpet were exposed to a variety of ignition sources. The purpose of this testing was to demonstrate that samples that fail the

"pill" test provided for in the Carpet Standard 7/ react similarly to those that pass. The conclusion the respondents seek to reach is that the pill test does not reflect a real life risk of fire hazard.

The Commission believes that respondents' position is a collateral attack on the Carpet Standard and must be rejected. The Carpet Standard was issued on April 10, 1970 and became effective on April 16, 1971. Upon its issuance, the Department of Commerce found that the Carpet Standard:

> (a) Is needed for carpet and rugs to protect the public against unreasonable risk of the occurrence of fire arising from the hazards of rapid flash burning or continuous or slow burning or smoldering, and leading to death, personal injury, or significant property damage;
>
> (b) Is reasonable, technologically practicable and appropriate and is stated in objective terms; and
>
> (c) Is limited to carpets and rugs, which currently present the unreasonable risks specified in (a) above.

(35 FR 6211, April 16, 1970). The purpose of the Carpet Standard was described in the preamble that accompanied its publication in the Federal Register:

7/ The test method requires eight replicate 9" X 9" carpet specimens. The specimens are dried in an oven and placed in a draft free environment. A flattening frame with a hole four inches in radius is placed on the specimen. A small methenamine tablet is then placed in the center of the hole and ignited. If the flame front burns within one inch of the flattening frame, the specimen fails. If two specimens of the eight tested fail, the sample is considered as failing.

> There has heretofore existed no flammability standard for carpets and rugs affording protection to the general public from an unreasonable risk of the occurrence of fire. This Standard will provide a measure of that protection, in that it is particularly designed to protect the public from the occurrence of fire from small ignition sources, such as glowing fireplace embers or inadvertently discarded lighted cigarettes, cigars or matches.

Section 4(e) of the Flammable Fabrics Act (15 U.S.C. 1193(e)) provides the procedure for judicial review of a standard issued under that Act. At the time of the issuance of the Carpet Standard, no challenge was made to it and the Standard has the force and effect of law. See Maryland Casualty Co. v. United States, 251 U.S. 342, 349 (1920), Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 165 (1963). Where Congress has provided an exclusive method of judicial review for a rule or standard, the use of a different method must be rejected. Standard Forge & Axle Co., Inc. v. Coleman, 551 F.2d 1268 (D.C. Cir. 1977), cert. denied ___ U.S. ___; Nader v. Volpe, 466 F. 2d 261 (D.C. Cir. 1972).

Furthermore, the record contains evidence that the pill test actually achieves the goals and objectives described in the Federal Register preamble to the Carpet Standard. Mr. Sidney H. Greenfield, a participant in the development of the Carpet Standard testified as an expert witness for the respondents. He described the pill test as a "performance test that will tell you whether or not the carpet will ignite

and spread fire when subjected to a small flaming source of ignition." 8/ Examples of such ignition sources are a "burning match, burning cigarette lighter, a candle, an ember from a fireplace, ..." 9/ Finally, in response to a question from respondents' counsel concerning the relationship between pill test results and a "real fire situation", Mr. Greenfield testified that

> "[w]e felt when we were developing the standard that [the pill test results] were indicative of how carpet would perform in a real life situation." 10/

The record supports the conclusion that there is a positive correlation between the risk the Carpet Standard was intended to address and the method selected to achieve it.

For the reasons discussed, the Commission believes that respondents' collateral attack on the Carpet Standard must be rejected as a matter of law, and the evidence in the record submitted in support of that position must be disregarded. The Commission concludes that the failure of the pill test may require a recall of noncomplying carpet. The granting of such relief shall be governed by the facts and circumstances of each case, including the number and extent of failures

8/ Transcript, page 1158.

9/ Transcript, page 1202.

10/ Transcript, page 1204.

and the probable cause for such failures. Evidence bearing upon these factors shall be considered by the administrative law judge and the Commission in determining whether a recall is appropriate to protect consumers and reasonable under the circumstances.

Although the Commission decided in The Matter of Northwick Mills, Inc., et al. 11/ that it has the authority under the Flammable Fabrics Act to order the recall of installed carpet that fails to comply with the Carpet Standard, it does not exercise that authority in this case. In the Northwick decision the Commission stated that both this Commission, and the Federal Trade Commission before it, "consistently pursued a policy to require recall of non-complying carpet." 12/ While the policy of recall was well established, it was not applied to installed carpet. 13/ Thus, to avoid unfairness and to eliminate any uncertainty that may exist among those subject to the Carpet Standard that the Commission has authority to order a recall of installed carpet and that it may exercise that authority where the facts, including the

11/ CPSC Docket No. 76-6, April 21, 1978.

12/ Id., n. 5 at p. 10.

13/ In The Matter of Congoleum Industries, Inc., CPSC Docket No. 75-3, the Commission affirmed the Administrative Law Judge's conclusion that "[r]ecall of carpet which has been installed is not at this juncture practicable...." (Initial Decision at p. 23).

number and pattern of pill test failures, indicate that such action is necessary and appropriate, the Commission has decided to exercise the authority to recall installed carpet prospectively. Thus, the order issued in this case 14/ will be limited to cease and desist provisions. Accordingly,

IT IS HEREBY ORDERED THAT

I

Respondent Barrett Carpet Mills Inc., a corporation, doing business under any other name or names, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, and Respondent Roy C. Barrett, an individual and officer of Barrett Carpet Mills Inc., shall give notice by certified mail, return receipt requested, to all known purchasers or persons in possession of Paradise Valley foam back carpet produced by respondents on the failing days (July 18, 1973 and December 10, 1973) to the effect that said carpet failed the Commission's Flammability Carpet Standard;

II

Respondents shall recall all carpet from failing finishing days from wholesalers and/or retailers;

III

Respondents shall cease and desist from further sales of Paradise Valley foam back carpet; unless such carpet has been tested in accordance with and complies with the provisions of the Standard for the Surface Flammability of Carpets and Rugs.

14/ The Commission is also withholding ordering a recall of installed carpet in The Matter of Westland Carpet Mills, Inc., CPSC Docket No. 75-21, which is being decided at the same time as this case.

IV

Respondents shall obtain a sample of Paradise Valley foam back from every finishing day not previously tested which remains in the channels of commerce and submit same to the Commission's Staff for testing; and

V

Respondents shall submit to the Commission's Staff complete production information concerning any other Barrett Carpet Mills Inc., foam carpet finished by Masterpiece Finishing Inc., on any failing days for appropriate remedial action.

VI

Respondents shall develop a plan acceptable to the Directorate for Compliance and Enforcement of the Commission to develop a quality control program designed to eliminate or minimize to the maximum extent practicable, errors in the manufacturing process that result in properly designed carpet failing the Standard for the Surface Flammability of Carpets and Rugs.

VII

Respondents shall file reports, as required by the Directorate for Compliance and Enforcement of the Commission, detailing fully and specifically what is proposed to be accomplished to comply with this Order. The Commission Staff may conduct inspections to determine compliance with this Order and it may direct Respondents to submit, or permit the Commission Staff to select, samples of any carpet or rug in Respondents' inventory or in production.

VIII

For a period of ten (10) years from the date this Order becomes final within the meaning of the Federal Trade Commission Act, Respondents shall notify the Commission, at least thirty (30) days prior to the event, of any proposed change in the corporate Respondent, such as dissolution, assignment, or sale resulting in

the emergence of a successor corporation; the creation or dissolution of subsidiaries; or any other change in the corporation which might affect compliance obligations arising out of this Order.

For a period of ten (10) years from the date this Order becomes final within the meaning of the Federal Trade Commission Act, the individual Respondent Roy C. Barrett shall notify the Commission of the discontinuance of his present employment or business and of his new employment or affiliation with a new business. Such notice shall include a description of the individual Respondent's employment or business as of the date of this Order, as well as his new business address and a description of his new duties and responsibilities.

BY THE COMMISSION *

Sadye E. Dunn

SADYE E. DUNN
Acting Secretary
Consumer Product Safety Commission

Dated: July 11, 1978

* Commissioners participating in this decision:
Chairman Byington
Commissioner Franklin
Commissioner Pittle

Commissioners King and Sloan did not participate in this decision.

SERVED: July 8, 1976

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of BARRETT CARPET MILLS INC., a corporation, and ROY C. BARRETT, individually and as an officer of the corporation. FLAMMABLE FABRICS ACT ENFORCEMENT PROCEEDING	CPSC DOCKET NO. 75-5

INITIAL DECISION AND ORDER

SERVED UPON:

Ronald Yelenick, Esquire, George Miller, Esquire, Annette Seltzer, Esquire, Enid Rubenstein, Esquire, and Jere Glover, Esquire, Attorneys, Bureau of Compliance, Consumer Product Safety Commission, 5401 Westbard Ave., Bethesda, Maryland 20207.

Richard Gimer, Esquire, Thomas Lumbard, Esquire, Respondents' Counsel, Berliner, Maloney, Gimer and Muir, Suite 420, 1100 Connecticut Ave., N.W., Washington, D. C. 20036.

N.B. Pursuant to Rule 72 of the Commission's Interim Rules of Practice for Adjudicative Proceedings (Part 1025.72) a notice of appeal from this initial decision must be filed within 10 days of the service date above. An appeal brief may be filed 30 days after said service date.

I

PRELIMINARY STATEMENT

A Notice of Enforcement was issued by the Secretary in this case on July 18, 1975, in which the Commission's Bureau of Compliance charged Respondents Barrett Carpet Mills Inc., and Roy C. Barrett, individually and as an officer thereof, with the manufacture and sale of carpet in interstate commerce which did not comply with the Standard for Surface Ignition of Large Carpets and Rugs (DOC FF 1-70) in violation of Section 3 of the Flammable Fabrics Act. The Notice also alleges that this failure constituted an unfair and deceptive practice under Section 5 of the Federal Trade Commission Act. The remedies sought are: (1) an order to cease and desist from all future violations; (2) notice of the hazard to all Respondents' customers; and (3) recall of all violative carpet from distributors, retailers, and ultimate consumers.

Respondents answered by denying all the substantive allegations of the Notice and, in addition, asserting affirmative defenses, inter alia, of improper sampling, improper Commission Staff action in negotiating a proposed settlement, and lack of due process in enforcing the Standard.

In addition Respondents allege that they have notified their customers (wholesalers/retailers) and have recalled from commerce all failing carpet rolls.

A prehearing conference was held on September 9, 1975. At that time, Respondents proposed a settlement agreement alleged to be identical to that ordered In Re Congoleum, Docket No. 75-3[1/] which directed notification to purchasers in possession of installed failing Endureze carpet style and recall of all uninstalled Endureze carpet from distributors and retailers for testing but not recall "from the floor" (from the home of a consumer). This agreement was rejected by the Staff. A further prehearing conference was held on October 22, 1975, when both parties indicated that a stipulation of some of the facts could be consummated with further negotiations. Such stipulation was entered into and a further prehearing conference was held on January 6, 1976. The hearing commenced February 2, 1976, and concluded on February 13, 1976. At the hearing Respondents asserted that no Paradise Valley nylon fat foam backed carpet remained in the channels of commerce.

