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 OPPOSITION TO RESPONDENT LEACHCO, INC.'S MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

Pursuant to 16 C.F.R. § 1025.23(c), Complaint Counsel respectfully requests that the Presiding Officer deny the Motion for Protective Order ("Motion") filed by Respondent Leachco, Inc. ("Leachco"). Dkt. Nos. 45 & 46. As explained in Complaint Counsel's pending Motion to Compel, Complaint Counsel's discovery requests seek documents and information directly relevant to the subject matter of this proceeding. *See* Dkt. Nos. 43 & 44. Yet, Leachco has produced **no** documents since the Court-ordered discovery reset in September and now seeks to be entirely shielded from producing documents and responding to certain requests for admission. This Court should not grant the protective order, as the requested materials fall squarely within the scope of discovery articulated in the 16 C.F.R. § 1025.31(c) and should be produced.

II. LEGAL STANDARD

Section 1025.31(d) of the Rules of Practice for Adjudicative Proceedings permits a Presiding Officer "for good cause shown" to issue a protective order "which justice requires to

protect a party or person from annoyance, embarrassment, competitive disadvantage, oppression or undue burden or expense." 16 C.F.R. § 1025.31(d). This language closely tracks that of Rule 26(c)(1) of the Federal Rules of Civil Procedure. As courts applying Rule 26(c) consistently have held, the party seeking a protective order bears a "heavy burden" to establish why discovery should be denied "[u]nder the liberal discovery principles of the Federal Rules [of Civil Procedure]." *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975) (reversing and remanding the trial court's granting of a motion for protective order). Further, a party seeking such an order, "must show that specific prejudice or harm will result if no protective order is granted." *Manning v. Uber Techs. Inc.*, 358 F. Supp. 3d 962, 963 (N.D. Cal. 2019) (citation and quotation marks omitted) (denying motion for protective order). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (citation omitted).

III. ARGUMENT

A. The Motion Does Not Comply with the Rules of Practice

The Presiding Officer should deny Leachco's Motion at the threshold because it does not comply with the requirements of the Rules of Practice for Adjudicative Proceedings. Section 1025.31(d) permits a Presiding Officer to issue a protective order "to protect a party or person from annoyance, embarrassment, competitive disadvantage, oppression or undue burden or expense." But Leachco raises none of these grounds in its Motion, nor did Leachco object to RFP No. 27 on any of these grounds. *See* Dkt. No. 46, Ex. 5.[1] Instead, Leachco's Motion is premised entirely on relevance grounds. Specifically, Leachco argues that the requested "information has absolutely nothing to do with the CPSC's allegations, and it is not remotely calculated to lead to

[1] RFP No. 27 requests internal and external communications sent to or from specific Leachco custodians regarding the Podsters and containing specific key words. *See* Dkt. No. 46, Ex. 4 at 3–4.

the discovery of admissible evidence." Dkt. No. 46 at 1.[2] Not only is Leachco's argument meritless, but relevance is not a valid ground for a protective order under the Rules of Practice, and so Leachco's request for such an order should be denied.

B. The Documents and Information Sought Are Relevant and Within the Scope of Discovery

Even if a motion for a protective order could be premised on relevance grounds, Leachco's relevance challenge would fail. Leachco has not satisfied the "heavy burden" of establishing that a protective order is necessary, nor has it provided evidence of the particularized prejudice or harm required to support such a protective order. *See Hearst*, 519 F.2d at 429; *Manning*, 358 F. Supp. 3d at 963.

As Complaint Counsel explained at length in the Motion to Compel it filed four days before Leachco's Motion, the internal and external communications requested by RFP No. 27 fall squarely within the permissible and appropriate scope of discovery. Leachco's internal communications and communications with third parties about the Podsters relate to Complaint Counsel's affirmative case regarding foreseeable use and the risk of injury posed by the Podsters. If Leachco employees were corresponding about risks posed by the Podsters and how the Podsters were being used—particularly if they were being used for sleep or were being used unsupervised, those communications are directly relevant to Complaint Counsel's case.

The communications also relate to the denials in Leachco's own Answer. For example, Leachco denies that "[i]t is foreseeable that caregivers will use the Podster for infant sleep," yet—from the limited materials they have produced—it is clear that Leachco employees had email exchanges with third parties about the use of Podsters for sleep. *See* Dkt. No. 1 at ¶ 38 and

[2] Leachco's objection to RFP No. 27 is premised on a similar relevance contention: "Request No. 27 seeks information that is neither relevant nor reasonably calculated to lead to the discovery of evidence for claims asserted by the Commission." Dkt. No. 46, Ex. 5 at 3.

