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

July 28, 2023

In the Matter of

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

Respondent.

ORDER GRANTING LEACHCO, INC.'S MOTION TO STRIKE KONICA MCMULLEN FROM THE COMMISSION'S WITNESS LIST

Respondent moved to strike Ms. Konica McMullen from the witness list and prohibit Complaint Counsel from calling her. *See* Leachco, Inc.'s Mot. to Strike Konica McMullen from the Comm'n's Witness List, at 10 (July 17, 2023). It argues that Complaint Counsel's alleged failure to identify Ms. McMullen as a witness prior to the close of fact discovery surprised and prejudiced Respondent, depriving it of a meaningful opportunity to perform discovery and depositions. *See id.* at 1–3, 4, 6.

Complaint Counsel opposes the motion, asserting that it is untimely, that it relies on an inapplicable discovery rule, and that Respondent was aware of the possibility of this witness testifying—precluding either surprise or prejudice. *See* Compl. Counsel's Opp'n to Leachco's Mot. to Strike Konica McMullen, at 1 (July 27, 2023). Complaint Counsel asserts the testimony "will provide valuable and relevant evidence of the fatal risk posed by" the Podster. *Id.* at 11.

For the following reasons, this Court GRANTS Respondent's motion. It will not, however, impose sanctions on Complaint Counsel, and it will allow an offer of proof prior to the hearing to address this Court's concerns.

I. Complaint Counsel Is Not Precluded from Calling the Witness Because of Late-Notice.

A. Respondent's motion is not untimely.

Complaint Counsel asserts the deadline for prehearing motions was July 14, 2023, so Respondent's motion is untimely. Opp'n at 1 n.1. Its claim is further predicated on the fact that it submitted a supplemental response to Respondent's Interrogatory No. 2 on May 11, 2023, specifically including Ms. McMullen. *Id.* at 3 (citing Compl. Counsel's 4th Suppl. Resps. to Resp't's 1st Set of Interrogs. to Consumer Prod. Safety Comm'n, at 9 (May 11, 2023) ("4th Suppl. Resp.")).

That interrogatory, however, requested the identity of "any Person who was a witness to or has knowledge of the facts, circumstances and events that are related to the relief requested in the Complaint, or who otherwise ahs knowledge relevant to the issues in this case." 4th Suppl. Resp. at 5. While this may be sufficient for Complaint Counsel's argument against surprise or prejudice, the witness list was not provided, as allowed by the prehearing schedule, until July 14, 2023. It is therefore appropriate that Respondent make this motion upon receipt of the witness list, even if it was later than July 14, as it could not have made it prior to actual knowledge of Complaint Counsel's official intent to call Ms. McMullen.

B. Respondent had sufficient knowledge of the possibility of this witness being called to preclude a finding of surprise.

Without a finding that Rule 26 of the Federal Rules of Civil Procedure applies to this proceeding, that case law still adequately supports the contention that surprise is not demonstrated where a party is aware of a witness because of identification during the discovery process or in that party's own disclosures. *See Jackson v. Herrington*, No. 4:05-CV-00186-JHM, 2011 WL 1750800, at *2 (W.D. Ky. May 6, 2011); *Conway v. Forsyth Cty. Sch. Dist.*, No. 2:06-CV-031-WCO, 2007 WL 9710581, at *4 (N.D. Ga. Sept. 12, 2007). Longstanding knowledge of a witness's relevance to an issue has also been held sufficient. *See EEOC v. Caterpillar, Inc.*, No. 03 C 5637, 2004 WL 2092003, at *9 (N.D. Ill. Sept. 14, 2002).

Sterling National Bank v. Block demonstrates that knowledge of a likely witness from depositions, and generally where a case involved the witness, is sufficient for knowledge to combat surprise. No. 16 C 9009, 2018 WL 11200447, at *2 (N.D. Ill. Apr. 18, 2018). That case, however, involved disclosure *prior to the end of discovery*—even if only two weeks—enabling a deposition if necessary. *Id.* at *3. As Complaint Counsel's supplemental response identifying Ms. McMullen occurred almost two months after the close of discovery, the same reliance on the ability to depose is not helpful here. Reliance on this authority is therefore only relevant to the fact that Ms. McMullen was known to be the parent of an alleged victim through prior action, depositions, and Respondent's own discovery responses.[1]

The court in *Commonwealth Capital Corp. v. City of Tempe* precluded a late-identified witness from testifying about certain issues because "the extend to which he had discoverable information was not disclosed." No. 2:09-cv-00274, JWS, 2011 WL 1325140, at *2 (D. Ariz. Apr. 7, 2011). Respondent's use of this case would depend on whether the information known to

[1] Citation to *Ollier v. Sweetwater Union High School District* is similarly unhelpful to Respondent because it precluded testimony because the witness was only "mentioned" at deposition. 768 F.3d 843, 862 (9th Cir. 2014). Here, Complaint Counsel goes further, alleging knowledge from a prior lawsuit, discovery mentions, and Respondent's own expert testimony.

Reliance on *In re First Alliance Mortgage Co.* is also a double-edged sword. The court found that the opposing party had knowledge of the identities of the potential witnesses. 471 F.3d 977, 1000 (9th Cir. 2006). The court did acknowledge, however, that the witness list was provided with "ample time remaining"—more than 60 days—prior to trial. *Id.*

Ms. McMullen differs significantly from that identified by Complaint Counsel in its witness list. It does not.[2]

It is not because of a disparity in the information known versus what Complaint Counsel identified, however, that this Court excludes Mr. McMullen's testimony. Complaint Counsel continues to assert that Respondent was, or should have been, aware of the information she possessed. This Court agrees that Respondent was aware of Ms. McMullen's existence and the testimony she could offer. It is therefore the proffered substance of her testimony that supports exclusion based on lack of foundation and undue prejudice. *See* Section II, *infra*.

