UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
LEACHCO, INC.	)	CPSC DOCKET NO. 22-1
	)	Hon. Michael G. Young Presiding Officer
Respondent.	)	

COMPLAINT COUNSEL'S OPPOSITION TO LEACHCO'S MOTION TO COMPEL DISCOVERY (Dkt. No. 18)

Pursuant to 16 C.F.R. § 1025.23(c), Complaint Counsel respectfully submits its Opposition to Respondent Leachco, Inc. ("Leachco")'s Motion to Compel Discovery ("Motion"). Leachco's Motion should be denied because Leachco has failed to meet its burden of establishing that the requested documents and information are relevant. Even if some of the requested materials arguably are relevant, the information requested is privileged and therefore protected from production and disclosure. In some instances, Leachco is seeking to compel the production of materials that Complaint Counsel already has agreed to produce, and, some of Leachco's contentions are moot because—without waiving any objections or claims of privilege—Complaint Counsel will be producing additional materials. For all these reasons, Leachco's Motion should be denied.

I. Background

On February 9, 2022, Complaint Counsel initiated this action by filing an Administrative Complaint against Leachco.[1] The Complaint alleges that Leachco manufactures and distributes

[1] Dkt. No. 1.

in commerce various models of infant lounging pillows, called the Podster.[2] Complaint Counsel alleges that it is reasonably foreseeable that caregivers will use the Podster without constantly supervising the infant despite the product's warnings and instructions, and that caregivers will use the Podster for infant sleep and unsafe bedsharing. An unsupervised infant can roll or move into a position where their nose and mouth may become obstructed by the Podster, or another object in the infant's environment, posing a risk of suffocation and death. Complaint Counsel requests that the Presiding Officer find that the Podsters are a substantial product hazard as defined in section 15(a)(2) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064(a)(2), and order Leachco to notify the public and conduct a recall of the Podsters.

On March 14, 2022, Complaint Counsel served Interrogatories and Requests for Production of Documents and Things on Respondent[3] and Leachco served its own Interrogatories ("Interrogatories") and Requests for Production of Documents and Things ("Requests") on Complaint Counsel.[4] The Parties agreed that both sets of discovery would be due May 13.[5]

The majority of Leachco's Interrogatories and Requests were vague, overly broad, and sought information not relevant to the question presented by this case—whether the Podster is a substantial product hazard. Notwithstanding the objectionable nature of the requests, on April 8—a month before responses to Leachco's discovery were due—Complaint Counsel made an initial document production to Leachco in an effort to move the litigation forward. The production included Product Safety Assessments ("PSAs"), which contain CPSC staff's

[2] These models include the Podster and Podster Plush, as well as the now-discontinued Bummzie and Podster Playtime.
[3] Dkt. Nos. 6 & 7.
[4] Dkt. Nos. 8 & 9.
[5] Dkt. No. 13 at p.2.

preliminary assessments of the defect and substantial risk of injury posed by the Podsters. The PSAs were prepared by subject matter specialists in CPSC's internal technical directorates, including a mechanical engineer, an industrial engineer, and a physiologist. The PSAs support staff's preliminary determination that the Podsters contain a defect that creates a substantial risk of injury to infants and pose a substantial product hazard.[6] Complaint Counsel also produced In-Depth Investigation reports ("IDIs") that contain a summary of field staff's investigation of the two known incidents in which infants died after being placed in a Podster as well as medical and other records supporting the investigative reports.