Dkt. No. 2 at ¶ 37. Such communications are relevant to an evaluation of Leachco's Answer by Complaint Counsel and any finder of fact.

Complaint Counsel also should be permitted to review key witness communications to rebut various statements made by those witnesses which may be restated on the stand at trial or during deposition. For example, Leachco's website states in part that "[t]he Podster provides a safe, secure spot to place an infant on its back . . . ." Dkt No. 44, Ex. 7. If Leachco's principals Clyde Leach or Jamie Leach (or other witnesses) testify regarding that statement on their website, or make similar independent statements about safety, Complaint Counsel is entitled to review their external or internal communications that may tend to support or refute those statements. Complaint Counsel also is entitled to communications related to Leachco's statement on its website that Podsters "can help aid in digestion and ***breathing***," Dkt. No. 44, Ex. 5 (emphasis added), particularly given that the weight of the evidence suggests otherwise: Podsters in fact can cause infants to suffocate.

The information requested in RFA Nos. 3, 4, and 5 similarly falls squarely within the scope of discovery.[3] These requests ask for Leachco's knowledge about how Podsters were used and how they were advertised. Leachco's knowledge about how Podsters were used by parents and caregivers and how the Podsters were marketed clearly is relevant to the question of their foreseeable use. That knowledge and the basis for it provide datapoints from which a finder of

[3] These RFAs are as follows:

> REQUEST NO. 3:
> Admit that, prior to the filing of the Complaint, Leachco had knowledge that consumers were allowing infants to sleep on Podsters.
> REQUEST NO. 4:
> Admit that, prior to the filing of the Complaint, Leachco had knowledge that at least one Retailer advertised the Podster as a product in which infants can sleep.
> REQUEST NO. 5:
> Admit that, prior to the filing of the Complaint, Leachco had knowledge that there were reviews on Amazon.com in which consumers referenced infants sleeping on Podsters.

Dkt. No. 46, Ex. 6 at 4.

fact can evaluate how the products are likely to be used. And it should not be a burden for Leachco to respond to these requests. Leachco presumably knows the answers to these RFAs and need only affirm or deny them. It is not as though the requested information and communications do not exist. Leachco has conceded that they exist and tacitly acknowledged that they exist by filing this Motion to protect against their disclosure.

Leachco also recently admitted that Leachco employees sent and received emails regarding the Podsters from at least the following email addresses: customerservice@leachco.com, jamieleach@leachco.com, tbarrett@leachco.com, lbarnes@leachco.com, and mballard@leachco.com. Ex. A at 10–11. Leachco also conceded that it conducted testing on the Podsters related to infant movement while on the Podsters, how consumers may use Podsters, and the effectiveness of the Podsters' warnings and instructions. Ex. A. at 5–7. Yet, Leachco has produced no testing reports on those subjects, nor has it produced any communications about them.

Leachco attempts to dodge the relevance of the discovery requests by contending (inaccurately) that Complaint Counsel's case is solely about "objective, reasonably foreseeable misuse by consumers" and, therefore, Leachco's own knowledge or subjective belief is not within the scope of discovery. *See* Dkt. No. 46 at 2. But Leachco's own knowledge of how the Podsters were used or what safety risks they may pose is very much relevant to whether these products are a substantial product hazard. Leachco, as the designer and manufacturer of the Podsters, is the entity in the best position to have and collect communications about how the Podsters are being used in consumers' homes and the risks that they may pose during day-to-day use. This information, and Leachco's internal discussions and evaluations of such information, is

directly relevant to the subject matter of this case, including what consumer uses are reasonably foreseeable.

Leachco employees' own knowledge and subjective beliefs also are very much relevant to the credibility of Leachco's potential witnesses and statements Leachco has made to the public about its products. If Leachco had information that parents were using the Podsters for sleep or that the Podsters posed a suffocation risk, that information certainly is relevant to whether these products pose a substantial product hazard. But it also is relevant to assessing the credibility of Leachco's witnesses and their statements, whether those statements are made during testimony or have been disseminated to the public.

