UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

IN THE MATTER OF **LEACHCO, INC.,** **Respondent.**	**CPSC DOCKET NO. 22-1** HON. MICHAEL J. YOUNG PRESIDING OFFICER

LEACHCO, INC.'S OPPOSITION
TO THE COMMISSION'S MOTION TO COMPEL

The Court should put an end to the Commission's fishing expedition for evidence related to claims the Commission has not alleged. Here, the only question is whether Leachco's infant lounger—the Podster—presents a substantial product hazard under 15 U.S.C. § 2064(a)(2). *See* Compl. Count I. A "substantial product hazard" is defined as "a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public." § 2064(a)(2). The Commission alleges that a "defect" exists here because "*it is foreseeable* that caregivers will use the product for infant sleep and *it is foreseeable* that caregivers will leave infants unattended in the product," which—upon the occurrence of various contingencies (*e.g.*, bedsharing)—could lead to the obstruction of an infant's nose or mouth. Compl. ¶ 50 (emphasis added).

Therefore, according to the Commission's allegations, Leachco is liable under §2064(a)(2) *even if* Leachco had *zero* subjective knowledge, understanding, or foresight about consumer misuse. The Commission objects to this plain reading of §2064(a)(2) and the Complaint's allegations, but it refuses to identify the legal elements of its claim. Instead, the Commission effectively asserts that the scope of discovery is unlimited. It

is not. Although broad, discovery does not extend "beyond the pleadings' allegations to attempt finding additional violations or claims." *Blankenship v. Fox News Network, LLC*, 2020 WL 9718873, at *15 (S.D. W.Va. Sept. 21, 2020). Yet that's exactly what the Commission attempts here.

In support of its Motion to Compel, the Commission cites to 16 C.F.R. § 1115.6, a regulation related to reporting requirements in 15 U.S.C. § 2064***(b)***—a statute not at issue here. Under §2064(b), a manufacturer that "obtains information which reasonably supports the conclusion" that a product has a defect which could create a substantial product hazard must "immediately inform" the Commission. Section 1115.6 provides that this "information" may include consumer or customer complaints. In that circumstance, a company's internal communications could be relevant. But the Commission's Complaint here does not allege that Leachco failed to meet any obligations under §2064(b). Its attempt to use discovery to find a violation of §2064(b) is an abuse of the discovery process.

Finally, as the Court will recall, the Commission previously represented that it is not relying on pre-Complaint analysis and "intends to produce expert witness testimony to establish" its claim. *CPSC Opp. to Leachco's Mtn. to Compel* [Dkt. No. 29], at 9. Therefore, it does not need Leachco's pre-Complaint knowledge.

In sum, the Commission's request for Leachco's internal[1] communications relating to its subjective knowledge seeks information that is neither relevant nor rea-

[1] The Commission mentions communications between Leachco and third parties related to the Podster's alleged suffocation defect. Leachco produced those communications. In any event, the Commission seeks an order compelling only the production of documents in response to RFP No. 27, which seeks certain internal emails. *See* Br. 15–16.

sonably calculated to lead to the discovery of admissible evidence. 16 C.F.R. § 1025.31(d). The Court should deny the Commission's Motion to Compel.

LAW AND ARGUMENT

Discovery cannot go beyond issues related to the Commission's claim

The scope of discovery is not unlimited, and the Commission's request for discovery that has no bearing whatsoever on the Commission's sole claim against Leachco should be denied. Thus, as the court stated in *Kelley v. Microsoft Corp.*—cited by the Commission (Br. 9)—discovery must be "'relevant to a[] *party's claim*.'" No. C07-0475 MFP, 2008 WL 5000278, at *1 (W.D. Wash. Nov. 21, 2008) (emphasis added) (quoting Fed. R. Civ. P. 26(b)(1)). And it is beyond dispute that parties "'have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.'" 8 FED. PRAC. & PROC. CIV. [WRIGHT & MILLER] § 2008 (3d ed.) (citation omitted). In short, the role of discovery is "to find support for properly pleaded claims, not to find the claims themselves." *Torch Liquidating Trust ex rel. Bridge Associates L.L.C. v. Stockstill*, 561 F.3d 377, 392 (5th Cir. 2009) (citation omitted). Accordingly, "courts should not grant discovery requests based on pure speculation that amount to nothing more than a 'fishing expedition' into actions or past wrongdoing not related to the alleged claims or defenses." *Collens v. City of New York*, 222 F.R.D. 249, 253 (S.D.N.Y. 2004) (citations omitted).

