

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
)	
)	
LEACHCO, INC.)	CPSC DOCKET NO. 22-1
)	
)	Hon. Michael G. Young
)	Presiding Officer
Respondent.)	
)	

**COMPLAINT COUNSEL’S OFFER OF PROOF
REGARDING THE EXCLUSION OF KONICA MCMULLEN**

Pursuant to 16 C.F.R. § 1025.43(f) and this Court’s July 28, 2023 Order, Complaint Counsel respectfully submits an Offer of Proof regarding the exclusion of Konica McMullen. As addressed below, the testimony that Ms. McMullen will provide is “reasonably related to the motivation for and issues in” this proceeding and “is not unexpected testimony [that] would be unfair surprise to Respondent.” Order Granting Leachco, Inc.’s Motion to Strike Konica McMullen from the Commission’s Witness List, July 28, 2023, at 4 (“July 28, 2023 Order”). Further, the testimony will not “only offer emotional content” and will relate to the Podster, its use, and how any alleged defects may have contributed to her son’s death. *Id.* Pursuant to the Commission’s Rules of Practice that govern this proceeding:

When an objection to proffered testimony or documentary evidence is sustained, the sponsoring party may make a specific offer, either in writing or orally, of what the party expects to prove by the testimony or the document. . . . Written offers of proof or of rebuttal, adequately marked for identification, shall accompany the record and be available for consideration by any reviewing authority.

16 C.F.R. § 1025.43(f).

Thus, Complaint Counsel submits this Offer of Proof so that it shall accompany the record in this proceeding. *See* July 28, 2023 Order at 4-5. Accordingly, Complaint Counsel requests that this filing and the accompanying exhibit be marked for identification as CCX-57 in this proceeding. Prior to the hearing in this proceeding, Complaint Counsel will proffer a declaration regarding the testimony that Ms. McMullen was expected to give at the hearing in this matter and also submit it pursuant to 16 C.F.R. § 1025.43(f).

As discussed in prior filings, *see e.g.*, Complaint Counsel’s Prehearing Brief, Dkt. No. 101 at 15, Ms. McMullen’s 4-month-old son is one of the infants that passed away after being placed on a Podster for sleep. Ms. McMullen filed a wrongful death lawsuit against Leachco and was deposed in that matter. Various topics covered in that deposition, conducted by Leachco’s counsel at the time (who served as one of Leachco’s initial attorneys in this matter), relate directly to the issues in this proceeding and whether the Podster poses a Substantial Product Hazard.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹ Dep. of Konica McMullen, Nov. 6, 2019, *McMullen v. Leachco, Inc.*, 01-CV-15-904869, at 192:21–203:8 (Exhibit 1).

² *Id.* at 263:14–265:9.

[REDACTED]

Thus, as briefly detailed above, these are just some of the examples where Ms. McMullen would be able to provide actual and probative testimony that goes directly to the issue of whether the Podsters are defective and create a substantial risk of injury to the public. Again, Leachco has previously deposed Ms. McMullen and had an opportunity to do so in this matter—but chose

³ *Id.* at 204:12–205:12.

⁴ *Id.* at 132:9–14.

⁵ *Id.* at 130:18–136:16.

⁶ *Id.* at 157:16–168:18.

not to. The proposed testimony from Ms. McMullen would not be “unexpected testimony” that would lead to unfair surprise, as the testimony would relate to this matter and an incident that Leachco has long been aware of.

As such, Complaint Counsel files this Offer of Proof that “shall accompany the record and be available for consideration by any reviewing authority.” 16 C.F.R. § 1025.43(f).

Accordingly, Complaint Counsel requests that this filing and the accompanying exhibit be marked for identification as CCX-57 in this proceeding. Prior to the hearing in this proceeding, Complaint Counsel will proffer a declaration regarding the testimony that Ms. McMullen was expected to give at the hearing in this matter and also submit it pursuant to 16 C.F.R. § 1025.43(f).

Dated this 31st day of July, 2023

Respectfully submitted,

/s/ Brett Ruff

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2023, I served Complaint Counsel's Offer of Proof Regarding the Exclusion of Konica McMullen on all parties and participants of record in these proceedings as follows:

By email to the Secretary:

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Judge Michael G. Young
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/s/ Brett Ruff
Brett Ruff
Complaint Counsel for
U.S. Consumer Product Safety Commission

EXHIBIT 1
(filed *in camera*)