Leachco also claims that its knowledge of potential "misuses" of the Podsters is irrelevant because Leachco would not be absolved of liability under the CPSA if it were able to "prove that it had zero knowledge of potential misuses of the Podster." Dkt. No. 46 at 8. This is a red herring. Leachco's knowledge regarding manners in which consumers may use and are using the products is not rendered irrelevant simply because a lack of knowledge would have no effect on the defect analysis. Leachco, as the designer, marketer, and the manufacturer of the Podsters, is in a particularly good position to have information about the manners in which the Podsters are used, and that information is relevant to an evaluation of the products' reasonably foreseeable uses.

In addition, Leachco attempts to avoid its responsibility for responding to discovery by contending that "[w]hen asked to explain the relevance, the CPSC has refused on the ground that such an explanation would divulge trial strategy." Dkt. 46 at 1. This is inaccurate. Complaint Counsel discussed the relevance of this information during its various meet and confer efforts

with Leachco[4] and even articulated the relevance of the discovery requests in its Motion to Compel papers, which were filed publicly days before Leachco's own Motion.[5] Complaint Counsel even explained the relevance of these materials in the initial Motion to Compel it filed in August. *See* Dkt. No. 15 at 9–11. Leachco's argument that Complaint Counsel has not explained the relevance of the requested materials rings hollow.

C. Leachco's Case Law Does Not Support a Protective Order

Leachco relies on two cases in support of its argument that Complaint Counsel is engaged in a "fishing expedition" into irrelevant materials. *See* Dkt. No. 46 at 8–9. But Leachco's cases do not counsel in favor of a protective order here.

In Leachco's first case, *Blankenship v. Fox News Network, LLC*, the magistrate judge actually granted the motion to compel at issue in the portion of the opinion cited by Leachco, and the court ordered the production of the following broad categories of records from over forty custodians: "any written or electronic communications that references Plaintiff, the West Virginia GOP debate ('Fox News Debate') broadcast by FNN, and the 2018 West Virginia U.S. Senate Republican primary election." 2020 WL 9718873 at *2–3 & *14–17. As the court explained, those documents "could shed light on" the plaintiff's allegations and therefore were properly the subject of discovery. *Id.* at *15. The district judge subsequently affirmed that order compelling the production of documents. 2021 WL 2345972 (S.D. W.Va. June 8, 2021). A similar result is appropriate here: the requested discovery could shed light on Complaint Counsel's allegations and Leachco's denials and therefore should be ordered.

[4] For example, during the parties' October 25 and November 9 telephone conferences, Complaint Counsel explained the relevance of the document requests to Leachco's counsel.

[5] In some instances, such as this one, Leachco's Motion ignores Complaint Counsel's Motion to Compel. In others, Leachco expressly references and attempts to rebut the Motion to Compel in an apparent effort to obtain two opportunities to oppose it—once in the instant Motion, and once in Leachco's opposition brief that is due on December 2, 2022. *See, e.g.,* Dkt. No. 46 at 2 ("But in support of its recent Motion to Compel, the CPSC expressly . . . . .").

Leachco relies on dicta from the magistrate judge's order to argue that Complaint Counsel is engaged in a fishing expedition and is seeking discovery "beyond the pleadings' allegations to attempt finding additional violations or claims." *See* Dkt. No. 46 at 8. First, this statement is factually inaccurate. As explained above and in the pending Motion to Compel, the requested discovery goes to Complaint Counsel's substantial product hazard claim, as well as Leachco's anticipated defenses and testimony. Second, the case from which that dicta originates actually supports Complaint Counsel's request for the contested discovery. *Blankenship* relies on an American Bar Association "Practice Points" article for that dicta, and the ABA article, in turn, cites *Gopher Excavation, Inc. v. North Am. Pipe Corp.*, No. 17-cv-01021, 2017 WL 7355300 (D. Colo. Dec. 15, 2017).[6] In *Gopher Excavation*, the court also found that the plaintiff was not engaged in a fishing expedition, and the court granted the bulk of the plaintiff's motion to compel. Although the defendant tried to limit the scope of discovery to certain O-rings that it contended were the cause of defects in pipe it sold to the plaintiff, the court barred the defendant from unilaterally narrowing the scope of discovery and permitted the plaintiff to "seek[] information about the entire pipe product that it alleges is defective." *Id.* at *3–*6. As the court explained: "A party should not be limited by its opponent's theory of the case in determining what is discoverable." *Id.* at *3 (quoting *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1192 (10th Cir. 2009)). Here, Complaint Counsel's discovery efforts similarly should not be limited by Leachco's unsupported and unreasonably narrow view of the case.

