UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of Amazon.com, Inc., Respondent	CPSC Docket No. 21-2 Hon. Carol Fox Foelak Presiding Officer

RESPONDENT AMAZON'S MOTION TO EXCLUDE THE REBUTTAL EXPERT REPORT AND TESTIMONY OF MS. SHARON R. WHITE

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

LEGAL STANDARD 4

ARGUMENT 5

I. Ms. White Lacks the Qualifications Necessary to Provide An Expert Opinion on Recall Effectiveness. 6

A. Ms. White Lacks Meaningful Familiarity with Key Rules, Manuals, and Policies. 7

B. Ms. White's Expert Report Includes References to Materials About Which She Has No Knowledge. 8

C. Ms. White's Lack of Expertise Relevant to This Matter Meant She Could Not Answer Questions About Materially Similar Recalls. 10

1. Ms. White Lacks Expertise Relevant to This Matter. 10

2. Ms. White's Lack of Expertise Prevented Her from Answering Questions about Materially Similar Recalls. 13

II. Ms. White's Status as a CPSC Employee Creates an Unacceptable Risk of Partiality 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Estate of Barabin v. AstenJohnson, Inc.,
740 F.3d 457 (9th Cir. 2014) 6

Carroll v. Otis Elevator Co.,
896 F.2d 210 (7th Cir. 1990) 6

DataQuill Ltd. v. Handspring, Inc.,
No. 01 C 4635, 2003 WL 737785 (N.D. Ill. Feb. 28, 2003) 10

Daubert v. Merrell Dow Pharmaceuticals,
509 U.S. 579 (1993)..... 5

EEOC v. Locals 14 & 15, Int'l Union of Operating Eng'rs,
No. 72 Civ. 2498(VLB), 1981 WL 163 (S.D.N.Y. Feb.11, 1981).....15

Haynes v. Shoney's, Inc.,
89-30093-RV, 1991 WL 354933 (N.D. Fla. Sept. 27, 1991).....15

James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Mgmt., LLC,
No. 11-374, 2014 WL 1744848 (E.D. Ky. Apr. 30, 2014)..... 9

Kingsbury v. U.S. Greenfiber, LLC,
CV 08-00151 DSF AGRX, 2013 WL 7018657 (C.D. Cal. Nov. 5, 2013)..... 6

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999) 15

Laux v. Mentor Worldwide, LLC,
295 F. Supp. 3d 1094 (C.D. Cal. 2017) 6

Lippe v. Bairnco Corp.,
288 B.R. 678 (S.D.N.Y. 2003), aff'd, 99 Fed. Appx. 274 (2d Cir. 2004)
(unpublished) 15

Miesen v. Hawley Troxell Ennis & Hawley LLP,
1:10-cv-00404-DCN (D. Idaho May 12, 2021).....15

Morrow v. Greensouth Equip., Inc.,
5:10-CV-000137, 2010 WL 5094304 (N.D. Fla. Dec. 7, 2010) 16

Mountaineers Found. v. The Mountaineers,
2:19-cv-1819-RSL-TLF (W.D. Wash. Apr. 8, 2022)..... 6

Newell Rubbermaid, Inc. v. Raymond Corp.,
676 F.3d 521 (6th Cir. 2012) 15

Niam v. Ashcroft,
354 F.3d 652 (7th Cir. 2004) 5

Numatics, Inc. v. Balluff, Inc.,
66 F. Supp. 3d 934 (E.D. Mich. 2014) 9

Pasha v. Gonzales,
433 F.3d 530 (7th Cir. 2005) 5

Radio Sys. Corp. v. Lalor,
C10-828RSL, 2014 WL 4626298 (W.D. Wash. Sept. 12, 2014) 6

Rodriguez Galicia v. Gonzales,
422 F.3d 529 (7th Cir. 2005) 5

Statutes

15 U.S.C. § 2054(a)(4) 15

16 U.S.C. § 2064(i)(1) 8

Other Authorities

16 C.F.R. § 1025.43(a) 5

16 C.F.R. § 1025.44 5

16 C.F.R. § 1115 8

78 Fed. Reg. 69793 7

78 Fed. Reg. 69794 7

Fed. R. Civ. P. 26(a)(2)(B) 9

Fed. R. Evid. 702 ..... 1, 5, 6, 14

Zen Magnets, LLC, C.P.S.C. Docket No. 12-2 (Oct. 26, 2017) 5

INTRODUCTION

Respondent Amazon, Inc. ("Amazon") hereby moves *in limine* to exclude the proposed expert testimony of Ms. Sharon R. White.

