UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

MEMORANDUM IN SUPPORT OF LEACHCO, INC.'S MOTION *IN LIMINE* TO EXCLUDE (1) ALL POST-FACT-DISCOVERY EVIDENCE AND (2) TESTIMONY AND DOCUMENTS REGARDING ALLEGED DEFECTS IN THE PODSTER'S WARNINGS

Pursuant to the Commission's Rules of Practice, 16 C.F.R. §§ 1025.23, 1025.43, and this Court's Order on Prehearing Schedule, Docket No. 35, Respondent Leachco, Inc. moves to exclude (1) post-fact-discovery evidence including documents, exemplars, and expert testimony, and (2) any testimony or documents related to any alleged deficiencies, defects, or inadequacies in the Podster's warnings and instructions.[1] Use of and reliance on late-produced evidence and new legal theories is improper and would prejudice Leachco. The Court should thus preclude the Commission from using these documents and testimony at the hearing.

BACKGROUND

The Commission filed its Complaint in February 2022. Fact discovery closed on March 20, 2023. *See* Dkt. 35, Order on Prehearing Schedule. For more than a year, then, the parties worked through discovery on numerous issues to narrow the scope of the claims and defenses and streamline the case for trial.

[1] Leachco uses the term "warning" in this motion to refer to warnings, instructions, and marketing materials.

During fact discovery, [redacted]

[redacted][2]

The Commission [redacted]

[redacted] *See* Ex. 6, CPSC Resp. to Leachco ROG No. 30; *id.* 31

[2] Leachco has filed an Appendix with the exhibits from this Motion and from Leachco's Motion to Exclude the Expert Testimony Proffered by the Consumer Product Safety Commission. The Exhibit numbers are the same in both briefs.

[redacted]

see also id., CPSC Resp. to Leachco's 1st ROGs Nos. 21, 23, 25, 27, 28, 30, 31, 33, 34, 38. On document requests, the Commission [redacted] *See, e.g.,* Ex. 7, CPSC's Resp. to Leachco's 1st RFPs No. 28.

Additionally, throughout discovery, the Commission [redacted] *See, e.g.,* Ex. 6, CPSC First Supp. Resp. to ROG No. 5 [redacted]; *see also* CPSC Resp. to Leachco Mtn. S.D. at 17 n.48 (Commission admitting that the Podster's warnings are "irrelevant arguments" because they relate to "what Complaint Counsel is *not* alleging." (emphasis in original)). The Commission was clear that it was not alleging defective, deficient, or inadequate warnings.

Finally, during fact discovery, Leachco [redacted]

see Ex. 5, Leachco RFP No. 50. As to the Interrogatory, [redacted] Ex. 6, First Supp. Resp. to ROG No. 36. And in that same response, [redacted]

As to RFP No. 50, the Commission [redacted] Ex. 7, CPSC Resp. RFP No. 50. [redacted] 10, Depo. Tr. of Hope Nesteruk, at 88:1–7 (testifying she reviewed two samples). In short, then, the Commission [redacted]

The state of discovery changed on April 28, 2023—a month *after* fact discovery closed—when the parties exchanged expert reports. *First*, [redacted]

Second, [redacted]

Third, the Commission's experts [redacted] *See* Ex. 4, Leachco ROG No. 36; Ex. 5, Leachco RFP No. 50. [redacted] Moreover, [redacted] *see* Ex. 1, Katwa Report at 5, 17, [redacted]

[redacted]

As this Court previously made clear:

[redacted]

Ex. 11, Feb. 24, 2023, Hearing Tr., 33:14–34:5.

Leachco now moves to exclude documents and testimony based on the Commission's improper discovery tactics.