The second case Leachco relies on, *Micro Motion*, arose in a unique procedural posture involving third-party discovery not present here. In *Micro Motion*, the plaintiff brought a patent infringement case. 894 F.2d 1318, 1320 (Fed. Cir. 1990). The plaintiff lost its initial jury trial on

[6] *See Blankenship*, 2020 WL 9718873 at *15 n.8 (citing https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2018/the-lure-of-the-siren-cry-fishing-expedition/).

the question of infringement, but the trial court granted a new trial and permitted "additional discovery for the purpose of updating the evidence on damages." *Id.* In response, the plaintiff served third-party subpoenas on five other competitors, seeking sweeping discovery. *Id.* at 1320–21. The plaintiff contended that it was "entitl[ed] to discovery of information concerning each [non-party] competitor's business simply because it may seek to prove lost profit damages." *Id.* at 1324. But the court explained that such extensive non-party discovery would lead to absurd results because "[i]f this position were correct, a patentee could, in virtually every infringement suit, immediately obtain discovery from all possible competitors by merely filing a complaint asking for damages against one." *Id.* at 1324–25. That is not the case here. Complaint Counsel is not seeking extensive third-party discovery from industry competitors against which it has no evidence of wrongdoing. Complaint Counsel is seeking discovery from the sole Respondent in this case about products that have been involved in two infant deaths and with respect to which CPSC staff have made a preliminary determination of a substantial product hazard. Such discovery is allowed by the Rules of Practice and even *Micro Motion*: "Clearly discovery is allowed to flesh out a pattern of facts already known to a party relating to an issue necessarily in the case." *Id.* at 1326.

D. Leachco's Efforts to Redefine the Scope of Discovery Are Flawed

Leachco also erroneously attempts to redefine the scope of this case by urging the Presiding Officer to adopt a common-law definition of "defect," rather than the definition supplied by CPSC's regulations. Leachco argues that, because the CPSA does not define the term "defect," this Court should apply a common-law meaning to that term. Dkt. No. 46 at 5. In support of this argument, Leachco cites *Gilbert v. United States*, 370 U.S. 650, 655 (1962), a case in which the Supreme Court interpreted the term "forge" for purposes of a criminal case.

This administrative litigation pursuant to the CPSA, however, is entirely distinguishable from *Gilbert* because, in that case, there was no regulation defining the statutory term at issue. But there is a regulation defining "defect" under the CPSA: 16 C.F.R. § 1115.4. Under CPSC's regulation, "defect" is defined as "[a]t a minimum, defect includes the dictionary or commonly accepted meaning of the word. Thus, a defect is a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function." *Id.* The regulation then provides detailed examples of types of defects along with numerous factors for the Commission and staff to consider in determining "whether the risk of injury associated with a product is the type of risk which will render the product defective." 16 C.F.R. § 1115.4(e). Neither Section 15 of the CPSA nor the regulation contains a requirement that, in substantial product hazard cases such as this one, a reasonable alternative design must be available in order for a defect to exist. Part of the reason those authorities are not so limited is because "defect" and the CPSA in general should be afforded an "expansive interpretation" due to "the Act's character as remedial legislation directed at a widespread, specifically identified threat to the public safety." *CPSC v. Chance Mfg. Co., Inc.*, 441 F. Supp. 228, 231 (D.D.C. 1977); *see also Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("[W]e are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes").

Leachco further argues that a protective order is appropriate because Complaint Counsel previously has explained that it will present expert testimony at the hearing in this matter and "it's hard to see what additional information the CPSC needs." Dkt. No. 46 at 9. This argument misconstrues the nature of expert testimony and how it is developed. Experts are entitled to review discovery materials in developing and shaping their expert testimony. *See, e.g.*, *Garcia v. Progressive Choice Ins. Co.*, No. 11-cv-466-BEN, 2011 WL 4356209, at *4 (S.D. Cal. Sept. 16,

2011) (finding that expert witnesses were permitted to review tax returns and W2 forms produced during discovery). In fact, the Court-approved Protective Order in this case expressly contemplates that experts may review discovery. Dkt. No. 12 at 5–6. And Leachco's communications regarding the Podster—whether internal to the company or with third parties—can assist the experts in developing their analysis of the hazards posed by the Podsters and their foreseeable uses. The communications also are relevant to rebutting Leachco's defense of the case, its denials in its Answer, and testimony it may present at the hearing. Complaint Counsel therefore is entitled to the discovery requested in RFP No. 27 and RFA Nos. 3, 4, and 5.

