

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

LISA MILICE,)	
)	
Petitioner,)	
)	
v.)	
)	
CONSUMER PRODUCT SAFETY)	No. 20-1373
COMMISSION,)	
)	
Respondent.)	
)	
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)	
)	

**RESPONSE TO PLAINTIFF’S MOTION FOR LEAVE TO FILE
SUPPLEMENTAL APPENDIX AND CONDITIONAL CROSS-MOTION
TO FILE SUPPLEMENTAL MATERIAL**

On May 13, 2020, plaintiff filed a motion to supplement the administrative record with two declarations: a declaration from plaintiff, and a declaration from plaintiff’s counsel. The declarations describe conversations between the declarants and one or more unnamed representatives of the Consumer Product Safety Commission (CPSC) concerning whether the infant bath seat standard that is incorporated by reference in the CPSC rule at issue, 84 Fed. Reg. 49,435 (Sept. 20, 2019), is available for viewing at CPSC headquarters.

The declarations that plaintiff seeks to add to the administrative record do not appear to constitute the administrative record as it is traditionally understood. *See* 28

U.S.C. 2112(b); Fed. R. App. P. 16(a); *see also City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010) (enumerating circumstances in which supplementation of administrative record is appropriate). If this Court nevertheless regards the declarations as relevant to plaintiff's legal claims, and deems it appropriate to take cognizance of them, the government requests leave to submit the attached declaration of Consumer Product Safety Commission Secretary Alberta Mills. Ms. Mills's declaration provides information regarding the availability of incorporated industry standards for inspection at CPSC's headquarters in Bethesda, Maryland.

CONCLUSION

For the foregoing reasons, should the Court take cognizance of the declarations submitted by plaintiffs, the government requests leave to submit the attached declaration of Consumer Product Safety Commission Secretary Alberta Mills.

Respectfully submitted,

SCOTT R. MCINTOSH

/s/ Courtney L. Dixon

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U.S. Department of Justice

950 Pennsylvania Ave., N.W.

Washington, D.C. 20530

MAY 2020

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Courtney L. Dixon
COURTNEY L. DIXON

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DECLARATION OF ALBERTA E. MILLS

1. I am the Secretary of the U.S. Consumer Product Safety Commission (“CPSC”). I have been the Secretary of the CPSC since February 2018. As part of my official duties as Secretary, I provide access to copies of documents available for inspection to members of the public who wish to inspect documents related to CPSC.
2. As part of my official duties, I have access to copies of ASTM standards that are incorporated by reference in CPSC rules including ASTM F1967-19, titled “Standard Consumer Specification for Infant Bath Seats” (the “Bath Seat Standard”), and other standards that are incorporated by reference in CPSC rules (together, the “Standards”).
3. Copies of the Bath Seat Standard and other Standards are generally available for inspection by the public at CPSC headquarters, 4330 East West Highway, Bethesda, MD (“CPSC Headquarters”) during normal business hours.
4. There is no charge to inspect copies of the Bath Seat Standard or other Standards at CPSC Headquarters.
5. I have read the declarations submitted by Ms. Milice and Mr. McClain, declaring under penalty of perjury that they were told by one or more unnamed CPSC representatives that there was not a way for the Bath Seat Standard or two other unspecified Standards to be viewed at CPSC headquarters. If those declarations

correctly capture what they were told, then Ms. Milice and Mr. McClain were misinformed.

6. I have taken steps to inform CPSC staff to refer any further requests to inspect Standards to me so that I may make arrangements for inspection.
7. If I had been aware of any request by a member of the public to inspect a copy of the Bath Seat Standard or other Standards, I would have promptly made arrangements for inspection of the requested Standards.
8. Copies of the Bath Seat Standard and other Standards are available for inspection at CPSC Headquarters. Persons who are interested in inspecting a copy of the Bath Seat Standard or other Standards may contact the agency and be referred to me. Interested persons may also contact me directly at 301-504-7479 or amills@cpsc.gov. Consistent with precautions being taken by the CPSC with respect to the COVID-19 pandemic, as well as restrictions imposed by local health authorities, we will attempt to make arrangements for inspection of the Bath Seat Standard or other Standards.
9. The Bath Seat Standard may be viewed for free online at ASTM's online Reading Room at <https://www.astm.org/READINGLIBRARY/>. The Federal Register notice for the Bath Seat Standard refers readers to <https://www.archives.gov/federal-register/cfr/ibr-locations.html>, which in turn provides a link to ASTM's online Reading Room. *See* 84 FR 49439 (Sept. 20, 2019).

Dated: May 29, 2020

Alberta Mills

Digitally signed by Alberta Mills
DN: cn=Alberta Mills, o=GCOS,
ou=GCOS,
email=amills@cpsc.gov, c=US
Date: 2020.05.29 16:10:21 -04'00'

Alberta E. Mills, Secretary
Consumer Product Safety Commission