

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

August 2, 2023

In the Matter of

LEACHCO, INC.,

CPSC Docket No. 22-1

Respondent.

**ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR LEAVE TO  
AMPLIFY WRITTEN DIRECT EXPERT TESTIMONY**

Complaint Counsel moved to allow its expert witnesses, Dr. Erin Mannen and Ms. Celestine Kish, to testify at hearing. Compl. Counsel's Mot. for Leave to Amplify Written Direct Expert Test., at 1 (July 14, 2023). Respondent opposes the motion. It asserts first that prior discovery actions demonstrate strict adherence to the rules, and those rules preclude such testimony. Leachco, Inc.'s Opp'n to the Comm'n's mot. to Amplify Direct Expert Test., at 1-2 (July 24, 2023). It also asserts Complaint Counsel did not demonstrate good cause, and such testimony would prejudice Respondent. *Id.* at 3.

For the following reasons, this Court GRANTS Complaint Counsel's motion.

Respondent is correct that the expert witness reports constitute direct testimony, incorporated into the record. See 16 C.F.R. § 1025.44(b). It is incorrect, however, that Complaint Counsel's reliance on Commission Rules denying expert depositions precludes experts from testifying at hearing. *See id.* ("Upon a showing of good cause, the party sponsoring the expert witness may be permitted to amplify the written direct testimony during the hearing.").

This Court finds that the testimony will be relevant and helpful, and it also provides Respondent the opportunity to cross-examine the proffered experts. It is also non-prejudicial as Respondent has had the expert reports since the deadline for expert disclosures. Respondent argues that it will be prejudiced by its inability to prepare for "brand-new" expert testimony at hearing, outside the scope of the provided written testimony. But that contention is not at issue because any attempt by Complaint Counsel to introduce evidence beyond the scope of that provided during discovery will be appropriately objectionable.

Complaint Counsel cited cases supporting the use of demonstrative evidence at hearing. *See* Mot. at 3. But, as acknowledged, such demonstrative evidence is only appropriately used "to illustrate other *admitted evidence* and thus render it more comprehensible to the trier of fact." *Id.*

(quoting *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 535 F. Supp. 2d 580, 583 (E.D. Va. 2008) (emphasis added).

This Court has consistently warned both parties that it will not allow surprise information. To the extent that any proffered demonstrative exhibits will render more comprehensible *admissible information already provided* in its expert written testimony, they may be allowed. To the extent that any discuss “brand-new” testimony, that would not be “amplification” of the expert testimony, and such will not be allowed. Respondent is therefore at no risk of prejudice.

Regarding specific exhibits—e.g., Ex. CCX-44–56, Opp’n at 3—Complaint Counsel has not moved to admit these demonstrative exhibits, and an opposition motion is not the appropriate mechanism to request affirmative relief; it should have been raised in its own motion. *See United States v. Anh Ngoc Dang*, 559 Fed. Appx. 660, 662 (10th Cir. 2014); *Dismukes v. Brandeis Univ.*, No. 19-11049-LTS, 2021 WL 1518828, at \*1 n.3 (D. Mass. Apr. 16, 2021); *LCP RCP LLC v. Ally Bank*, No. 3:19-CV-0396-M, 2021 WL 5285068, at \*2 (N.D. Tex. Mar. 4, 2021); *Beaulieu Grp., LLC v. Mohawk Carpet Distrib., Inc.*, No. 4:15-CV-0124, 2016 WL 11745981, at \*6 n.4 (N.D. Ga. Aug. 3, 2016). As stated, none of the demonstrative exhibits will be admitted now, and the use or admission of each will be evaluated at hearing.

This Court therefore **GRANTS** Complaint Counsel’s motion to amplify the direct testimony of Dr. Mannen and Ms. Kish at hearing.



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](mailto:bruff@cpsc.gov)

Rosalee Thomas, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, [rbthomas@cpsc.gov](mailto:rbthomas@cpsc.gov)

Caitlin O’Donnell, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, [codonnell@cpsc.gov](mailto:codonnell@cpsc.gov)

Michael J. Rogal, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, [mrogal@cpsc.gov](mailto:mrogal@cpsc.gov)

Gregory Reyes, U.S. Consumer Product Safety Commission, 4330 East West Highway,  
Bethesda, MD 20814, [greyes@cpsc.gov](mailto:greyes@cpsc.gov)

Frank Perilla, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda,  
MD 20814, [FPerilla@cpsc.gov](mailto:FPerilla@cpsc.gov)

Thomas J. Mendel, U.S. Consumer Product Safety Commission, 4330 East West Highway,  
Bethesda, MD 20814, [tmendel@cpsc.gov](mailto:tmendel@cpsc.gov)

Oliver J. Dunford, Pacific Legal Foundation, 4440 PGA Blvd., Suite 307, Palm Beach Gardens,  
FL 33410, [ODunford@pacificlegal.org](mailto:ODunford@pacificlegal.org)

John F. Kerkhoff, Pacific Legal Foundation, 3100 Clarendon Boulevard, Suite 610, Arlington,  
VA 22201, [JKerkhoff@pacificlegal.org](mailto:JKerkhoff@pacificlegal.org)

Frank Garrison, Pacific Legal Foundation, 3100 Clarendon Boulevard, Suite 610, Arlington, VA  
22201, [FGarrison@pacificlegal.org](mailto:FGarrison@pacificlegal.org)

Jessica L. Thompson, Pacific Legal Foundation, 3100 Clarendon Boulevard, Suite 610,  
Arlington, VA 22201, [JLThompson@pacificlegal.org](mailto:JLThompson@pacificlegal.org)

Alberta E. Mills, U.S. Consumer Product Safety Commission, 4330 East West Highway,  
Bethesda, MD 20814, [amills@cpsc.gov](mailto:amills@cpsc.gov)