Thereafter, an opportunity was afforded for the submission of proposed findings and conclusions. Upon request of Respondents' counsel, an oral argument on legal issues was held on May 11, 1976, on which date the case was submitted for initial decision.

1/ Commission final decision, July 14, 1975.

II

THE OPPOSING CONTENTIONS

The failing carpet known as Style 222, Paradise Valley (foam back) was produced on 26 widely separated days in 1972, 1973, and 1974. Enforcement Counsel's position is that the failing DOC FF 1-70 tests conducted on the carpet produced on September 18, 1972, July 18, 1973, November 9, 1973, and December 10, 1973 are sufficient to condemn the entire style and that recall from the consumer's floor is required.

Respondents claim that the September 18, 1972 sample was finished by Reliance Finishing Inc., a different sub-contractor, and is not representative of the later production finished by Masterpiece Finishing Inc., and that the November 9, 1973 sample (hereinafter called the Vest sample) is defective used carpet and properly should not be tested under DOC FF 1-70. While admitting failures on the other two dates named above, Respondents have presented passing tests from other production days to oppose the Staff's allegation that the entire style is defective. In addition, Respondents have conducted so-called "real life" tests tending to establish that passing and failing samples react similarly to a variety of typical household ignition sources and that the absolute level of hazard is not high enough to justify recall from the consumer's home.

III

THE EVIDENCE

Much of the evidence is contained in an amended stipulation of facts relating to the collection of carpet samples and the results of the flammability tests. The stipulation may be summarized as follows: Roy C. Barrett controls the operation of Barrett Carpet Mills which produces carpet in interstate commerce subject to the Flammability Standard which is in full force and effect. A total of 15,013.76 square yards of style Paradise Valley, nylon, fat foam, was produced of which 13,430 square yards were sold. Paradise Valley was last manufactured on January 31, and last sold on March 7, 1974. Respondent does not manufacture the entire carpet. The operation of applying the foam to the carpet back is described as finishing and is performed by subcontractors pursuant to specifications prepared by Barrett. Paradise Valley foam was designed to be manufactured with aluminum trihydrate (ATH) in its latex precoat to provide the necessary flame resistant characteristics. The following chart displays the finishing days, finisher, amounts, and flammability tests for all Paradise Valley:

PARADISE VALLEY FOAM PRODUCTION

Reliance 3,902.20 square yards

6 finishing days (dates not available)

Test Results

7-1, 6-2
2 tests, 1 pass
1 fail

Masterpiece 10,079.84 square yards

18 finishing days

09-29-72 (100 sq yds)
12-20-72 (312 sq yds)
12-22-72 (547 sq yds)
12-28-72 (315 sq yds)
01-05-73 (93 sq yds)
01-10-73 (2207 sq yds)
02-14-73 (297 sq yds)
03-21-73 (308 sq yds)
05-03-73 (287 sq yds)
05-15-73 (309 sq yds)
06-01-73 (401 sq yds)
07-18-73 (1635 sq yds)

The criteria for passing DOC FF 1-70 is that no more than 1 specimen out of 8 fails. All results labeled 8-0 or 7-1 are passes. All others fail.

6-2, 6-2, 4-4, 6-2, 6-2, 5-3, 1-7, 6-2, 8-0, 5-3

10 tests - 9 fail, 1 pass

10-10-73 (913 sq yds)
5 tests - all pass

8-0, 8-0, 8-0, 8-0, 8-0

11-09-73 (817 sq yds)

8-0, 8-0, 8-0, 8-0, 8-0, 6-2 (Vest sample)

6 tests - 5 pass, 1 fail

12-05-73 (302 sq yds)
12-10-73 (311 sq yds)
3 tests - 1 pass, 2 fail

4-4, 1-7, 7-1

01-24-74 (310 sq yds)
01-31-74 (615 sq yds)

The Georgia Institute of Technology conducted a Neutron Activation Analysis upon two samples of each of two passing and two failing rolls of Paradise Valley foam backed carpeting. The analysis showed the presence of alumina trihydrate in both the passing and the failing samples. The range in alumina trihydrate level in the passing rolls was 8.6% to 13.9%; the range in the failing samples was 3.2% to 26.3%. The average level of alumina trihydrate in the passing samples was 10.9%; the average level in the failing samples was 9.4%. The Georgia Institute of Technology has concluded that the failure of the two rolls "was probably due to the lack of uniformity in addition of $Al_2O_3 . 3H_2O$ (alumina trihydrate) to the carpet backing."

The remainder of the Stipulation was concerned with the actual facts of investigation and initial enforcement action leading up to this proceeding.

The Bureau of Compliance presented evidence supplementing the stipulation as follows: (1) that samples of Paradise Valley foam back failed the standard; (2) that based on statistical projections, at least 46% of Paradise Valley could be expected to fail the flammability standard at a confidence level of 95%; (3) that a sample secured from the home of a consumer by the name of Vest had never been actually installed; (4) that alleged flaws in the Vest sample (polypropylene fibers on the face) did not prevent it from being selected as a representative sample for flammability testing.

Respondents' evidence tended to show (1) that the defect which caused Paradise Valley to fail the flammability standard occurred in the finishing process performed by an independent subcontractor; (2) that, according to tests performed by the Georgia Institute of Technology the failures were caused by an uneven distribution of ATH; (3) that the flammability standard was not intended to be applied to installed carpet; (4) that it is inherent in the nature of carpet manufacturing that some quantity of carpet will fail the flammability standard; (5) that the production failures

which occured in this case were very rare and are not expected to be repeated; (6) that Paradise Valley was finished on 26 separate days and there is no evidence of any failing carpet produced on any other dates than those listed in the stipulation; and (7) that tests performed by an independent laboratory indicate that passing and failing samples react similarly to "real life" ignition sources.

The resolution of this case requires a detailed understanding of the production pattern of Paradise Valley foam back carpet. According to the creditable testimony of Respondents' production manager, McMahon, and of their finisher's converter manager, Mr. Bartenfeld, the following represents an outline of the production process of Paradise Valley foam: The initial stage of production involves taking nylon yarn and weaving it into polypropylene backing in a tufting machine at Respondents' plant. The loosely woven carpet known as greige goods was finished with any one of several backs, e.g., jute, thin foam, fat foam. Paradise Valley was finished in one-half inch fat foam. The backing apparently directly affects the flammability characteristics of the carpet. The same greige goods with jute backing passed the flammability test consistently.

Greige goods are normally stored at the mill until an order is received for a particular lot of carpet dyed to customer specifications. The carpet is then shipped to the finisher, who first dyes it, and then applies the foam backing. The finisher's process of foaming the carpet is a continuous one involving greige goods from many manufacturers. The goods are attached to one another end-to-end and fed into the converter. The first stage in the process is the attachment of the latex precoat to the back of the greige goods.

The precoat in Paradise Valley foam backed nylon carpet has three functions: first, to lock the strands of the greige goods which are otherwise loose in place; second, to provide an appropriate surface for the attachment of the backing; and third, as a carrier for aluminum trihydrate, the fire-retarding agent which acts by releasing water when heated.

The latex precoat for the first six production days of Paradise Valley consisted of a premixed batch delivered by the precoat manufacturer to the finisher, Reliance Industries Inc. All subsequent finishing was performed by Masterpiece Finishers Inc. (Masterpiece). Respondents' production manager and the Masterpeice converter supervisor testified that during the entire time of production, Masterpiece compounded (mixed) its own latex precoat.

The compounding process involves a mixing of the necessary components of the latex precoat consisting mainly of water, carboxylated latex rubber and filler. The filler traditionally used in the carpet industry is whiting (ground up Georgia marble calcium carbonate). This whiting is necessary, both as an extender of the latex and to give the latex the appropriate consistency. Since the carpet standard was promulgated, the filler has usually consisted of varying proportions of whiting and ATH commonly referred to as parts. For example, a specific formulation of a particular consistency might have 500 parts of filler which could be composed of 150 parts of ATH and 350 parts of whiting.

According to the Respondents' production manager, the water, latex, filler and some other minor chemicals are mixed in a large tank. The mixing is performed by sequentially adding each ingredient and then agitating the batch. After mixing for some time, the viscosity of the mix is checked and, if not correct, it is altered by the addition of thickening agents, since otherwise the precoat will not properly flow onto the carpet in the converter. The viscosity check, performed several times, is the only quality control measure employed by Respondents to check the complete mixing of the latex precoat. Significantly, there is no check made to

ascertain whether the two components of the filler (whiting and ATH) have been properly mixed throughout the batch. Respondents' production manager testified that he saw no reason why these two components would react differently to the mixing process. Therefore, the viscosity check does not indicate that the ATH is evenly distributed throughout the mixing batch--only that the filler as a whole is evenly distributed. In addition, the witness testified that if the viscosity was not correct, it would be adjusted by adding thickening agents. This, however, would have no effect upon assuring the even distribution of ATH.

The Standard for Large Carpet and Rugs, DOC FF 1-70, is commonly referred to as the "pill test." The test method requires eight replicate 9" X 9" carpet speciments. The speciments are dried in an oven and placed in a draft free environment. A flattening frame with a hole four inches in radius is placed on the specimen. A small methenamine tablet is then placed in the center of the hole and ignited. If the flame front burns within one inch of the flattening frame, the specimen fails. If two specimens of the eight tested fail, the sample is considered as failing.

For Paradise Valley to pass the standard consistently, it is necessary not only that a sufficient amount of ATH be present in the latex precoat, but that it be evenly distributed.

This is because the pill test ignites a very small area of carpet and any area with a deficiency of ATH would be more likely to ignite and burn even if the carpet as a whole had the specified amount of ATH. Respondents employed no quality control which would consistently insure the even distribution of ATH across the back of the carpet.

In the finishing process the greige goods are spread to its full width, attached to other carpet and, in a continuous process, are fed over an applicator to pick up the latex precoat. The precoat is then scraped by an iron "doctor bar" to even it out and force it into the fibers. The carpet is then heated to "drive" the excess water from the latex precoat and then coated with a latex foam which does not have ATH added, heated again, and cooked in a carpet oven.

The carpet oven at Masterpiece is a very large machine holding approximately 300 linear feet of carpet at one time. Greige goods from different manufacturers are joined together. Paradise Valley would normally be processed at a rate between 10 to 20 linear feet per minute and since it was fat foam backed it would move closer to 10 feet per minute.

It is clear that a large quantity of carpet was manufactured which did not contain the appropriate distribution of ATH. This is not only reflected in the passing and failing carpet tests, but in the Georgia Institute of

Technology study which showed that although the total amount of ATH in the failing carpet was approximately the same as that in the passing carpet, it was completely maldistributed.

Respondents' production manager McMahon, proposed several possible causes for uneven or irregular ATH application: (1) settling out of the latex precoat in the holding tanks could induce improper viscosity; (2) a misaligned "doctor bar" could cause irregularities in the backing; (3) tight or loose fabric selvage[2/] could cause the carpet to take up the precoat unevenly. However, in the witness's opinion, settling of the latex precoat was the least likely cause of failure since improper viscosity would be noticed immediately because the precoat would not flow evenly onto the carpet.

