UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

IN THE MATTER OF	CPSC DOCKET NO. 22-1
LEACHCO, INC.,	**HEARING REQUESTED**
Respondent.	**JUDGE MICHAEL G. YOUNG**

LEACHCO, INC.'S OPPOSITION TO THE COMMISSION'S MOTION FOR PROTECTIVE ORDER AS TO CERTAIN OF LEACHCO'S FIRST SET OF REQUESTS FOR ADMISSION, LEACHCO'S SECOND SET OF REQUESTS FOR ADMISSION, AND LEACHCO'S INTERROGATORY NO. 40

INTRODUCTION

After this Court's February 24 conference advising the parties that the Court had reviewed Leachco's Requests for Admission, Leachco promptly emailed the Commission's counsel and offered to submit (no later than March 3) a revised set of RFAs. Leachco asked the Commission if it would agree to file a Join Notice to that effect. *See* Ex. B (O. Dunford Feb. 24, 2023 email). The Commission rejected Leachco's proposal. *See id.* (G. Reyes Feb. 24 and 27, 2023 emails). While Leachco is disappointed with the Commission's refusal to work together, Leachco remains willing to withdraw and revise certain RFAs so that this dispute can be resolved quickly. Accordingly, Leachco proposes revised RFAs, which are set forth in a chart attached as Exhibit A. In this chart, Leachco has included all of the RFAs that are the subject of the Commission's for Protective Order; grouped the RFAs by subject matter; and proposes revisions or withdrawals. For example, Leachco groups together RFA Nos. 25, 36–37, 52–53, 67–68, and 84–85 (relating to whether the Podster has a manufacturing

defect) and proposes a single RFA to replace them ("The Podster is not defective or otherwise violative of 15 U.S.C. § 2064(a) and related regulations because of a manufacturing defect."). Similarly, Leachco groups together RFA Nos. 325–353 and proposes to withdraw those. If the Court finds these proposals acceptable, Leachco would submit a revised set of RFAs to the Commission and would ask the Court to order the Commission to respond.

Still, some disputes need to be resolved. First, the Commission—as it has from the beginning of this proceeding—refuses to provide factual information on the ground that the Commission will later provide expert testimony. For example, in response to Leachco's August 19, 2022 Motion to Compel, which sought evidence supporting allegations in the Complaint, the Commission argued that it was "not relying on technical staff's preliminary analysis to prove its case against Leachco in this proceeding. Instead, Complaint Counsel intends to produce expert witness testimony to establish that the Podsters are defective and create a substantial risk of injury." CPSC Aug. 29, 2022 Opp. at 9. At the September 7, 2022 discovery conference, the Court warned the Commission that it must state "a factual basis for the complaint having been filed." Tr. at 14:15–16 attached as Ex. C. And the Commission—like any litigant—must "show [its] cards," because if it does not, the Court stated, it would "dismiss the complaint." *Id.* at 14:16–18.

Despite these warnings, the Commission repeatedly invoked the expert-testimony deadline as an excuse to refuse Leachco's discovery requests for basic factual

information.[1] Now, here, the Commission again relies on its "wait for expert testimony" excuse both in its Motion for Protective Order (*see* Mem. in Supp. at 18–31) and in responses served on Friday. These objections are improper. The Commission cannot refuse to produce relevant factual information simply because that information may *also* be relevant to expert testimony.

The Commission's other arguments lack merit as well. As the Court noted in Friday's discovery conference, RFAs asking whether a notice-and-comment rule exists does not ask for a legal conclusion. Neither do those RFAs that ask the Commission to apply the law to the facts of this case. *See, e.g.*, RFA No. 152 ("The Podster has always complied with all applicable product safety rules under Chapter 47 of Title 15 of the U.S. Code.").

Further, many of Leachco's RFAs not only ask the Commission to apply law to fact, but they also seek to determine the scope of the Commission's allegations. For

[1] Examples abound. In response to Leachco's first set of Interrogatories, when Leachco asked the Commission to describe the "defect in the design" of the Podster, the Commission objected that Leachco sought "premature expert discovery." CPSC Resp. to Interrogatory No. 3. When Leachco sought to compel documents, the Commission objected because it would "produce expert witness testimony to establish that the Podsters are defective and create a substantial risk of injury." Dkt. No. 29, CPSC Aug. 29, 2022 Opp. at 9. In emails, the Commission refused to say whether it would use evidence about other infant lounger products, although it reassured Leachco that "*[i]f* we intend" to do so, "we will furnish such evidence, including any expert-related discovery, in accordance with Judge Young's revised scheduling order." In Supplemental Responses to an interrogatory asking the Commission to identify everyone "with knowledge of your efforts to respond" the interrogatories, the Commission pulled the expert card once more, "reiterat[ing] its objection that this Interrogatory seeks premature expert discovery," and assuring Leachco that the Commission "will identify the expert witnesses it expects to call at the hearing in this matter" eventually. CSPC Supp. Res. to Interrogatory No. 1. *See also* Supp. Responses to Interrogatory No. 2 (objecting because interrogatory "constitutes premature expert discovery."); *id.* No. 3 (same); *id.* No. 6 (same). Even simple requests asking the Commission to describe "the basis for the allegations in . . . the Complaint" have been met with the expert shield. *See* Resp. to Interrogatory No. 11 (objecting to request because it "constitutes premature expert discovery"); *id.* Nos. 12-19 (same for each response). Finally, the Commission even objected to the deposition of a CPSC technical staffer—whom the Commission expressly identified as being a percipient witness—on the ground that this staffer would be an expert. *See* Ex. B (G. Reyes Feb.24, 2023 E-Mail.)

example, RFA No. 32 asks the Commission to admit that the Podster "is a not Substantial Product Hazard *because of defective warnings*." (Emphasis added.) These Requests are important because the Commission, while sometimes stating that this proceeding does not involve a claim of defective or inadequate warnings, has alleged that products may be defective because of inadequate warnings (*see* Compl. ¶46). So, Leachco propounded interrogatories about warnings. But, in its response to Leachco's Interrogatory No. 32, the Commission refused to answer whether consumers will misuse the Podster "regardless of any warnings on the Podster." And during its depositions of Leachco employees, the Commission has repeatedly inquired into the Podster warnings. Leachco's RFAs here simply ask to confirm the scope of its allegations—Is this an "inadequate warning" case or not?—and to thereby narrow the issues for trial.

The Commission's restrictive approach to responding to Leachco's discovery prejudices Leachco's defense. (Among other things, under the Commission's stance, Leachco could get virtually no information until April 28—the expert-discovery deadline—more than a month after the close of fact discovery (March 20). *See* Order on Prehearing Schedule (Dkt. No. 35)). Discovery allows Leachco to probe the Complaint's claims by, among other things, asking about "the truth of any matters within the scope of § 1025.31(c)" that relate to statements of fact or of the application of law to fact. 16 C.F.R. § 1025.34(a). The scope of discovery is broad: "Parties may obtain discovery regarding any matter, not privileged, which is *within the Commission's statutory authority* and is *relevant to the subject matter involved in the proceedings*,

whether it relates to the claim or defense of the party seeking discovery or to the *claim or defense of any other party*." 16 C.F.R. §1025.31(c) (emphasis added).

Leachco submitted an admittedly lengthy set of RFAs. But, as explained above, it did so because of the Commission's refusal to respond to other forms of discovery and in an effort to narrow the issues for trial. Following the Court's instruction, however, Leachco proposes to revise the RFAs that are the subject of the Commission's Motion for Protective Order. The Court should deny the Commission's Motion and order the Commission to respond to Leachco's revised RFAs.

Finally, as alluded to above, the Commission's responses to the RFAs it did answer are woefully deficient. (*See* Section VI, below.) Accordingly, Leachco asks the Court to order the Commission to provide full responses.

Leachco respectfully submits that a conference would aid the Court's consideration of these matters. And, because the fact-discovery deadline is March 20, Leachco asks the Court to schedule a conference as soon as is practicable.

ARGUMENT

I. LEACHCO'S RFAS PROPERLY ADDRESS THE APPLICATION OF LAW TO FACT AND OPINIONS ABOUT LAW

The Commission contends that certain Leachco's RFAs seek conclusions of law. *See* CPSC Mem. in Supp. 5–16.[2] To the contrary, with the exception of RFAs 236–239 and 360–361, which Leachco hereby withdraws, Leachco's RFAs ask the Commission to admit the application of law to fact or to opinions about the application of law to fact. Such requests have long been recognized as appropriate means of discovery.

[2] RFA Nos. 3, 8–24, 92–99, 136–42, 149–56, 236–239, 249–52, 274–78, 296, 305, 325–58, 360–61.

As this Court noted during the February 24, 2023 conference, RFAs about the existence of certain notice-and-comment rules (RFA Nos. 8–23) do not seek legal conclusions. Case law supports the point. For example, in *Heartland Surgical Specialty Hospital, LLC v. Midwest Division, Inc.*, the court held that a request to admit "that no state law required an identified Defendant to contract with [plaintiff]," was proper because the request "directly relate[d] to the facts of the case." No. 05-2164-MLB-DWB, 2007 WL 3171768, at *5 (D. Kan. Oct. 29, 2007). *See also First Options of Chicago, Inc. v. Wallenstein*, No. CIV. A. 92-5770, 1996 WL 729816, at *3 (E.D. Pa. Dec. 17, 1996) (holding that requests for admission "are not objectionable even if they require opinions or conclusions of law, as long as the legal conclusions relate to the facts of the case.").

Leachco's RFAs ask the Commission to admit or deny the scope of its allegations. In other words, Leachco asks the Commission to admit that Leachco is not liable under the CPSA based on the facts of this case:

> 92. Leachco did not fail to report a Substantial Product Hazard.
>
> 93. Leachco has not failed to report a Substantial Product Hazard.
>
> 94. Leachco did not fail to report a product that created an unreasonable risk of injury or death.
>
> 95. Leachco has not failed to report a product that created an unreasonable risk of injury or death.[3]
>
> …
>
> 305. Leachco has not violated 15 U.S.C. 2064(b) with respect to the incidents involving Infant A, Infant B, and Incident [sic] C.[4]

[3] As explained in the Exhibit A, Leachco proposes to combine Nos. 92–95 to a single RFA.
[4] In its RFAs, Leachco used "Infant A," "Infant B" and "Infant C" rather than the infants' names.