Federal Rule of Evidence 702 precludes a party from offering expert testimony absent a showing that the proposed expert is qualified to offer an opinion. Both parties agree that the "only" issue that "remains in controversy in this proceeding" is "the narrow issue of required corrective action remedies."[1] While Ms. White has had a long and productive career at the Consumer Product Safety Commission (the "Commission" or "CPSC"), she, by her own concession, does not have expertise in this "narrow" area. Her proposed testimony is therefore inadmissible.

Several key factors illustrate Ms. White's lack of expertise and objectivity as to "the narrow issue of required corrective action remedies." *First*, she lacks familiarity with the central rules, manuals, and practices applicable to CPSC recalls. *Second*, she testified in her deposition that Complaint Counsel made additions to her report without her knowledge or approval. *Third*, she could not respond to questions about the factors that the CPSC uses to request a company to use one remedy rather than another. *Fourth*, Ms. White testified during her deposition that her service as an expert will be considered in her performance reviews. Taken together, these factors confirm that her testimony lacks the reliability and objectivity necessary for qualification as an expert.

[1] Mot. to Compel Resp. at 1.

BACKGROUND

On May 9, 2022, Amazon provided Complaint Counsel with the Expert Report of Mr. Joseph P. Mohorovic, a former CPSC commissioner.[2] [redacted] In response, Complaint Counsel identified Ms. Sharon R. White as the Commission's rebuttal expert witness and provided Amazon with her expert report, addressing Mr. Mohorovic's conclusions.[6]

Ms. White's deposition testimony revealed four key points. *First*, Ms. White conceded she lacks familiarity with virtually every CPSC rule, manual, and guideline concerning recalls, including the Commission's mandatory and proposed voluntary recall

[2] *See* Ex. 1, Email of Amazon counsel Sarah Wilson to Complaint Counsel, 5/9/2022 at 8:02 PM.

[3] Ex. 2, Joseph P. Mohorovic, Expert Report (hereinafter the "Mohorovic Report"), 5.

[4] *Id.* at 6.

[5] *Id.*

[6] *See* Ex. 3, Email of Complaint Counsel Liana Wolf to Amazon counsel, 6/30/2022 at 8:19 PM; Ex. 9, Sharon R. White, Rebuttal Expert Report (hereinafter the "White Report"), 22.

rules, and its 2012 Recall Handbook operative at the time the Subject Products were sold. For example:

[redacted] Ordinarily, the addition of citations might be excused as minor. Here, the additions are problematic [redacted]

[7] Ex. 4, White Dep. (hereinafter "White Dep.") 217:2-16.

[8] White Dep. 217:17-218:5 (emphasis added).

[9] White Dep. 219:7-13.

[redacted], notwithstanding her report's suggestion that she purportedly relied on and considered them.

Third, [redacted] (She did not personally work on the Subject Product notifications or remedies.) As a result, Ms. White refused to answer dozens of questions about Commission recall notices that are materially similar to the Amazon notifications that her expert report asserted were insufficient to effectively warn consumers of Subject Product hazards.[11] [redacted]

Fourth, [redacted]

LEGAL STANDARD

[10] White Dep. 282:3-7 [redacted].