ARGUMENT

I. THE COURT SHOULD EXCLUDE LATE-PRODUCED DOCUMENTS AND EXEMPLARS, AND ANY TESTIMONY BASED ON THOSE SOURCES

The documents the Commission produced on April 28, 2023, came more than a *month* after fact discovery closed. Yet, [redacted] *See, e.g.*, Ex. 4, Leachco ROG Nos. 21, 25, 27–29, 31. On top of that, the Commission's expert [redacted] And because Leachco lacked access to these documents—and could not provide them to its own expert or review them at all—Leachco has suffered prejudice.

The case law is clear: Parties cannot smuggle factual information through experts. To the contrary, experts are "in effect locked-in to the factual record as of the time fact discovery closed." *Apple Inc. v. Samsung Elec. Co.*, No 11-CV-01846, 2012 WL 3155574, at *5 (N.D. Cal. Aug. 2, 2012). And "facts upon which experts may base

their opinions . . . are distinct from the expert opinions themselves" and are "subject to the . . . fact discovery deadline." *Gore v. 3M Co.,* No. 5:16-CV-716-BR, 2017 WL 5076021, at *2 (E.D.N.C. Nov. 3, 2017).[3]

And "even though the documents might well become information considered by an expert in forming his opinion," such *factual* documents cannot be "served well after the close of fact discovery." *Sparton Corp. v. United States*, 77 Fed. Cl. 10, 15 (Fed. Cl. 2007) (emphasis added); *see also United States v. N. E. Med. Servs.*, No. 10-cv-01904-CW (JCS), 2014 WL 7208627, at *5 (N.D. Cal. Dec. 17, 2014) ("Documents that have a direct bearing on the factual disputes in the case are the subject of fact discovery, which often (as here) concludes before expert discovery so that the parties may rely on a complete factual record to inform their own experts and depose their opponents' experts.").

"Strategic manipulation of the discovery process"—producing factual documents late—is grounds for exclusion. *Aetna Inc. v. Mednax, Inc.*, No. 18-cv-2217, 2021 WL 949454, at *4 (E.D. Pa. Mar. 12, 2021). By disclosing information "after the close of fact discovery, Plaintiffs effectively deprived Defendants of the tools necessary to challenge the underlying assumptions of Plaintiffs' expert—i.e., the documents or and deposition testimony that would speak to the factual matters being evaluated by the expert." *Ritchie Risk-Linked Strategies Trading (Ireland) Ltd. v. Coventry First LLC*, 280 F.R.D. 147, 160 (S.D.N.Y. 2012).

[3] Leachco has separately moved to exclude the Commission's proffered expert testimony for its failure to disclose factual information during fact discovery. *See* Leachco's *Motion to Exclude the Expert Testimony Proffered by the Consumer Product Safety Commission.*

In short, a party cannot "withh[o]ld . . . information that bears on [opposing party's] case while simultaneously providing that same information to its own expert." *Brown v. Wal-Mart Store, Inc.*, No. 09-CV-02229-EJD, 2018 WL 2011935, at *5 (N.D. Cal. Apr. 27, 2018). "By producing" documents "after the close of fact discovery" the Commission "prevent[ed] [Leachco] from conducting further fact discovery related to that information and from incorporating those findings into [Leachco's] opening expert report." *Id.* And "[t]he only way to restore both parties to equal footing," is to "exclude" the information and "strik[e] . . . the related expert report." *Id.*

When experts do not have "an opportunity to review the withheld documents before forming their opinions," and a party cannot "question witnesses about the withheld documents," prejudice occurs. *Zurich Am. Ins. Co. v. Hardin*, No. 8:14-cv-775-T-23AAS, 2020 WL 1150981, at *2 (M.D. Fla. Mar. 10, 2020). Indeed, that's true even when parties have rebuttal reports—something that Leachco does *not* have here. *Id.* at *3. Thus, Leachco faces even *more* prejudice than in a typical case. *See Aetna*, 2021 WL 949454, at *6 (prejudice not cured by a rebuttal report when "fact discovery has long since closed" because "any [rebuttal] report necessarily would rely on an artificially limited record"). In *Zurich*, the Court excluded documents and an expert opinion based on documents produced after the close of discovery—just as here. 2020 WL 1150981, at *3.