As to which of these three possible production defects caused the ATH maldistribution: settling of the latex precoat, a misaligned "doctor bar," or tight or loose fabric selvage, the testimony is inconclusive. Other causes of failure are possible. For example, it is equally conceivable that incomplete mixing of the whiting and ATH in the original precoat batch was the primary cause of the ATH maldistribution. An analogy can be drawn to a can of black paint poured into a can of white paint and stirred only once. The mixture would

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2/ Selvage is the weave of the carpet fabric itself.

not be of a consistent color and painting on a wall would result in an extremely irregular color pattern, even though a viscosity test would show the paint to be properly mixed.

It is not possible on this record, nor critical to the decision, to pinpoint the exact cause of the ATH maldistribution. It is sufficient that the production defect occurred within the control of the finishing subcontractor for whom Respondents are admittedly legally responsible under the Act.

Following the finishing process, the carpet was trucked back to Barrett for storage on the same day or within at the most, a day or two later. Carpet was not normally retained at the finisher. Significantly, nothing which occurred in the manufacturing process after finishing involved improving the flame resistant quality of the carpet.

The critical issue in this case is the propriety of requiring recall of some quantity of defective carpet from the consumer's home. According to witness Greenfeld, who was active in the development of DOC FF 1-70, this Standard was designed to insure that passing carpet would remain safe throughout its lifetime. However, with respect to failing carpet, the effects of home usage or contamination were not taken into account in formulating the Standard. Moreover, the Standard was designed primarily as a manufacturer's quality control test rather than as a test measuring an

unreasonable degree of risk of fire in the home. In 1970, when the Standard was drafted, no Federal agency had statutory authority to recall flammable carpet either from a wholesaler/retailer or from the consumer's floor. The limit of the then known authority in a contested proceeding was a Federal Trade Commission order to the manufacturer to cease and desist from further manufacture of failing carpet. However, in several consent order settlements the FTC did obtain voluntary recalls from wholesalers/retailers, but none from a consumer's floor.

In an effort to project the effect of the sample test failures upon the entire carpet style, the Staff presented a statistical witness, Mr. Ralph Madison, who testified that in his opinion, within a 95% level of certainty, 46% of Paradise Valley foam back would, if tested, fail to meet the flammability standard.

This estimate involves an assumption that the samples tested were selected by the Staff at random from the entire carpet style. Respondents were unable to present evidence of any conscious attempt by the Staff to select unrepresentative carpet samples for testing purposes. There is no dispute as to the calculations contained in the projection. However, the underlying assumptions and, therefore, the ultimate conclusions are in dispute.

In Re Congoleum supra, holds that for the purpose of preventing future sales of violating carpet, a small number of failing tests reasonably projected to encompass an entire

carpet style, is adequate to sustain a cease and desist order banning future sales of the style, recalling samples of all shipped untested carpet of the style in question from distributors and retailers for testing roll-by-roll, and notifying the original purchaser or person in possession of the premises of the hazard. However, no other recall action was taken with respect to the untested rolls. Since the remedy demanded in this case is recall of the entire carpet style from the consumer's floor, it is vital that the statistical projection be accurate in forecasting which carpet is likely to fail the standard.

The key difficulty with the Staff's statistical projection is the fact that it is the only evidence that any Paradise Valley carpet produced on the untested days would actually fail the standard. Some of the tested carpet apparently passed without any failure whatever; other carpet failed repeatedly. The passing and failing carpet tests were concentrated among separate production days. Rarely was there a significant mix of passes and failures within the same production day. Therefore, considering the testimony concerning the method of carpet production, it is reasonable to assume that the failures were the result of production defects on particular days.

In essence, the evidence discloses that there were two days on which the production clearly failed, two days on which the production clearly passed, and a large number of

days for which there is no proof of failures other than the statistical presentation. Inasmuch as the evidence is persuasive that the failures were caused by a production rather than a design defect, it is reasonable to conclude that the "lot" to be subject to a cease and desist and/or recall order, if any be found required by the public interest, is properly a finishing day rather than the entire Paradise Valley style, as the Staff contends. To adopt the Staff position in this case that "style" is equivalent to "lot" would be to completely disregard the evidence that the most probable proximate cause of the carpet failures was one or a combination of several possible finishing errors.

The other major evidence presented at the hearing concerned the so-called Vest sample. The Vest sample consisted of Paradise Valley foam back carpet from an identifiable roll which had been shipped to the Overberg Decorating Center in Festus, Missouri, subsequently purchased by Mr. Vest, and personally installed by him in his home. For approximately six months a two-piece carpet remnant left over from the installation was stored under the bed of Mr. Vest's son in the basement. This bed contained a skirt around the frame and the carpet lay underneath partly rolled and partly face up for those six months. There was no direct testimony as

to whether the carpet had ever been vacuumed while it was in that location. Mr. Vest testified that the carpet was not used; it was not walked on; and it had never been installed. However, there was evidence that the sample contained some facial imperfections which could affect its flammability. The sample failed the flammability standard 6-2. Other portions of the same carpet roll produced on the same day were tested five other times by Respondents and they passed all five tests 8-0 each.

Mr. Greenfeld testified that he perceived no reason why the test in DOC FF 1-70 could not be applied to used carpet. However, the witness was unclear as to exactly what lot the Vest sample roll represents.

Assuming the facial flaws were present in the Vest sample at the time it was produced and did in fact adversely affect flammability, this would be either a design or production defect for which Respondents would bear responsibility. In the event the facial flaw was caused during installation by Mr. Vest, or in another manner during his custody, Respondents would not bear any responsibility for the failure.

As indicated above, other portions of the roll from which the Vest sample was derived passed the tests without

exception. Also, since the Vest sample failed marginally (6-2), it is more likely that the failure was due to the condition of the carpet in the home (dust, grease, etc.) than to a production defect.

It is, therefore, concluded that the Vest sample is unrepresentative and that the roll sold to Mr. Vest need not be the subject of a cease and desist/recall order, if any is required herein.

Respondents presented videotape evidence as to the flammability characteristics of Paradise Valley when exposed to so-called "real life" tests designed and conducted by Dr. Le Blanc, stipulated to be an expert in carpet flammability. These tests clearly demonstrated that when subjected to a number of ordinary home ignition sources, both failing and passing carpet samples reacted with approximately the same characteristics. The results of the tests were offered not to contradict or impeach the carpet standard, but rather to demonstrate that the recall of failing carpet from the home would represent an unnecessary and inappropriate remedy.

The tests consisted of subjecting 8 X 4 ft failing and passing samples of Paradise Valley taped down on plywood to ignition sources including cigarettes, matches, cigars, cigarette lighters, burning plastic waste paper baskets, charcoal briquettes, and flaming cooking oil. With the

exception of the Zippo lighter there was no noticeable difference in performance between the passing and failing carpet samples. All samples except those ignited by the plastic waste paper basket extinguished without outside help, burning approximately the same distance. The nylon yarn[3/] appeared to melt rather than burn extensively.

However, the tests conducted by Dr. Le Blanc are not officially sanctioned standards in contrast to the FF 1-70 pill test. No one from the Staff was present to observe the tests to determine, for example, whether all the results were actually depicted in the videotape recording submitted in evidence. In addition, there was no evidence that certain variables which are controlled in the pill test, such as draft, water content of the carpet, and standardization of the ignition source were similarly controlled in the Le Blanc tests.

Enforcement Counsel conducted only a minimum of cross-examination of Dr. Le Blanc, none of which diminished the credibility of his presentation. No rebuttal evidence was produced even though an opportunity for an adjournment to prepare such was afforded. Nor was the pill test rehabilitated as representing typical household ignition conditions by appropriate expert testimony. Counsel chose instead merely

3/ The record contains testimony that nylon is one of the least flammable of carpet materials.

to rely upon the admitted flammability standard failures as justifying recalling carpet from the home. Consequently, the Le Blanc test results were received into evidence virtually unchallenged. The state of the record remains that passing and failing carpet samples react similarily to typical household ignition sources.

IV

FINDINGS AND CONCLUSIONS

The Staff is adamant in demanding recall of the entire Paradise Valley carpet style from the consumer's floor because of the failing samples. In Congoleum, supra, the Administrative Law Judge held that "Recall of carpet which has been installed is not at this juncture practicable because of the length of time most of it has been laid down, and the legal and practical problems presented by any order contemplating the taking up of carpet now on floors."[4/] Judge Hanscom's decision was affirmed by the Commission without extended comment on this issue.

The reasons underlying the Judge's decision apply equally to this case. The carpet in question was produced during 1972 and 1973. Presumably, some of it has been installed for at least three years. The inconvenience to the consumer of ripping carpet from the floor of his home in 1976 or possibly 1977 would be considerable. If the consumer were a hotel instead of an individual homeowner, such rip-out and reinstallation could cause a substantial economic loss through interruption of occupancy.

4/ Initial Decision of Federal Trade Commission Chief Administrative Law Judge Daniel H. Hanscom, December 12, 1974, p.23.

If a refund of the 1972 price were made, the effects of inflation would render such relief inadequate and not likely to permit replacement. There is no record of any fire involving Paradise Valley foam back in any consumer home or place of business.

Carpet in the home may be substantially different than carpet in the showroom. After shag carpet has been walked upon repeatedly, the strands become packed down eliminating oxygen and consequently the carpet is less flammable.[5/] On the other hand, household conditions normally produce dirt, dust, grime and grease from cooking or from shoes traversing driveways where automobiles are parked, or fuzzing of the carpet fibers by pedestrian traffic, any of which may render the carpet more flammable, but not due to any act of the manufacturer.

Neither the Flammable Fabrics Act nor the Federal Trade Commission Act contain any expressions of Congressional intent concerning recall, replacement, or refund of the purchase price from the ultimate consumer. This Commission has not made the necessary Section 30(d) finding to invoke the remedies available under the Consumer Product Safety Act.

5/ Witness Greenfeld explained the Section 1630 4(d)(1), FF 1-70 requirement that the pile be raised before testing "because it was determined during early testing that the carpet is more flammable with the pile standing up than when crushed." Tr. 1156

Under that Act a carpet manufacturer would have the option to elect between repair (impracticable), replacement, or purchase price refund less an allowance for use for more than one year at the time of notice of the hazard. On this basis a consumer owning carpet for three or more years would not likely receive as much as 50% of his original purchase price as a refund plus installation which would hardly justify his replacing the carpet.

It is not necessary on the state of this record to reach a final conclusion as to whether the Commission possesses the legal power to recall the failing Paradise Valley carpet from the consumer's floor. Staff Counsel was unable to sustain its burden of proof to establish that carpet which fails the standard presents an unreasonable risk of the occurrence of fire leading to death or serious injury to the consumer in his home. The Standard does not measure the height nor speed of the flame. The fact that the flame persists for three or more inches does not per se establish the existence of an unreasonable home fire hazard. The hazard posed by nylon carpet is relatively minor compared to polyurethane mattresses and children's sleepwear. Since nylon carpet, as shown by the evidence in this case, is

difficult to ignite, has a tendency to melt, and propagates a low flame slowly if at all, proof of failing a standard which measures only a four inch spread of the flame front in a draft free environment, does not establish that an unreasonable risk of fire in the home environment chargeable to the manufacturer exists.

