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April 17, 2023

In the Matter of

LEACHCO, INC., CPSC Docket No. 22-1

Respondent.

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINT COUNSEL'S MOTION FOR PROTECTIVE ORDER AS TO CERTAIN OF LEACHCO, INC.'S FIRST SET OF REQUESTS FOR ADMISSION, LEACHCO, INC.'S SECOND SET OF REQUESTS FOR ADMISSION AND LEACHCO, INC.'S INTERROGATORY NO. 40

In response to two sets of Requests for Admission ("RFA") and three sets of Interrogatories, Complaint Counsel seeks a protective order for 283 of Respondent's 363 RFAs, and Interrogatory No. 40. *See* Compl. Counsel's Mot. for Protective Order as to Certain of Leachco, Inc.'s 1st Set of Reqs. for Admission, Leachco, Inc.'s 2d Set of Reqs. for Admission and Leachco, Inc.'s Interrog. No. 40, at 1–2 (Feb. 16, 2023). Complaint Counsel objects to the designated RFAs on the grounds that they: (1) relate to a purely legal question; (2) seek information related to Respondent's own business; (3) relate to or seek expert opinion or testimony; (4) pose improper hypotheticals; and (5) seek privileged information or information not yet required under the scheduling order. Memo. in Supp. of Compl. Counsel's Mot. for Protective Order as to Certain of Leachco, Inc.'s 1st Set of Reqs. for Admission, Leachco, Inc.'s 2d Set of Reqs. for Admission and Leachco, Inc.'s Interrog. No. 40, at 2 (Feb. 16, 2023). It also asserts Interrogatory No. 40 incorporates all RFAs by reference, designed to "annoy, oppress, and impose undue burden" upon it. *Id.* at 3, 33.

Respondent opposes the protective order, asserting that Complaint Counsel's legal claims for protection are unfounded, or that the individual RFAs or Interrogatory do not fall within the available protection. *See* Leachco, Inc.'s Opp'n to the Comm'n's Mot. for Protective Order as to Certain of Leachco's 1st Set of Reqs. for Admission, Leachco's 2d Set of Reqs. for Admission, and Leachco's Interrog. No. 40 (Feb. 27, 2023). Respondent offered to submit a revised RFA set by March 3, 2023, but Complaint Counsel rejected the proposal. *Id.* at 1. Respondent included its proposed revisions—withdrawing 37 and consolidating 170 others into 14 RFAs. *Id.* at 34, Ex. A.

The Court convened a prehearing conference to address the motion on February 24, 2023. For the reasons set forth below, Complaint Counsel's motion for protective order is **GRANTED** in part and **DENIED** in part.

I. The majority of RFAs are appropriate, and only those that implicate narrowly privileged information are granted protection.

A. Complaint Counsel must answer RFAs seeking the application of law to the facts of the present case.

Complaint Counsel asserts RFAs solely regarding questions of law are inappropriate. Memo. at 5 (citing *Machinery Solutions, Inc. v. Doosan Infracore Am. Corp.*, 323 F.R.D. 522, 534 (D.S.C. 2018)). The court in *Machinery Solutions, Inc.* did find it improper for a party to request admission of a legal conclusion—that one was a "dealer" by statutory definition. *Id.* (citing *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1057 (S.D. Cal. 1999)). That court did, however, recognize that parties may request admissions regarding the application of law to facts. *Id.* (citing *Adventis, Inc. v. Consolidated Property Holdings, Inc.*, 124 Fed. Appx. 169, 172 (4th Cir. 2005) (citing *In re Carney*, 258 F.3d 41, 418 (5th Cir. 2001))).

Respondent argues its RFAs properly address the application of law to fact. Opp'n at 5–12 (citing *McSparran v. Hanigan*, 225 F. Supp. 628, 636 (E.D. Pa. 1963); *Whole Woman's Health Alliance v. Hill*, No. 1:18-cv-01904-SEB-MJD, 2020 WL 1028040, at *2–3 (S.D. Ind. Mar. 2, 2020); *First Options of Chi., Inc. v. Wallenstein*, No. CIV. A. 92-5770, 1996 WL 729816, at *3 (E.D. Pa. Dec. 17, 1996)). In *McSparran*, the court recognized a denial of whether a party was "in possession or control." 225 F. Supp. at 635–36 (recognizing this as a factual admission not requiring the associated legal conclusion regarding *the right* to occupy or control).