[11] *See*, e.g., White Dep. 256:1-4 [redacted]; White Dep. 281:3-6 [redacted]. *See also* White Dep. 245:10-18; 245:19-246:2; 246:20-247:5; 247:6-11; 248:6-8; 250:1-15; 253:21-254:9; 255:16-256:4; 256:19-257:7; 257:8-14; 257:15-258:3; 258:4-14; 258:15-259:2; 259:17-260:1; 260:7-14; 261:10-19; 262:15-18; 266:4-12; 266:13-267:6; 267:7-15; 267:16-22; 268:1-12; 268:19-22; 269:18-270:2; 277:7-15; 277:16-278:7; 278:13-17; 279:14-20; 279:21-280:4; 280:17-281:2; 283:17-284:7; 285:15-22; 286:1-6; 286:7-11; 287:17-288:4; 288:8-18; 288:19-289:10; 290:19-291:11; 293:18-294:6; 296:5-17; 297:2-10; 298:17-299:7; 302:22-303:11; 308:6-14.

[12] White Dep. 122:17-18.

[13] White Dep. 22:14-23:1.

The Commission's Rules of Practice for Adjudicative Proceedings state that, "[u]nless otherwise provided. . .the Federal Rules of Evidence shall apply."[14] The admissibility of expert testimony in this proceeding is thus governed by Federal Rule of Evidence 702 and the U.S. Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals*.[15] Indeed, the Commission has stated that the "Federal Rules of Evidence apply to adjudications under Sections 15(c) and (d) of the CPSA," and applied *Daubert* to expert testimony in such proceedings.[16]

ARGUMENT

Under *Daubert*, trial judges are required to serve as "gatekeepers"[17] and prevent unreliable, unhelpful, and unqualified expert testimony from entering the record. Expert testimony is admissible only if (1) the expert is *qualified* by "knowledge, skill, experience, training or education,"[18] and (2) their testimony is *reliable*, i.e., if it (a) "will help the trier

---

[14] 16 C.F.R. § 1025.43(a).

[15] 509 U.S. 579 (1993).

[16] Zen Magnets, LLC, C.P.S.C. Docket No. 12-2, p. 43, n.41 (Oct. 26, 2017), https://www.cpsc.gov/s3fs-public/RCA-Final-Decision-and-Order-in-Zen-Magnets-Dkt-12-2-102617.pdf. Although the text of 16 C.F.R. § 1025.44, which outlines the agency's adjudicative rules regarding expert witnesses, differs slightly from the current text of Federal Rule of Evidence 702, that does not compel a different conclusion. First, the text of that regulation is substantially similar to the text of Rule 702 as interpreted by the *Daubert* court. *See* 509 U.S. at 588. Second, the "spirit of *Daubert*" must be applied in administrative proceedings, even where agencies choose not to adopt Federal Rule 702. *See Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 539 (7th Cir. 2005); *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004); *Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005). As a result, *Daubert*'s key principles—that the witness must be qualified and offer reliable testimony—apply, and White's testimony must be excluded under any governing standard.

[17] *Daubert*, 509 U.S. at 597.

[18] Fed. R. Evid. 702; *see also* 16 CFR § 1025.44 (requiring expert witnesses to have "peculiar knowledge concerning the subject matter" as a result of their "education, training, experience, or profession").

of fact to understand the evidence or to determine a fact in issue;"[19] (b) "is based on sufficient facts or data;"[20] (c) "is the product of reliable principles and methods;" and (d) the expert witness has "reliably applied the principles and methods to the facts of the case."[21] The proponent of the expert testimony bears "the burden of establishing that the pertinent admissibility requirements are met."[22]

I. Ms. White Lacks the Qualifications Necessary to Provide An Expert Opinion on Recall Effectiveness.

"Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony."[23] On this basis, courts frequently exclude expert testimony where the relevant subject matter falls beyond the scope of the proffered expert's area of expertise.[24] This is the case here: although Ms. White seeks to opine on

---

[19] Fed. R. Evid. 702(a).

[20] Fed. R. Evid. 702(b).

[21] Fed R. Evid. 702(c). *See also Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 464 (9th Cir. 2014) (stating that Rule 702 "clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify").

[22] Fed. R. Evid. 702 Advisory Committee Notes (2000).

[23] *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir. 1990).