Complaint Counsel later timely served objections and responses to Leachco's Interrogatories and Requests and produced a second round of documents to Leachco in response to their Requests. In its written responses, Complaint Counsel responded fully, but, where appropriate, objected on the grounds that the document or information sought was protected by privilege or another legal basis.[7] Additionally, although the Commission's adjudicatory rules do not require it, Complaint Counsel indicated that it would produce a privilege log to explain the basis for privilege attached to the withheld documents or information.[8]

On June 6, 2022, Complaint Counsel requested a meet-and-confer to discuss the deficiencies in Leachco's discovery, and also identified the categories of Leachco's responses and production that were deficient.[9] The parties agreed to meet and confer by telephone on June

[6] As Complaint Counsel explained when it made the production, to the extent the April 8, 2022 production of the PSAs constituted a limited waiver of any protection or privilege, such as the deliberative process privilege, that waiver was restricted to that production, and that production was not intended to be construed as a broader waiver of any protection or privilege. *See* Exhibit 1 at p. 1.
[7] Leachco argues that Complaint Counsel "claim[ed] privilege with respect to 72 of Leachco's [89] requests apparently to avoid producing vast amounts of relevant material." Memorandum in Support of Leachco, Inc.'s Motion to Compel Discovery ("Memorandum") at p. 2. What they fail to state in their Memorandum is that Leachco objected to all but 4 of Complaint Counsel's 19 interrogatories and every one of Complaint Counsel's 26 Requests for Production.
[8] Counsel intends to produce this privilege log to Leachco the week of August 29.
[9] Exhibit 1 at p. 2.

22. On the eve of that meeting, counsel for Leachco stated that it had "some issues to raise about the agency's discovery responses as well," but it did not identify those issues.[10]

The parties met and conferred on June 22 but did not resolve all discovery disputes. The following day, Complaint Counsel listed the discovery-related topics it understood Leachco's counsel to be confirming with its client and proposed a meeting on June 28 to follow up on those topics.[11] Leachco's counsel stated that they were not available for a call on June 28 and instead emailed a list of alleged deficiencies in Complaint Counsel's responses.[12]

On July 1, 2022, Complaint Counsel acknowledged that both Complaint Counsel and Leachco still had discovery concerns and urged Leachco's counsel to consider participating in a meet-and-confer with Complaint Counsel to discuss outstanding discovery issues.[13] But despite numerous attempts to schedule an additional meet-and-confer, Leachco declined to agree to future dialogue unless Complaint Counsel provided written responses to Leachco's purported discovery concerns.[14]

Complaint Counsel attempted *again* to schedule a meet-and-confer on Thursday, July 14.[15] Leachco's counsel did not respond to Complaint Counsel's request until July 18.[16]

In an effort to advance the matter and proceed with discovery without judicial intervention, Complaint Counsel provided written responses to each of Leachco's discovery concerns on July 19.[17]

[10] Exhibit 1 at p. 3.
[11] *Id.* at p. 4.
[12] *Id.* at pp. 5–6.
[13] *Id.* at p. 7.
[14] *Id.* at p. 8.
[15] *Id.* at p. 9.
[16] *Id.* at p. 11.
[17] *Id.* at pp. 11–14.

Leachco then finally agreed to a second meet-and-confer telephone conference, which was held on July 28. While the parties' discovery concerns were not resolved during this call, Complaint Counsel did agree to provide a privilege log by the week of August 29, and noted that it would expect a concurrent production of Leachco's privilege log.

On August 1, Complaint Counsel emailed Leachco and again proposed a simultaneous exchange of privilege logs during the week of August 29.[18] Complaint Counsel also addressed Leachco's arguments about the scope of Complaint Counsel's discovery requests and worked to provide even greater clarity with respect to the scope of the requests.[19] For example, Complaint Counsel addressed Leachco's contention that phrases like "subject matter of this litigation" and "safety issue" are vague and impossible to answer, despite the meaning of those phrases being clear from CPSC's investigation, the Complaint, and the productions in this matter.[20] Complaint Counsel also explained that "despite our efforts on numerous occasions to meet and confer to resolve these disputes, it appears that we may have to resolve this through judicial intervention. We are prepared to file a motion to compel if necessary."[21]

Despite Complaint Counsel's many efforts to resolve its discovery disputes with Leachco informally, Complaint Counsel filed a Motion to Compel Discovery on August 10, requesting that the Presiding Officer compel the production of Leachco's communications regarding the Podster and the hazard they pose.[22]

[18] *Id.* at pp. 15–16.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] Dkt No.14.