E. Leachco Does Not Even Attempt to Articulate a Basis for Withholding Its Communications with Third Parties

Complaint Counsel is entitled to all non-privileged communications responsive to RFP No. 27, whether internal to Leachco or communications between Leachco and third parties.[7] But it is notable that Leachco's Motion does not even attempt to articulate why Leachco should be shielded from producing communications between Leachco and third parties. Despite the focus of Leachco's Motion, RFP No. 27 does not request only internal Leachco communications exchanged among Leachco employees. Rather, it requests "[a]ll electronic communications (including, but not limited to, internal and ***external*** emails, instant messages, and text messages) to and from the following persons, whether ***involving third parties*** and/or other Leachco personnel . . . ." Dkt. No. 46, Ex. 4 at 3 (emphasis added). Yet, Leachco's Motion ignores Complaint Counsel's request for electronic communications with third parties and instead focuses solely on why Leachco believes its internal communications should be shielded from production. *See, e.g.*, Dkt. No. 46 at 1 ("CPSC seeks Leachco's internal communications concerning its subjective knowledge of irrelevant matters.") & at 8 ("[I]t is not enough to declare

[7] To date, Leachco has not made any privilege claims, nor has it provided a privilege log of any sort.

. . . the [sic] Leachco's internal communications are relevant."). Because Leachco has not even attempted to bear its burden of establishing why the Presiding Officer should order that Leachco be excused from producing communications with third parties, the Presiding Officer can and should deny the Motion on that additional ground. *Jackson v. United States*, 153 F.R.D. 646, 648 (D. Colo. 1993) (denying motion for protective order where movant failed "to show the necessity of its issuance"); *see also Hearst*, 519 F.2d at 429; *Manning*, 358 F. Supp. 3d at 963.

IV. CONCLUSION

Leachco's Motion should be denied, Complaint Counsel's motion to compel should granted, and Leachco should be ordered to produce documents responsive to RFP No. 27 and respond to RFA Nos. 3, 4, and 5. This discovery is relevant, appropriate, and should have been provided without the need for intervention by the Presiding Officer.

Dated this 2nd day of December, 2022

Respectfully submitted,

/s/ *Brett Ruff*

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2022, I served Complaint Counsel's Opposition to Respondent Leachco, Inc.'s Motion for a Protective Order on all parties and participants of record in these proceedings as follows:

By email to the Secretary:

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/s/ *Brett Ruff*

Brett Ruff
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EXHIBIT A

CONSUMER PRODUCT SAFETY COMMISSION

IN THE MATTER OF **LEACHCO, INC.**	CPSC Docket No. 22-1 HON. MICHAEL G. YOUNG PRESIDING OFFICER

LEACHCO, INC.'S OBJECTIONS AND RESPONSES TO CPSC'S SECOND SET OF REQUESTS FOR ADMISSION

Pursuant to 16 C.F.R. § 1025.34, Respondent Leachco, Inc. submits its objections and responses to the Commission's First Set of Requests for Admissions. Leachco objects to any definitions or instructions in the Commission's Requests that seek, or would require Leachco to disclose, discovery beyond the permissible scope of discovery in the Commission's Rules of Practice for Administrative Proceedings.

* * *

REQUEST NO. 1: Admit that since 2008 Leachco has not had any document management policies other than those contained in the Quality Assurance Plan produced by Leachco with Bates numbers Leachco–CPSC–000003 through Leachco–CPSC–000022.

RESPONSE: Admit.

REQUEST NO. 2: Admit that Leachco has marketed the Podster as a product that "provides upper body elevation which can help aid in digestion and breathing."

RESPONSE: Admit that Leachco has stated on its website that the "Podster provides upper body elevation which can help aid in digestion and breathing." To the

extent a further response is required, Leachco denies the remaining parts, if any, of this Request.

REQUEST NO. 3: Admit that, prior to the filing of the Complaint, Leachco had knowledge that consumers were allowing infants to sleep on Podsters.

RESPONSE: Objection. This Request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Leachco has filed a Motion for Protective Order (Nov. 21, 2022) objecting to this Request, and Leachco incorporates the objections set forth in that Motion here.