[24] *See Mountaineers Found. v. The Mountaineers*, 2:19-cv-1819-RSL-TLF (W.D. Wash. Apr. 8, 2022) (excluding portions of a rebuttal expert report because the rebuttal expert did not have the requisite "expertise in analyzing donor intent or donor confusion" to opine on "donor intent" and "likelihood of confusion"); *Laux v. Mentor Worldwide, LLC*, 295 F. Supp. 3d 1094, 1098 (C.D. Cal. 2017) (finding that a plastic surgeon who "has treated over 500 women with biotoxin disease" was not qualified to provide testimony "concerning 'biotoxins, or the mechanisms by which mold might enter a breast implant' due to her "lack of medical training in immunology, mycology, and infectious diseases"); *Radio Sys. Corp. v. Lalor*, C10-828RSL, 2014 WL 4626298, at *2 (W.D. Wash. Sept. 12, 2014) (excluding expert's testimony despite their "significant credentials and experience in computer science and digital processing" because they lacked experience in the "relevant art in this case"); *Kingsbury v. U.S. Greenfiber, LLC*, CV 08-00151 DSF AGRX, 2013 WL 7018657, at *2 (C.D. Cal. Nov. 5, 2013) (concluding that a real estate associate was unqualified to render an expert opinion on construction

issues of recalls and recall effectiveness, her training, experience, and background do not qualify her to do so. Her lack of familiarity with the key rules, policies and manuals that bear on this matter, her reliance on counsel to fill in related sections of her expert report, and inability to answer question after question about materially similar recall notices all evidence that gap.

A. Ms. White Lacks Meaningful Familiarity with Key Rules, Manuals, and Policies.

Fundamental to any expert opinion about "required corrective action remedies" is an understanding of the Commission's rules, policies and guidance governing those corrective action remedies. Although Complaint Counsel seeks additional direct notice by Amazon in this proceeding, [redacted]

Her lack of knowledge of the mandatory recall guidelines is representative of Ms. White's lack of experience with the Commission's other policies relating to recalls. [redacted]

disclosure requirements in part because "he has encountered a disclosure issue involving insulation fewer than six times in his career").

[25] White Dep. 217:2-16.

[26] White Dep. 235:6-9.

[27] White Dep. 120:4-19; *see also* 78 Fed. Reg. 69793-94 (Nov. 21, 2013) (proposing a "rule to set forth principles and guidelines for the content and form of voluntary recall notices that firms provide as part of corrective action plans"). Ms. White was unfamiliar with the Commission's July 2017 Recall Effectiveness Workshop, the Commission's last major initiative to "explore and develop proactive measures that the Commission and stakeholders can take to improve recall effectiveness." *See* Ex. 5, Consumer Product Safety Commission, *Recall Effectiveness Workshop Report* at 2 (Feb. 22, 2018).

[redacted]

Ms. White was equally unfamiliar with basic recall effectiveness concepts. For example, when asked about recall correction rates, she demonstrated a lack of familiarity:[30]

[redacted]

B. Ms. White's Expert Report Includes References to Materials About Which She Has No Knowledge.

The Commission has established "guidelines setting forth a uniform class of information to be included" in any recall notice resulting from a mandatory recall

[28] White Dep. 270:11-21.

[29] White Dep. 270:20-21. The directive establishes procedures to be used by commission personnel when advising firms about corrective action plans and provides expectations about monitoring such plans. Ex. 10, U.S. Consumer Product Safety Commission, *Initiating and Monitoring Corrective Action Plans*, Directive Order No. 9010.34 (July 15, 1992); *see also* White Dep. at 271:1-6.

[30] The correction rate is the sole performance measure the Commission uses "to assess the effectiveness of recalls." Ex. 6, U.S. Government Accountability Office, Consumer Product Safety Commission - Actions Needed to Improve Processes for Addressing Product Defect Cases (November 2020), p. 27, available at https://www.gao.gov/assets/gao-21-56.pdf.