The Commission's reliance on stray statements from case law is misplaced. Br. 9–10. Indeed, the "often intoned legal tenet," that "relevance" is broader for discovery than for admissibility, "should not be misapplied so as to allow fishing expeditions in

discovery." *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (1992) (referencing, inter alia, *Oppenheimer Fund, Inc. v. Saunders*, 437 U.S. 340 (1978)). *Oppenheimer Fund* itself explained that in "deciding whether a request comes within the discovery rules, a court is not required to blind itself to the purpose for which a party seeks information. Thus, when the purpose of a discovery request is to gather information for use in proceedings *other than the pending suit*, discovery properly is denied." *Id.* at 353 n.17 (emphasis added). Under these well-worn standards, the Commission's discovery request seeks irrelevant information.

First, in *this suit*, the Commission's sole claim is that Leachco violated 15 U.S.C. § 2064(a)(2) because "*it is foreseeable* that caregivers will use the product for infant sleep and *it is foreseeable* that caregivers will leave infants unattended in the product," which—upon the occurrence of various contingencies (*e.g.*, bedsharing)—could lead to the obstruction of an infant's nose or mouth. Compl. ¶ 50 (emphasis added). Leachco's subjective knowledge has nothing to do with the Commission's claim under §2064(a)(2).[2]

The Commission also points to Leachco's denials of the Commission's allegations of foreseeability. Br. 10–11. But the effect of these denials is merely that the Commission must prove, in fact, that "*it is foreseeable* that caregivers will use the product for infant sleep and *it is foreseeable* that caregivers will leave infants unattended in the product," which—upon the occurrence of various contingencies (*e.g.*, bedsharing)—

[2] While discovery may involve *issues* not specifically alleged in a complaint, these *issues* cannot go beyond the alleged *claim*. *See Oppenheimer Fund*, 473 U.S. at 350 (noting that discovery includes matters that bear on "any issue that is or may be *in the case*") (emphasis added); *id.* at 353 n.17 (confirming that discovery is "properly" denied when a party seeks to gather information outside the "pending suit").

could lead to the obstruction of an infant's nose or mouth. Compl. ¶ 50 (emphasis added). Those denials do not transform the foreseeability question from a reasonable-person standard to one of subjective intent or knowledge. *See, e.g.*, *Guevara v. Constar Fin. Srvcs., LLC*, No. 3:17-CV-2282, 2020 WL 3001390, at *4, *5 (M.D. Pa. June 4, 2020) (defendant denied allegations that it violated the Fair Debt Collection Practices Act, and plaintiff had to prove elements of claim under the Act, which imposes liability without proof of an intentional violation).[3]

Second, and similarly irrelevant, is Leachco's understanding of test results. Br. 14–15. As the Commission notes, Leachco was already compelled to produce test results in response to the Commission's pre-Complaint investigation. *Id*. 14. The Commission then speculates that "Leachco may call witnesses to testify at trial about these tests." *Id*. 15. But the Commission fails to show how Leachco's understanding of these tests is in any way related to the Commission's claim under §2064(a)(2). Further, as the Court knows, the Commission represented that it will not rely on its staff's pre-Complaint analysis and will instead rely on expert testimony to prove its claim against Leachco. *CPSC Opp. to Leachco's Mtn. to Compel* [Dkt. No. 29], p. 9. The Commission does not explain why Leachco's knowledge of pre-Complaint testing is relevant. Instead, the Commission's sudden interest in Leachco's understanding of pre-Complaint testing is a transparent attempt to manufacture another basis to obtain irrelevant emails.

[3] Again, while the Commission disputes Leachco's plain reading of 15 U.S.C. § 2064(a)(2) and the Complaint's allegations, the Commission has failed to identify the legal elements of its claim. As Leachco explained in its Motion for Protective Order, the Commission's theory of liability here is a Frankenstein mash-up of various products-liability concepts. *See Mem. in Supp. of Mtn. to Compel* (filed Nov. 21, 2022) at 4–8. If Leachco's understanding of the relevant legal standards is incorrect, the Commission has failed to explain why.