REQUEST NO. 4: Admit that, prior to the filing of the Complaint, Leachco had knowledge that at least one Retailer advertised the Podster as a product in which infants can sleep.

RESPONSE: Objection. This Request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Leachco has filed a Motion for Protective Order (Nov. 21, 2022) objecting to this Request, and Leachco incorporates the objections set forth in that Motion here.

REQUEST NO. 5: Admit that, prior to the filing of the Complaint, Leachco had knowledge that there were reviews on Amazon.com in which consumers referenced infants sleeping on Podsters.

RESPONSE: Objection. This Request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Leachco has filed a Motion for Protective Order (Nov. 21, 2022) objecting to this Request, and Leachco incorporates the objections set forth in that Motion here.

REQUEST NO. 6: Admit that at least one infant died after being left unsupervised on a Podster.

RESPONSE: Objection. This Request is vague in that it fails to provide a relevant time frame, nor does this Request include a scenario that necessarily and directly leads from a lack of supervision to an infant's death. Without exhausting the possibilities, an infant left unsupervised in a Podster could have died directly because of a health condition or from a piece of food lodged in the infant's airways, or because a full bottle was placed in the infant's mouth, or because a caregiver rolled on top of and suffocated an infant. Leachco further objects to this Request because it assumes a consumer misuse of the Podster, a misuse that is directly contrary to Leachco's express warnings and instructions, not to mention common sense. Finally, Leachco objects that it does not have first-hand knowledge of facts of any deaths allegedly related to a Podster and that there are conflicting reports about the two incidents alleged at paragraphs 36 & 37 in the Commission's complaint. For example, the IDI related to the incident at the Alabama daycare center states that the "daycare licensing agency report (Exhibit 4) shows the boy was found unresponsive face down on the pillow, but the medical examiner's report (Exhibit 5) shows the boy was found unresponsive lying on his back on the pillow. No further information could be obtained to determine in which position the boy was found. It is unclear in what position the boy was placed on the pillow." *See* CPSC0010225.

Subject to and without waiving all objections, and based on information and belief, Leachco admits one infant died after personnel at a daycare facility placed a

baby in an infant lounger (either on the infant's side or back), which was already on a crib mattress in a crib, which also included a stuffed animal that was found near the baby's face; and after a bottle of some type of liquid was placed in the infant's mouth; and after the infant was left unattended for approximately ninety minutes.

Subject to and without waiving all objections, and based on information and belief, Leachco admits that one infant, who had occasionally made gasping sounds while breathing, died after being placed on an infant lounger, which was on top of a queen-size bed, on which a blanket was also present; and after the infant and the infant's parents co-slept on the bed (the infant, at one point in time, in the Podster between the parents); after the parents fell asleep; and after the infant was found in the bed off of the Podster.

To the extent a further response is required, Leachco denies the remaining parts, if any, of this Request.

REQUEST NO. 7: Admit that an infant can suffocate on the Podster.

RESPONSE: Objection. This Request is far too abstract to be a properly focused Request for Admission. It is possible that any person "can suffocate" in literally any location, depending on an unknown number of factors including, among other things, the person's health, the ingestion of items that could block the person's airways, the age of the person, the lack of supervision over a person who may be—because of health risks or otherwise—particularly susceptible to breathing problems. The defective nature of this Request underscores the absurdity of the CPSC's allegations in this proceeding. Accidents that lead to serious injury or death "can" occur literally

anywhere and under an unknown number of circumstances. This Request provides no information concerning the relative health of the "infant." Nor does the Request identify the age, length, or weight of the "infant." Further, the phrase "on the Podster" is vague as used here. Subject to and without waiving all objections, Leachco admits that an infant "can suffocate" "on the Podster" if an infant is placed on the Podster in a position contrary to Leachco's warnings and instructions and/or if the infant is not constantly supervised.

To the extent a further response is required, Leachco denies the remaining parts, if any, of this Request.

REQUEST NO. 8: Admit that, prior to selling the Podsters, Leachco conducted no Tests to assess potential infant movement while on the Podsters.

RESPONSE: Deny.

REQUEST NO. 9: Admit that, after beginning to sell the Podsters, Leachco conducted no Tests to assess potential infant movement while on the Podsters.

RESPONSE: Deny.

REQUEST NO. 10: Admit that, prior to selling the Podsters, Leachco conducted no Tests to evaluate whether the Podsters pose a suffocation risk.