[31] White Dep. 271:9-17 (emphasis added).

proceeding.[32] Complaint Counsel initiated this proceeding, seeking to require Amazon to provide additional notice to consumers, and arguing that Amazon's prior notice failed to comply with those guidelines.[33] Ms. White's expert report cites those guidelines five times.[34] However, as noted above (*supra* at 3), she [redacted] had no knowledge about or familiarity with the underlying materials.

[redacted]

Complaint Counsel might not have afforded Ms. White the opportunity to review the final draft before it was signed.[35]

Federal Rule of Civil Procedure 26 requires that expert testimony "be accompanied by a written report–*prepared* and signed by the witness."[36] While Rule 26 "does not preclude counsel from providing assistance to experts in preparing the reports," such assistance is "generally limited to helping the expert draft a report in a way that satisfies the requirements of Rule 26,"[37] i.e., "that facts or data considered and exhibits relied on are listed; that qualifications and compensation are listed; and that prior testimony is disclosed."[38] Rule 26 does not authorize counsel to "improper[ly] participat[e] in the

---

[32] 16 U.S.C. § 2064(i)(1); *see also* 16 C.F.R. § 1115.

[33] *See* Compl., Relief Sought.

[34] *See* White Report, p.6 n.6; pp. 7-8 n.9; p. 15 n.19.

[35] White Dep. 217:20-219:13.

[36] Fed. R. Civ. P. 26(a)(2)(B) (emphasis added).

[37] *James T. Scatuorchio Racing Stable, LLC v. Walmac Stud Mgmt., LLC*, No. 11-374, 2014 WL 1744848, at *6 (E.D. Ky. Apr. 30, 2014).

[38] *See* Fed. R. Civ. P. 26(a)(2)(B)(i)-(vi).

expert's report writing."[39] Said otherwise, "ghostwriting . . . is not allowed under any circumstances."[40] Counsel may not "exceed the bounds of legitimate assistance"[41] and simply "put words in [the expert's] mouth-or in this case, in his [or her] report."[42]

While such actions might be excused where, for example, an expert generally recalls a rule or source and asks counsel to fill in a citation to the correct subsection or pin-cite, that is not the case here. Here, the citations in Ms. White's report indicate that she considered or relied on the cited documents [redacted]

Further, in the evening prior to Ms. White's deposition, Complaint Counsel produced 27 documents, described as materials Ms. White "reviewed for this matter" and "in preparation for the deposition."[43] [redacted]

That Ms. White's report contained references to materials she had never seen and about which she had no knowledge underscores that Ms. White does not have the qualifications necessary to testify as an expert in this proceeding.

C. Ms. White's Lack of Expertise Relevant to This Matter Meant She Could Not Answer Questions About Materially Similar Recalls.

1. Ms. White Lacks Expertise Relevant to This Matter.

---

[39] *Numatics, Inc. v. Balluff, Inc.*, 66 F. Supp. 3d 934, 942 (E.D. Mich. 2014).

[40] *Id.* at 943.

[41] *Id.* at 942.

[42] *DataQuill Ltd. v. Handspring, Inc.*, 01 C 4635, 2003 WL 737785, at *4 (N.D. Ill. Feb. 28, 2003).

[43] *See* Ex. 7, Email of Serena Anand to Amazon counsel, 8/8/22 at 6:06 PM.

[44] White Dep. 26:4-27:2.

Ms. White's lack of expertise as to the "narrow issue of required corrective action remedies" stems from the nature of the work she performs at the Commission. With one relevant exception,[45] Ms. White has spent her entire 38 year CPSC career in the Division of Human Factors, where she worked on the safety warnings printed on products or accompanying them.[46] As recognized by the materials Ms. White cited in her report, safety warnings and recall-related communications are "somewhat different:" recall notices do not accompany the product itself, because the product has already been purchased, and must be structured to capture attention about a past purchase.[47] During her time in the Division of Human Factors, Ms. White did not work directly on any recalls[48] or negotiate any corrective action plans.[49]

Ms. White's only direct experience with recalls is limited to work conducted as a temporary detailee with the Commission's Office of Compliance, which lasted eighteen months.[50] But this detail did not provide her with an opportunity to become familiar with the Commission's recall-related policy documents or its process, as she repeatedly

---

[45] Ms. White was detailed to the Commission's Office of Compliance for eighteen months, which is discussed in greater detail *infra*. For the first three years of her career, she served as a clerk typist. *See* White Dep. 60:9-12. This latter role is not relevant to any of the claims in her expert report.