Wallenstein, similarly, involved fact-based RFAs regarding whether the defendant owed a fiduciary duty to specified others at particular times. 1996 WL 729816, at *3. The court in *Hill* allowed questions about what Indiana law required and allowed doctors and the health department to do. 2020 WL 1028040, at *2. It held that these were not pure legal conclusions because defendants should have had personal knowledge of how the law applied in specific situations [relevant to the matter]. *Id.* at *3 ("[RFAs] ask them simply to apply the law to the facts and state whether or not certain situations would require a license by Defendant . . . .").

Circuit courts have recognized that RFAs regarding pure questions of law are inappropriate, but they allow those requesting admission of facts directly supporting a legal conclusion. The Eleventh Circuit recently found statements that a prosecution was "malicious, in bad faith, vexatious, and frivolous" inappropriate for RFAs, as they were legal conclusions. *United States v. Annamalai*, No. 20-10543, 2022 WL 16959207, at *4 (11th Cir. Nov. 16, 2022) (citing *Pickens v. Equitable Life Assurance Soc'y of U.S.*, 413 F.2d 1390, 1393 (5th Cir. 1969) ("[RFAs] as to central facts in dispute are beyond the proper scope of [Rule 36]")).

The request the Court found inappropriate as a central fact in dispute in *Pickens* was that the decedent committed suicide. 413 F.2d at 1393. The Fifth Circuit seems to have evolved since 1969, recently allowing an RFA regarding whether the plaintiff had any evidence establishing that "every reasonable officer would have been on notice that the conduct of [named officers] was unlawful." *Hernandez v. Smith*, 793 Fed. Appx. 261, 266 (5th Cir. 2019). The RFA challenged a central fact governing whether plaintiff could overcome qualified immunity, but the court allowed it, stating, "Although the *requests go to the ultimate question* of

Defendants' liability, nothing in the text of Rule 36 prohibits such requests." *Id.* (citing *In re Carney*, 258 F.3d 415, 419 (5th Cir. 2001) (emphasis added); *cf. Rhone-Poulenc v. Home Indemnity Co.*, No. 88-9752, 1992 WL 394425, at *7 (E.D. Pa. Dec. 28, 1992) ("That such an admission could lead a court or factfinder to come to a legal conclusion is not a ground for objecting to the interrogatory.").

Other circuit courts have similarly permitted RFAs that touch on legal questions, or even the ultimate question on an issue. *See Resolution Trust Corp. v. Gill*, 960 F.2d 336, 341–42 (3d Cir. 1992) (permitting RFA that funds were in an account at the time of notice as a material issue of fact, despite the effect of establishing an adverse conclusion of law); *Apex Oil Co. v. Belcher Co. of N.Y., Inc.*, 855 F.2d 1009, 1016 (2d Cir. 1988) (permitting RFA as to what parties contemplated when contract was negotiated); *Smith v. United States*, 199 F.2d 377, 380 (1st Cir. 1952) (affirming disregard of Plaintiff's objection to part of RFA reaching legal conclusion where admission to another part was sufficient to support summary judgment on the question).

RFA numbers 8–24, 236–39, 250, 274–78, and 355–58 all regard the Commission's knowledge of its own regulations. These are all appropriate under *Hill*. Similarly, RFA numbers 98–99, 136–42, 296 simply request Complaint Counsel's knowledge of its burden of proof and its own contentions. RFA numbers 325–54 and 360–61 appropriately seek to narrow the issues for hearing by requesting what Parts of the Commission's regulations the product is not subject to, or what remedy the Commission seeks.