Similarly, Leachco asks the Commission to admit its own allegations, to determine what will be at issue during trial. *See* RFAs No. 96–97; 136–142; 296.

These RFAs seek to narrow the Commission's legal theories that support (or not) its allegations—and such requests are wholly proper. *See Morley v. Square, Inc.*, No. 4:10CV2243 SNLJ, 2016 WL 123118, at *3 (E.D. Mo. Jan. 11, 2016) ("[R]equests for admissions requiring application of law to the facts of a case are permitted to clarify an opponent's legal theories."); *Abbott v. United States*, 177 F.R.D. 92, 93 (N.D.N.Y. 1997) (noting Plaintiffs could have "posed proper questions requiring application of law to the facts peculiar to this case to clarify the government's legal theories").

An application of law to facts is simply "a request to confirm or deny if the requestor's interpretation of a law, regulation, etc. concurs and is in agreement with that of the other party." in *Diederich v. Dep't of the Army*, 132 F.R.D. 614, 617 (S.D.N.Y. 1990). As the Advisory Committee Notes to Federal Rule 36 explain:

> An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. In *McSparran v. Hanigan*, plaintiff admitted that "the premises on which said accident occurred, were occupied or under the control" of one of the defendants, 225 F. Supp. [628,] 636 [(E.D. Pa. 1963)]. This admission, involving law as well as fact, removed one of the issues from the lawsuit and thereby reduced the proof required at trial.

Fed. R. Civ. P. 36 (Advisory Committee Notes) (1970). *See* also *Morley*, 2016 WL 123118, at *3; *Abbott*, 177 F.R.D. at 93.

Leachco's RFAs here directly require the application of facts. For example, RFA No. 93 concerns whether a report of a substantial product defect requires the

facts of both the reporting and the characteristics of the alleged defect itself, just as the legal determination of "occupied or control" in *McSparran* required underlying facts such as whether a person was present.

Requests to admit or deny liability under particular laws or regulations are thus proper. For example, in *Parsons v. Best Buy Stores, L.P.*, the court held that requests for the defendant to admit both that its employee was negligent and that the defendant was vicariously liable for the employee's actions all properly sought application of the law to the facts. No. 3:09-CV-00771, 2010 WL 2243980, at *1–2 (S.D.W. Va. May 19, 2010). As the court explained, "[i]f Defendant contends that such failure was not negligence, or that other conduct… was negligence, then Defendant should say so." *Id.* at *2. Given that a determination of liability requires specific factual allegations as a predicate, a contention that a party is liable for violating a statute implicitly and necessarily requires an application of the law to specific facts.

The same analysis applies to RFA Nos. 149–56, 249–52 and 325–53, which require the Commission to admit the application of the law to a specific set of facts.

Finally, these requests and others ask the Commission to make admissions regarding laws and regulations that the Commission administers. And these kinds of requests are proper. For example, in *Whole Woman's Health Alliance v. Hill*, the court held that RFAs propounded to Indiana officials and the state's Health Department, that Indiana law does or does not impose various requirements on doctors, did not improperly seek legal conclusions. No. 118CV01904-SEB-MJD, 2020 WL 1028040, at

*2–3 (S.D. Ind. Mar. 2, 2020).[5] The court explained that the requests did not seek pure legal conclusions because the recipients, "who are responsible for the enforcement of, and providing licenses under, the relevant laws," should "have knowledge of how those laws apply in specific situations," and because the requests, "do not require Defendants to, for example, interpret a statute, but instead ask them simply to apply the law to the facts and state whether or not certain situations would require a license by Defendant Indiana Department of Health." *Id.* at *3.

Many of Leachco's RFAs similarly ask the Commission to apply laws and regulations—which the Commission is charged with administering—to the facts of this case:. For example, RFA 24 asks "To find Leachco liable under the CPSA in this Proceeding, the Commission must prove both that the Podster contains a "defect" and that the "defect" "creates a substantial risk of injury." This is plainly proper.

Leachco's RFA Nos. 3 and 8–24 mirror permissible requests in *First Options*, *Heartland*, and in *Whole Woman's Health*. *See, e.g.*, RFA No. 13 ("There is consumer product safety rule issued through notice-and-comment rulemaking that states foreseeable misuse of a consumer product causes a defect."); RFA No. 21 ("There is no rule or regulation that states foreseeable misuse of a consumer product causes a

[5] The requests were: "Request No. 1: Indiana does not require doctor's offices to be licensed by the Health Department unless they provide abortions. Request No. 2: Indiana does not require office-based settings, as defined by 844 Ind. Admin. Code 5-5-13, to be licensed by the Health Department. Request No. 3: Practitioners may provide general anesthesia in unlicensed, office-based settings in accordance with 844 Ind. Admin. Code 5-5-1 to 5-5-22. Request No. 4: Indiana does not require any particular medical intervention other than abortion to be provided in a facility licensed by the Health Department. Request No. 5: Indiana law does not require the Health Department to conduct annual inspections of licensed hospitals, ambulatory surgical centers, and birthing centers." *Id.*

Substantial Risk of Injury.").[6] These RFAs are all "proximate and relevant" to the facts of this case. They all relate to the Commission's specific factual claims concerning the Podster's (alleged) defects. And the Commission's cases don't suggest otherwise. *Machinery Solutions*, involved a request to interpret a statute—not —as here—whether a statute or rule applied to the facts at issue. *Mach. Sols., Inc. v. Doosan Infracore Am. Corp.*, 323 F.R.D. 522, 533–34 (D.S.C. 2018).

Further, as a regulatory agency, the Commission–like the Health Department in *Whole Woman's Health Alliance* (and not a private litigant as in *Machinery Solutions*)—should be familiar with the laws and regulations that it administers and enforces. Whereas the private litigant in *Machinery Solutions* lacked expertise about state law, the Commission declares itself to be an expert regulatory agency. As such, the Commission can address RFA Nos. 8–24, which specifically ask about the existence and application of consumer product safety rules—rules that either the Commission has or has not promulgated—just as the state Health Department and state

[6] These RFAs (and others) also show why the Commission's complaint about the number and (supposed) repetitiveness of Leachco's RFAs is misplaced. Leachco submitted short and simple RFAs with, in some cases, alternative language. Thus, for example, RFA No. 20 says, "There is no consumer product safety rule issued through notice-and-comment rulemaking that states foreseeable misuse of a consumer product *amounts to* a Substantial Risk of Injury;" RFA No. 21 says, "There is no rule or regulation that states foreseeable misuse of a consumer product *causes* a Substantial Risk of Injury;" and RFA No. 22 says, "There is no rule or regulation that states foreseeable misuse of a consumer product *creates* a Substantial Risk of Injury." (emphasis added). But this was done not to harass or oppress the Commission. Rather, Leachco offered alternative RFAs to (1) avoid lengthy requests with indirect and qualifying language, and (2) ensure that the Commission couldn't raise objections on those grounds. In other words, Leachco sought to get at the crux of certain questions and, where possible, limit the issues for trial. In any event, Leachco has now revised these and other RFAs. *See* Ex. A.

officials in *Whole Woman's Health Alliance* could answer whether certain health-related state laws existed.[7]

Leachco's RFAs 354–358 are also based directly on the Commission's inquiries into Leachco's conduct. In depositions, the Commission has asked Leachco's witnesses whether, and to what extent, they have monitored third-party websites (such as Amazon) for consumer reviews of the Podster. The Commission has also asked these witnesses whether they had a duty to do so. But Leachco does not believe any such duty exists. And to clarify, Leachco asks the Commission to admit as much. *See, e.g.*, RFA No. 354 ("The CPSA does not create a duty for a manufacturer of consumer products to monitor third-party websites Concerning the manufacturer's consumer products.").[8]

Requests to admit or deny that regulations impose certain requirements, "ask them simply to apply the law to the facts and state whether or not certain situations" are covered by the law. *Whole Woman's Health Alliance*, 2020 WL 1028040, at *3. And again, to the extent that the Commission's objections to these requests is that "this proceeding has nothing to do with Chapter 47 of Title 15 of the U.S. Code," the Commission can simply deny that request.

Moreover, even requests for admission involving opinions or conclusions of law are permissible when "the legal conclusions relate to the facts of the case." *First*

[7] Consistent with Leachco's argument here—that the Commission must respond to RFAs involving laws and regulation that the Commission itself administers—Leachco withdraws RFA Nos. 236–239, which sought admissions concerning state law over which the Commission has no authority. Similarly, Leachco withdraws RFA Nos. 360 & 361, which sought admissions concerning general legal principles that, again, are not within the Commission's authority.

[8] Leachco proposes combining RFA Nos. 354–358 into a single RFA. *See* Ex. A.

Options of Chicago, Inc., 1996 WL 729816, at *3. *Stark-Romero v. National Railroad Passenger* serves as a good example. The court held that the recipient had to admit or deny an RFA that the New Mexico Department of Transportation was responsible for administering the federal grade crossing improvement program in New Mexico because the RFA sought an application of law to fact rather than the answer to a pure matter of law. 275 F.R.D. 551, 557 (D.N.M. 2011). As the court explained, the RFA "is closer to a request seeking application of law to the facts of the case. It is trying to narrow the range of entities that—factually—administer a particular program in New Mexico; it does not seek the admission of an abstract question of law." *Id.* at 558. Likewise, in *Brown v. Montoya*, the court did not consider as requesting legal conclusions RFAs that asked whether, the "Defendant's duty or authority includes ensuring that the Defendant's agency's, office's, or political subdivision's policies are in compliance with relevant state and federal laws, including the Fourteenth Amendment to the United States Constitution." No. CIV 10-0081 JB/ACT, 2013 WL 1010390, at *24 (D.N.M. Mar. 8, 2013). The court explained that these RFA sought the application of laws to facts and were not pure legal conclusions because:

> [T]he RFAs here are also trying to determine, factually, if individual Defendants are individually involved in, or responsible for, ensuring their office's compliance with laws and the Constitution. These RFAs are not asking whether the Constitution's Fourteenth Amendment protects an individual's privacy rights from state infringement. Nor are they asking if the New Mexico Constitution's Due Process Clause protects an individual's privacy rights to the same extent as the United States Constitution's Due Process Clause. They are not a question taken from the Multistate Bar Examination in true/false form, asking the Defendants to admit the truth of the bar exam question. Rather, because at issue in this case, which sets forth a claim under 42 U.S.C. § 1983, is whether the policies of the Defendants' offices violated the Plaintiffs' constitutional rights, these RFAs are not unrelated to the case.