In summary, Respondent was aware of Ms. McMullen's relevant knowledge before and throughout this proceeding, even if Complaint Counsel did supplement its discovery response to include her after the close of fact discovery. Though the official witness list had not been submitted, the inclusion of Ms. McMullen as a person with knowledge of the events in Complaint Counsel's May supplemental response left approximately two months for Respondent to request reopening of discovery for deposition of a likely witness. Such circumstances do not support a finding of unfair surprise.

II. Complaint Counsel Has Not Demonstrated the Rational Basis for Its Decision to Call the Witness.

Complaint Counsel described the expected testimony as follows:

> As a parent of one of the infants who died while using the Podster, Ms. McMullen is expected to testify, among other things, about the victim, the victim's physical condition at the time of his death, and the victim's death in the Podster.

Compl. Counsel's Witness List, at 1 (July 14, 2023). This Court does not recognize a foundation for Ms. McMullen's testimony *as it may be relevant to this proceeding*, and knowledge of the evidence and its relevance is required to address Respondent's assertion of prejudice.

From this Court's understanding of the evidence, Ms. McMullen has no direct knowledge of the incident that is not gleaned from the same reports on which the Commission and Complaint Counsel's expert witnesses rely. There is nothing in the record indicating that Ms. McMullen purchased the Podster, that she used it, or that she was present when the incident involving the Podster occurred. She therefore does not appear to have evidence about the child's

[2] This Court notes, in discussion of *Commonwealth*, that Complaint Counsel's argument that Ms. McMullen is a "third-party witness who is not under [its] control" is unpersuasive. *See* Opp'n at 9; *see also* Mot. Ex. 10 ("More fundamentally, Ms. McMullen is not under Complaint Counsel's control. She is a third-party witness. You were always able to seek a subpoena . . . ."). The court in *Commonwealth* noted that the "harmless" exception to Rule 37 was activated where potential witnesses were "identified by the *other parties to this action*." 2011 WL 1325140, at *1 (emphasis added). There are no other parties to *this* action. Ms. McMullen was a party to a separate action, and her involvement in this action is only supported by Complaint Counsel's identification of her as a witness.

death beyond that which would accrue in a personal injury lawsuit, which would likely be irrelevant and less probative than prejudicial.

Testimony "about the victim" is similarly vague and unhelpful to an evaluation of whether the late-provided response may prejudice Respondent. Such a description by the child's mother, who was not present for the incident, cannot provide insight into the technical evaluation of the product's alleged risk.

Finally, this Court would require more information regarding "the victim's physical condition at the time of his death" to properly evaluate this witness's relevance. Based on discovery requests and responses, there are contentions regarding the physical health of a *different* child prior to a fatal incident. But any testimony regarding this witness's son's physical condition at the time of his death would only appropriately be supported by medical records, or, at best, by a lack of such records combined with the witness's testimony, as the mother of a deceased child, about the child's physical condition. This would not appear to have any logical connection to the Podster and any alleged defects.

Complaint Counsel must have a rational basis, at a minimum, for its decision to commence this action. Any testimony by this witness must be reasonably related to the motivation for and issues in this action. As of now, only unexpected testimony would render Ms. McMullen a relevant fact witness. And such unexpected testimony would be unfair surprise to Respondent. *See Commonwealth Cap. Corp.*, 2011 WL 1325140, at *2. This Court's current understanding of Ms. McMullen's ability to provide direct testimony about the event is that it will likely only offer emotional content and not any firsthand knowledge this witness has about the Podster, its use, and how any alleged defects may have contributed to her son's death.

The proffered description of the intended testimony therefore portends that it would be more prejudicial than probative. Ms. McMullen is therefore excluded from testifying. This Court will, however, allow Complaint Counsel to submit an offer of proof for reconsideration.[3]

[3] The Federal Rules of Evidence provide, "If the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." Fed. R. Evid. 103(a)(2) (2023). Evidence rulings cannot be assigned as error unless "(1) a substantial right is affected, and (2) the nature of the error was called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures." *Id.* Advisory Committee Note to 1972 Proposed Rule. Objections and offers of proof are the mechanisms for doing this. *Id.*

Definitive rulings do not necessarily require offers of proof, but "when the trial court appears to have reserved its ruling or to have indicated that the ruling is provisional, it makes sense to require the party to bring the issue to the court's attention subsequently." *Id.* Advisory Committee Note to 2000 Amendment (citing *United States v. Vest*, 116 F.3d 1179, 1188 (7th Cir. 1997); *United States v. Valenti*, 60 F.3d 941 (2d Cir. 1995)).

III. Conclusion

Respondent's motion to strike Konica McMullen from Complaint Counsel's witness list and exclude her testimony is **GRANTED**.

Respondent's request for sanctions regarding the cost incurred preparing for this motion is **DENIED**.

Complaint Counsel may submit an **OFFER OF PROOF** prior to hearing to demonstrate why Ms. McMullen's relevant testimony may outweigh the likely prejudice to Respondent.

Michael G. Young
Administrative Law Judge

Distribution:

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

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

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

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

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

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

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

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

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

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

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

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