RESPONSE: Objection. This Request is far too abstract to be a properly focused Request for Admission. The phrase "suffocation risk" is vague as used here. One confronts a "suffocation risk" often—for example, at every meal or every time one goes swimming—and such a risk may be increased for those who have underlying health problems, for those who ignore product warnings and/or who lack common sense, or

for those whose caregivers ignore product warnings and/or lack common sense. Subject to and without waiving all objections, deny.

REQUEST NO. 11: Admit that, after beginning to sell the Podsters, Leachco conducted no Tests to evaluate whether the Podsters pose a suffocation risk.

RESPONSE: Objection. This Request is far too abstract to be a properly focused Request for Admission. The phrase "suffocation risk" is vague as used here. One confronts a "suffocation risk" often—for example, at every meal or every time one goes swimming—and such a risk may be increased for those who have underlying health problems, for those who ignore product warnings and/or who lack common sense, or for those whose caregivers ignore product warnings and/or lack common sense. Subject to and without waiving all objections, deny.

REQUEST NO. 12: Admit that, prior to selling the Podsters, Leachco conducted no Tests regarding how consumers may use the Podsters.

RESPONSE: Deny.

REQUEST NO. 13: Admit that, after beginning to sell the Podsters, Leachco conducted no Tests regarding how consumers may use the Podsters.

RESPONSE: Deny.

REQUEST NO. 14: Admit that, prior to selling the Podsters, Leachco conducted no Tests regarding the effectiveness of the Podsters' warnings and instructions.

RESPONSE: Deny.

REQUEST NO. 15: Admit that, after beginning to sell the Podsters, Leachco conducted no Tests regarding the effectiveness of the Podsters' warnings and instructions.

RESPONSE: Deny.

REQUEST NO. 16: Admit Leachco has no safety department to assess the safety of its products.

RESPONSE: Objection. The phrase "safety department" is undefined and vague. The term "safety" is also vague in that it fails to describe what level of "safety" is acceptable. Leachco also objects to the CPSC's apparent premise—based on its allegations in the Complaint here—that "consumer safety" means that no consumer must ever suffer any injury or harm when using or in the vicinity of consumer products, regardless of misuse, common sense, or product warnings or instructions. Leachco further objects to the premise of this Request, *i.e.*, that a small company like Leachco would be expected to have a completely independent, lawyerly described "department" whose sole focus is the "safety" of its products. Subject to and without waiving all objections, Leachco admits that it does not have a group of people designated as a "safety department" to assess the "safety" of its products, but Leachco denies that it lacks a systematic means of assessing the safety of its products.

REQUEST NO. 17: Admit Leachco has no safety committee to assess the safety of its products.

RESPONSE: Objection. The phrase "safety committee" is undefined and vague. The term "safety" is also vague in that it fails to describe what level of "safety" is

acceptable. Leachco also objects to the CPSC's apparent premise—based on its allegations in the Complaint here—that "consumer safety" means that no consumer must ever suffer any injury or harm when using or in the vicinity of consumer products, regardless of misuse, common sense, or product warnings or instructions. Leachco further objects to the premise of this Request, *i.e.*, that a small company like Leachco would be expected to have a completely independent, lawyerly described "committee" whose sole focus is the "safety" of its products. Subject to and without waiving all objections, Leachco admits that it does not have a group of people designated as a "safety committee" to assess the "safety" of its products, but Leachco denies that it lacks a systematic means of assessing the safety of its products.

REQUEST NO. 18: Admit Leachco has no employee whose position at Leachco focuses solely on product safety.

RESPONSE: Objection. The term "safety" is vague in that it fails to describe what level of "safety" is acceptable. Leachco also objects to the CPSC's apparent premise—based on its allegations in the Complaint here—that "consumer safety" means that no consumer must ever suffer any injury or harm when using or in the vicinity of consumer products, regardless of misuse, common sense, or product warnings or instructions. Further objecting, Leachco states that from Jamie Leach and down through every employee, Leachco is focused on the safety of its products; product safety is part of every employee's job at Leachco. Subject to and without waiving all objections, Leachco admits that it does not have an employee whose position at

Leachco focuses solely on product safety, but Leachco denies that it lacks a systematic means of assessing product safety.

REQUEST NO. 19: Admit Leachco has no written company policies regarding consumer safety.

