

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Lisa Milice,	:	
	:	No. 20-1373
	:	
<i>Petitioner,</i>	:	
	:	
v.	:	
	:	
Consumer Product Safety Commission,	:	
	:	
	:	
<i>Respondent.</i>	:	

MOTION FOR LEAVE TO FILE SUPPLEMENTAL APPENDIX

Petitioner Lisa Milice respectfully moves for leave to file a Supplemental Appendix along with her opening brief. *See* Fed. R. App. P. 27(a). Ms. Milice’s proposed Supplemental Appendix will include two affidavits attached to this motion. The affidavits attest to attempts by Ms. Milice and her undersigned counsel to view the safety standard at issue in this case, for free, in the Consumer Product Safety Commission’s reading room in Bethesda, Maryland.

While appellate review of administrative action focuses on “the administrative record already in existence,” a court should permit that record to be supplemented when relying on the existing record would “frustrate effective judicial review.” *Camp v. Pitts*, 411 U.S. 138, 143-44 (1973). One well-established reason for supplementing the record exists when facts demonstrate that the agency has not complied with its own rules or otherwise acted in bad faith. *See, e.g., Dep’t of Commerce v. New York*, 139 S. Ct.

2551, 2574 (2019) (extra-record discovery, even into “mental impressions” of decision-makers, is appropriate if there is a “strong showing of bad faith or improper behavior”); *Sm. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (“Extra-record documents may also be admitted when plaintiffs make a showing of agency bad faith.”) (citation omitted). Indeed, this Court has allowed the parties to supplement the administrative record through affidavits when necessary to correct factual misstatements. *See Greene/Guilford Env'tl. Ass'n. v. Wykle*, 94 F. App'x 876, 879 (3d Cir. 2004) (unpublished) (affirming decision allowing agency to supplement record with evidence it considered relevant factors not present in administrative record). Ultimately, while this Court’s “review is deferential,” this Court is “not required to exhibit a naiveté from which ordinary citizens are free” and can look past an agency’s record if there is a reason to doubt the adequacy of the agency’s process. *Dep't of Commerce*, 139 S. Ct. at 2575-76 (citation omitted).

The affidavits included in the proposed Supplemental Appendix give reason to doubt the Consumer Product Safety Commission’s process in this case. According to the rule at issue, *Revisions to Safety Standard for Infant Bath Seats*, 84 Fed. Reg. 49435, 49438-39 (Sept. 20, 2019), “A copy of the [relevant] standard can also be inspected at CPSC’s Division of the Secretariat, U.S. Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814, telephone 301-504-7923.” The affidavits attest that Respondent Consumer Product Safety Commission has not made

the relevant standard available for inspect as required by the rule, 84 Fed. Reg. at 49438-39.

This evidence would show that the CPSC has not adhered to its obligations under the Administrative Procedure Act, and, in fact, has violated its own regulatory requirements. Indeed, the affidavits included in the proposed Supplemental Appendix are necessary because they tend to prove issues raised in Ms. Milice's brief, including Respondent's failure to provide notice of the law; Respondent's failure to adhere to legal requirements; and Respondent's general indifference to the public's right of access to the law. Adequate review of the agency's actions requires consideration of this information. *See Dep't of Commerce*, at 139 S. Ct. at 2575-76. After all, the crux of Ms. Milice's challenge here is that the relevant binding standards are *not* freely available to the public. Thus, to rely on CPSC's demonstrably false assertions in the administrative record concerning the availability of relevant standard would completely "frustrate effective judicial review" of Ms. Milice's challenge. *See Camp*, 411 U.S. at 143-44.

Undersigned Counsel contacted counsel for Respondent concerning this motion and provided a copy of the two affidavits. Respondent's counsel indicated that Respondent will wait to take a position on this motion until after Ms. Milice has filed her motion.

May 13, 2020

Respectfully Submitted,

/s/ Jared McClain

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 Respondent. :

AFFIDAVIT OF PETITIONER LISA MILICE

1. I am the Petitioner in this matter.
2. On March 6, 2020, I gave birth to my son, Callahan Milice Craft.
3. I am a consumer of durable infant and toddler products.
4. On January 10, 2020, I called the Consumer Product Safety Commission to inquire about viewing copies of safety standards that the Commission has incorporated by reference into its rules governing durable infant and toddler products.
5. I took contemporaneous notes of my phone call, and I relayed those notes to my attorney, Jared McClain, as soon as the call ended.
6. During my phone call on January 10, 2020, I spoke with a representative from the Consumer Product Safety Commission who advised me that “there is

absolutely no way” that I can view ASTM International standards for free, at the agency reading room or otherwise.

7. The representative told me that to get a copy of the standards I wished to view, I would have to contact ASTM International and pay for the standards.
8. My contemporaneous notes of my phone conversation confirm the substance of the phone conversation.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: May 11, 2020

A handwritten signature in cursive script, appearing to read "Lisa Milice", written above a horizontal line.

Lisa Milice

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AFFIDAVIT OF COUNSEL JARED McCLAIN, ESQ.

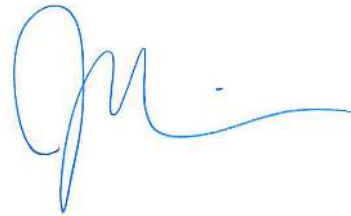
1. I am an attorney licensed in the State of Maryland, in good standing with the Court of Appeals of Maryland. I am admitted to practice in the United States Court of Appeals for the Third Circuit.
2. I represent Petitioner Lisa Milice in *Milice v. CPSC*, No. 20-1373.
3. According to the rule at issue in this case, *Revisions to Safety Standard for Infant Bath Seats*, 84 Fed. Reg. 49435, 49438-39 (Sept. 20, 2019), “A copy of the [relevant] standard can also be inspected at CPSC’s Division of the Secretariat, U.S. Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814, telephone 301-504-7923.”

4. On the afternoon of January 9, 2020, I called the Consumer Product Safety Commission Division of the Secretariat at the number provided in the proposed rule.
5. The purpose of my call was to clarify how to find CPSC's reading room and what steps I would have to take to view a copy of the standard.
6. Consistent with directions from CPSC published in public notices of proposed rulemaking, I planned to travel to Bethesda, Maryland, to view a copy of CPSC's Safety Standard for Infant Bath Seats as well as two other safety standards that CPSC has incorporated by reference into its rules.
7. I took contemporaneous notes of my call, which I forwarded to my co-counsel Caleb Kruckenberg following my phone call.
8. The representative of CPSC with whom I spoke told me that CPSC does not possess a copy of the full standards. She confirmed that there was no way for me to view the standard without paying the organization who produced the standard to see a copy.
9. My contemporaneous notes from that call memorialized that the representative of CPSC responded as follows to my inquiry: "Listen, I've been here for five years and we get calls about this every single day, and the answer is that if you want to see, you have to pay for it. Because we don't come up with them; the labs who come up with them have to make money somehow. So, there's only

limited information that we can provide for free. They are private organizations and we have nothing to do with the prices they set.”

I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: May 11, 2020



Jared McClain

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this Motion for Leave to File Supplemental Appendix with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system on May 13, 2020. I also certify that the foregoing document is being served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1.

May 13, 2020

Respectfully,

/s/ Jared McClain
JARED MCCLAIN