Id.

In its brief, the Commission complains that some of the laws identified in certain RFAs do not apply in this case. Therefore, the Commission may "'readily admit[] or den[y]'" whether laws or regulations apply in this case. CPSC Mem. in Supp. 5 (citation omitted).[9]

II. THE COMMISSION CANNOT REFUSE TO ANSWER RFAS SIMPLY BECAUSE THEY INVOLVE LEACHCO

Another set of disputed RFAs involve Leachco's business practices. The Commission says it need not answer these requests because they seek information internal to Leachco. This fails once more. *See* Mem. in Supp. 16–18.[10]

Leachco may ask the Commission to admit facts—even if they involve Leachco's business—to narrow the issues for trial. Whether an RFA "is already within plaintiff's knowledge" is irrelevant because the "purpose" of RFAs is "to seek defendant's agreements as to alleged fact[s]." *Diederich v. Dep't of Army*, 132 F.R.D. 614, 617 (S.D.N.Y. 1990). The case the Commission relies on, *Dubin v. E.F. Hutton Group Inc.*, is both distinguishable and contrary to the Commission's objections. *Dubin* itself affirms that the purpose of RFAs is "to allow for the narrowing or elimination of issues in a case. . . . [I]t is 'a procedure for obtaining admissions for the record of facts already known' by the seeker." 125 F.R.D. 372, 375 (S.D.N.Y. 1989) (quoting 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2253 (1970)). There, the

[9] The Commission complains about the burden and time involved in answering Leachco's RFAs. But surely it would have been easier and less time consuming to have simply admitted that various laws and regulations do (or not) apply to the facts of this case, rather than preparing its Motion for Protective Order, which has now consumed much of Leachco's and the Court's time.
[10] RFA Nos. 110–15, 212, 293.

court sustained the objections to RFAs not because the information was in the sole possession of the propounding party, but only because the RFAs would have required the defendant to interview a *third party*. *See id.* at 374–75 ("[P]laintiffs have not brought to this Court's attention any authority demonstrating that a party's obligation to make 'reasonable inquiry' entails seeking information from a third party *absent sworn deposition testimony*.").

The RFAs here do not require the Commission to conduct extra-party discovery. They merely require a basic and reasonable inquiry to review the Podster's packaging and advertising. If the Commission is unable to admit or deny, it may say so. But it may not simply avoid responding.

Moreover, these requests are firmly in line with the purpose of Rule 36 to narrow the issues for trial by determining the facts the parties agree on. The Commission alleges that the Podster was a defective product. Each of these requests relates to whether the Podster had a warning defect. Should the Commission admit that Podster adequately instructed consumers on how to use the product, the scope of the adjudication will be narrowed by eliminating the issue of warning defect.

The same is true of RFA No. 212. The Commission claims that only Leachco knows whether the Podster "always" contained warnings. But this request asks whether the Commission alleges a warning defect. An admittance or denial therefore narrows the scope of issues for trial. Either the warnings amount to a defect, or they do not. The RFA helps answer that question.

Finally, RFA No. 293 seeks to narrow issues for trial. Indeed, the statute at issue here directly contemplates "the number of defective products in commerce" as a relevant factor in whether a product amounts to a "substantial product hazard." 15 U.S.C. § 2064(a)(2). Additionally, the risk of injury is relevant to this case. Determining risk of injury requires calculating the probability of injury, which is a question of fact because the probability relates to the number of injuries divided by the number of units sold. Asking the Commission to admit or deny that 180,000 units were sold eliminates an issue of fact from the adjudication by at least partially, if not wholly, determining the denominator in the risk/probability calculation. As the court in *Diedrich* reiterated, "the purpose of requests for admissions are to seek defendant's agreements as to alleged fact." *See also White Consol. Indus., Inc. v. Waterhouse*, 158 F.R.D. 429, 433 (D. Minn. 1994) (the "purpose of Rule 36 is to remove uncontested issues"). Given the number of Podsters sold directly affects the risk of injury, the Commission may not claim that this request seeks to "cause annoyance, oppression, or undue burden or expense." This request simply seeks the Commission to agree to the number of Podsters sold, an uncontested number which the Commission has already alleged in its Complaint, so that the issues for trial may be efficiently narrowed.

III. LEACHCO'S RFAS ADDRESS BASIC QUESTIONS GOING TO THE COMMISSION'S ALLEGATIONS

The Commission seeks to avoid inquiries about factual matters that may *also* be relevant to expert testimony. *See* Mem. in Supp. 18–31.[11] But the "expert

[11] RFA Nos. 25–91, 102–09, 116–23, 130–35, 143–48, 157–84, 240–45, 253–64, 266–73, 285–91, 295, 307–21, 359, 362–63.

discovery" shield fails once more. Leachco is entitled to know the facts supporting (or not) the Commission's allegations—even if those facts may also be relied upon by the Commission's expert witness(es). The Commission's argument to the contrary fall short: (A) The Commission may not refuse to reveal factual information simply because it may relate to expert testimony; (B) Many of the RFAs the Commission complains about address the scope of the Commission's allegations and have nothing to do with expert testimony.

A. Parties may not withhold factual information simply because it may also be used by parties' experts.

The Commission's plan to present expert testimony does not absolve it from responding based on the knowledge it possesses or could readily possess with a reasonable inquiry. Responding parties "must answer the Requests with the knowledge and information they presently possess, or can obtain after reasonable inquiry (independent of their experts), and cannot delay their responses until after their expert disclosure deadline." *Nat'l R.R. Passenger Corp*., 2017 WL 1408226, at *2–3 (D. Kansas April 20, 2017). *See id.* (rejecting responding parties' argument that "requiring them to admit or deny at this stage of the litigation will provide Intervenor-Plaintiffs an unfair and prejudicial early preview of their experts' opinions"). *See also McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co.*, 322 F.R.D. 235, 253 (N.D. Tex. 2016) (where a recipient, "has already retained experts and disclosed its testifying expert witnesses," a Rule 36 request, "is not improper simply because responding to it may require the answering party to consult with its experts"); *Drutis*, 236 F.R.D. at 330 (requiring recipient to consult with expert prior to supplementing response).

The Commission cites a single case to arguing that RFAs cannot touch subjects of expert testimony. *See* CPSC Mem. in Supp. 18 (citing *Emerson Lab. Corp. of America*, No. 1:11-cv-01709-RWS, 2012 WL 1564683 (N.D. Ga. May 1, 2012)). But *Emerson* sits as an outlier at odds with federal court practice. *See, e.g.*, *McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co.*, 322 F.R.D. 235, 252 (N.D. Tex. 2016) (discussing *Emerson* and noting, "other courts have rejected an argument that a Rule 36 request requiring a party to consult with an expert witness is improper."); *Baugh v. Bayer Corp.*, No. 4:11-CV-525-RBH, 2012 WL 4069582, at *2 (D.S.C. Sept. 17, 2012) (rejecting objection that RFA seeks expert opinion because Federal Rule 36 "authorizes requests to admit the truth of '*any matters* within the scope of 26(b)(1) relating to ... facts, the application of law to fact, or opinions about either.'").

B. Most of the RFAs seek to narrow the Commission's claims and have nothing to do with expert testimony.

The Commission alleges that the Podster contains a defect under 15 U.S.C. § 2064(a)(2). The statute does not define the term "defect." Accordingly, Leachco has submitted RFAs to determine—and, if possible, to narrow—the nature of the "defect" according to the Commission's allegations.

Thus, as noted above, the Commission has both (1) alleged that a product can be defective because of inadequate warnings, and (2) represented, at times, that this case does not involve inadequate warnings. Further, the Commission has exhaustively asked Leachco witnesses about the language, location, and effectiveness of its warnings and instructions. Similarly, the Commission has denied that it has any obligation to propose a reasonable, alternative design that would mitigate the Podster's

alleged defect. *See* CPSC Response to Interrogatory No. 4 ("Complaint counsel does not have the burden of proving or providing any 'alternative design[s]' for the Podsters in order to establish that they present a substantial product hazard under Section 15(a)(2) of the CPSA."); *id.* Response to Interrogatory No. 5 ("Complaint Counsel does not have the burden of proving or providing any alternative warning or instruction for the Podsters in order to establish that they present a substantial production hazard under Section 15(a)(2) of the CPSA."); *id.* Response to Interrogatory No. 7 ("Complaint Counsel does not have the burden of proving or providing any changes that could be made to the Podster in order to comply with any standard in order to establish that the Podsters present a substantial product hazard under Section 15(a)(2) of the CPSA."); *id.* Response to Interrogatory No. 35 ("Complaint Counsel does not have the burden of proving or providing any alternative design, warnings, construction, instructions, packaging, advertising and marketing, or public safety education campaigns warning or instruction for the Podsters in order to establish that they present a substantial product hazard under Section 15(a)(2) of the CPSA.")

Must Leachco rebut evidence about inadequate warnings? Will the Commission put on evidence about alternative designs? Does a "defect" occur under the CPSA only when consumers fail to follow warnings and instructions? Leachco doesn't know. And Complaint Counsel has obfuscated all along. So these RFAs cut to the heart of that issue. Moreover, statements by the Commission's counsel in emails and discovery responses do not have the same effect as the admission to an RFA—particularly when those statements are contradicted by the Commission's actions (*e.g.*, deposing

Leachco's witnesses about warnings). Therefore, to determine the scope of the Commission's allegations and to narrow down the potential bases on which the Commission could claim that the Podster is defective, Leachco asks the Commission to admit that the Podster is *not* defective *because of* inadequate warnings or because of other reasons. *See* RFA Nos. 25-91; 102-109; 116-123; 130-135; 157-168; 169-180; 240-245.[12]

C. Many RFAs address the Commission's application of regulations to Leachco

The Commission relies on 16 C.F.R. § 1115.4 to argue that the Podster contains a defect.[13] *See, e.g.*, Compl. ¶¶45–47. Section 1115.4 identifies several factors relating to "whether the risk of injury associated with a product is the type of risk which will render the product defective." *Id.* § 1115.4(e). Among these factors are: the "utility of the product involved; the nature of the risk of injury which the product presents; the necessity for the product; . . .; the adequacy of warnings and instructions to mitigate such risk; the role of consumer misuse of the product and the foreseeability of such misuse; the Commission's own experience and expertise; the case law interpreting Federal and State public health and safety statutes; the case law in the area of products liability; and other factors relevant to the determination." *Id*. Leachco thus asked the Commission to admit requests based on the application of this regulation to the facts of this case. RFA Nos. 143–148; 181–184; 359.