On August 17, Leachco, represented by new counsel, filed a Motion to Disqualify the Presiding Officer and Stay Proceedings, or in the alternative, Motion to Stay Discovery.[23] On August 19, Leachco filed its Motion to Compel.[24]

II. Legal Standard

Leachco's Motion should be denied. Complaint Counsel has produced all relevant and non-privileged information to which Leachco is entitled. Leachco has not met its burden of showing—nor could it meet its burden of showing—that all of the documents and information it seeks to compel Complaint Counsel to produce are relevant, and in the instances where Leachco does seek relevant material, Complaint Counsel has valid claims of privilege.

The Commission's adjudicatory rules regarding discovery permit parties to "obtain discovery regarding any matter, *not privileged* … relevant to the subject matter involved in the proceedings." 16 C.F.R. § 1025.31(c)(1) (emphasis added). In other words, even where relevant to the subject matter of the proceeding, privileged material is protected from discovery. *See* 16 C.F.R. § 1025.31(c)(2).

While "relevant to the subject matter involved in the proceedings" should be construed broadly, relevance does not extend to information that has no bearing on the issues in the case. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351–52 (1978) (interpreting previous version of Federal discovery rule upon which Commission's rule is based). Information and material sought in discovery must be "reasonably calculated to lead to the discovery of admissible evidence." *Id.*, 16 C.F.R. § 1025.31. "The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable without discovery, not to find out if it

[23] This filing has not been posted to the public docket.
[24] Dkt. No. 18.

has any basis for a claim." *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d. 1318, 1327 (Fed. Cir. 1990). Although the issue of burden of proof in a motion to compel discovery is not addressed by the Commission's adjudicatory rules, under the Federal Rules, "a party moving to compel discovery … bears the initial burden of proving the relevance of the material requested." *First Niagara Risk Management, Inc. v. Folino*, 317 F.R.D. 23, 25 (E.D. Pa. 2016). *See also*, *e.g.*, *O'Malley v. NaphCare, Inc.*, 311 F.R.D. 461, 463 (S.D. Ohio 2015). Respondent has failed to demonstrate that the material requested is relevant to the issue of whether the Podsters present a substantial product hazard, and thus their motion should be denied.

Even if relevant, however, as Complaint Counsel has advised Leachco, many of the documents it has requested are protected by the deliberative process privilege. The deliberative process privilege shields from disclosure preliminary documents generated during a government agency's deliberations about a proposed agenda, rule, investigation, or policy. *See United States Fish and Wildlife Service v. Sierra Club, Inc.*, 141 S. Ct. 777, 785–86 (2021) ("The privilege therefore distinguishes between predecisional, deliberative documents, which are exempt from disclosure, and documents reflecting a final agency decision and the reasons supporting it, which are not."); *see also N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–52 (1975). This privilege is in place "to prevent injury to the quality of agency decisions" and to ensure that government agencies do not operate in a fishbowl. *Sears*, 421 U.S. at 151.

To be protected by the deliberative process privilege, the document at issue must be both "predecisional" and "deliberative." *Sierra Club*, 141 S. Ct. at 786; *see also Vaughn v. Rosen*, 523 F.2d 1136, 1143–44 (D.C. Cir. 1975) ("[T]o come within the [deliberative process] privilege … the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Put another way, pre-decisional materials are

not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take of the deliberative process by which the decision itself is made."). "Documents are 'predecisional' if they were generated before the agency's final decision on the matter, and they are 'deliberative' if they were prepared to help the agency formulate its position." *Sierra Club*, 141 S. Ct. at 786. A document communicates an agency's final position if the agency treats the document as its final view on the matter—draft documents, which are, "by definition, a preliminary version of a piece of writing subject to feedback and change," are examples of "predecisional" documents. *Id.* at 786–87.

As will be demonstrated below, even if Leachco can sustain its burden to prove that the documents and information it seeks is relevant, all of the material withheld has been properly identified by Complaint Counsel as subject to the deliberative process or another applicable privilege; thus, the Court should deny Respondent's motion to compel their production.