Nor may parties ignore fact-discovery obligations simply because they plan to make later disclosure during expert discovery. *MLC Intellectual Prop. LLC v. Micron Tech., Inc.*, 10 F.4th 1358 (Fed. Cir. 2021). In *MLC*, a party "argue[d] that it was not

required to disclose these specific facts and documents supporting its damages theory during fact discovery because it ultimately disclosed them during expert discovery." *Id.* at 1369. Like the Commission here, the party in *MLC* argued that "it provided adequate responses to" interrogatories and "that anything more would have required it to disclose material designated for expert discovery." *Id.* Of course, a party need not "disclose its expert *opinions* during fact discovery," but it must disclose the evidence that an expert would rely on. *Id.* at 1371. Indeed, the Court rejected the argument that a party "need not disclose factual underpinnings and evidence underlying" its legal theory "*prior to* expert discovery." *Id.* at 1372 (emphasis added); *see also Vera v. Berkshire Life Ins. Co.*, No. 19-61360-CIV-DIMITROULEAS/SNOW, 2020 WL 8184335 (S.D. Fla. Dec. 24, 2020) (precluding party from "relying on the testimony" of experts based on documents not turned over in fact discovery).

Here, the CPSC [redacted] Case after case has made clear that parties cannot wait to reveal such factual information during expert discovery. In fact, the entire *purpose* of making the expert discovery deadline *after* the fact discovery cut off is so that experts may evaluate all the relevant facts collected during fact discovery. "[D]ata for an expert report should be gathered during fact discovery and . . . the extended deadline for the expert report is provided to give the expert time to thoroughly analyze the collected data." *Henry v. Quicken Loans Inc.,* No. 04-40346, 2008 WL 4735228, at *6 (E.D. Mich. Oct. 15, 2008); *see also ParkerVision, Inc., v. Qualcomm Inc.,* No. 3:11-cv-719-J-37-TEM, 2013 WL 3771226, at *4 (M.D. Fla. July 17, 2013) ("[T]he expert

discovery period . . . does not provide an extended period of document discovery related to the disclosed experts").

But the Commission [redacted]

Leachco's expert [redacted]

Nor did Leachco [redacted]

That is wholly improper. And it is grounds for excluding the documents, exemplars, and all testimony that relies on such information. Otherwise, Leachco would suffer severe prejudice. *Jones v. Travelers Cas. Ins. Co. of Am.*, 304 F.R.D. 677, 681–82 (N.D. Cal. 2015) (untimely disclosure of factual material used by experts cannot be cured even by allowing additional discovery); *Brown,* 2018 WL 2011935, at *5;

Aetna, 2021 WL 949454, at *6 (party "cannot cure prejudice" resulting from late-produced information when "fact discovery has long since closed."). The documents and testimony must be excluded.

II. The Court Should Exclude All Testimony and Documents About Alleged Deficiencies in the Podster's Warnings

All testimony and evidence about any deficiencies, defects, or inadequacies in Podster's warnings should also be excluded. The Commission [redacted]

For example, [redacted]

In its first supplemental response, the Commission [redacted]

Ex. 6, CPSC First Supp. Resp. to ROG No. 5. And in its response to Leachco's Motion for Summary Decision, the Commission once more made clear that the Podster's warnings are "irrelevant arguments" because they relate to "what Complaint Counsel

is *not* alleging." CPSC Resp. Leach Mtn. S.D. at 17 n.48 (emphasis in original). The Commission agreed that it is not "alleging a . . . warning defect," so "any argument on summary decision is irrelevant." *Id.*

Yet, after fact discovery closed, [redacted] *See* Ex. 2, Kish Report at 1–2. [redacted] *Id.* at 22. [redacted] *Id.* at 23. Ms. Kish [redacted] *Id.* at 24. Further, Ms. Kish [redacted] *Id.* at 26. Page after page, Ms. Kish [redacted]. *Id.* at 27–31.