[12] Leachco proposes a revised set of these RFAs. *See* Ex. A.

[13] Leachco contends that 16 C.F.R. § 1115.4 has no bearing on this case whatsoever. First, this regulation applies to 15 U.S.C. § 2064(b), which is not at issue in this case. Second, the regulation is merely an interpretive rule and, as such, cannot bind anyone. Third, the regulation is hopelessly vague and fails to advise the public what conduct is and is not authorized. Nonetheless, because the Commission contends that §1115.4 does apply, Leachco is entitled to understand how the Commission believes it applies to the facts of this case.

The Commission objects to these RFAs despite the fact that Complaint Counsel has itself continued to ask Leachco witnesses during depositions whether caregivers—or even prospective parents—are busy people who have many things going on in their lives. Complaint Counsel cannot have it both ways—asking Leachco witnesses whether new parents have little time to waste, while claiming Leachco's RFAs about whether infants "need adult supervision" improperly seek expert testimony.

D. Several RFAs have nothing to do with expert testimony and are based entirely on statutory and regulatory language

Again, the Commission improperly objects to applying law to fact. According to 15 U.S.C. § 2057d(b), an "inclined sleeper for infants" is "a product with an inclined sleep surface greater than ten degrees that is intended, marketed, or designed to provide sleeping accommodations for an infant up to 1 year old." Leachco maintains that the Podster is not an "inclined sleeper for infants" and wants to ensure that the Commission does not try to apply laws or regulations concerning "inclined sleeper for infants" to the Podster. Thus, Leachco served RFAs directly bearing on that question. *See, e.g.*, RFA No. 253 ("The Podster is not intended to provide sleeping accommodations for an Infant."); *see also* RFA Nos. 254-264.

These RFAs clearly ask the Commission to admit facts or the application of law to facts—e.g., that the Podster is not an "inclined sleeper for infants" under 15 U.S.C. § 2057d(b) because, for example, the Podster was not marketed to provide sleeping accommodations for infants. These RFAs are taken directly from the language in statutes and the Commission's own regulations and Complaint. *See* 15 U.S.C. § 2057d(b); Safety Standard for Infant Sleep Products, 86 Fed. Reg. 33022,

33047 (June 23, 2021) ("While newborns can and do fall asleep in many products, because young infants sleep for extended hours throughout the day, certain products are ***designed***, ***marketed***, and intended for infant sleep.") (emphasis added); Compl. ¶13 ("The Podster is a product marketed for caregivers to use for infant lounging and to 'provide[] a warm and cozy caress for infants.' It was ***designed to*** permit a caregiver to keep an infant in a safe environment, allowing for hands-free supervision.") (emphasis added). The Commission cannot reasonably contend that an allegation in its complaint is the subject of expert testimony such that it may avoid responding to RFAs on the same subject.

Leachco submits that these RFAs could be combined into a single RFA asking the Commission to admit that laws and regulations concerning the "inclined sleeper for infants" do not apply to the Podster.

E. Some RFAs ask simple factual questions

The Commission has widely publicized the studies carried out by Erin Mannen.[14] Leachco contends that a report[15] she authored does not apply to the Podster because the Podster is an infant lounger and not an infant sleep product. Accordingly, Leachco wants to confirm the subject matter of this report. RFA Nos. 266-273 go directly to this point, asking about the scope of the Mannen Report, and they are clearly proper RFAs. They seek the admission of simple facts—whether this report studied

[14] *See, e.g.*, https://www.cpsc.gov/Newsroom/News-Releases/2020/CPSC-Cautions-Consumers-Not-to-Use-Inclined-Infant-Sleep-Products (last visited Feb. 25, 2023).
[15] *See* https://www.cpsc.gov/s3fs-public/Dr-Mannen-Study-FINAL-Report-09-18-2019_Redacted.corrected_0.pdf?g.Jao0IN_zU.TjiX4FeSUM3SPc3Zt_25 (last visited Feb. 25, 2023).

Inclined Sleep Products. They have nothing to do with the substance of any expert testimony.

F. Some RFAs involve questions of fact or the application of law to fact that may or may not also be relevant to expert testimony

Lastly, Leachco asks the Commission to admit that the Podster (or any alleged defect thereof) did not cause the infant deaths alleged by the Commission. Once again, Leachco proposes to limit these RFAs as explained in Exhibit A. Still, these are simple enough that the text of the RFA alone shows they should be answered directly:

> 285. The deaths allegedly identified in IDI 160519CCC2600, IDI 200917CCC3888, and IDI 220916HCC1454 involve failures by the infants' caregivers to follow or observe one or more of the warnings or instructions contained on the Podster.
>
> 286. The death allegedly identified in IDI 160519CCC2600 involved failures by the infant's caregiver(s) to follow or observe one or more of the warnings or instructions contained on the Podster.
>
> 287. The death allegedly identified in IDI 200917CCC3888 involved failures by the infant's caregiver(s) to follow or observe one or more of the warnings or instructions contained on the Podster.
>
> 288. The death allegedly identified in IDI 220916HCC1454 involved failures by the infant's caregiver(s) to follow or observe one or more of the warnings or instructions contained on the Podster.
>
> 289. The death allegedly identified in IDI 160519CCC2600 was caused by consumer misuse of a Podster.
>
> 290. The death allegedly identified in IDI 200917CCC3888 was caused by consumer misuse of a Podster.
>
> 291. The death allegedly identified in IDI 220916HCC1454 was caused by consumer misuse of a Podster.
>
> …

295. The deaths alleged in the Complaint were caused by consumer misuse of the Podster.

…

307. The Podster did not cause Infant A's death.

308. The Podster's design did not cause Infant A's death.

309. No manufacturing defect of the Podster caused Infant A's death.

310. The lack of warnings or instructions for the Podster did not cause Infant A's death.

311. Inadequate warnings or instructions for the Podster did not cause Infant A's death.

312. The Podster did not cause Infant B's death.

313. The Podster's design did not cause Infant B's death.

314. No manufacturing defect of the Podster caused Infant B's death.

315. The lack of warnings or instructions for the Podster did not cause Infant B's death.

316. Inadequate warnings or instructions for the Podster did not cause Infant B's death.

317. The Podster did not cause Infant C's death.

318. The Podster's design did not cause Infant C's death.

319. No manufacturing defect of the Podster caused Infant C's death.

320. The lack of warnings or instructions for the Podster did not cause Infant C's death.

321. Inadequate warnings or instructions for the Podster did not cause Infant C's death.

…

362. Caregivers of Infant C did not follow Leachco's warnings.

363. Caregivers of Infant C did not follow Leachco's instructions.

G. The Commission's objections are improper

Objections on the basis that an RFA requires expert testimony are improper where either the RFA concerns a legitimate subject under Federal Rule 36 or the recipient has failed to make a reasonable inquiry into the request. For example, in *Baugh v. Bayer Corp*, the court found requests that might require expert testimony was proper where the requests "concern facts, the application of law to fact, or opinions about either." No. 4:11-CV-525-RBH, 2012 WL 4069582, at *2 (D.S.C. Sept. 17, 2012). Likewise in *House v. Giant of Maryland LLC*, the court found inadequate the defendant's response that it could not either admit or deny the requests because the requests required expert testimony as defendants' "answers [wrongly] reflect folklore within the bar which holds that requests for admission need not be answered if the subject matter of the request . . . addresses a subject for expert testimony." 232 F.R.D. 257, 258 (E.D. Va. 2005) (cleaned up). "If the responding party is not sure whether to admit or deny, he must make 'reasonable inquiry' into the subject matter of the request and state in his answer the steps taken to satisfy this obligation." *Id.* at 262; *see Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242, 1246 (9th Cir. 1981). "[Rule 36] provides that a party may not give lack of information as a reason for failure to admit or deny 'unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny.'" *Drutis v. Rand McNally & Co.*, 236 F.R.D. 325, 330 (E.D. Ky. 2006) ("an answering party must conduct a reasonable inquiry and answer a RFA if the information is readily obtainable, even though the answering party has no personal

knowledge of the facts"); *see also Nat'l R.R. Passenger Corp. v. Cimarron Crossing Feeders*, LLC, No. 16-CV-1094-JTM-TJJ, 2017 WL 1408226, at *3 (D. Kan. Apr. 20, 2017); *T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer* & Co., 174 F.R.D. 38, 43 (S.D.N.Y. 1997).

IV. LEACHCO'S "HYPOTHETICALS" MERELY ASK THE COMMISSION TO ADMIT (OR DENY) THAT THE PODSTER WAS NOT THE SOLE CAUSE OF INFANT DEATH

The Commission's argument that Leachco asked improper hypotheticals is without merit. *See* Mem. in Supp. 31–32.[16] As a general matter, "courts allow parties to pose discreet factual hypotheticals related to the facts of the case." *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); *see also Clean Earth of Maryland, Inc. v. Total Safety, Inc.*, No. 2:10-CV-119, 2011 WL 4832381, at *3 (N.D.W. Va. Oct. 12, 2011) (holding that the defendant had to admit or deny hypothetical posed in if/then format because the "Plaintiff drafted these requests for admission on the basis of facts that have been developed through the discovery process.").

More specifically, RFAs posing hypotheticals are proper to the extent they seek to determine the opposing party's legal theory as applied to the case. *Morley*, 2016 WL 123118. The court *Clean Earth of Maryland, Inc. v. Total Safety, Inc.*, No. 2:10-CV-119, 2011 WL 4832381, at *3 (N.D.W. Va. Oct. 12, 2011) held that the defendant had to admit or deny hypothetical posed in an "if/then" format because the "Plaintiff drafted these requests for admission on the basis of facts that have been developed through the discovery process."

[16] RFA Nos. 232–33, 294.

Here, Leachco asks the Commission about its legal theories and the facts behind its allegations. The Commission alleges that the Podster caused infant deaths. The requests at issue here each seek to determine the facts the Commission is using to base its allegations. An alternative cause would undermine the Commission's claim. To the extent that answering these requests would resolve 'ultimate facts,' as already noted, "a party may not refuse to respond to a request on the sole ground that the 'matter of which an admission has been requested presents a genuine issue for trial." *Campbell v. Spectrum Automation Co.*, 601 F.2d 246, 253 (6th Cir. 1979) (quoting Fed. R. Civ. P. 36(a)(5)). Nor do any of these questions require expert testimony. That expert testimony may also consider such hypotheticals does not relieve the Commission of its obligation to respond to the RFAs.