III. Argument

Leachco identified five categories of documents or information that it alleges Complaint Counsel has improperly refused to produce: (1) testing and evaluation documents; (2) documents related to other lounger products; (3) information related to whether CPSC developed and considered alternative designs or warning labels for the Podster; (4) additional CPSC communications, both internal and external; and (5) unredacted copies of the PSAs and IDIs that Complaint Counsel provided to Leachco on April 8.

As will be shown below, Leachco has failed to establish that the material is relevant, and, even if relevant, the material sought is protected by privilege. However, Complaint Counsel commits in this pleading that, without waiving any objection or claim of privilege with respect to any particular document, and in an effort to facilitate a resolution of this dispute, it will produce:

(1) the privilege log (which Complaint Counsel has repeatedly committed to producing); (2) photographs taken by CPSC's mechanical engineer; (3) a list of product reviews gathered by the CPSC's industrial engineer; and (4) certain IDIs regarding other loungers. Complaint Counsel maintains its assertion of privilege as to all other documents previously withheld on that basis.

Finally, Complaint Counsel addresses an argument that is implied throughout Leachco's Motion; the argument that CPSC is engaging in selective enforcement against Leachco and should be approaching this issue through rulemaking instead of litigation. Leachco is not entitled to obtain discovery relating to this claim, which it does not substantiate with any factual evidence or analytically sound legal argument.

A. Complaint Counsel has produced or will shortly produce all relevant non-privileged documents regarding its testing and evaluations.

On April 8, Complaint Counsel produced PSAs containing CPSC staff's preliminary assessments of the defect and substantial risk of injury posed by the Podsters. The PSAs form the basis of CPSC staff's preliminary determination that the Podsters contain a defect that creates a substantial risk of injury to infants and pose a substantial product hazard. To be clear, Complaint Counsel is 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.[25]

By producing the PSAs, Complaint Counsel satisfied Leachco's requests for all inspection and testing reports, risk assessments, analyses of consumer reviews, and analyses of the Podster's warning labels and instructions. There are some requested documents that simply

[25] To the extent that Leachco is requesting documents and information on Complaint Counsel's expert witnesses, those requests are premature. Complaint Counsel will amend their discovery responses in accordance with 16 C.F.R. § 1025.31(f) at the appropriate time.

do not exist, such as x-rays of the Podster, and Complaint Counsel has informed Respondent of this fact.

Complaint Counsel did not, however, produce staff notes or draft analyses, which are protected from disclosure by the deliberative process privilege because they are both (1) "predecisional" in that they were generated before the agency's final decision on the matter; and (2) "deliberative" because they were prepared to help the agency formulate its position. *See Baker & Hostetler LLP v. U.S. Dep't of Com.*, 473 F.3d 312, 321 (D.C. Cir. 2006) ("As a general matter, notes taken by government officials often fall within the deliberative process privilege …. Notes generally are selective and deliberative—and routine public disclosure of meeting notes and other notes would hinder government officials from debating issues internally, deter them from giving candid advice, and lower the overall quality of the government decision making process."); *Zinker v. Doty*, 637 F. Supp. 138, 140 (D. Conn. 1986) ("Selective note-taking is the product of deliberative process."); *Jud. Watch of Fla., Inc. v. U.S. Dep't of Just.*, 102 F. Supp. 2d 6, 12-15 (D.D.C. 2000) (holding that handwritten notes, even if they were not circulated to others within the agency, are properly protected from disclosure by the deliberative process privilege); *see generally Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) ("The [deliberative process] privilege protects 'recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.'"). The notes and other material sought fall within the ambit of draft documents, and other material reflecting initial and personal opinions of technical staff and are thus protected by the privilege.

Without waiving any objection or claim of privilege, Complaint Counsel will produce photographs taken by the CPSC mechanical engineer during the course of completing her PSA

and a list of product reviews gathered by the CPSC industrial engineer during the course of completing his PSA.

B. Complaint Counsel has produced or will shortly produce all relevant non-privileged documents relating to other lounger products.