The Le Blanc results establishing substantial equality between the flammability of failing and passing Paradise Valley samples under home-like ignition conditions stand virtually unchallenged by cross-examination or rebuttal. It follows that, on this record, no sound finding can be made that Paradise Valley nylon foam back carpet produced by these Respondents in 1972-3 represents an unreasonable risk of fire or injury to any consumer in his home. Consequently, no order to recall Paradise Valley foam back carpet from the home would be appropriate.

An order in general terms to cease and desist manufacturing carpet which fails the flammability standard similarly makes little sense. The failures were not shown to be due to any intentional act, such as deliberately reducing the amount of aluminum trihydrate in the foam backing. Nor is there evidence of a consistent pattern of failing carpet which could constitute a generally negligent operation. The failure

on two production days to properly mix the latex batch, or improper operation of the "doctor bar," or settling out the latex precoat in the holding tanks are operational accidents which are not likely to reoccur, certainly not intentionally. A cease and desist order based on such inadvertencies could hardly be the subject of substantial civil or criminal penalties if violated.[6/] The considerable litigation expense and risk which Respondents have already undergone, or will be subjected to before this proceeding is completed, would appear to be a sufficient deterrent to inhibit careless production in the future.

An appropriate solution to the problem posed by this case would be to amend FF 1-70 to require the manufacturer to test appropriately designated lots (for example carpet design, production unit, or materials lots) before shipment to wholesalers/retailers similar to the requirements of the Mattress Standard (FF 4-72) and to promptly report failing results to the Commission. In this manner public safety and manufacturing quality control would be better

6/ Chairman Casper Weinberger, in Hearings before the Consumer Sub-Committee of the Senate Committee on Commerce at p.45 stated: "Experience has also shown that when an effective order is eventually obtained civil penalty proceedings for violations of such orders have been so infrequent, so protracted, and involve such minimal monetary penalties that they are hardly a real deterrent to future violations of the act." June 2, 1970

assured. Premarket testing would be substantially more effective and economical from the standpoint of the manufacturer than post-sale recall. The increased cost to the manufacturer of such a requirement, which naturally would be passed on to the consumer in the form of slightly high prices, is justifiable in the interest of public safety.

Respondents have asserted that all Paradise Valley foam carpet style has been recalled from the channels of commerce. The Staff was unconvinced. To assure adequate public protection the order to be issued herein will contain the following provisions:

(1) Respondents shall give notice by certified mail, return receipt requested, to all known purchasers or persons in possession of Paradise Valley foam back carpet produced by Respondents on the failing days (July 18, 1973 and December 10, 1973) to the effect that said carpet failed the Commission's Flammability Carpet Standard;

(2) Respondents shall cease and desist from further sales of Paradise Valley foam back carpet;

(3) Respondents shall recall all carpet from failing finishing days from wholesalers and/or retailers;

(4) Respondents shall obtain a sample of Paradise Valley foam back from every finishing day not previously tested which remains in the channels of commerce and submit same to the Commission's Staff for testing; and

(5) Respondents shall submit to the Commission's Staff complete production information concerning any other Barrett Carpet Mills Inc., foam back carpet finished by Masterpiece Finishing Inc., on any failing days for appropriate remedial action.

In view of the foregoing considerations and upon all the substantial evidence of record considered as a whole, it is concluded that, in accordance with Section 3(a) of the Flammable Fabrics Act and Section 5(b) of the Federal Trade Commission Act, a cease and desist order including the provisions above set forth should be issued herein.

Paul N. Pfeiffer

PAUL N. PFEIFFER
Administrative Law Judge

DATE: July 8, 1976

APPENDIX A - Statutory References

APPENDIX A

FLAMMABLE FABRICS ACT

PROHIBITED TRANSACTIONS

"Sec. 3(a) The manufacture for sale, the sale, or the offering for sale, in commerce, or the importation into the United States, or the introduction, delivery for introduction, transportation or causing to be transported, in commerce, or the sale or delivery after a sale or shipment in commerce, of any product, fabric, or related material which fails to conform to an applicable standard or regulation issued or amended under the provisions of section 4 of this Act, shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(b) The manufacture for sale, the sale, or the offering for sale, of any product made of fabric or related material which fails to conform to an applicable standard or regulation issued or amended under section 4 of this Act, and which has been shipped or received in commerce shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

REGULATION OF FLAMMABLE FABRICS

Sec. 4(a) Whenever the Secretary of Commerce finds on the basis of the investigations or research conducted pursuant to section 14 of this Act that a new or amended flammability standard or other regulation, including labeling, for a fabric, related material, or product may be needed to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage, he shall institute proceedings for the determination of an appropriate flammability standard (including conditions and manner of testing) or other regulation or amendment thereto for such fabric, related material, or product.

(b) Each standard, regulation, or amendment thereto promulgated pursuant to this section shall be based on findings that such standard regulation, or amendment thereto is needed to adequately protect the public against unreasonable risk of the occurrence of fire leading to death, injury, or significant property damage, is reasonable, technologically practicable, and appropriate, is limited to such fabrics, related materials, or products which have been determined to present such unreasonable risks, and shall be stated in objective terms.***"
(Emphasis added.)

FEDERAL TRADE COMMISSION ACT

"Proceeding by Commission; modifying and setting aside orders

Sec. 5(b): Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.***"
(Emphasis added.)

SERVED: July 8, 1976

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of BARRETT CARPET MILLS INC., a corporation, and ROY C. BARRETT, individually and as an officer of the corporation. FLAMMABLE FABRICS ACT ENFORCEMENT PROCEEDING	CPSC DOCKET NO. 75-5

INITIAL DECISION AND ORDER

SERVED UPON:

Ronald Yelenick, Esquire, George Miller, Esquire, Annette Seltzer, Esquire, Enid Rubenstein, Esquire, and Jere Glover, Esquire, Attorneys, Bureau of Compliance, Consumer Product Safety Commission, 5401 Westbard Ave., Bethesda, Maryland 20207.

Richard Gimer, Esquire, Thomas Lumbard, Esquire, Respondents' Counsel, Berliner, Maloney, Gimer and Muir, Suite 420, 1100 Connecticut Ave., N.W., Washington, D. C. 20036.

N.B. Pursuant to Rule 72 of the Commission's Interim Rules of Practice for Adjudicative Proceedings (Part 1025.72) a notice of appeal from this initial decision must be filed within 10 days of the service date above. An appeal brief may be filed 30 days after said service date.

I

PRELIMINARY STATEMENT

A Notice of Enforcement was issued by the Secretary in this case on July 18, 1975, in which the Commission's Bureau of Compliance charged Respondents Barrett Carpet Mills Inc., and Roy C. Barrett, individually and as an officer thereof, with the manufacture and sale of carpet in interstate commerce which did not comply with the Standard for Surface Ignition of Large Carpets and Rugs (DOC FF 1-70) in violation of Section 3 of the Flammable Fabrics Act. The Notice also alleges that this failure constituted an unfair and deceptive practice under Section 5 of the Federal Trade Commission Act. The remedies sought are: (1) an order to cease and desist from all future violations; (2) notice of the hazard to all Respondents' customers; and (3) recall of all violative carpet from distributors, retailers, and ultimate consumers.

Respondents answered by denying all the substantive allegations of the Notice and, in addition, asserting affirmative defenses, inter alia, of improper sampling, improper Commission Staff action in negotiating a proposed settlement, and lack of due process in enforcing the Standard.

In addition Respondents allege that they have notified their customers (wholesalers/retailers) and have recalled from commerce all failing carpet rolls.

A prehearing conference was held on September 9, 1975. At that time, Respondents proposed a settlement agreement alleged to be identical to that ordered In Re Congoleum, Docket No. 75-3[1/] which directed notification to purchasers in possession of installed failing Endureze carpet style and recall of all uninstalled Endureze carpet from distributors and retailers for testing but not recall "from the floor" (from the home of a consumer). This agreement was rejected by the Staff. A further prehearing conference was held on October 22, 1975, when both parties indicated that a stipulation of some of the facts could be consummated with further negotiations. Such stipulation was entered into and a further prehearing conference was held on January 6, 1976. The hearing commenced February 2, 1976, and concluded on February 13, 1976. At the hearing Respondents asserted that no Paradise Valley nylon fat foam backed carpet remained in the channels of commerce.

Thereafter, an opportunity was afforded for the submission of proposed findings and conclusions. Upon request of Respondents' counsel, an oral argument on legal issues was held on May 11, 1976, on which date the case was submitted for initial decision.

1/ Commission final decision, July 14, 1975.

II

THE OPPOSING CONTENTIONS

The failing carpet known as Style 222, Paradise Valley (foam back) was produced on 26 widely separated days in 1972, 1973, and 1974. Enforcement Counsel's position is that the failing DOC FF 1-70 tests conducted on the carpet produced on September 18, 1972, July 18, 1973, November 9, 1973, and December 10, 1973 are sufficient to condemn the entire style and that recall from the consumer's floor is required.

Respondents claim that the September 18, 1972 sample was finished by Reliance Finishing Inc., a different sub-contractor, and is not representative of the later production finished by Masterpiece Finishing Inc., and that the November 9, 1973 sample (hereinafter called the Vest sample) is defective used carpet and properly should not be tested under DOC FF 1-70. While admitting failures on the other two dates named above, Respondents have presented passing tests from other production days to oppose the Staff's allegation that the entire style is defective. In addition, Respondents have conducted so-called "real life" tests tending to establish that passing and failing samples react similarly to a variety of typical household ignition sources and that the absolute level of hazard is not high enough to justify recall from the consumer's home.

III

THE EVIDENCE

Much of the evidence is contained in an amended stipulation of facts relating to the collection of carpet samples and the results of the flammability tests. The stipulation may be summarized as follows: Roy C. Barrett controls the operation of Barrett Carpet Mills which produces carpet in interstate commerce subject to the Flammability Standard which is in full force and effect. A total of 15,013.76 square yards of style Paradise Valley, nylon, fat foam, was produced of which 13,430 square yards were sold. Paradise Valley was last manufactured on January 31, and last sold on March 7, 1974. Respondent does not manufacture the entire carpet. The operation of applying the foam to the carpet back is described as finishing and is performed by subcontractors pursuant to specifications prepared by Barrett. Paradise Valley foam was designed to be manufactured with aluminum trihydrate (ATH) in its latex precoat to provide the necessary flame resistant characteristics. The following chart displays the finishing days, finisher, amounts, and flammability tests for all Paradise Valley:

PARADISE VALLEY FOAM PRODUCTION

Reliance 3,902.20 square yards

6 finishing days (dates not available)

Test Results

7-1, 6-2
2 tests, 1 pass
1 fail

Masterpiece 10,079.84 square yards

18 finishing days

09-29-72 (100 sq yds)
12-20-72 (312 sq yds)
12-22-72 (547 sq yds)
12-28-72 (315 sq yds)
01-05-73 (93 sq yds)
01-10-73 (2207 sq yds)
02-14-73 (297 sq yds)
03-21-73 (308 sq yds)
05-03-73 (287 sq yds)
05-15-73 (309 sq yds)
06-01-73 (401 sq yds)
07-18-73 (1635 sq yds)

The criteria for passing DOC FF 1-70 is that no more than 1 specimen out of 8 fails. All results labeled 8-0 or 7-1 are passes. All others fail.