[46] *See* White Dep. 133:9-16.

[47] *See* Ex. 8, Jennifer A. Cowley and Michael S. Wogalter, "Analysis of Terms Comprising Potential Names for a Recall Notification Campaign," 52 Proceedings of the Human Factors and Ergonomics Society Annual Meeting 1698, 1701 (2008) (noting that recall notifications entail "temporal and spatial separation from the product that is larger than for most kinds of product warnings"). This study is listed as a "Material[] Considered" in Ms. White's expert report. *See* White Report, App. 2.

[48] *See* White Dep. 102:8-21; 110:220-22.

[49] White Dep. 71:18-72:3.

[50] White Dep. 34:1-2, 58:4-6.

confirmed during her deposition. [redacted] the Commission's Recall Handbook, a manual that Complaint Counsel argued comprehensively states the "agency's positions and actions with respect to remedies."[52] [redacted] Despite her time in the Office of Compliance, Ms. White could not opine on key recall issues [redacted] She refused to explain the differences between recall alerts and press releases [redacted]

Outside of her employment with the Commission, Ms. White has had no other relevant experience that would qualify her as an expert in this proceeding. [redacted]

[51] White Dep. 235:1-4.

[52] Mot. to Compel Resp. at 9.

[53] White Dep. 235:1-9.

[54] White Dep. 168:20-169:1.

[55] White Dep. 360:10-16.

[56] White Dep. 375:12-15.

[57] White Dep. 33:19-21.

[58] White Dep. 46:19-21.

[59] White Dep. 50:11-14.

[redacted]

[redacted]

2. Ms. White's Lack of Expertise Prevented Her from Answering Questions about Materially Similar Recalls.

Ms. White's deposition testimony confirms her lack of qualification on the narrow remedial issues here. Ms. White's report critiques the language used in Amazon's direct notices to consumers about the Subject Products. [redacted]

[redacted]

But Ms. White categorically refused to answer questions about why recall notices used by other companies, notices that used language strikingly similar to Amazon's notices, were acceptable. Ms. White was asked, for example, about a product sold by another company:

[redacted]

This refusal was difficult to understand, given that White repeatedly compared Amazon's language against Commission-approved recalls in her written report.[64]

[60] White Dep. 45:12-15.

[61] White Dep. 46:13-17.

[62] White Report at 8.

[63] White Dep. 245:10-16.

[64] *See* White Report at 10.

Similarly, Ms. White's proposed testimony includes assertions that Amazon's action was deficient because it fails to ensure consumers implemented the suggested remedy. But when asked about other situations in which the Commission had permitted recalls without obtaining such assurances, she again could not answer:

[redacted]

Ms. White refused to answer these questions [redacted] By that logic, she cannot opine on Amazon's direct notices. Ms. White was not involved in the Commission-Amazon communications regarding the Subject Products in the lead up to this suit, and has only been involved in her role as a purported expert.[67] Amazon is not suggesting that the Commission's rebuttal expert should be able to answer every question about recall notices and remedies that she might have only seen for the first time during her deposition. Rather, Ms. White's inability to articulate even the factors that can lead to one recall remedy differing from another [redacted]

[65] White Dep. 280:17-281:6.

[66] White Dep. 282:3-7 [redacted]

[67] *See* White Dep. 125:5-9.

[redacted]—demonstrates that she lacks sufficient knowledge to provide a reliable expert opinion on the recall notice issues at the heart of this case.