RESPONSE: Objection. The term "consumer safety" is vague in that it fails to level of "safety" is acceptable. Leachco also objects to the CPSC's apparent premise—based on its allegations in the Complaint here—that "consumer safety" means that no consumer must ever suffer any injury or harm when using or in the vicinity of consumer products, regardless of misuse, common sense, or product warnings or instructions. Subject to and without waiving all objections, Leachco admits that it does not have written company policies regarding "consumer safety," but Leachco denies that it lacks policies and practices regarding "consumer safety."

REQUEST NO. 20: Admit Leachco has no written company procedures regarding consumer safety.

RESPONSE: Objections. The phrase "consumer safety" as used here is vague. Leachco also objects to the CPSC's apparent premise—based on its allegations in the Complaint here—that "consumer safety" means that no consumer must ever suffer any injury or harm when using or in the vicinity of consumer products, regardless of misuse, common sense, or product warnings or instructions. Subject to and without waiving all objections, Leachco admits that it does not have written company procedures regarding "consumer safety," but Leachco denies that it lacks procedures and practices regarding "consumer safety."

REQUEST NO. 21: Admit that Leachco employees sent emails regarding the Podsters, including emails containing the term "Podster", using the customerservice@leachco.com email address.

RESPONSE: Admit.

REQUEST NO. 22: Admit that Leachco employees received emails regarding the Podsters, including emails containing the term "Podster", using the customerservice@leachco.com email address.

RESPONSE: Admit.

REQUEST NO. 23: Admit that Jamie Leach sent emails to other Leachco employees regarding the Podsters, including emails containing the term "Podster", using the jamieleach@leachco.com email address.

RESPONSE: Admit.

REQUEST NO. 24: Admit that Jamie Leach received emails from other Leachco employees regarding the Podsters, including emails containing the term "Podster", using the jamieleach@leachco.com email address.

RESPONSE: Admit.

REQUEST NO. 25: Admit that Tonya Barrett sent emails to other Leachco employees regarding the Podsters, including emails containing the term "Podster", using the tbarrett@leachco.com email address.

RESPONSE: Admit.

REQUEST NO. 26: Admit that Tonya Barrett received emails from other Leachco employees regarding the Podsters, including emails containing the term "Podster", using the tbarrett@leachco.com email address.

RESPONSE: Admit.

REQUEST NO. 27: Admit that Leah Barnes sent emails to other Leachco employees regarding the Podsters, including emails containing the term "Podster", using the lbarnes@leachco.com email address.

RESPONSE: Admit.

REQUEST NO. 28: Admit that Leah Barnes received emails from other Leachco employees regarding the Podsters, including emails containing the term "Podster", using the lbarnes@leachco.com email address.

RESPONSE: Admit.

REQUEST NO. 29: Admit that Mabry Ballard sent emails to other Leachco employees regarding the Podsters, including emails containing the term "Podster", using the mballard@leachco.com email address.

RESPONSE: Admit.

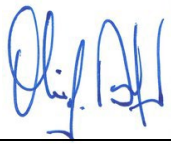
REQUEST NO. 30: Admit that Mabry Ballard received emails from other Leachco employees regarding the Podsters, including emails containing the term "Podster", using the mballard@leachco.com email address.

RESPONSE: Admit.

* * *

Dated: November 30, 2022.

Respectfully submitted,



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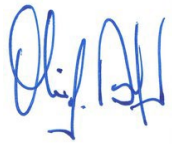
Counsel for Respondent Leachco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2022, I served, by electronic mail, the foregoing upon all parties of record in these proceedings:

Leah Ippolito, Supervisory Attorney **Brett Ruff**, Trial Attorney **Rosalee Thomas**, Trial Attorney **Caitlin O'Donnell**, Trial Attorney **Michael Rogal**, Trial Attorney **Frederick C. Millett** **Gregory M. Reyes** Complaint Counsel Office of Compliance and Field Operations U.S. Consumer Product Safety Comm'n Bethesda, MD 20814 lippolito@cpsc.gov bruff@cpsc.gov rbthomas@cpsc.gov codonnell@cpsc.gov mrogal@cpsc.gov fmillett@cpsc.gov greyes@cpsc.gov	**Mary B. Murphy** Director, Div. of Enforcement & Litigation U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 mmurphy@cpsc.gov **Robert Kaye** Assistant Executive Director Office of Compliance and Field Operations U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 rkaye@cpsc.gov



Oliver J. Dunford
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