6-2, 6-2, 4-4, 6-2, 6-2, 5-3, 1-7, 6-2, 8-0, 5-3

10 tests - 9 fail, 1 pass

10-10-73 (913 sq yds)
5 tests - all pass

8-0, 8-0, 8-0, 8-0, 8-0

11-09-73 (817 sq yds)

8-0, 8-0, 8-0, 8-0, 8-0, 6-2 (Vest sample)

6 tests - 5 pass, 1 fail

12-05-73 (302 sq yds)
12-10-73 (311 sq yds)
3 tests - 1 pass, 2 fail

4-4, 1-7, 7-1

01-24-74 (310 sq yds)
01-31-74 (615 sq yds)

The Georgia Institute of Technology conducted a Neutron Activation Analysis upon two samples of each of two passing and two failing rolls of Paradise Valley foam backed carpeting. The analysis showed the presence of alumina trihydrate in both the passing and the failing samples. The range in alumina trihydrate level in the passing rolls was 8.6% to 13.9%; the range in the failing samples was 3.2% to 26.3%. The average level of alumina trihydrate in the passing samples was 10.9%; the average level in the failing samples was 9.4%. The Georgia Institute of Technology has concluded that the failure of the two rolls "was probably due to the lack of uniformity in addition of $Al_2O_3 . 3H_2O$ (alumina trihydrate) to the carpet backing."

The remainder of the Stipulation was concerned with the actual facts of investigation and initial enforcement action leading up to this proceeding.

The Bureau of Compliance presented evidence supplementing the stipulation as follows: (1) that samples of Paradise Valley foam back failed the standard; (2) that based on statistical projections, at least 46% of Paradise Valley could be expected to fail the flammability standard at a confidence level of 95%; (3) that a sample secured from the home of a consumer by the name of Vest had never been actually installed; (4) that alleged flaws in the Vest sample (polypropylene fibers on the face) did not prevent it from being selected as a representative sample for flammability testing.

Respondents' evidence tended to show (1) that the defect which caused Paradise Valley to fail the flammability standard occurred in the finishing process performed by an independent subcontractor; (2) that, according to tests performed by the Georgia Institute of Technology the failures were caused by an uneven distribution of ATH; (3) that the flammability standard was not intended to be applied to installed carpet; (4) that it is inherent in the nature of carpet manufacturing that some quantity of carpet will fail the flammability standard; (5) that the production failures

which occured in this case were very rare and are not expected to be repeated; (6) that Paradise Valley was finished on 26 separate days and there is no evidence of any failing carpet produced on any other dates than those listed in the stipulation; and (7) that tests performed by an independent laboratory indicate that passing and failing samples react similarly to "real life" ignition sources.

The resolution of this case requires a detailed understanding of the production pattern of Paradise Valley foam back carpet. According to the creditable testimony of Respondents' production manager, McMahon, and of their finisher's converter manager, Mr. Bartenfeld, the following represents an outline of the production process of Paradise Valley foam: The initial stage of production involves taking nylon yarn and weaving it into polypropylene backing in a tufting machine at Respondents' plant. The loosely woven carpet known as greige goods was finished with any one of several backs, e.g., jute, thin foam, fat foam. Paradise Valley was finished in one-half inch fat foam. The backing apparently directly affects the flammability characteristics of the carpet. The same greige goods with jute backing passed the flammability test consistently.

Greige goods are normally stored at the mill until an order is received for a particular lot of carpet dyed to customer specifications. The carpet is then shipped to the finisher, who first dyes it, and then applies the foam backing. The finisher's process of foaming the carpet is a continuous one involving greige goods from many manufacturers. The goods are attached to one another end-to-end and fed into the converter. The first stage in the process is the attachment of the latex precoat to the back of the greige goods.

The precoat in Paradise Valley foam backed nylon carpet has three functions: first, to lock the strands of the greige goods which are otherwise loose in place; second, to provide an appropriate surface for the attachment of the backing; and third, as a carrier for aluminum trihydrate, the fire-retarding agent which acts by releasing water when heated.

The latex precoat for the first six production days of Paradise Valley consisted of a premixed batch delivered by the precoat manufacturer to the finisher, Reliance Industries Inc. All subsequent finishing was performed by Masterpiece Finishers Inc. (Masterpiece). Respondents' production manager and the Masterpeice converter supervisor testified that during the entire time of production, Masterpiece compounded (mixed) its own latex precoat.

The compounding process involves a mixing of the necessary components of the latex precoat consisting mainly of water, carboxylated latex rubber and filler. The filler traditionally used in the carpet industry is whiting (ground up Georgia marble calcium carbonate). This whiting is necessary, both as an extender of the latex and to give the latex the appropriate consistency. Since the carpet standard was promulgated, the filler has usually consisted of varying proportions of whiting and ATH commonly referred to as parts. For example, a specific formulation of a particular consistency might have 500 parts of filler which could be composed of 150 parts of ATH and 350 parts of whiting.

According to the Respondents' production manager, the water, latex, filler and some other minor chemicals are mixed in a large tank. The mixing is performed by sequentially adding each ingredient and then agitating the batch. After mixing for some time, the viscosity of the mix is checked and, if not correct, it is altered by the addition of thickening agents, since otherwise the precoat will not properly flow onto the carpet in the converter. The viscosity check, performed several times, is the only quality control measure employed by Respondents to check the complete mixing of the latex precoat. Significantly, there is no check made to

ascertain whether the two components of the filler (whiting and ATH) have been properly mixed throughout the batch. Respondents' production manager testified that he saw no reason why these two components would react differently to the mixing process. Therefore, the viscosity check does not indicate that the ATH is evenly distributed throughout the mixing batch--only that the filler as a whole is evenly distributed. In addition, the witness testified that if the viscosity was not correct, it would be adjusted by adding thickening agents. This, however, would have no effect upon assuring the even distribution of ATH.

The Standard for Large Carpet and Rugs, DOC FF 1-70, is commonly referred to as the "pill test." The test method requires eight replicate 9" X 9" carpet speciments. The speciments are dried in an oven and placed in a draft free environment. A flattening frame with a hole four inches in radius is placed on the specimen. A small methenamine tablet is then placed in the center of the hole and ignited. If the flame front burns within one inch of the flattening frame, the specimen fails. If two specimens of the eight tested fail, the sample is considered as failing.

For Paradise Valley to pass the standard consistently, it is necessary not only that a sufficient amount of ATH be present in the latex precoat, but that it be evenly distributed.

This is because the pill test ignites a very small area of carpet and any area with a deficiency of ATH would be more likely to ignite and burn even if the carpet as a whole had the specified amount of ATH. Respondents employed no quality control which would consistently insure the even distribution of ATH across the back of the carpet.

In the finishing process the greige goods are spread to its full width, attached to other carpet and, in a continuous process, are fed over an applicator to pick up the latex precoat. The precoat is then scraped by an iron "doctor bar" to even it out and force it into the fibers. The carpet is then heated to "drive" the excess water from the latex precoat and then coated with a latex foam which does not have ATH added, heated again, and cooked in a carpet oven.

The carpet oven at Masterpiece is a very large machine holding approximately 300 linear feet of carpet at one time. Greige goods from different manufacturers are joined together. Paradise Valley would normally be processed at a rate between 10 to 20 linear feet per minute and since it was fat foam backed it would move closer to 10 feet per minute.

It is clear that a large quantity of carpet was manufactured which did not contain the appropriate distribution of ATH. This is not only reflected in the passing and failing carpet tests, but in the Georgia Institute of

Technology study which showed that although the total amount of ATH in the failing carpet was approximately the same as that in the passing carpet, it was completely maldistributed.

Respondents' production manager McMahon, proposed several possible causes for uneven or irregular ATH application: (1) settling out of the latex precoat in the holding tanks could induce improper viscosity; (2) a misaligned "doctor bar" could cause irregularities in the backing; (3) tight or loose fabric selvage[2/] could cause the carpet to take up the precoat unevenly. However, in the witness's opinion, settling of the latex precoat was the least likely cause of failure since improper viscosity would be noticed immediately because the precoat would not flow evenly onto the carpet.

As to which of these three possible production defects caused the ATH maldistribution: settling of the latex precoat, a misaligned "doctor bar," or tight or loose fabric selvage, the testimony is inconclusive. Other causes of failure are possible. For example, it is equally conceivable that incomplete mixing of the whiting and ATH in the original precoat batch was the primary cause of the ATH maldistribution. An analogy can be drawn to a can of black paint poured into a can of white paint and stirred only once. The mixture would

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2/ Selvage is the weave of the carpet fabric itself.

not be of a consistent color and painting on a wall would result in an extremely irregular color pattern, even though a viscosity test would show the paint to be properly mixed.

It is not possible on this record, nor critical to the decision, to pinpoint the exact cause of the ATH maldistribution. It is sufficient that the production defect occurred within the control of the finishing subcontractor for whom Respondents are admittedly legally responsible under the Act.

Following the finishing process, the carpet was trucked back to Barrett for storage on the same day or within at the most, a day or two later. Carpet was not normally retained at the finisher. Significantly, nothing which occurred in the manufacturing process after finishing involved improving the flame resistant quality of the carpet.

The critical issue in this case is the propriety of requiring recall of some quantity of defective carpet from the consumer's home. According to witness Greenfeld, who was active in the development of DOC FF 1-70, this Standard was designed to insure that passing carpet would remain safe throughout its lifetime. However, with respect to failing carpet, the effects of home usage or contamination were not taken into account in formulating the Standard. Moreover, the Standard was designed primarily as a manufacturer's quality control test rather than as a test measuring an

unreasonable degree of risk of fire in the home. In 1970, when the Standard was drafted, no Federal agency had statutory authority to recall flammable carpet either from a wholesaler/retailer or from the consumer's floor. The limit of the then known authority in a contested proceeding was a Federal Trade Commission order to the manufacturer to cease and desist from further manufacture of failing carpet. However, in several consent order settlements the FTC did obtain voluntary recalls from wholesalers/retailers, but none from a consumer's floor.

In an effort to project the effect of the sample test failures upon the entire carpet style, the Staff presented a statistical witness, Mr. Ralph Madison, who testified that in his opinion, within a 95% level of certainty, 46% of Paradise Valley foam back would, if tested, fail to meet the flammability standard.

This estimate involves an assumption that the samples tested were selected by the Staff at random from the entire carpet style. Respondents were unable to present evidence of any conscious attempt by the Staff to select unrepresentative carpet samples for testing purposes. There is no dispute as to the calculations contained in the projection. However, the underlying assumptions and, therefore, the ultimate conclusions are in dispute.

In Re Congoleum supra, holds that for the purpose of preventing future sales of violating carpet, a small number of failing tests reasonably projected to encompass an entire

carpet style, is adequate to sustain a cease and desist order banning future sales of the style, recalling samples of all shipped untested carpet of the style in question from distributors and retailers for testing roll-by-roll, and notifying the original purchaser or person in possession of the premises of the hazard. However, no other recall action was taken with respect to the untested rolls. Since the remedy demanded in this case is recall of the entire carpet style from the consumer's floor, it is vital that the statistical projection be accurate in forecasting which carpet is likely to fail the standard.