II. Ms. White's Status as a CPSC Employee Creates an Unacceptable Risk of Partiality.

Rule 702 requires that an expert witness' testimony be "the product of reliable principles and methods,"[68] and an expert must "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[69] An expert's "subjectivity" and bias are part of this analysis, and are "[r]ed flags that caution against certifying an expert."[70] Expert witnesses "do not serve as advocates, but as sources of information."[71] An expert witness is thus properly excluded where "the role the witness played in the case crossed the line from expert to advocate."[72]

Ms. White has worked for only one employer in her 38 year career: the U.S. Consumer Product Safety Commission.[73] She has no other professional affiliations from which she has drawn to establish her expertise or generate her opinions.[74] Her

---

[68] Fed. R. Evid. 702.

[69] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

[70] *Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 527 (6th Cir. 2012).

[71] *Lippe v. Bairnco Corp.*, 288 B.R. 678, 687 (S.D.N.Y. 2003), aff'd, 99 Fed. Appx. 274 (2d Cir. 2004)(unpublished) (citing *EEOC v. Locals 14 & 15, Int'l Union of Operating Eng'rs*, No. 72 Civ. 2498 (VLB), 1981 WL 163, at *4 (S.D.N.Y. Feb.11, 1981)).

[72] *Miesen v. Hawley Troxell Ennis & Hawley LLP*, 1:10-cv-00404-DCN (D. Idaho May 12, 2021), at *6 (discussing *Lippe v. Bairnco Corp.*, 288 B.R. 678 (S.D.N.Y. 2003)).

[73] *See* White Report at 24 [redacted]; White Dep. 33:1-4 [redacted]

[74] White is an affiliate of the American Society for Testing and Material (ASTM), and recently affiliated with Underwriter's Laboratory, as well. *See* White Report at 27. These affiliations, though, are in her capacity as a CPSC employee. *See* White Dep. 40:11-41:6 [redacted]; *id.* at 39:9-40:4 [redacted]

longstanding and current employment at the Commission creates an unacceptable risk of partial testimony, given the inherent pressures to conform with the views of her employer. In some cases, "the fact of employment alone is sufficient to demonstrate bias,"[75] particularly where "the expert is a full time salaried employee of the party offering the opinion of the expert" and "the salary and benefits" are "tied in any way to the opinions offered by the employee-expert."[76]

[redacted] This condition is exacerbated by the Complaint Counsel's failure to take any measures to control the conflict of interest that might arise as a result of retaining an employee as an expert. [redacted]

Ms. White's testimony demonstrates she does *not* view herself as an independent expert but as part of the Commission's team in this proceeding:

[redacted]

[redacted]; 15 U.S.C. § 2054(a)(4) (CPSC shall "assist public and private organizations . . . in the development of product safety standards").

[75] *Haynes v. Shoney's, Inc.*, 89-30093-RV, 1991 WL 354933, at *5 (N.D. Fla. Sept. 27, 1991).

[76] *Morrow v. Greensouth Equip., Inc.*, 5:10-CV-000137, 2010 WL 5094304, at *2 (N.D. Fla. Dec. 7, 2010).

[77] White Dep. 22:14-23:1.

[78] White Dep. 24:4-8.

[79] White Dep. 374:10-14 (emphasis added).

CONCLUSION

For the reasons discussed above, Ms. White's testimony should be excluded in its entirety.

Dated: September 22, 2022

Respectfully submitted,

/s/ Sarah L. Wilson

Sarah L. Wilson
Stephen P. Anthony
Rukesh A. Korde
Thomas Brugato
John F. Mizerak

COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
202-662-5397
swilson@cov.com
santhony@cov.com
rkorde@cov.com
tbrugato@cov.com
jmizerak@cov.com

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that, on September 22, 2022, a true and correct copy of the foregoing document was, pursuant to the Order Following Prehearing Conference entered by the Presiding Officer on October 19, 2021:

- filed by email with the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills at amills@cpsc.gov, with a copy to the Presiding Officer at alj@sec.gov and to all counsel of record; and
- served to Complaint Counsel by email at jeustice@cpsc.gov, lwolf@cpsc.gov, and sanand@cpsc.gov.

/s/ Sarah L. Wilson
Sarah L. Wilson