V. LEACHCO'S RFAS DO NOT SEEK PRIVILEGED INFORMATION; THE COMMISSION SIMPLY REFUSES TO ANSWER BASIC QUESTIONS RELATED TO ITS OWN ALLEGATIONS[17]

The "deliberative process" privilege does not apply to Leachco's request for admissions because it (1) applies only to documents not to statements, (2)(a) may be asserted only by members of the Commission or other high-level officials, and (2)(b) is not supported by an affidavit declaring that the privilege-invoker has reviewed each document and providing justification for preserving confidentiality, and (3) even if the Commission may invoke the privilege, the balance of equities weighs towards requiring the Commission to respond given Leachco's compelling need.

[17] RFA Nos. 246–48, 302.

1. The privilege does not apply to RFA responses. *See United States Dept. of Labor v. Randolph Cty. Sheltered Workshop, Inc.* 2017 WL 1042120, at *4 (N.D. W. Va. Nov. 17, 2017) ("the deliberative process privilege relates to intra or inter departmental documents or other forms of communication" so the "deliberative process privilege does not apply to this, or any, request for admission."). The case the Commission cites did not involve requests for admission but rather a Freedom of Information Act request, "seeking access to communications between the Bureau and the Basin Tribes during the relevant time period." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 6 (2001). Moreover, in describing the privilege, the Court explicitly stated that the deliberative process covers "*documents* reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Klamath*, 532 U.S. at 8 (2001) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975)) (emphasis added). Other courts have consistently held that the privilege applies to documents. *See, e.g.*, *Deseret Mgmt. Corp. v. United States*, 76 Fed. Cl. 88, 94 (2007); *Elkem Metals Co. v. United States*, 24 C.I.T. 1395, 1398 (2000); *Kaufman v. City of New York*, No. 98CIV.2648(MJL)(KNF), 1999 WL 239698 (S.D.N.Y. Apr. 22, 1999). Moreover, because the privilege is fundamentally about the process in arriving at a final decision, "[o]nly documents that are prepared to assist a decisionmaker in arriving at a decision fall within the privilege." *Kaufman*, 1999 WL 239698, at *4.

Plus, the purpose of the privilege shows that it only applies to documents and not to RFA responses. It is designed to protect specific communications between

specific government officials, not to hide the agency's position. As the Supreme Court in *Klamath* stated, the privilege "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance "the quality of agency decisions," by protecting open and frank discussion among those who make them within the Government." *Klamath*, 532 U.S. at 8–9. Or, as another court explained, the "accepted rationale [of the DPP] is that frank and open discussions within governmental agencies would be 'chilled' if the personal opinions and ideas of government personnel involved in the decision-making process were subject to public scrutiny." *Greenpeace v. Nat'l Marine Fisheries Serv.*, 198 F.R.D. 540, 543 (W.D. Wash. 2000). Here, Leachco does not seek the personal opinions of any specific agency staff members, nor does it seek any specific communications of particular persons through its RFAs. Rather it seeks simply to determine whether the Commission is using specific facts to support its allegations. These requests plainly pose no threat that CPSC personnel will be chilled if the Commission is compelled to reply to the requests.

2.a. Further, even if the DPP may be invoked in response to RFAs, the Commission has failed to do so properly. First, the DPP may be asserted "only . . . by the head of a governmental agency or by a designated high-ranking subordinate." *Kaufman*, 1999 WL 239698, at *3; *see also Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 752 (E.D. Pa. 1983) ("[T]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal

consideration by that officer.") (quoting *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953)); *Pierson v. United States*, 428 F. Supp. 384, 394 (D. Del. 1977) (compiling cases).

The assertion of the DPP by a government litigation attorney is inadequate. *See Kaufman*, 1999 WL 239698, at *3; *Rizzo*, 97 F.R.D. at 752. Only the head of the agency or a designated high-ranking subordinate may invoke the privilege because preventing disclosure imposes significant harm on the public by shrouding relevant information in secrecy. *See Resol. Tr. Corp. v. Diamond*, 773 F. Supp. 597, 603 (S.D.N.Y. 1991) (The "agency head is called upon to exercise discretion to determine whether the public interest in confidentiality outweighs the public interest in disclosure."); *Rizzo*, 97 F.R.D. at 752 (E.D. Pa. 1983) ("Since these privileges obstruct the search for truth, and since their benefits are at best indirect and speculative they must be strictly confined within the narrowest possible limits consistent with the logic of their principles.") (cleaned up). Here the privilege has not been invoked by the Commission itself but rather by the Commission's counsel in this action. Such an invocation does not comport with the requirements of the privilege and is therefore improper.

2.b. Further still, even if Complaint Counsel were authorized to invoke the DPP—it is not—Complaint Counsel failed to properly invoke the privilege since it has not provided any affidavit describing the information it seeks to exclude and reasons for invoking the privilege. *See Elkem Metals Co. v. United States*, 24 C.I.T. 1395, 1398 (2000) (to assert the privilege, the official must submit "an affidavit sufficiently

describing the documents"); *Kaufman*, 1999 WL 239698, at *4 (to assert the deliberative process privilege, "the agency head or his or her designee" must provide an "affidavit" which: "(i) confirms his or her review of the withheld documents; and (ii) details why each of the withheld documents must be kept confidential and shielded from disclosure"); *see also Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv.*, 267 F.R.D. 1, 4 (D.D.C. 2010) (requiring a "detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege"); *Deseret Mgmt. Corp. v. United States*, 76 Fed. Cl. 88, 97 (2007) (The "agency must supply the court with 'precise and certain reasons' for maintaining the confidentiality of the requested document."). As one court explained the rationale for requiring an affidavit from the government with a detailed argument, "without a specific articulation of the rationale supporting the privilege, a court cannot rule on whether the privilege applies." *Ascom*, 267 F.R.D. at 4. Thus, "conclusory descriptions will not suffice." *Elkem Metals*, 24 C.I.T. at 1398.

Here, the Commission fails to provide any reasons to maintain confidentiality beyond its conclusory statement that the requests require the agency's mental impressions. This objection is wholly inadequate because it is not in an affidavit and does not give 'precise and certain reasons' why the documents (which are not here requested) 'must be kept confidential and shielded from disclosure.'

3. Finally, assuming only for the sake of argument that the Commission is authorized to and has properly invoked the deliberative process privilege—though it has not—this Court should compel the Commission to respond because the balance of

equites does not favor maintaining confidentiality. As courts have consistently held, the "deliberative process privilege is not absolute; rather, the privilege is qualified and subject to judicial oversight." *Deseret Mgmt. Corp.*, 76 Fed. Cl. at 96; *see also U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 165 (E.D.N.Y. 1994). Thus, "[a]fter the government makes a sufficient showing of entitlement to the privilege, the court should balance the competing interests of the parties." *Scott Paper Co. v. United States*, 943 F. Supp. 489, 496 (E.D. Pa. 1996); *see also Elkem Metals Co. v. United States*, 24 C.I.T. 1395, 1399 (2000) (A "court may still order disclosure of the deliberative material if the party seeking the information can demonstrate that its need for disclosure of such material is greater than the government's interest in non-disclosure.").

Here, Leachco's RFAs serve a substantial purpose: they seek to determine whether the Commission had a good-faith basis to bring its claim against Leachco. Indeed, in its September 7, 2022 discovery conference, this Court expressly warned Complaint Counsel that it had to provide evidence to show that it had a factual basis to file the complaint against Leachco:

> [A]t some point, if there is not a basis for this complaint and there is a motion to dismiss it because no factual basis has been established and it's arbitrary and capricious, you're going to have to produce an affidavit of supporting documents.
>
> So I would suggest that you might anticipate that and save us some steps, some trouble, some time[,] and some energy by avoiding that necessity because if there is not a factual basis for the complaint having being filed and that is challenged and you need to show your cards, I'm going to make you show your cards, or I'm going to dismiss the complaint.

Tr. at 14:6–18 (excerpt attached as Exhibit C).

By contrast, as discussed, the Commission's contention that the requests require disclosure of mental impressions is entirely conclusory and unsupported. This balance of interests clearly favors compelling the government to respond to the requests.

VI. THE COMMISSION'S RFA RESPONSES ARE DEFICIENT, THE COURT SHOULD COMPEL RESPONSES

The Commission has also failed to adequately respond to many of Leachco's RFAs. But a party cannot simply disregard RFAs because it unilaterally decides the requests are improper. For example, RFA No. 187 asked the Commission to admit that it is "aware of no injuries caused by the Podster when consumer(s) followed Leachco's warnings." This is a simple question—a straightforward request for admission that falls well within normal discovery.

But the Commission objected "to the extent that Complaint Counsel is *not necessarily aware of* all incidents in which infants were injured by the Podster when the Podster was not used in accordance with Leachco's warnings." CPSC Response to RFA No. 187 (emphasis added). Complaint Counsel echoes the same or similar responses in multiple RFAs that seek to learn of the basis of the Commission's claims. *See* CPSC Responses to RFA Nos. 185–92, 279–84, 292.

The objection makes little sense. Leachco does not presume that Complaint Counsel is omnipotent or *is* necessarily aware of everything that has ever occurred with a Podster since Leachco began selling them. Nor would Leachco ask the Commission such a speculative request for admission. Instead, Leachco simply *asked what the Commission knows*—the bread and butter of RFA requests.

The Commission did not answer the RFA. It instead objected and admitted only "to the representations made in its Complaint." CPSC Response RFA No. 187. But that's not what Leachco asked. And there is no reason to limit the admission or denial. Either the Commission is aware of injuries caused by the Podster when a consumer follows the warnings, or it is not so aware. In either event, the Commission must answer the RFA. There is no reason to suggest otherwise.

For another example, consider what is surely among the key facts in this case: the number of injuries and deaths associated with the use of a Podster. Leachco asked simply and directly whether the Commission was aware of "no more than three deaths allegedly involving a Podster." RFA No. 279. And instead of answering that direct question, the Commission again obfuscated, claiming the RFA was "vague and ambiguous" (it is not) and that the request sought "information . . . about Respondent's own business practices" (it does not). CPSC Response to RFA No. 279. Then—inexplicably—the Commission admits "it is not aware of any other deaths to infants involving a Podster," while also "den[ying] the remainder of this Request." *Id.* It is hard to piece together what exactly the Commission means in so answering. A simple "admit" or "deny" is required.