The key difficulty with the Staff's statistical projection is the fact that it is the only evidence that any Paradise Valley carpet produced on the untested days would actually fail the standard. Some of the tested carpet apparently passed without any failure whatever; other carpet failed repeatedly. The passing and failing carpet tests were concentrated among separate production days. Rarely was there a significant mix of passes and failures within the same production day. Therefore, considering the testimony concerning the method of carpet production, it is reasonable to assume that the failures were the result of production defects on particular days.

In essence, the evidence discloses that there were two days on which the production clearly failed, two days on which the production clearly passed, and a large number of

days for which there is no proof of failures other than the statistical presentation. Inasmuch as the evidence is persuasive that the failures were caused by a production rather than a design defect, it is reasonable to conclude that the "lot" to be subject to a cease and desist and/or recall order, if any be found required by the public interest, is properly a finishing day rather than the entire Paradise Valley style, as the Staff contends. To adopt the Staff position in this case that "style" is equivalent to "lot" would be to completely disregard the evidence that the most probable proximate cause of the carpet failures was one or a combination of several possible finishing errors.

The other major evidence presented at the hearing concerned the so-called Vest sample. The Vest sample consisted of Paradise Valley foam back carpet from an identifiable roll which had been shipped to the Overberg Decorating Center in Festus, Missouri, subsequently purchased by Mr. Vest, and personally installed by him in his home. For approximately six months a two-piece carpet remnant left over from the installation was stored under the bed of Mr. Vest's son in the basement. This bed contained a skirt around the frame and the carpet lay underneath partly rolled and partly face up for those six months. There was no direct testimony as

to whether the carpet had ever been vacuumed while it was in that location. Mr. Vest testified that the carpet was not used; it was not walked on; and it had never been installed. However, there was evidence that the sample contained some facial imperfections which could affect its flammability. The sample failed the flammability standard 6-2. Other portions of the same carpet roll produced on the same day were tested five other times by Respondents and they passed all five tests 8-0 each.

Mr. Greenfeld testified that he perceived no reason why the test in DOC FF 1-70 could not be applied to used carpet. However, the witness was unclear as to exactly what lot the Vest sample roll represents.

Assuming the facial flaws were present in the Vest sample at the time it was produced and did in fact adversely affect flammability, this would be either a design or production defect for which Respondents would bear responsibility. In the event the facial flaw was caused during installation by Mr. Vest, or in another manner during his custody, Respondents would not bear any responsibility for the failure.

As indicated above, other portions of the roll from which the Vest sample was derived passed the tests without

exception. Also, since the Vest sample failed marginally (6-2), it is more likely that the failure was due to the condition of the carpet in the home (dust, grease, etc.) than to a production defect.

It is, therefore, concluded that the Vest sample is unrepresentative and that the roll sold to Mr. Vest need not be the subject of a cease and desist/recall order, if any is required herein.

Respondents presented videotape evidence as to the flammability characteristics of Paradise Valley when exposed to so-called "real life" tests designed and conducted by Dr. Le Blanc, stipulated to be an expert in carpet flammability. These tests clearly demonstrated that when subjected to a number of ordinary home ignition sources, both failing and passing carpet samples reacted with approximately the same characteristics. The results of the tests were offered not to contradict or impeach the carpet standard, but rather to demonstrate that the recall of failing carpet from the home would represent an unnecessary and inappropriate remedy.

The tests consisted of subjecting 8 X 4 ft failing and passing samples of Paradise Valley taped down on plywood to ignition sources including cigarettes, matches, cigars, cigarette lighters, burning plastic waste paper baskets, charcoal briquettes, and flaming cooking oil. With the

exception of the Zippo lighter there was no noticeable difference in performance between the passing and failing carpet samples. All samples except those ignited by the plastic waste paper basket extinguished without outside help, burning approximately the same distance. The nylon yarn[3/] appeared to melt rather than burn extensively.

However, the tests conducted by Dr. Le Blanc are not officially sanctioned standards in contrast to the FF 1-70 pill test. No one from the Staff was present to observe the tests to determine, for example, whether all the results were actually depicted in the videotape recording submitted in evidence. In addition, there was no evidence that certain variables which are controlled in the pill test, such as draft, water content of the carpet, and standardization of the ignition source were similarly controlled in the Le Blanc tests.

Enforcement Counsel conducted only a minimum of cross-examination of Dr. Le Blanc, none of which diminished the credibility of his presentation. No rebuttal evidence was produced even though an opportunity for an adjournment to prepare such was afforded. Nor was the pill test rehabilitated as representing typical household ignition conditions by appropriate expert testimony. Counsel chose instead merely

3/ The record contains testimony that nylon is one of the least flammable of carpet materials.

to rely upon the admitted flammability standard failures as justifying recalling carpet from the home. Consequently, the Le Blanc test results were received into evidence virtually unchallenged. The state of the record remains that passing and failing carpet samples react similarily to typical household ignition sources.

IV

FINDINGS AND CONCLUSIONS

The Staff is adamant in demanding recall of the entire Paradise Valley carpet style from the consumer's floor because of the failing samples. In Congoleum, supra, the Administrative Law Judge held that "Recall of carpet which has been installed is not at this juncture practicable because of the length of time most of it has been laid down, and the legal and practical problems presented by any order contemplating the taking up of carpet now on floors."[4/] Judge Hanscom's decision was affirmed by the Commission without extended comment on this issue.

The reasons underlying the Judge's decision apply equally to this case. The carpet in question was produced during 1972 and 1973. Presumably, some of it has been installed for at least three years. The inconvenience to the consumer of ripping carpet from the floor of his home in 1976 or possibly 1977 would be considerable. If the consumer were a hotel instead of an individual homeowner, such rip-out and reinstallation could cause a substantial economic loss through interruption of occupancy.

4/ Initial Decision of Federal Trade Commission Chief Administrative Law Judge Daniel H. Hanscom, December 12, 1974, p.23.

If a refund of the 1972 price were made, the effects of inflation would render such relief inadequate and not likely to permit replacement. There is no record of any fire involving Paradise Valley foam back in any consumer home or place of business.

Carpet in the home may be substantially different than carpet in the showroom. After shag carpet has been walked upon repeatedly, the strands become packed down eliminating oxygen and consequently the carpet is less flammable.[5/] On the other hand, household conditions normally produce dirt, dust, grime and grease from cooking or from shoes traversing driveways where automobiles are parked, or fuzzing of the carpet fibers by pedestrian traffic, any of which may render the carpet more flammable, but not due to any act of the manufacturer.

Neither the Flammable Fabrics Act nor the Federal Trade Commission Act contain any expressions of Congressional intent concerning recall, replacement, or refund of the purchase price from the ultimate consumer. This Commission has not made the necessary Section 30(d) finding to invoke the remedies available under the Consumer Product Safety Act.

5/ Witness Greenfeld explained the Section 1630 4(d)(1), FF 1-70 requirement that the pile be raised before testing "because it was determined during early testing that the carpet is more flammable with the pile standing up than when crushed." Tr. 1156

Under that Act a carpet manufacturer would have the option to elect between repair (impracticable), replacement, or purchase price refund less an allowance for use for more than one year at the time of notice of the hazard. On this basis a consumer owning carpet for three or more years would not likely receive as much as 50% of his original purchase price as a refund plus installation which would hardly justify his replacing the carpet.

It is not necessary on the state of this record to reach a final conclusion as to whether the Commission possesses the legal power to recall the failing Paradise Valley carpet from the consumer's floor. Staff Counsel was unable to sustain its burden of proof to establish that carpet which fails the standard presents an unreasonable risk of the occurrence of fire leading to death or serious injury to the consumer in his home. The Standard does not measure the height nor speed of the flame. The fact that the flame persists for three or more inches does not per se establish the existence of an unreasonable home fire hazard. The hazard posed by nylon carpet is relatively minor compared to polyurethane mattresses and children's sleepwear. Since nylon carpet, as shown by the evidence in this case, is

difficult to ignite, has a tendency to melt, and propagates a low flame slowly if at all, proof of failing a standard which measures only a four inch spread of the flame front in a draft free environment, does not establish that an unreasonable risk of fire in the home environment chargeable to the manufacturer exists.

The Le Blanc results establishing substantial equality between the flammability of failing and passing Paradise Valley samples under home-like ignition conditions stand virtually unchallenged by cross-examination or rebuttal. It follows that, on this record, no sound finding can be made that Paradise Valley nylon foam back carpet produced by these Respondents in 1972-3 represents an unreasonable risk of fire or injury to any consumer in his home. Consequently, no order to recall Paradise Valley foam back carpet from the home would be appropriate.

An order in general terms to cease and desist manufacturing carpet which fails the flammability standard similarly makes little sense. The failures were not shown to be due to any intentional act, such as deliberately reducing the amount of aluminum trihydrate in the foam backing. Nor is there evidence of a consistent pattern of failing carpet which could constitute a generally negligent operation. The failure

on two production days to properly mix the latex batch, or improper operation of the "doctor bar," or settling out the latex precoat in the holding tanks are operational accidents which are not likely to reoccur, certainly not intentionally. A cease and desist order based on such inadvertencies could hardly be the subject of substantial civil or criminal penalties if violated.[6/] The considerable litigation expense and risk which Respondents have already undergone, or will be subjected to before this proceeding is completed, would appear to be a sufficient deterrent to inhibit careless production in the future.

An appropriate solution to the problem posed by this case would be to amend FF 1-70 to require the manufacturer to test appropriately designated lots (for example carpet design, production unit, or materials lots) before shipment to wholesalers/retailers similar to the requirements of the Mattress Standard (FF 4-72) and to promptly report failing results to the Commission. In this manner public safety and manufacturing quality control would be better

6/ Chairman Casper Weinberger, in Hearings before the Consumer Sub-Committee of the Senate Committee on Commerce at p.45 stated: "Experience has also shown that when an effective order is eventually obtained civil penalty proceedings for violations of such orders have been so infrequent, so protracted, and involve such minimal monetary penalties that they are hardly a real deterrent to future violations of the act." June 2, 1970

assured. Premarket testing would be substantially more effective and economical from the standpoint of the manufacturer than post-sale recall. The increased cost to the manufacturer of such a requirement, which naturally would be passed on to the consumer in the form of slightly high prices, is justifiable in the interest of public safety.

Respondents have asserted that all Paradise Valley foam carpet style has been recalled from the channels of commerce. The Staff was unconvinced. To assure adequate public protection the order to be issued herein will contain the following provisions:

(1) Respondents shall give notice by certified mail, return receipt requested, to all known purchasers or persons in possession of Paradise Valley foam back carpet produced by Respondents on the failing days (July 18, 1973 and December 10, 1973) to the effect that said carpet failed the Commission's Flammability Carpet Standard;

(2) Respondents shall cease and desist from further sales of Paradise Valley foam back carpet;

(3) Respondents shall recall all carpet from failing finishing days from wholesalers and/or retailers;

(4) Respondents shall obtain a sample of Paradise Valley foam back from every finishing day not previously tested which remains in the channels of commerce and submit same to the Commission's Staff for testing; and

(5) Respondents shall submit to the Commission's Staff complete production information concerning any other Barrett Carpet Mills Inc., foam back carpet finished by Masterpiece Finishing Inc., on any failing days for appropriate remedial action.