The remaining objected to RFAs involve the application of law to fact—admittedly, legal conclusions, but specific to the facts of the case. *Machinery Solutions, Inc.* is supportive of Complaint Counsel's motion as it found inappropriate admission of identification as a statutory definition. It is, however, an outlier, and my preference toward disclosure is supported by multiple district and circuit courts. Even the court in *Advantis, Inc.*, cited in *Machinery Solutions, Inc.*, allowed an RFA requesting whether marks were "confusingly similar" [statutory language] under trademark provisions. The remaining RFAs are therefore not inappropriate.

RFA number 251 is identical to RFA number 3, and therefore cumulative, not requiring a response. Complaint Counsel's motion is **DENIED** as to RFA numbers 3, 8–24, 92–99, 136–42, 149–56, 236–39, 249–50, 252, 274–78, 296, 305, 325–58, and 360–61.

B. Complaint Counsel must answer RFAs seeking information on matters within the requesting party's own business practices or knowledge where they can reasonably be answered based on deposition testimony or produced documents.

Complaint Counsel asserts RFAs regarding matters within the requesting party's own business practices are improper. Memo. At 16 (citing *Dubin v. E.F. Hutton Grp., Inc.*, 125 F.R.D. 372, 374 (S.D.N.Y. 1989). Respondent argues it may ask the Commission to admit facts, even though they involve its own business and are "already within [its] knowledge." Opp'n at 13 (citing *Diederich v. Dep't of Army*, 132, F.R.D. 614, 617 (S.D.N.Y. 1990)).

The "reasonable inquiry" in *Dubin*, though, involved a party's failure to interview one of its former employees. 125 F.R.D. at 374. The court in *Diederich* refuted defendant's objection that RFAs were attempting to shift the burden of plaintiff's discovery responsibilities to defendant by requesting facts within plaintiff's knowledge. 132 F.R.D. at 616–17. This case is therefore more pertinent and enables Respondent to ask the Commission, via RFA, about information gained by Complaint Counsel in discovery, even facts within the inquiry within Respondent's own business knowledge.

The purpose of RFAs is to narrow issues for trial, rather than simply to obtain information. *Id.* at 616 (citing *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 967 (3d Cir. 1988); *Asea, Inc. v. So. Pac. Transp. Co.*, 669 F.2d 1242, 1245 (9th Cir. 1981); *Moosman v. Joseph P. Blitz, Inc.*, 358 F.2d 686 (2d Cir. 1966). The governing principle in *Diederich* has found acceptance in other district courts. *See also Kaehni v. Diffraction Co.*, 342 F. Supp. 523, 533 (D. Md. 1972) (objection to facts "primarily within defendant's knowledge and control" denied; "[P]laintiff had everything at his disposal except the inclination to verify Diffraction's assertions."; *Moore v. Rees*, No. 06–CV–22–KKC, 2007 WL 1035013, at *14 (E.D. Ky. Mar. 30, 2007) (citing *Diederich*, 132 F.R.D. at 617) (overruling objection that information already provided to plaintiff was therefore within his own control).

Respondent's RFAs would require no such inquiry. Rather, they are answerable by the availability, or non-availability, of information Complaint Counsel may acquire from the Commission's own employees. Complaint Counsel may respond to an RFA, for example, stating that Respondent instructed consumers not to use the Podster for sleep, if such an answer is available based on depositions or produced communications.[1] Requests for information involving Respondent's business, but that is reasonably known by the Commission, are therefore not improper.

Complaint Counsel's motion is therefore **DENIED** as to RFA numbers 110–15, 212, and 293.

[1] Complaint Counsel appears to have at least *some* knowledge relevant to this inquiry. *See*, *e.g.*, Compl. ¶ 15 (Feb. 9, 2022). *See also United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 748 (D.C. Cir. 1998) (treating a concession in a pleading [Answer] as a binding judicial admission which respondent could not later contradict). "Admissions are 'formal concessions . . . or stipulations' by the parties intended to act as concessions that the alleged fact at issue is true, thereby eliminating the need to debate the veracity of that fact." *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, No. 95-1231 (RCL), 2007 WL 915237, at *1 (D.D.C. Mar. 27, 2007) (quoting *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995)) (disagreeing with the contention that complaint statements constitute judicial admissions). While a statement in the Complaint is not taken as an admission, Respondent has seemingly admitted it and is requesting Complaint Counsel acknowledge its allegation as an admission as well.