The same is true of many other RFAs. Over and over, the Commission "admits" allegations in the Complaint—even when that is not what Leachco asks. *E.g.*, CPSC Response RFA No. 193 (admitting "to the representations made in paragraph 36 of the Complaint, that describes use of a Podster in a crib, and paragraph 38, that

alleges that 'it is foreseeable that caregivers will use the Podster for infant sleep, despite instructions and warnings.'").

Worse yet, the Commission avoids answering many RFAs by instead pointing Leachco to documents, which the Commission says speak for themselves. *See* CPSC Responses to RFA Nos. 193–211, 213–14, 218–225, 227–231, 297–300, 322–324. But Leachco is not being sued by *documents*. The *Commission* brought this case. And Leachco is entitled to what the *Commission* knows and alleges.

In short, all answers to RFAs must "specifically admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." 16 C.F.R. § 1025.34(b). A party may deny an RFA, but a "denial shall fairly meet the substance of the requested admission." *Id.* As Complaint Counsel's own filings in this case agree, RFA responses must provide "a clean admission or denial of the request for admission." Dkt. No. 58 (CPSC Memorandum in Support of Mtn. for Sanctions) at 11. Yet, the Commission comes nowhere close to doing so. Instead, it sporadically admits what it says in the Complaint (which is not what Leachco asked) or points to documents (which is not what Leachco seeks).

Complaint counsel should be compelled to cleanly admit or deny RFAs 185–92, 193–211, 213–14, 218–225, 227–231, 279–84, 292, 297–300, 322–324.

CONCLUSION

In sum, Leachco agrees to refine its RFAs as outlined in the chart in Exhibit A. Under that proposal, 170 of Leachco's RFAs will be reduced to only 17, and another 37 will be completely withdrawn. This narrowing will help ease any alleged burden

on the Commission. However, Leachco submits that the Commission's objections are unfounded, and so the Motion for a Protective Order should be denied. Moreover, because the Commission failed to adequately admit or deny many of Leachco's RFAs, this Court should order the Commission to fully respond.

Dated: February 27, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2023, the forgoing was served via email upon the following:

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LEACHCO, INC.'S OPPOSITION TO THE COMMISSION'S MOTION FOR PROTECTIVE ORDER AS TO CERTAIN OF LEACHCO'S FIRST SET OF REQUESTS FOR ADMISSION, LEACHCO'S SECOND SET OF REQUESTS FOR ADMISSION, AND LEACHCO'S INTERROGATORY NO. 40

EXHIBIT A

Leachco's RFAs	Proposed Revisions
25. The Podster does not have a manufacturing defect. 36. The Podster is a not Substantial Product Hazard because of defective manufacturing. 37. The Podster has never been a Substantial Product Hazard because of defective manufacturing. 52. The Podster is a not Product Defect because of defective manufacturing. 53. The Podster has never been a Product Defect because of defective manufacturing. 66. The Podster does not present a Substantial Risk of Injury because of the existence of a defective manufacturing. 67. The Podster has never presented a Substantial Risk of Injury because of the existence of a defective manufacturing. 84. The Podster is not defective because of defective manufacturing. 85. The Podster has never been defective because of defective manufacturing.	**The Podster is not defective or otherwise violative of 15 U.S.C. § 2064(a) and related regulations because of a manufacturing defect.**
26. The Podster does not have a warning defect. 27. The Podster is not defective because of inadequate warnings. 28. The Podster is not defective because of inadequate instructions. 30. The Podster is a not Substantial Product Hazard because of inadequate warnings.	**The Podster is not defective or otherwise violative of 15 U.S.C. § 2064(a) and related regulations because of defective or inadequate warnings or instructions.**

Leachco's RFAs	Proposed Revisions
31. The Podster is a Substantial Product Hazard because of inadequate instructions.	
32. The Podster is a not Substantial Product Hazard because of defective warnings.	
33. The Podster is a not Substantial Product Hazard because of defective instructions.	
40. Leachco has not failed to provide adequate warnings for use of the Podster.	
41. Leachco has not failed to provide adequate instructions for use of the Podster.	
42. The Podster is a not Product Defect because of inadequate warnings.	
43. The Podster has never been a Product Defect because of inadequate warnings.	
44. The Podster is a not Product Defect because of inadequate instructions.	
45. The Podster has never been a Product Defect because of inadequate instructions.	
46. The Podster is a not Product Defect because of defective warnings.	
47. The Podster has never been a Product Defect because of defective warnings.	
48. The Podster is a not Product Defect because of defective instructions.	
49. The Podster has never been a Product Defect because of defective instructions.	

Leachco's RFAs	Proposed Revisions
56. The Podster presents no Substantial Risk of Injury because of inadequate warnings.	
57. The Podster presents no Substantial Risk of Injury because of inadequate instructions.	
58. The Podster presents no Substantial Risk of Injury because of defective warnings.	
59. The Podster presents no Substantial Risk of Injury because of defective instructions.	
60. The Podster has never presented a Substantial Risk of Injury because of inadequate warnings.	
61. The Podster has never presented a Substantial Risk of Injury because of inadequate instructions.	
62. The Podster has never presented a Substantial Risk of Injury because of defective warnings.	
63. The Podster has never presented a Substantial Risk of Injury because of defective instructions.	
70. Leachco's warnings Concerning the Podster were adequate.	
71. Leachco's instructions Concerning the Podster were adequate.	
72. Leachco's warnings Concerning the Podster are adequate.	
73. Leachco's instructions Concerning the Podster are adequate.	
74. The Podster is not defective because of inadequate warnings.	
75. The Podster has never been defective because of inadequate warnings.	

Leachco's RFAs	Proposed Revisions
76. The Podster is not defective because of inadequate instructions.	
77. The Podster has never been defective because of inadequate instructions.	
78. The Podster is not defective because of defective warnings.	
79. The Podster is not defective because of defective instructions.	
80. The Podster has never been defective because of defective warnings.	
81. The Podster has never been defective because of defective instructions.	
88. The Podster has never been a Substantial Product Hazard because of inadequate instructions.	
89. The Podster has never been a Substantial Product Hazard because of inadequate warnings.	
90. The Podster has never been a Substantial Product Hazard because of defective warnings.	
91. The Podster has never been a Substantial Product Hazard because of defective instructions.	
102. Leachco adequately warned consumers about the potential risk of Infant suffocation.	
103. Leachco adequately warned consumers about the potential risk of using the Podster for sleep.	
104. Leachco adequately warned consumers about the potential risk of using the Podster without constant adult supervision.	

Leachco's RFAs	Proposed Revisions
105. Leachco adequately warned consumers about the potential risk of using the Podster on anything but flat surfaces. 106. Leachco adequately warned consumers about the potential risk of using the Podster on elevated surfaces. 107. Leachco adequately warned consumers about the potential risk of using the Podster for co-sleeping or bed-sharing. 108. Leachco adequately warned consumers about the potential risk of using the Podster in a crib. 109. Leachco adequately warned consumers about the potential risk of using the Podster with soft products. *** 116. Leachco's instructions adequately explained proper use of the Podster. 117. The Podster presents no risk that is not contemplated in Leachco's warnings. 118. The Podster presents no risk that is not contemplated in Leachco's instructions. 119. You do not allege that the Podster presents a risk that is not contemplated in Leachco's warnings. 120. You do not allege that the Podster presents a risk that is not contemplated in Leachco's instructions. 121. You contend that no warnings about the Podster by Leachco would have been sufficient to cure the alleged Substantial Product Hazard.	

Leachco's RFAs	Proposed Revisions
122. You contend that no instructions about the Podster by Leachco could be sufficient to cure the alleged Substantial Product Hazard. 123. Your allegation that the Podster presents a Substantial Product Hazard is not based on Your consideration of whether Leachco's warnings and instructions were adequate to mitigate the alleged risk of injury.	
157. The Podster is safe when used consistent with Leachco's warnings. 158. The Podster is safe when used consistent with Leachco's instructions. 159. The Podster is safe when consumers follow Leachco's warnings. 160. The Podster is safe when consumers follow with Leachco's instructions. 161. The Podster is not defective when used consistent with Leachco's warnings. 162. The Podster is not defective when used consistent with Leachco's instructions. 163. The Podster is not defective when consumers follow Leachco's warnings. 164. The Podster is not defective when consumers follow Leachco's instructions. 165. The Podster does not present a Substantial Product Hazard when it is used consistent with Leachco's warnings. 166. The Podster does not present a Substantial Product Hazard when it is	**The Podster is not defective or otherwise violative of 15 U.S.C. § 2064(a) and related regulations when it is used consistent with Leachco's warnings and instructions.**

Leachco's RFAs	Proposed Revisions
used consistent with Leachco's instructions. 167. The Podster does not present a Substantial Product Hazard when consumers follow Leachco's warnings. 168. The Podster does not present a Substantial Product Hazard when consumers follow Leachco's instructions. 169. The Podster does not have a Product Defect when it is used consistent with Leachco's warnings. 170. The Podster does not have a Product Defect when it is used consistent with Leachco's instructions. 171. The Podster does not have a Product Defect when consumers follow Leachco's warnings. 172. The Podster does not have a Product Defect when consumers follow Leachco's instructions. 173. The Podster presents no Substantial Risk of Injury when used consistent with Leachco's warnings. 174. The Podster presents no Substantial Risk of Injury when used consistent with Leachco's instructions. 175. The Podster presents no Substantial Risk of Injury when consumers follow Leachco's warnings. 176. The Podster presents no Substantial Risk of Injury when consumers follow Leachco's instructions. 177. The Podster does not have a defect when used consistent with Leachco's warnings.	