In view of the foregoing considerations and upon all the substantial evidence of record considered as a whole, it is concluded that, in accordance with Section 3(a) of the Flammable Fabrics Act and Section 5(b) of the Federal Trade Commission Act, a cease and desist order including the provisions above set forth should be issued herein.

Paul N. Pfeiffer

PAUL N. PFEIFFER
Administrative Law Judge

DATE: July 8, 1976

APPENDIX A - Statutory References

APPENDIX A

FLAMMABLE FABRICS ACT

PROHIBITED TRANSACTIONS

"Sec. 3(a) The manufacture for sale, the sale, or the offering for sale, in commerce, or the importation into the United States, or the introduction, delivery for introduction, transportation or causing to be transported, in commerce, or the sale or delivery after a sale or shipment in commerce, of any product, fabric, or related material which fails to conform to an applicable standard or regulation issued or amended under the provisions of section 4 of this Act, shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(b) The manufacture for sale, the sale, or the offering for sale, of any product made of fabric or related material which fails to conform to an applicable standard or regulation issued or amended under section 4 of this Act, and which has been shipped or received in commerce shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

REGULATION OF FLAMMABLE FABRICS

Sec. 4(a) Whenever the Secretary of Commerce finds on the basis of the investigations or research conducted pursuant to section 14 of this Act that a new or amended flammability standard or other regulation, including labeling, for a fabric, related material, or product may be needed to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage, he shall institute proceedings for the determination of an appropriate flammability standard (including conditions and manner of testing) or other regulation or amendment thereto for such fabric, related material, or product.

(b) Each standard, regulation, or amendment thereto promulgated pursuant to this section shall be based on findings that such standard regulation, or amendment thereto is needed to adequately protect the public against unreasonable risk of the occurrence of fire leading to death, injury, or significant property damage, is reasonable, technologically practicable, and appropriate, is limited to such fabrics, related materials, or products which have been determined to present such unreasonable risks, and shall be stated in objective terms.***"
(Emphasis added.)

FEDERAL TRADE COMMISSION ACT

"Proceeding by Commission; modifying and setting aside orders

Sec. 5(b): Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.***"
(Emphasis added.)

CERTIFICATION

I hereby certify that copies of the foregoing document were sent by me to the following named individuals:

Ronald G. Yelenik, Esquire
Consumer Product Safety Commission
5401 Westbard Avenue
Washington, D.C. 20207

Secretary
Consumer Product Safety Commission
Washington, D.C. 20207

Ernest G. Barnes,
Administrative Law Judge.

Dated: December 9, 1975

HOWREY & SIMON
1730 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20006
(202) 872-8800

November 5, 1975

Hon. Ernest G. Barnes
Administrative Law Judge
Federal Trade Commission
6th & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Esquire Carpet Mills, Inc., et al.
FTC Docket No. 8913

Dear Judge Barnes:

This letter is to inform you of our intention to discontinue any further participation in the above-referenced matter. During the past several months our firm has been involved in an effort to conclude litigation in this case. As you may know, neither respondent Esquire Carpet Mills, a defunct company, nor the individual respondents, both of whom have filed petitions for personal bankruptcy, have authorized our firm to act as their legal counsel in this matter. Rather, we have participated at your honor's request and without compensation in connection with an order directing enforcement counsel to show cause why this litigation was in the public interest and should be continued.

Since we are not legal counsel for respondents and have been unable to effectively communicate with them, we feel that our firm is no longer in a position to further participate in this matter.

Very truly yours,

/Kenneth E. Krosin

Kenneth E. Krosin

cc: Ronald G. Yelenik, Esq.

November 6, 1975

Kenneth E. Krosin, Esquire
Howrey & Simon
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Esquire Carpet Mills, Inc., et al.
CPSC Docket No. 75-6 (FTC Docket
No. 8913)

Dear Mr. Krosin:

This is to acknowledge receipt of your letter of November 5, 1975, advising of your intention to discontinue any further participation in the above-referenced matter.

I can well understand the problems which you have encountered, and I appreciate your past participation in this matter.

Very truly yours,

Ernest G. Barnes

EGB/lh

Ernest G. Barnes
Administrative Law Judge

CERTIFICATION

I hereby certify that copies of the foregoing document were sent by me to the following named individuals:

Ronald G. Yelenik, Esquire
Consumer Product Safety Commission
5401 Westbard Avenue
Washington, D.C. 20207

Secretary
Consumer Product Safety Commission
Washington, D.C. 20207

Ernest G. Barnes,
Administrative Law Judge.

Dated: December 9, 1975

HOWREY & SIMON
1730 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20006
(202) 872-8800

November 5, 1975

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Administrative Law Judge
Federal Trade Commission
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Very truly yours,

/Kenneth E. Krosin

Kenneth E. Krosin

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November 6, 1975

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EGB/lh

Ernest G. Barnes
Administrative Law Judge

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of SPRAY TECH CORPORATION, a corporation doing business as WAGNER/SPRAY TECH CORPORATION and PETER E. BADER, individually and as an officer of SPRAY TECH CORPORATION	CPSC DOCKET NO. 75-7

To: The Honorable Paul N. Pfeiffer,
Administrative Law Judge

AGREEMENT

SPRAY TECH CORPORATION, a corporation, doing business as WAGNER/SPRAY TECH CORPORATION and PETER E. BADER, individually and as an officer of the aforesaid corporation (Consenting Parties) are willing to enter into an Agreement with counsel of the Consumer Product Safety Commission (Enforcement Counsel) concerning airless paint spray cup guns manufactured and sold by the Consenting Parties.

Therefore the Consenting Parties and Enforcement Counsel agree:

(a) That Spray Tech Corporation is a corporation organized and doing business under the laws of the State of Minnesota with its office and principal place of business located at 4307 Quebec Avenue North, Minneapolis, Minnesota 55428;

(b) That Spray Tech Corporation distributes airless paint spray cup guns under the trade names of WAGNER/SPRAY TECH, SEARS

and ASHLAND in commerce as the term "commerce" is defined in Section 3(a) of the Consumer Product Safety Act (CPSA);

(c) That PETER E. BADER is an officer of SPRAY TECH CORPORATION and formulates, directs and controls the acts, practices and policies of the corporation;

(d) That the Consenting Parties agree to voluntarily carry out the terms of this Agreement;

(e) That this Agreement will become effective upon the approval of the Commissioners of the Consumer Product Safety Commission.

The Consenting Parties further agree:

(a) That after acceptance of this Agreement they will incorporate onto all airless paint spray cup guns manufactured by them, a nozzle guard substantially of the design incorporated into this Agreement by Appendix A;

(b) That they will give notice in the manners specified in subsections c(1) through c(6) below, immediately on acceptance of this Agreement, which shall state that the Consumer Product Safety Commission has determined that airless paint spray cup guns marketed under the brand names of Wagner/Spray Tech, Sears and Ashland could cause serious injury by paint injection into the skin due to extremely high operating pressures at the nozzle;

(c) That they will offer, to consumers at no cost, a nozzle guard retrofit kit (accompanied by installation instructions and a warning label as specified and incorporated into this agreement in Appendices B and C respectively); and

(d) That they will notify consumers of the hazard and offer repair in the following manner(s):

1. Direct mail customers--

By mailing (postage prepaid) a certified letter, return receipt, warning the consumer of the hazard and enclose at no cost, a nozzle guard retrofit kit; kit.

2. Retail customers--

By informing every merchandiser and retailer with which Spray Tech is directly doing business, at both their principal offices and at each retail outlet, of the hazard of the airless paint spray cup guns and that Spray Tech will supply at no cost to the consumer a nozzle guard retrofit kit and request that appropriate notification be posted in their stores;

3. Jobber and Distributor customers--

By notifying jobber and distributor accounts of the hazard and repair program and obtaining their customer lists and by mailing (postage prepaid) a certified letter, return receipt, warning the consumer of the hazard and enclose at no cost, a nozzle guard retrofit kit;

4. Customers returning warranty cards--

By identifying all customers listed in its warranty card system and by mailing (postage prepaid) a certified letter, return receipt, warning each customer of the hazard and enclose at no cost a nozzle guard retorfit kit; where such customers have not been notified pursuant to

subsection 1 through 3 above.

(In lieu of verification of receipt by certified mail as required in subsections 1 through 4 of the above, consenting parties may use regular mail enclosing a self-addressed, stamped post card requesting acknowledgement of receipt.)

5. Current inventory--

By instructing their salesmen to notify all Spray Tech accounts and install at no cost a nozzle guard retrofit kit on their current inventory; and

6. Advertising and Public Notification--

By including in their advertising, of at least the same size in which consenting parties generally advertise their product, a notification to the public of the hazard and the availability of a free nozzle guard retrofit kit. Such advertisements shall appear in at least three consecutive issues of following trade and consumer publications: American Paint and Wall Covering Dealer, American Painting Contractor, Decorating Retailer, Western Paint Review, P.D.C.A. (Professional Decorating and Coating Association), Northern Hardware Trade, Hardware Merchandiser, Hardware Age, Southern Hardware.

In addition, consenting parties agree to furnish a press release (Appendix D) to pertinent consumer magazines and newspapers and to make a presentation to them concerning the benefits of the new nozzle guard and the availability of a free retrofit kit.

Consenting Parties agree to file a report with the Commission within thirty (30) days after Commission approval of this Agreement, detailing fully and specifically what they have done to comply with this Agreement.

Consenting parties agree to file compliance reports every thirty days thereafter, until submission of a final report, summarizing all actions taken by respondents, which is due seven months after the approval of this Agreement.

By accepting this Agreement, the Commission agrees that it will dismiss the present enforcement action against consenting parties and not commence proceedings against the Consenting Parties concerning the facts alleged in the Notice of Enforcement and the facts enumerated in this Agreement, provided Consenting Parties comply fully with this Agreement.

This Agreement is for settlement purposes only and does not constitute an admission by Consenting Parties that the law has been violated as alleged in the Notice of Enforcement, nor does it constitute an admission by Consenting Parties that the facts as alleged in the Notice of Enforcement or as stated in this Agreement, are true.

SPRAY TECH CORPORATION d/b/a/
Wagner/Spray Tech

By Peter E Bader by Glenn A Lund
Peter E. Bader
Executive Vice President Vice President & Board member

Peter E Bader by Glenn A Lund
Peter E. Bader, individually and as an officer of the corporation

[signature]
Enforcement Counsel

Stephen E. Joyce
Enforcement Counsel

APPENDIX B

Installtion instructions for adding nozzle guard:

1. Remove existing nozzle from gun.
2. Remove plastic collar from the steel nozzle. Discard the plastic collar.
3. Insert steel nozzle into the nozzle guard.
4. The nozzle is now ready to use in the same manner as before.
5. Caution---this guard protects you against accidental contact with the nozzle while spraying. Close contact could cause serious injury.

APPENDIX C

Warning label to be affixed to front rim of nozzle guard:

"Caution---do not remove.
This guard protects you against
accidental contact with the nozzle.
Close contact can cause serious injury."