C. Complaint Counsel must answer RFAs related to expert testimony based on consultation with its expert and must supplement its responses to RFAs that require factual determinations by an expert when they become available.

Complaint counsel asserts RFAs seeking expert testimony or opinion are improper and premature. Memo. at 13 (citing *Emerson v. Lab. Corp. of Am.*, No. 1:11-CV-01709-RWS, 2012 WL 1564683, at *4 (N.D. Ga. May 1, 2012). Respondent argues Complaint Counsel cannot withhold factual information simply because it may be used by experts—it must answer with knowledge presently possessed or able to obtain through reasonable inquiry. Opp'n at 16 (citing *Nat'l R.R. Passenger Corp. v. Cimarron Crossing Feeders, LLC*, No. 16-cv-1094-JTM-TJJ, 2017 WL 1408226, at *2–3 (D. Kan. Apr. 20, 2017); *McKinney / Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co.*, 322 F.R.D. 235, 253 (N.D. Tex. 2016)).

The court in *Emerson* denied a motion to compel responses to RFAs that requested the opinions of testifying experts—holding that disclosures must be made only by the set deadline. 2012 WL 1564683, at *4–5. The RFAs there involved statements that medical slides contained certain types of cells consistent with a condition. *Id.* at *1–2. The court therefore did not require a party to answer RFAs regarding factual determinations requiring an expert.

In contrast, the court in *National Railroad Passenger Corp.* required the plaintiffs to answer RFAs argued as premature to the established deadline for expert testimony. 2017 WL 1408226 at *3–4. The court stated, "If they do have such knowledge or information, then even though their expert disclosure deadline has not passed, they are required to respond with whatever discoverable information they presently possess or can obtain after reasonable inquiry." *Id.* at *3.[2]

A careful review reveals that *Emerson* is an outlier, as Respondent claims. *See* Opp'n at 17 (citing *McKinney*, 322 F.R.D. at 252; *Baugh v. Bayer Corp.*, No. 4:11-CV-525-RBH, 2012 WL 4069582, at *2 (D.S.C. Sept. 17, 2012)). As has been noted, requests for admission function "first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be." Fed. R. Civ. P. 36, advisory committee's note to 1970 amendment.

Earlier in these proceedings, my view of discovery, communicated to the parties, was that the process must ensure, as much as possible, that every piece of evidence necessary to the full and fair trial of this case is made mutually available to the parties. In accordance with that directive, "[p]arties may not view requests for admission as a mere procedural exercise requiring minimally acceptable conduct. They should focus on the goal of the Rules, full and efficient

[2] The requests at issue asked for admission that certain identified figures in a report accurately represent video frames from the train's image recorder and what they depict. *Id.* at *2. The plaintiff admitted that it accurately represented video from the recorder, but denied information depicted as calling for "an expert opinion as to the interpretation of the . . . video and . . . event recorder data." *Id.* The court did not read the responses as denying the substance [what was depicted, speed traveled, or time to emergency], and it noted that plaintiff did not object to the request. *Id.* at *2–3.

discovery, not evasion and word play." *House v. Giant of Md., LLC*, 232 F.R.D. 257, 259 (E.D. Va., 2005) (quoting *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 936–37 (9th Cir.1994)).

I agree with the Court's disapproval of the "expert testimony" and similar objections raised in *House,* which it held "reflect folklore within the bar which holds that requests for admission need not be answered if the subject matter of the request 'is within plaintiff's own knowledge,' 'invades the province of the jury,' 'addresses a subject for expert testimony,' or 'presents a genuine issue for trial.'" *House,* 232 F.R.D. at 262. As the Court noted, "the folklore is wrong." *Id.*[3]

I therefore agree with the authorities cited by Respondent here. The court in *McKinney* required the answer of an RFA dealing with a slab or other structural movement, holding the response could be readily obtainable from consultation with its expert. 322 F.R.D. at 251–53 (citing *Kay v. Lamar Adver. of S.D., Inc.*, No. 07-5091-KES, 2008 WL 5221083, at *6 (D.S.D. Dec. 12, 2008)). The court in *Baugh* similarly required a party to answer RFAs involving expert testimony about the possible effects of a medical device by consulting with its expert. 2012 WL 4069582, at *2 (citing *Drutis v. Rand McNally & Co.*, 236 F.R.D. 325, 330 (E.D. Ky. 2006)).