Leachco has asserted that Complaint Counsel must produce documents and answer interrogatories regarding other lounger products. Leachco has asserted that CPSC intends to rely on this information in order to prove that the Podster is defective and poses a substantial risk of injury. To the contrary, Complaint Counsel intends to produce expert witness testimony to address the specific mechanical features of the Podster, as well as the specific warning labels and instructions accompanying the Podster. Thus, the information regarding other lounger products is not relevant to whether the Podster is a substantial product hazard, and Leachco has not satisfied it burden of demonstrating that their production should be compelled.

However, Complaint Counsel acknowledges that CPSC's industrial engineer examined 23 IDIs containing information on infant fatalities in other lounger products. These IDIs were not examined for the purpose of proving that the Podster is defective or poses a substantial risk of injury. Rather, they shed light on consumer behavior, specifically whether it is reasonably foreseeable that consumers will use these products for sleep, will fail to supervise infants while using the products, or will use the product in the presence of other soft bedding.

In an effort to move this matter forward, and without waiving any basis for objection, Complaint Counsel will produce the 23 IDIs involving other lounger products reviewed by CPSC staff in the draft PSA.

C. Information concerning alternative designs and warnings is not relevant to this proceeding.

In Interrogatories Nos. 4 & 5, Leachco seeks information regarding "each alternative design or modification *you contend* was possible to reduce or eliminate the defect and/or

hazard," "any warning or instruction *you contend* Leachco provided improperly or failed to provide," and "the content of any warning or instruction *you contend* was proper or required" (emphasis added).[26] These Interrogatory requests seek information that is not relevant to the charges in the Complaint and thus is outside the scope of discoverable material. Moreover, Complaint Counsel does not contend that any modification of the Podsters' design, warnings, or instructions would mitigate the hazard posed by the Podster. Complaint Counsel has therefore satisfied Leachco's requests.

To the extent that Leachco argues that Complaint Counsel must consider alternative designs and warnings, Leachco improperly relies on 16 C.F.R. § 1115.6. This section is wholly irrelevant to these proceedings; it lays out the factors that a *manufacturer* such as Leachco should consider to determine whether it has an obligation to report to CPSC regarding a product's unreasonable risk of serious injury or death under section 15(b) of the CPSA. 15 U.S.C. § 2064(b). The rule states that in evaluating whether the risk posed by its product is unreasonable, manufacturers should consider a number of factors, including "the availability of alternative designs or products" that might eliminate or mitigate the risk of serious injury or death posed by the product. A failure to report a product that poses an unreasonable risk subjects a firm potentially to civil penalties. There is nothing in the CPSA or adjudicative rules that require Complaint Counsel to evaluate alternative designs, and the existence of such designs plays no role in the determination of whether the Podsters create a substantial product hazard. *See* 16 C.F.R. §1115.12. This baseless request does not warrant relief.

[26] Leachco's Interrogatories No. 4 & 5, Dkt. No. 8 at pp. 5–6.

D. Complaint Counsel has produced all relevant, non-privileged communications.

Complaint Counsel has divided Leachco's Requests for communications into four categories.

1. Communications with third parties about the Podster.

Leachco moves to compel production of all communications between CPSC and third parties including retailers and nongovernmental organizations about the Podster. However, Complaint Counsel has reviewed and produced relevant, non-privileged documents, including correspondence between CPSC and retailers.

Leachco now also requests all communications with parents, guardians or attorneys of any child injured or killed while using the Podster. On April 8, 2022, Complaint Counsel produced all IDIs regarding incidents involving the Podsters. Those IDIs contain a summary of staff's investigation of the two fatal incidents in which infants died after being placed in the Podster, as well as any supporting documents including reports from law enforcement and to the extent they exist, summaries of interviews with parents or caregivers of the infants who died. There are no additional documents in Complaint Counsel's possession that can be provided in response to these discovery requests. As this is ongoing litigation, Complaint Counsel will continue to produce any relevant, non-privileged documents responsive to Leachco's requests.