Finally, the Commission's argument, that Leachco's internal emails should be produced in case the Commission needs them for impeachment, is based on pure conjecture. Br. 13–15; *see also id*. 11 (claiming that Commission must be permitted to review communications to test statements from Leachco's website that "may be" restated at trial). Here, again, the Commission, based on its mistaken view that evidence unrelated to its sole claim under §2064(a)(2) is discoverable, guesses about what Leachco may do at trial—and then claims an entitlement to any information that could perhaps be used to impeach the (unknown) testimony of (unknown) Leachco witnesses. But as the Commission concedes, witness lists are not due until July. Br. 14. Therefore, the Commission's entirely speculative argument fails to demonstrate that Leachco's internal emails are relevant. In situations like these, "courts 'have required parties to establish good cause where discovery is sought solely to unearth potential impeachment material, and have not found such cause where the request is speculative.'" *Alvarado v. GC Dealer Srvcs. Inc.*, 18-cv-2915 (SJF)(SIL), 2018 WL 6322188, at *4 (E.D.N.Y. Dec. 3, 2018) (quoting *Dzanis v. JPMorgan Chase & Co.*, No. 10-cv-3384, 2011 WL 5979650, at *6 (S.D.N.Y. Nov. 30, 2011)).[4] No such cause exists here.[5]

[4] The cases cited by the Commission confirm only that impeachment evidence can be—depending on the facts and circumstances of a particular case—relevant. Br. 13–14. They do not show that speculative requests for hoped-for impeachment evidence is proper. *See Adelman v. Boy Scouts of America*, 276 F.R.D. 681, 697 (S.D. Fla. 2011) (noting that discovery of impeachment evidence could be relevant, but such evidence was not at issue in that case); *Behler v. Hanlon*, 199 F.R.D. 553, 555 (D. Md. 2001) (holding, under circumstances at issue, that evidence of financial ties of an opposing party's expert witness was relevant to test the expert's objectivity); *U.S. v. Cathcart*, No. C 07–4762 PJH, 2009 WL 1764642 (N.D. Cal. June 18, 2009) (holding, under particular circumstances of dispute, that the identity of the third-party source paying for defendant's legal fees was discoverable).

[5] Leachco does not dispute that search terms *can* be an effective way to find *relevant* evidence. *See* CPSC Br. 12–13. Leachco does, of course, dispute that the Commission's search terms will lead to discovery that is relevant or reasonably calculated to lead to the discovery of admissible evidence.

The Commission's Discovery relates—if at all—only to a claim it has not alleged

Any doubt about the Commission's attempt to expand discovery beyond the issues in this proceeding is resolved by the Commission's reliance on 16 C.F.R. § 1115.6, a regulation related solely to a manufacturer's reporting requirements under 15 U.S.C. § 2064(b)(3). In such a case, a manufacturer that "obtains information which reasonably supports the conclusion" that a product has a defect which could create a substantial product hazard must "immediately inform" the Commission. *Id*. The Commission's regulation thus provides that this "information" may include consumer or customer complaints. 16 C.F.R. § 1115.6. In that circumstance, a company's internal communications could be relevant. But the Commission's Complaint does not allege that Leachco failed to meet any obligations under §2064(b)(3).

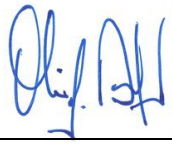
CONCLUSION

At bottom, it is readily apparent that the Commission is simply fishing for irrelevant information that it could use in a suit "*other than the pending suit.*" *Oppenheimer Fund*, 427 U.S. at 353 n.17 (emphasis added). The Court should not "blind itself to [that] purpose," *id*., and should thus deny the Commission's Motion to Compel.

* * *

DATED: December 2, 2022.

Respectfully submitted,



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I hereby certify that on December 2, 2022, the foregoing was served upon all parties and participants of record as follows:

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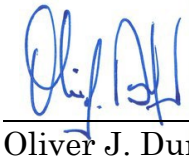

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