The majority of district court cases support Respondent's contention that Complaint Counsel must consult its expert(s) and answer RFAs regarding facts or opinions based on readily available information. Accordingly, parties must answer RFAs regarding expert opinions based on consultation with their experts, but they need not admit facts that can only be determined by an expert, until the expert has made such conclusions as would permit a response. This is consistent with the fundamental purpose of discovery, which is to ensure that the parties are dealing (as much as possible) with a continuously-updated set of mutual facts, and that as those facts become known, they are used to narrow the matters that must be resolved at trial.

The obligation for an entity to make reasonable inquiry of the knowledge of its officers, agents, and employees is obvious here because of the nature of these proceedings. Unlike a common private plaintiff, the complaining agency here is *required* to base its enforcement actions on a reasonable, fact-based belief that the action is necessary to protect the public. *See Morgan v. Perry*, 142 F.3d 670, 684 (3d Cir. 1998) (providing that the government's position must be substantially justified by demonstrating a reasonable basis in truth for the facts alleged, a reasonably basis in law for its theory, and a reasonable connection between them). Further, agency expertise is routinely cited as a basis for deferring to its judgment in matters conferred to it by Congress. *See*, *e.g.*, *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 286 (4th Cir. 2018) (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 159 (4th Cir. 2016)) ("[T]he arguments . . . marhsalled in the agency's defense are merely litigation positions that do not reflect an exercise of delegated legislative authority and agency expertise and are not eligible for

[3] Both parties have been less than forthcoming in their responses to discovery, engendering numerous motions to compel responses or for protective orders. Sanctions have been sought but not awarded—yet. The parties are well advised to amend their conduct and should consider that matters within their grasp, if not their perfect knowledge, may not be accepted as evidence or may be deemed admitted at trial, even if no pretrial motion for sanctions has been made. *See House*, 232 F.R.D. at 262.

any deference."); *Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C. Cir. 1996) (requiring an agency to identify and explain the reasoned basis for its decision to ensure it has not acted arbitrarily).

The facts known to the Commission, or knowable by it after reasonable inquiry, must be disclosed as they are known and updated as its factual knowledge is refined in preparation for trial. More pointedly, facts that formed the basis for the agency's decision to proceed in the first instance absolutely must be provided unless clearly privileged, and the privilege must be construed in light of Complainant's status as a federal agency engaged in the people's business.

RFA numbers 27–39, 42–91, and 157–180 are appropriate because they, in essence, ask whether something could contribute to the hazard, in accordance with *McKinney* and *Baugh*. RFA number 27, for example, could be read as whether inadequate warnings contributed to an alleged defect. The remaining RFAs either could fall within the unrecognized *Emerson* exception, or may not necessarily involve expert testimony.

RFA numbers 25–26, 40–41, 102–109, 116–18, 147–48, 181–84, 253–64,[4] 285–91, 295, 307–321, 359, and 362–63 require the admission of fact that can only be determined by an expert. *See*, *e.g.*. RFA No. 25 ("The Podster does not have a manufacturing defect."); RFA No. 102 ("Leachco adequately warned consumers about the potential risk of Infant suffocation."). As noted above, to the extent Complaint Counsel can respond after consultation with its expert, it must; and for those whose answer cannot be discerned before its expert has made a conclusion, it must update its responses when that information becomes available.

RFA numbers 119–23, 130–35, and 240–45 request admission of what Complaint Counsel alleges or contends. While appropriate, it may be necessary to await its expert's conclusions, but they must be answered as the information becomes available. RFA numbers 143–46 are general statements about the care of *all* infants, not specifically tied to the Podster. Complaint Counsel must answer to the extent it is able after consultation with its expert or production of its expert's report. RFA numbers 266–73 regard factual statements about what the Mannen Report considered, reviewed, studied, or tested. Such requests may not even require expert consultation, but to the extent that they do, Complaint Counsel is required to answer as described above.