Leachco's RFAs	Proposed Revisions
178. The Podster does not have a defect when used consistent with Leachco's instructions. 179. The Podster does not have a defect when consumers follow Leachco's warnings. 180. The Podster does not have a defect when consumers follow Leachco's instructions.	
244. You contend that there is no warning adequate to cure the Podster's alleged substantial defect. 245. You contend that there is no instruction adequate to cure the Podster's alleged substantial defect.	**You contend that no warning or instruction is adequate to cure the Podster's alleged substantial defect.**
29. The Podster is not defective because of a defective design. 38. The Podster is a not Substantial Product Hazard because of defective design. 39. The Podster has never been a Substantial Product Hazard because of defective design. 54. The Podster is a not Product Defect because of defective design. 55. The Podster has never been a Product Defect because of defective design. 68. The Podster does not present a Substantial Risk of Injury because of the existence of a defective design. 69. The Podster has never presented a Substantial Risk of Injury because of the existence of a defective design. 86. The Podster is not defective because of defective design.	**The Podster is not defective or otherwise violative of 15 U.S.C. § 2064(a) and related regulations because of a design defect.**

Leachco's RFAs	Proposed Revisions
87. The Podster has never been defective because of defective design.	
34. The Podster is a not Substantial Product Hazard because of the existence of a reasonable alternative design. 35. The Podster has never been a Substantial Product Hazard because of the existence of a reasonable alternative design. 50. The Podster is a not Product Defect because of the existence of reasonable alternative design. 51. The Podster has never been a Product Defect because of the existence of a reasonable alternative design. 64. The Podster does not present a Substantial Risk of Injury because of the existence of a reasonable alternative design. 65. The Podster has never presented a Substantial Risk of Injury because of the existence of a reasonable alternative design. 82. The Podster is not defective because of the existence of a reasonable alternative design. 83. The Podster has never been defective because of the existence of a reasonable alternative design. 130. You do not propose a reasonable alternative design for the Podster. 131. You do not propose any alternative design for the Podster. 132. You do not allege that a reasonable alternative design of the Podster would mitigate the Substantial Product	**The Podster is not defective or otherwise violative of 15 U.S.C. § 2064(a) and related regulations because of the existence of a reasonable alternative design.**

Leachco's RFAs	Proposed Revisions
Hazard allegedly presented by the Podster. 133. You do not allege that a reasonable alternative design of the Podster would cure the Substantial Product Hazard allegedly presented by the Podster. 134. You do not allege that an alternative design of the Podster would mitigate the risk of injury while providing to consumers the same utility. 135. You do not allege that an alternative design of the Podster would cure the risk of injury while providing to consumers the same utility.	
240. You contend that there is nothing Leachco can do to cure the Substantial Product Hazard allegedly presented by the Podster. 241. You contend that there is nothing Leachco can do to mitigate the Substantial Product Hazard allegedly presented by the Podster. 242. You contend that there is nothing Leachco could have done to cure the Substantial Product Hazard allegedly presented by the Podster. 243. You contend that there is nothing Leachco could have done to mitigate the Substantial Product Hazard allegedly presented by the Podster.	**You contend that there is nothing Leachco can do to render the Podster non-defective or otherwise free from liability under 15 U.S.C. § 2064(a) and related regulations.**
92. Leachco did not fail to report a Substantial Product Hazard. 93. Leachco has not failed to report a Substantial Product Hazard.	**Leachco did not fail to report that the Podster is a Substantial Product Hazard or that the Podster created an unreasonable risk of injury or death, under 15 U.S.C. § 2064(b).**

Leachco's RFAs	Proposed Revisions
94. Leachco did not fail to report a product that created an unreasonable risk of injury or death. 95. Leachco has not failed to report a product that created an unreasonable risk of injury or death.	
149. The Podster does not fail to comply with any applicable consumer product safety rule under Chapter 47 of Title 15 of the U.S. Code. 150. The Podster has never failed to comply with any applicable consumer product safety rule under Chapter 47 of Title 15 of the U.S. Code. 151. The Podster complies with all applicable product safety rules under Chapter 47 of Title 15 of the U.S. Code. 152. The Podster has always complied with all applicable product safety rules under Chapter 47 of Title 15 of the U.S. Code. 153. The Podster does not fail to comply with any rule, regulation, standard, or ban, similar to an applicable safety rule under Chapter 47 of Title 15 of the U.S. Code, under any other Act enforced by the Commission. 154. The Podster has never failed to comply with any rule, regulation, standard, or ban, similar to an applicable safety rule under Chapter 47 of Title 15 of the U.S. Code, under any other Act enforced by the Commission. 155. The Podster complies with all rules, regulations, standards, or bans similar to applicable safety rules under	**Leachco did not violate any rules, regulations, standards, or bans similar to applicable safety rules under Chapter 47 of Title 15 of the U.S. Code under any other Act enforced by the Commission.**

Leachco's RFAs	Proposed Revisions
Chapter 47 of Title 15 of the U.S. Code under any other Act enforced by the Commission. 156. The Podster has always complied with all rules, regulations, standards, or bans similar to applicable safety rules under Chapter 47 of Title 15 of the U.S. Code under any other Act enforced by the Commission.	
354. The CPSA does not create a duty for a manufacturer of consumer products to monitor third-party websites Concerning the manufacturer's consumer products. 355. The CPSA does not create a duty for a manufacturer of consumer products to review third-party websites Concerning the manufacturer's consumer products. 356. The CPSA does not create a duty for a manufacturer of consumer products to read comments on third-party websites Concerning the manufacturer's consumer products. 357. The CPSA does not create a duty for a manufacturer of consumer products to take affirmative steps to address comments on third-party websites Concerning the manufacturer's consumer products. 358. The CPSA does not create a duty for a manufacturer of consumer products to respond to comments on third-party websites Concerning the manufacturer's consumer products.	**The CPSA does not create a duty for a manufacturer of a consumer product to monitor, review, read, or respond to or correct reviews found on websites other than the manufacturer's Concerning the manufacturer's products.**

Leachco's RFAs	Proposed Revisions
253. The Podster is not intended to provide sleeping accommodations for an Infant. 254. The Podster is not marketed to provide sleeping accommodations for an Infant. 255. The Podster is not designed to provide sleeping accommodations for an Infant. 256. The Podster was never intended to provide sleeping accommodations for an Infant. 257. The Podster was never marketed to provide sleeping accommodations for an Infant. 258. The Podster was never designed to provide sleeping accommodations for an Infant. 259. The Podster is not intended to provide sleeping accommodations for any infant or baby of any age. 260. The Podster is not marketed to provide sleeping accommodations for any infant or baby of any age. 261. The Podster is not designed to provide sleeping accommodations for any infant or baby of any age. 262. The Podster was never intended to provide sleeping accommodations for any infant or baby of any age. 263. The Podster was never marketed to provide sleeping accommodations for any infant or baby of any age.	**The Podster is not and was never designed, intended, or marketed for sleep.**

Leachco's RFAs	Proposed Revisions
264. The Podster was never designed to provide sleeping accommodations for any infant or baby of any age.	
285. The deaths allegedly identified in IDI 160519CCC2600, IDI 200917CCC3888, and IDI 220916HCC1454 involve failures by the infants' caregivers to follow or observe one or more of the warnings or instructions contained on the Podster. 295. The deaths alleged in the Complaint were caused by consumer misuse of the Podster.	**Withdrawn.**
286. The death allegedly identified in IDI 160519CCC2600 involved failures by the infant's caregiver(s) to follow or observe one or more of the warnings or instructions contained on the Podster. 289. The death allegedly identified in IDI 160519CCC2600 was caused by consumer misuse of a Podster. 307. The Podster did not cause Infant A's death. 308. The Podster's design did not cause Infant A's death. 309. No manufacturing defect of the Podster caused Infant A's death. 310. The lack of warnings or instructions for the Podster did not cause Infant A's death. 311. Inadequate warnings or instructions for the Podster did not cause Infant A's death.	**The death of Infant A was not caused by the Podster.** **The death of Infant A was caused by caregiver misuse of the Podster.**

Leachco's RFAs	Proposed Revisions
287. The death allegedly identified in IDI 200917CCC3888 involved failures by the infant's caregiver(s) to follow or observe one or more of the warnings or instructions contained on the Podster. 290. The death allegedly identified in IDI 200917CCC3888 was caused by consumer misuse of a Podster. 312. The Podster did not cause Infant B's death. 313. The Podster's design did not cause Infant B's death. 314. No manufacturing defect of the Podster caused Infant B's death. 315. The lack of warnings or instructions for the Podster did not cause Infant B's death. 316. Inadequate warnings or instructions for the Podster did not cause Infant B's death.	**The death of Infant B was not caused by the Podster.** **The death of Infant B was caused by caregiver misuse of the Podster.**
288. The death allegedly identified in IDI 220916HCC1454 involved failures by the infant's caregiver(s) to follow or observe one or more of the warnings or instructions contained on the Podster. 291. The death allegedly identified in IDI 220916HCC1454 was caused by consumer misuse of a Podster. 317. The Podster did not cause Infant C's death. 318. The Podster's design did not cause Infant C's death.	**The death of Infant C was not caused by the Podster.** **The death of Infant C was caused by caregiver misuse of the Podster.**

Leachco's RFAs	Proposed Revisions
319. No manufacturing defect of the Podster caused Infant C's death. 320. The lack of warnings or instructions for the Podster did not cause Infant C's death. 321. Inadequate warnings or instructions for the Podster did not cause Infant C's death. 362. Caregivers of Infant C did not follow Leachco's warnings. 363. Caregivers of Infant C did not follow Leachco's instructions.	
236. State regulations governing the daycare center where Infant A died required that infants be held for bottle feeding. 237. State regulations governing the daycare center where Infant A died prohibit the placement of pillows in cribs. 238. State regulations governing the daycare center where Infant A died require staff to monitor sleeping infants at all times. 239. Daycare employees violated state law by giving Infant A a bottle while Infant A was on the Podster. *** 360. You seek an order compelling Leachco to pay damages to third parties.	**Withdrawn.**

Leachco's RFAs	Proposed Revisions
361. Your Claim against Leachco is akin to a common-law action arising in tort.	
325. The Podster is not subject to 16 C.F.R. Part 1112. 326. The Podster is not subject to 16 C.F.R. Part 1130. 327. The Podster is not subject to 16 C.F.R. Part 1215. 328. The Podster is not subject to 16 C.F.R. Part 1216. 329. The Podster is not subject to 16 C.F.R. Part 1217. 330. The Podster is not subject to 16 C.F.R. part 1218. 331. The Podster is not subject to 16 C.F.R. part 1219. 332. The Podster is not subject to 16 C.F.R. part 1220. 333. The Podster is not subject to 16 C.F.R. part 1221. 334. The Podster is not subject to 16 C.F.R. part 1222. 335. The Podster is not subject to 16 C.F.R. Part 1223. 336. The Podster is not subject to 16 C.F.R. Part 1224. 337. The Podster is not subject to 16 C.F.R. Part 1225.	**Withdrawn.**

Leachco's RFAs	Proposed Revisions
338. The Podster is not subject to 16 C.F.R. Part 1226.	
339. The Podster is not subject to 16 C.F.R. Part 1227.	
340. The Podster is not subject to 16 C.F.R. Part 1228.	
341. The Podster is not subject to 16 C.F.R. Part 1229.	
342. The Podster is not subject to 16 C.F.R. Part 1230.	
343. The Podster is not subject to 16 C.F.R. Part 1231.	
344. The Podster is not subject to 16 C.F.R. Part 1232.	
345. The Podster is not subject to 16 C.F.R. Part 1233.	
346. The Podster is not subject to 16 C.F.R. Part 1234.	
347. The Podster is not subject to 16 C.F.R. Part 1235.	
348. The Podster is not subject to 16 C.F.R. Part 1236.	
349. The Podster is not subject to 16 C.F.R. Part 1237.	
350. The Podster is not subject to 16 C.F.R. Part 1238.	
351. The Podster is not subject to 16 C.F.R. Part 1239.	
352. The Podster is not subject to 16 C.F.R. Part 1241.	