To the extent that these requests call for documents within the possession, custody or control of CPSC Commissioners and their immediate staff, Complaint Counsel indicated in its May Response to Leachco that it was not producing these documents because they are not within Complaint Counsel's possession, custody, or control. These documents are exclusively controlled by CPSC Commissioners and their immediate staff, who, for purposes of this litigation, are walled off from Complaint Counsel and represented by separate counsel.

2. Communications with third parties about the Complaint.

To the extent those documents exist, Complaint Counsel produced all relevant non-privileged material in its possession. As this is an ongoing litigation, Complaint Counsel will continue to produce any relevant, non-privileged documents.

3. Internal communications among staff and Commissioners about the Podster and the Complaint.

Complaint Counsel has produced all relevant, non-privileged documents responsive to Leachco's request. Most of the documents responsive to these Requests for internal Commission communications are protected by the attorney-client privilege, the work product privilege, and/or the deliberative process privilege; those which are not privileged have been produced. Any internal communications regarding the preparation, approval, or filing of the Complaint is protected by the deliberative process privilege. *See Nova Oculus Partners, LLC v. U.S. Sec. & Exch. Comm'n*, 486 F. Supp. 3d 280, 292 (D.D.C. 2020) (holding that deliberative process privilege applies to the following categories of documents: "(1) emails or portions of emails about drafting and filing the complaint in the … enforcement case; (2) emails about other steps being taken in the … investigation; (3) emails about litigation in other SEC enforcement actions"); *McCann v. U.S. Dep't of Health & Hum. Servs.*, 828 F. Supp. 2d 317, 322 (D.D.C. 2011) (documents revealing internal deliberations among agency employees regarding a complaint, specifically advice, recommendations, suggestions, opinion, and analysis about the alleged claims, fall within scope of deliberative process privilege); *Rutila v. United States Dep't of Transportation*, No. 3:16-CV-2911-B-BK, 2020 WL 3485575, at *5 (N.D. Tex. Apr. 27, 2020), report and recommendation adopted, No. 3:16-CV-2911-B-BK, 2020 WL 2552944 (N.D. Tex. May 20, 2020) (documents reflecting preliminary findings analyzing claims against the

agency were properly withheld under the deliberative process privilege). Complaint Counsel will be producing a privilege log the week of August 29.

To the extent that these requests call for documents solely within the possession, custody or control of CPSC Commissioners and their immediate staff, Complaint Counsel, as noted above, is not producing these documents because they are not within Complaint Counsel's possession, custody or control. These documents are exclusively controlled by CPSC Commissioners and their immediate staff, who, for purposes of this litigation, are walled off from Complaint Counsel and are represented by separate counsel.

4. Documents related to Podster incidents, injuries, or fatalities.

Complaint Counsel has already produced documents that Leachco is seeking to compel relating to incidents, injuries, or fatalities involving the Podster. On April 8, 2022, Complaint Counsel produced all In-Depth Investigation Reports involving the Podsters. Those IDIs contain a summary of staff's investigation of the two known fatal incidents in which infants died after being placed in the Podster, as well as any supporting documents including reports from law enforcement. Complaint Counsel is aware of no other relevant and non-privileged documents responsive to this request.

E. Complaint Counsel has produced all relevant, non-privileged documents, including Product Safety Assessments and In-Depth Investigation reports.

1. Leachco has not met its burden of showing that Complaint Counsel must provide an unredacted version of the mechanical engineering PSA.

Leachco requests that this Court compel production of the unredacted mechanical engineering PSA. Complaint Counsel only redacted two items in the PSA, both having to do with another lounger product evaluated by CPSC staff. That lounger has a feature that staff refer to as a "crotch hump" that facilitates rolling and movement by allowing the infant to push off the lounger's raised edge. Technical staff only reference the crotch hump in order to explain that

although the Podster *does not have one*, its design still creates a raised edge from which infants can push off and roll over or move off the Podster. Only the PSA number and the name of the product are redacted.