In addition, Dr. Katwa [redacted] Ex. 1, Katwa Report at 29–30. Dr. Katwa [redacted] *Id.* at 27; *id.* [redacted]

[redacted] *id.* at 28 [redacted]; *id.* at 29 [redacted]

The Commission's bait-and-switch cannot stand. As courts have long understood, a failure to properly reveal legal theories before expert discovery is cause for excluding expert testimony. *MLC Intellectual Prop.*, 10 F.4th at 1371; *see also Igenco Holdings, LLC v. Ace Am. Ins. Co.*, 921 F.3d 803 821–22 (9th Cir. 2019) (excluding damages theory introduced through expert that had not been previously disclosed); *Elliott v. Google, Inc.*, 860 F.3d 1151, 1162 (9th Cir. 2017) (excluding evidence of a theory offered by a party where it was "not disclosed during discovery").

Parties cannot be forced to "glean[] . . . theories" from vague statements; the theory must be clear. *Masimo Corp v. Apple, Inc.*, No SACV2000048JVSJDEX, 2022 WL 18285029, at *7 (C.D. Cal. Nov. 22, 2022). And when a party does not "provide notice for the basis of" an expert's opinion, "[o]ffering additional fact-question time during the relevant expert depositions would be insufficient." *Id.* After all, parties cannot "explicitly refute[] th[e] theory of" the case "only to adopt it a few short months later" after discovery has closed. *Aetna*, 2021 WL 949454, at *6. If a party "knew it would announce its pursuit" of a new theory "in an expert report," then failure to "disclose this . . . theory seems willful," and a party cannot "refute[]" the theory "during fact discovery" only for the expert to "adop[t]" the theory "shortly thereafter." *Id.* at *6 n.7.

Here, Ms. Kish and Dr. Katwa [redacted]

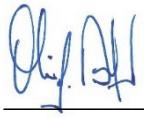
But Leachco, naturally, did not focus on the warnings, instructions, and marketing during discovery because the Commission claimed it was not relevant. Thus, introduction of any testimony or evidence claiming the warnings, instructions, or marketing are defective, deficient, or inadequate would severely prejudice Leachco. All such evidence must be excluded.

CONCLUSION

This Court should grant Leachco's Motion *in Limine* and exclude all late-produced documents, late-produced exemplars, all testimony relying on such information, and all testimony and documents about any alleged deficiencies, inadequacies, or defects in the Podster's warnings.

DATED: July 14, 2023.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2023, I served, by electronic mail, the foregoing upon all parties and participants of record:

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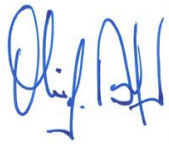

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

IN THE MATTER OF **LEACHCO, INC.**	CPSC DOCKET NO. 22-1

[PROPOSED] ORDER GRANTING
RESPONDENT LEACHCO, INC.'S MOTION *IN LIMINE*

Now before the Court is Respondent Leachco, Inc.'s Motion *in Limine* to Exclude (1) All Post-Fact-Discovery Evidence and (2) Testimony and Documents Regarding Alleged Defects in the Podster's Warnings. Having considered the Motion and finding good cause therefor, **IT IS HEREBY**:

ORDERED that Leachco's Motion *in Limine* to Exclude (1) All Post-Fact-Discovery Evidence and (2) Testimony and Documents Regarding Alleged Defects in the Podster's Warnings is **GRANTED**; and further

ORDERED that Complaint Counsel is precluded from introducing at the hearing any evidence that was not produced during fact discovery; and further

ORDERED that Complaint Counsel is precluded from introducing at the hearing any evidence concerning alleged defects in the Podster's warnings.

ORDERED that a copy of this Order and accompanying Memorandum Opinion shall be entered on the docket and proceedings before the Presiding Officer are terminated.

Dated: _____

_____
Hon. Michael G. Young
Administrative Law Judge