APPENDIX D

Press release to magazines and newspapers:

"Spray-Tech Corporation of Minnesota announces a safety improvement program for its electric airless cup guns. By using high pressure cup guns improperly, it is possible to cause injury by injecting paint into the skin through high pressure. Spray-Tech is cooperating with the Consumer Product Safety Commission and has developed a safety nozzle guard for its products. This safety nozzle guard eliminates the risk of injury even with improper use and accidental triggering. This safety guard is available free of cost to every American consumer who owns a cup gun manufactured by Spray-Tech Corporation.

If you own a Spray-Tech Model ST-125, ST-150, ST-300, ST-350, W-170, W-190, W-280, a Sears Model-15528, a Rubberset Flowmatic Model CB-16152 or an Ashland Model W-160, send your name, address, model and serial number to Spray-Tech Corporation, ~~Robinsdale, Minn. 55428.~~"
P.O. BOX 1357 MINNETONKA MN
55343

Attach. 1.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of SPRAY TECH CORPORATION, a corporation doing business as WAGNER/SPRAY TECH CORPORATION and PETER E. BADER, individually and as an officer of SPRAY TECH CORPORATION.	CPSC DOCKET NO. 75-7

ORDER

Agr

The Commission having accepted an Agreement between Enforcement Counsel and respondents in the above captioned matter, (the Agreement and subsequent modification attached hereto);

IT IS HEREBY ORDERED THAT action in the above matter be dismissed without prejudice to either party, and may be only reopened in the event that respondents do not fully comply with the aforementioned Agreement.

Signed on this 14th day of October, 1975.

Sadye E. Dunn

Sadye E. Dunn, Secretary
Consumer Product Safety Commission

Attach. 1.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of SPRAY TECH CORPORATION, a corporation doing business as WAGNER/SPRAY TECH CORPORATION and PETER E. BADER, individually and as an officer of SPRAY TECH CORPORATION.	CPSC DOCKET NO. 75-7

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Sadye E. Dunn

Sadye E. Dunn, Secretary
Consumer Product Safety Commission

attach. 2

LAW OFFICES

ARENT, FOX, KINTNER, PLOTKIN & KAHN

FEDERAL BAR BUILDING

1815 H STREET, N.W.

WASHINGTON, D.C. 20006

CABLE: ARFOX, WESTERN UNION TELEX: 892672

202 347-8500

[illegible] J. FOX
[illegible] PLOTKIN
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JOEL N. SIMON
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BURTON A. SCHWALB
M. J. SHEFFIELD, JR.
JOHN M. BRAY
EVAN R. BERLACK
DAVID A. SACKS
DANIEL C. SMITH
JEROME R. AKMAN
WILLIAM B. SULLIVAN
CYNTHIA H. MILLIGAN
ANDREW M. LEVY
RODNEY F. PAGE
JOHN W. CURRIE
DONALD W. SAVELSON
DANIEL C. KAUFMAN
DONALD E. OSTEEN
BENJAMIN E. GOLDMAN
LEE CALLIGARO
MICHAEL M. EATON
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ALBERT E. ARENT
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GERALD B. GREENWALD
ROBERT H. NEUMAN
JAMES B. NALPERN
JOSEPH E. CASSON
ARNOLD P. WESTERMAN
THEODORE D. FRANK
RUTH P. ROLAND
MICHAEL H. LEAHY
RICK A. HARRINGTON
JAMES P. PARKER
ROBERT W. GREEN
JOHN L. BURKE, JR.
MARTIN KALB
ERIC L. BERNTHAL
MICHAEL B. ROSENBERG
JOHN C. FILIPPINI
SAMUEL H. WEISSBARD
JOSEPH P. GRIFFIN
CHRISTOPHER SMITH
JOE N. WRIGHT
M. CANDACE FOWLER

EARL W. KINTNER
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ARTHUR L. CONTENT
SIDNEY HARRIS
CHARLES B. RUTTENBERG
ALLEN G. SIEGEL
STEPHEN J. WEISS
WILLIAM J. LEMPFELD
ARNOLD J. KOHN
PETER TANNENWALD
EUGENE J. REIGNER
HOWELL J. REEVES
STEPHEN A. BODZIN
LINDA A. CINCIOTTA
SALVATORE A. ROMANO
ALAN R. MALASKY
GARY M. EPSTEIN
LAWRENCE A. LEVIT
RONALD I. TISH
ROBERT P. BUNN
CARTER STRONG
STEPHEN B. FORMAN
STANLEY J. BROWN
BARRY R. SCHENOF
WILLIAM R. CHARYK
RONALD A. CASS
J.T. WESTERMEIER, JR.

EDWIN L. KAHN
JOHN J. SEXTON
EARL M. COLSON
JOHN J. FUROW
MATTHEW S. PERLMAN
GEORGE R. RUCIK
L.F. HENNEBERGER
C.R. DONNENFELD
JAMES P. MERCURIO
JOHN R. BISHER, JR.
MICHAEL E. JAFFE
DAVID F. TILLOTSON
JOHN HARLLEE, JR.
DONALD M. BARNES
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PAMELA M. NOLAND
EUGENE A. MASSEY
WARREN BELMAR
CHARLES F. PLENGE
STEPHEN L. GIBSON
KEITH A. SEAT
DAVID L. COHEN
JAMES K. STEWART
FRANCIS X. LILLY
CHRISTOPHER B. FAGER
KARYL S. LUCK
PETER CHATILOVICZ

September 26, 1975

Hand Delivered

The Honorable Paul N. Pfeiffer
Administrative Law Judge
U.S. Consumer Product Safety Commission
1750 K Street, N.W.
Washington, D. C. 20207

Re: Spray Tech Corp.
CPSC Docket No. 75-7

Dear Judge Pfeiffer:

This letter is in response to your hand delivered letter of September 25, 1975 asking counsel whether the nozzle guard, proposed as part of the Corrective Action Plan involving airless paint spray cup guns manufactured by Spray Tech Corporation, is designed to fit the nozzle extension optional accessory to the cup guns and, if so, why no provision was made for the nozzle extensions in the retrofit instructions.

Spray Tech did not propose the nozzle guard for the nozzle extension as part of its voluntary Corrective Action Plan because Spray Tech believes that the velocity of the paint at the tip of the nozzle extension is not sufficient to cause any injury to users of the cup gun. Moreover, the nozzle extension is an optional accessory which is sold separately from the cup gun. The nozzle extension costs $8.90 and Spray Tech's records reveal that only about 6 or 7% of the purchasers of cup guns also purchase the nozzle extension.

Nevertheless, in the interest of expediting approval of the Corrective Action Plan submitted in this case and in order to avoid costly and time consuming testing of the nozzle extension Spray Tech has proposed to the Commission's enforcement staff and the staff has agreed (such agreement to be

confirmed by a separate letter to you) that the Corrective Action Plan (Agreement) submitted in case number 75-7 be amended to provide that the notice to consumers enclosing a retrofit kit will include notice that an adapter to make the nozzle guard fit on the nozzle extension is available and will be supplied to the consumer at no cost if the consumer checks the appropriate box on the postage prepaid reply card enclosed with the retrofit kit. The adapter will also be made available at no charge to all jobbers and distributors and will be included with all new nozzle extensions sold after acceptance of the Agreement by the Commission.

In the interest of clarifying the situation as to accessories to the cup guns Spray Tech wishes to bring to your attention another rarely used optional accessory to the cup gun. The so-called cleaning nozzle or needle jet nozzle is sold for $7.65 and has been purchased by about 2 or 3% of the purchasers of cup guns. This nozzle is purchased almost exclusively by service companies as a cleaning tool and its primary use is to clean engines, engine parts and other similar equipment.

However, again in the interest of expediting acceptance of the proposed Corrective Action Plan, Spray Tech has proposed and the Commission's enforcement staff has agreed that the Corrective Action Plan be amended to offer an adapter for the cleaning accessory in the same manner as described above for the nozzle extension accessory.

The only other relevant accessory to the cup guns offered by Spray Tech is a nozzle used to spray flowers and to disinfect upholstery. Spray Tech and the Commission's enforcement staff agree that this accessory, because of its many orifices and resultant low velocity, presents no hazard and should not be included in the Corrective Action Plan.

I have read this letter over the telephone to Mr. Norman Ehrlich of the Commission's enforcement staff.

It is my understanding that he agrees with its

contents and will confirm this agreement by separate letter to you.

Sincerely,

Joseph P. Griffin
Counsel for Spray Tech
Corporation and
Peter E. Bader

cc: Norman A. Ehrlich, Esq.
Mr. Glenn A. Lund

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of SPRAY TECH CORPORATION, a corporation doing business as WAGNER/SPRAY TECH CORPORATION and PETER E. BADER, individually and as an officer of SPRAY TECH CORPORATION	CPSC DOCKET NO. 75-7

To: The Honorable Paul N. Pfeiffer,
Administrative Law Judge

JOINT MOTION TO CERTIFY SETTLEMENT AGREEMENT TO THE COMMISSION FOR CONSIDERATION

Enforcement Counsel and respondents on SEP 1 0 1975, entered into an Agreement in which respondents agree to take voluntary action disposing of all the issues in this case. The Agreement with supporting memorandum is attached.

Enforcement Counsel and counsel for respondents move that the Agreement be certified to the Commission and that adjudicative proceedings before the Administrative Law Judge be suspended pending a decision by the Commission as to whether or not it will adopt the Agreement.

Enforcement Counsel

Stephen E. Joyce
Enforcement Counsel

Counsel for Respondents

Dated:

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of SPRAY TECH CORPORATION, a corporation doing business as WAGNER/SPRAY TECH CORPORATION and PETER E. BADER, individually and as an officer of SPRAY TECH CORPORATION	CPSC DOCKET NO. 75-7

To: The Honorable Paul N. Pfeiffer,
Administrative Law Judge

MEMORANDUM IN SUPPORT OF AGREEMENT

Enforcement Counsel entered into the attached Agreement with respondents for the purpose of settling this case without adjudication. There is no order accompanying this Agreement because Spray Tech's offer was submitted to the Commission staff as a voluntary corrective action program, prior to the Commission's decision to issue the Notice of Enforcement.

In entering into the Agreement, it was the intention of the parties to resolve the issues just as if the Notice of Enforcement had not been issued. The following circumstances support the contention that an Order against Spray Tech should not accompany the Agreement.

On May 8, 1975 the Commission voted to issue Notices of Enforcement against all manufacturers of high pressure airless paint spray equipment marketed for consumer use. However, Spray Tech had previously begun to

develop and patent a nozzle guard in response to prior contact by the Commission with the spray paint industry in November of 1974.

During the week of July 21, 1975 Spray Tech had submitted its nozzle guard for the staff's technical and biomedical evaluation accompanied by supporting pathological tests performed by an independent laboratory. Spray Tech's proposed voluntary corrective action plan (which comprises the substance of the Agreement herein) and its newly developed nozzle were being evaluated by the staff when the Commission voted to issue the prepared Notice of Enforcement on July 31, 1975. Since the Commission staff's biomedical evaluation of the nozzle guard was extensive, the voluntary corrective action plan was not ready to be submitted for Commission approval until now.

The technical and biomedical evaluations of the nozzle guard are now complete. The results show the guard to be a satisfactory means of protecting the consumer against certain risks of injury associated with high pressure paint sprayers (Exhibit G).

Enforcement Counsel and counsel for the respondents respectfully submit the Agreement herein, for consideration by the Commission.