Complaint Counsel's motion is therefore **DENIED** as to RFA numbers 25–91, 102–09, 116–23, 130–35, 143–48, 157–84, 240–45, 253–64, 266–73, 285–91, 295, 307–21, 359, and 362–63.

[4] I would also note that RFA Nos. 253–64 are answerable based on information obtained via document discovery and testimony regarding how the Podster was marketed or intended for use. *See* Section I.B., *supra*.

D. Complaint Counsel must answer RFAs posing hypotheticals so long as they are related to the facts of the present case.

Complaint Counsel asserts RFAs that pose hypotheticals are improper, and that Respondent cannot question whether one "could have" taken a particular action. Memo. at 31–32 (citing *Abbot v. United States*, 177 F.R.D. 92 (N.D.N.Y. 1997); *Storck USA, L.P. v. Farley Candy Co.*, No. 92 C 552, 1995 WL 153260, at *3 (N.D. Ill. Apr. 6, 1995)). Respondent argues that it may pose factual hypotheticals related to the facts of the case. Opp'n at 25 (citing *Jones v. Crum & Forster Specialty Ins. Co.*, No. 7:22-CV-00025-FL, 2022 WL 17587568, at *3 (E.D.N.C. Nov. 18, 2022); *Clean Earth of Md., Inc. v. Total Safety, Inc.*, No. 2:10-CV-119, 2011 WL 4832381, at *3 (N.D.W. Va. Oct. 12, 2011); *Morley v. Square, Inv.*, Nos. 4:14CV172, 4:10CV2243 SNLJ, 2016 WL 123118, at *3 (E.D. Mo. Jan. 11, 2016)).

I agree with Respondent and note that Complainant's authorities do not support a prohibition against hypothetical questions. The court in *Abbott* found the hypothetical improper because it was unconnected to the facts of the case and was therefore an improper request for a pure legal conclusion. 177 F.R.D. at 93 (citing *Storck USA, L.P.*, 1995 WL 153260, at *3).[5]

Respondent's cited cases similarly support the contention that hypotheticals are proper to the extent they are related to the facts of the case and seek to determine the opposing party's legal theory as applied to the case. *See Jones*, 2022 WL 17587568, at *3 (noting hypotheticals were related to the present facts, and thereby did not require abstract legal conclusions); *Morley*, 2016 WL 123118, at *3 (finding RFAs appropriately focused on individuals involved in the case and their duties were not seeking pure legal conclusions); *Pitts v. City of Cuba*, No. 4:10CV00274 ERW, 2012 WL 3765086, at *2 (E.D. Mo. Aug. 30, 2012) (asking whether a party conspired to deprive others of rights or to obstruct justice)). *Contra Parsons v. Best Buy Stores, L.P.*, No. 3:09-CV-00771, 2010 WL 2243980, at *2 (S.D.W. Va. May 19, 2010) (permitting request to admit that an employee was negligent for failing to secure a load to a pallet).

As Complaint Counsel's cited cases do not dispute Respondent's contention, there is no need to find further support to allow hypotheticals related to the facts of the present case. The Federal Circuit has, nevertheless, also not disturbed the use of a hypothetical in an RFA. *See Slattery v. United States*, 583 F.3d 800, 822 (Fed. Cir. 2009) (allowing an RFA that stated, "If the FDIC was unable to find a merger partner for Western in or about the Spring of 1982, the agency recognized that either it or the State of Pennsylvania would have to seize and/or liquidate the institution."). Respondent's RFAs posing hypotheticals are therefore proper so long as they relate to the facts of the case.

[5] The court in *Storck* found a hypothetical regarding whether the commercial child-actor would have been able to obtain the product at his age improper. 1995 WL 153260, at *3. This, however, was because Storck had provided the respondent with the underlying facts pertinent to such question—e.g., the actor's age and when the candy was sold in the United States. *Id.* *Storck*, therefore, did not necessarily preclude the use of hypotheticals related to the present facts, and *Abbott* only found them improper because they were "unconnected" to the case facts.