Leachco's RFAs	Proposed Revisions
353. The Podster is not subject to 16 C.F.R. Part 1250.	

LEACHCO, INC.'S OPPOSITION TO THE COMMISSION'S MOTION FOR PROTECTIVE ORDER AS TO CERTAIN OF LEACHCO'S FIRST SET OF REQUESTS FOR ADMISSION, LEACHCO'S SECOND SET OF REQUESTS FOR ADMISSION, AND LEACHCO'S INTERROGATORY NO. 40

EXHIBIT B

John F. Kerkhoff

From: Reyes, Gregory <GReyes@cpsc.gov>
Sent: Monday, February 27, 2023 10:12 AM
To: Oliver J. Dunford; Frank Garrison; John F. Kerkhoff
Cc: Ruff, Brett; Rogal, Michael
Subject: RE: In the Matter of Leachco, Inc., CPSC Docket No. 22-1

Counsel:

We disagree with your reading of the schedule. The Order on Prehearing Schedule states that February 2, 2023 was the last day to serve written discovery. You do not get to revise otherwise improper requests after the deadline for filing written discovery. There is no motion to compel pending on these RFAs, so we do not think the parties are "effectively" at this stage.

Regarding depositions, you still have not provided a list of topics for your proposed "agency deposition." Again, and as noted in my email below, we cannot even begin to consider such a request, much less identify a person and track down availability, without a potential list of topics. If you would like us to consider that request, we again request a potential list of topics. We believe that your unilateral notice of such a deposition would be improper without additional information on your proposed topics.

For Ms. Kish, we can agree to her deposition, ***provided that***, you agree to ask only questions regarding "facts related to this case" not acquired or developed in anticipation of litigation or for trial. If you delve into areas of her expert testimony we will object and advise her not to answer, based on her designation as an expert that will be providing written testimony in accordance with the Order on Prehearing Schedule. If you agree to this, let us know and we can ask Ms. Kish for her availability.

Regards,
Greg

Gregory M. Reyes
Supervisory Attorney, Division of Enforcement and Litigation
U.S. Consumer Product Safety Commission | Office of Compliance and Field Operations
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From: Oliver J. Dunford <ODunford@pacificlegal.org>
Sent: Monday, February 27, 2023 8:07 AM
To: Reyes, Gregory <GReyes@cpsc.gov>; Ruff, Brett <BRuff@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>
Cc: Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>
Subject: RE: In the Matter of Leachco, Inc., CPSC Docket No. 22-1

Counsel,

With respect to the RFAs, we were following Judge Young's advice to reduce and/or revise our requests. And we disagree that the deadline for serving written requests prevents the parties from considering revisions, particularly as the fact-discovery deadline is still three weeks away. Further, that deadline—pursuant to the Court's schedule—is expressly subject to the resolution of any motions to compel, which is effectively where the parties are here. In any event, we will file our response to your Motion for Protective Order.

Thank you for identifying potential deposition dates. We will be issue notices. Your objections to Ms. Kish and an agency deposition are improper, however. First, Ms. Kish's name appears on relevant documents and, regardless, you identified her as a percipient witness in responses to Leachco's interrogatories. That she may also testify as an expert does not relieve your obligation to present her for a deposition regarding her knowledge of facts related to this case. We will, therefore, serve a notice for her deposition.

Similarly, your assertion that there is "no support" for an agency deposition is mistaken. Under 16 C.F.R. § 1025.35(b) parties may "take a deposition of another party." And Section 1025.35(i)(2) expressly contemplates depositions of "anyone who at the time of the taking of the deposition was an officer, director, managing agent, or person otherwise *designated to testify on behalf of* a . . . *governmental entity which is a party to the proceedings*." The Commission is, of course, "another party" (§1025.35(b)) and a "party to the proceeding" (§1025.35(i)(2)), and we are entitled to depose "an officer, director, managing agent, or person otherwise designated to testify on behalf of" the Commission. We will, therefore, serve a notice for this deposition.

Thank you,
Oliver

Oliver J. Dunford | Senior Attorney
Pacific Legal Foundation
4440 PGA Blvd., Suite 307 | Palm Beach Gardens, FL 33410
916.503.9060 (Direct) | 216.702.7027 (Cell)

Defending Liberty and Justice for All.

From: Reyes, Gregory <GReyes@cpsc.gov>
Sent: Friday, February 24, 2023 3:03 PM
To: Oliver J. Dunford <ODunford@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>
Cc: Ruff, Brett <BRuff@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>
Subject: RE: In the Matter of Leachco, Inc., CPSC Docket No. 22-1

Counsel:

Regarding the RFAs, we plan on serving our responses today as noted in our motion. If you plan on withdrawing certain RFAs, you can alert the judge that you are doing so in your Monday filing. As you know, the deadline for serving written discovery has passed, so we will not agree to the serving of additional or revised RFAs.

Regarding depositions, we have been tracking down the availability of CPSC staff you identified in your email sent late Wednesday.

Here is the availability for the following CPSC staff members:

Zachary Foster – March 8
Christopher Nguyen – March 9
Suad Wanna-Nakamura – March 13
Hope Nesteruk – March 15

For Celestine Kish, we plan on designating her as an expert and thus object to her deposition. As you know, the Rules of Practice limit discovery for experts and depositions are not a permitted type. *See* 16 C.F.R. § 1025.31(c)(4). We will provide Ms. Kish's expert testimony in accordance with the Judge's schedule and you will have an opportunity to conduct cross examination during the hearing.

We also do not think an "agency deposition" is appropriate, as there is no support in the Rules of Practice for such a deposition. In any event, without additional information on the types of topics you are considering, we are unable to even properly consider such a request.

Regards,
Greg

Gregory M. Reyes
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From: Oliver J. Dunford <ODunford@pacificlegal.org>
Sent: Friday, February 24, 2023 11:17 AM
To: Ruff, Brett <BRuff@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>
Cc: John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>
Subject: In the Matter of Leachco, Inc., CPSC Docket No. 22-1

Counsel,

Two things. First, in light of Judge Young's comments about Leachco's RFAs, we will withdraw our pending set of RFAs and serve (no later than March 3) a revised set of RFAs. Would you agree to file a Joint Notice to that effect? I don't know whether you'd prefer to withdraw your motion, ask the judge to withhold consideration, note that you may amend the motion after reviewing our revised RFAs—or something else. In any event, because our response is otherwise due Monday, we'd like to get the Notice on file today or Monday.

Second, just a reminder to let us know available dates to depose CPSC personnel during the weeks of March 6 and March 13. We intend to conduct the agency deposition last (March 16 or 17) but, otherwise, we are willing to accommodate schedules. We intend to serve notices Monday.

If you'd like to talk about any of this, I'm available all day today.

Thank you,
Oliver

Oliver J. Dunford | Senior Attorney
Pacific Legal Foundation
4440 PGA Blvd., Suite 307 | Palm Beach Gardens, FL 33410
916.503.9060 (Direct) | 216.702.7027 (Cell)

Email secured by Check Point

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LEACHCO, INC.'S OPPOSITION TO THE COMMISSION'S MOTION FOR PROTECTIVE ORDER AS TO CERTAIN OF LEACHCO'S FIRST SET OF REQUESTS FOR ADMISSION, LEACHCO'S SECOND SET OF REQUESTS FOR ADMISSION, AND LEACHCO'S INTERROGATORY NO. 40

EXHIBIT C

IN THE MATTER OF LEACHCO, INC.

DOCKET NO. 22-1

U.S. CONSUMER PRODUCT SAFETY COMMISSION

BETHESDA, MARYLAND

Wednesday, September 7, 2022

APPEARANCES:

Presiding Officer:

Michael G. Young, Administrative Law Judge

On behalf of the Complaint:

Brett Ruff, Esq.

Michael Rogal, Esq.

Rosalee Thomas, Esq.

Leah Ippolito, Esq.

U.S. Consumer Product and Safety Commission

Office of Compliance and Enforcement

4330 East West Highway, Suite 400

Bethesda, Maryland 20814

On behalf of the Respondent:

Bettina Strauss, Esq.

James Emanuel, Esq.

Bryan Cave Leighton Paisner

211 N. Broadway, Suite 3600

St. Louis, MO 63102

APPEARANCES (cont.):

On behalf of the Respondent (cont.):

John Kerkhoff, Esq.

Oliver Dunford, Esq.

Frank Garrison, Esq.

Pacific Legal Foundation

From the Office of the Secretary, CPSC:

Nina DiPadova, Esq.

Also Present:

Frank Robert Perilla, Paralegal

Christopher Jannace, Law Clerk

identify the documents that are allegedly privileged, I don't know how we can do that.

JUDGE YOUNG: Well, I know one way that it could be done. And maybe Mr. Ruff -- and I'm hopeful about this -- in providing the 1500 pages, has thought anew about the discovery process. But if not, Mr. Ruff, at some point, if there is not a basis for this complaint and there is a motion to dismiss it because no factual basis has been established and it's arbitrary and capricious, you're going to have to produce an affidavit of supporting documents.

So I would suggest that you might anticipate that and save us some steps, some trouble, some time and some energy by avoiding that necessity because if there is not a factual basis for the complaint having being filed and that is challenged and you need to show your cards, I'm going to make you show your cards, or I'm going to dismiss the complaint.

MR. RUFF: We understand, Your Honor. And our position is that -- that we have produced documents and materials that support our allegations. I recognize that there might be a difference in opinion on