RFA numbers 232 and 233 request admission that Infant C's caregiver could have used another object "for elevation," or to keep the infant "propped up." These are not necessarily hypotheticals as compared to the available precedents—those that ask what an entity would do in a certain situation or whether individuals would have duties in similar circumstances. These involve whether an individual could act in another manner to accomplish a goal. It is related to the facts of the case though, and to the extent Complaint Counsel can answer, it must.

RFA number 294 is similarly not a hypothetical. It simply asks whether Complaint Counsel has knowledge of how many times each Podster is used by a caregiver. It also must be answered. Complaint Counsel's motion is therefore **DENIED** as to RFA numbers 232, 233, and 294.

E. Complaint Counsel need not answer RFAs that implicate privileged information.

Complaint Counsel asserts RFAs seeking information implicating the deliberative process or work product privileges are improper. Memo. at 32–33 (citing *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)). Respondent aptly notes that *Klamath* involved a FOIA exemption protecting disclosure of agency documents protected by a privilege—deliberative process or work product—and not RFAs. Opp'n at 27 (citing *U.S. Dep't of Labor v. Randolph Cty. Sheltered Workshop, Inc.*, No. 2:16-CV-78, 2017 WL 10442120, at *4 (N.D.W. Va. Nov. 17, 2017)); *see Klamath*, 532 U.S. at 8.

Randolph Cty., however, is too narrow to require disclosure of privileged information—it only prevents protection by the deliberative process privilege:

> [T]he deliberative process privilege relates to intra or inter departmental documents or other forms of communication. Admitting or denying this request does not require disclosure of any documents or substantive content of any conversations. Thus, deliberative process privilege does not apply to this, or any, request for information.

2017 WL 10442120, at *4 (denying objection to the following: "[A]dmit that the DOL is withholding granting Defendant's 2016 application for a Section 14(c) certificate because of this pending civil action.").

Courts have found that RFAs can implicate attorney-client or work product privileges, and would therefore be objectionable. *Mattel, Inc. v. MGA Ent., Inc.*, No. CV 04-9049 DOC (RNBx), 2010 WL 3705907, at *5 (C.D. Cal. Sept. 20, 2010) (citing *Bergstrom, Inc. v. Glacier Bay, Inc.*, No. 08 C 50078, 2010 WL 257253, at *4 (N.D. Ill. Jan. 22, 2010); *Cohen v. McDonnell Douglas Corp.*, No. 4:92CF1048 GFG(CDP), 1993 WL 835279, at *3 (E.D. Mo. July 12, 1993)). *Contra Jackson v. Wilson Welding Serv., Inc.*, No. 10–2843, 2011 WL 5119045, at *5 (E.D. La. Oct. 27, 2011) (finding that the RFAs did not request documents or tangible things prepared—only the admission or denial of facts—and thus, did not implicate work product).

This Court's prior order denied deposition of a Commission representative where the topics aimed at the nature of allegations and supporting evidence, or the processes by which the Commission investigates—necessarily involving privileged information regarding decisions and strategies. *See* Depo. Order at 4 (citing *FTC v. U.S. Grant. Res., LLC*, No. Civ.A.04-596, 2004 WL 1444951, at *10–11 (E.D. La. June 25, 2004) (citing *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991); *Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 721 (5th Cir. 1985))).

The policies girding the asserted privileges must be respected, but the protection of privileged communications must be narrowly construed to safeguard those interests the privileges were designed to protect, without compromising the need for full and open discovery. The thoughts and recollections of attorneys, their private communications with clients, and the frank and confidential deliberations of public officials may be privileged. But facts that become known to such persons, which become part of the body of knowledge developed by a party for trial, may not be protected from thoughtful, narrowly-targeted inquiries that respect the bases of the asserted privileges.

Respondent further contends that Complaint Counsel did not properly invoke the deliberate process privilege and that the "balance of equities" does not favor maintaining confidentiality. *See* Opp'n at 28–31. I need not address the invocation of the privilege. As noted above, deliberations will be protected, but the facts known to Complaint Counsel, if properly and narrowly requested, must be admitted.

RFA numbers 246–48 request whether Complaint Counsel will rely, or is relying, on tests performed prior to the Complaint. The requests, as stated, implicate Complaint Counsel's deliberations—i.e., processes by which the Commission investigates. Complaint Counsel may be required to produce the results of tests on which it relies, but it need not respond to requests to admit that it has not relied, or does not plan to rely, on such tests if such requests would intrude on the attorney work product or other privileges.

RFA number 302 is a factual request whose answer would be found in public actions—i.e., whether the Commission has attempted to recall similar products. To the extent that the Commission has knowledge of such actions taken, it must respond. If the request is construed to implicate Commission counsel's non-public deliberations that have not materialized in an agency action, Complaint Counsel is protected from answering.

Complaint Counsel's motion is therefore **GRANTED** as to RFA numbers 246–48, and it is **GRANTED** in part and **DENIED** in part as to RFA number 302.

II. The Information Requested by Interrogatory No. 40 Exceeds the Commission's Procedural Rule Requirements for RFA Responses and is Unduly Burdensome.

The Rules provide the following regarding answers to RFAs:

> The answer shall specifically admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.

. . . .

> When good faith requires that a party qualify an answer, or deny only a part of the matter to which an admission is requested, the party shall specify the portion that is true and qualify or deny the remainder.

16 C.F.R. § 1025.34(b).[6] Interrogatory No. 40 stated, "If you respond to any [RFA] with other than an unqualified, 'Admit,' explain the reason(s) for not so admitting." Memo. Ex. D, at 7.

The Interrogatory applies to all RFAs and would require an explanation for any denial. To the extent any such response would be required by the Rules, the inquiry is redundant. A party may simply deny, even if it must specify the portion of an RFA it denies. Complaint Counsel must qualify any portion of an otherwise admitted RFA that it does not explicitly deny.

Complaint Counsel asserts the Interrogatory "substantially and unfairly increases the number of interrogatories required to answer." Memo. at 34; *see Safeco of Am. v. Rawstron*, 181 F.R.D. 441, 446 (C.D. Cal. 1998) ("[A]n interrogatory that asks the responding party to state facts, identify witnesses, or identify documents supporting the denial of each request for admission contained in a set of requests for admissions usually should be construed as containing a subpart for each request for admission contained in the set."); Fed. Civ. Proc. Before Trial Nat'l Ed. § 11.1694 (Rutter Grp. May 2022) ("An interrogatory asking the basis for denial of any accompanying [RFAs] as to discrete matters is treated as an interrogatory with subparts; i.e., as many interrogatories as there are RFAs.").

I agree. This Court thus construes the request to "explain the reason(s) for not so admitting" as including "facts . . . supporting the denial of each request." An additional interrogatory therefore exists for every RFA not explicitly admitted. In addition to not being required by the Rules, such responses, if required, would be unduly burdensome on Complaint Counsel.

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[6] The FRCP provides that a party's response to an RFA

> [M]ust specifically deny it or state in detail the reasons why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of the matter, the answer must specify the part admitted and qualify or deny the rest. *The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry* and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

Fed. R. Civ. P. 36(a)(4) (emphasis added). A party who has answered a Rule 36 request for admission has a duty to supplement his or her responses. Fed. R. Civ. P. 26(e)(1).

III. Conclusion

I **DENY** Complaint Counsel's motion for protective order as to RFA Nos. 3, 8–99, 102–23, 130–84, 212, 232–33, 236–45, 249–78, 285–91, 293–96, 305, 307–21, and 325–63. I also **DENY** in part Complaint Counsel's motion as to RFA No. 302, to the extent that the Commission has knowledge of public action to recall similar products.

I **GRANT** Complaint Counsel's motion for protective order as to RFA Nos. 246–48. I also **GRANT** in part Complaint Counsel's motion as to RFA No. 302, to the extent such response requires disclosure of deliberations not resulting in public agency recall action.

I **GRANT** Complaint Counsel's motion for protective order as to Interrogatory No. 40.

Michael G. Young
Administrative Law Judge

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