The characteristics of other Loungers that may facilitate infant rolling and movement are not relevant to this action. Other loungers' design characteristics may provide resistance, and facilitate movement, in different ways. That is not relevant to the question in this matter: whether the Podster facilitates infant movement and rolling such that an infant may move into a position where their nose and mouth may become obstructed by the Podster, or another object in the infant's environment, posing a risk of suffocation and death. Whether another product creates a greater or lesser risk is irrelevant to the instant action.

Further, contrary to Leachco's statement that Complaint Counsel is relying on the redacted information to prosecute its case, all evidence of Complaint Counsel's allegations will be presented through an expert witness, who will conduct independent analysis.

2. Complaint Counsel cannot produce a totally unredacted IDI due to its obligation to protect Personally Identifiable Information (PII).

Complaint counsel produced two IDIs. Leachco has requested an unredacted copy of one of the IDIs. Complaint Counsel made minimal redactions to this IDI to protect personally identifiable information ("PII") of the deceased infant's family.[27] CPSC has not been able to obtain consent for the release of this information from the family, and has only had limited contact with one family member, who has declined to speak to Complaint Counsel. At this time, Complaint Counsel does not intend to call these individuals as witnesses.

[27] Complaint Counsel explained the redaction of PII to Leachco in the cover letter accompanying the April 8 production. *See* Exhibit 1 at p.1.

Pursuant to the Privacy Act of 1974, 5 U.S.C. § 552a, any federal agency must take steps to protect PII and cannot release that information without consent of the individual, unless the disclosure is pursuant to one of twelve statutory exceptions. An appropriate exception is the disclosure of PII in the course of this administrative litigation through a court order. 5 U.S.C. § 552a(b)(11). If the Presiding Officer issues an order requiring Complaint Counsel to provide the unredacted IDI, it will, of course, comply.

F. Leachco has not alleged sufficient facts to show that it is entitled to discovery to prove its allegation of selective enforcement or improper exercise of enforcement discretion.

Scattered throughout Leachco's Motion are explicit or implicit arguments that Complaint Counsel has selectively and unfairly chosen to prosecute Leachco "in the press and in the courts (rather than properly engage in a rulemaking)."[28] Leachco ties this allegation to its argument that Complaint Counsel must produce irrelevant information and documents concerning other investigations,[29] other infant lounger products,[30] and communications with other manufacturers,[31] so that it may learn "whether" it is being selectively prosecuted.[32] To assist the court in expediently resolving this dispute and without conceding that such argument should be entertained, we briefly address it here.

To obtain discovery in support of a claim of selective prosecution, Leachco must prove both that Complaint Counsel has acted selectively *and* with improper motive. *Atty Gen. of U.S. v. Irish People, Inc.*, 684 F.2d. 928, 947–48 (D.C. Cir. 1982). "Defendants are similarly situated when their circumstances present no legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them." *Branch Ministries v. Rossotti*, 211 F.3d

[28] Memorandum at p. 4.
[29] *E.g., id.* (arguing Leachco is entitled to learn "what type of other products the Agency evaluated with similar incidents but have not found defective").
[30] *Id.* at p. 12.
[31] *Id.* at p. 16.
[32] *Id.* at p. 4.

137, 173–74 (D.C. Cir. 2000) (quoting *United States v. Hastings*, 126 F.3d 310, 315 (4th Cir. 1997)). As Leachco is aware, the Podsters are not the only infant lounger product the CPSC has investigated. On September 23, 2021, CPSC and The Boppy Company ("Boppy") jointly announced that Boppy was recalling of over 3 million infant loungers that had been associated with 8 infant deaths.[33] CPSC's treatment of both Boppy and Leachco is clearly justified by a "legitimate prosecutorial factor": Boppy voluntarily recalled its loungers, and Leachco, despite the two infant deaths associated with the Podsters, will not agree to a voluntary recall.

Even assuming Leachco can establish that Complaint Counsel's pursuit of this action against Leachco is "selective", Leachco has not met its burden. Selective enforcement is not "in itself" a violation of Constitutional equal protection principles. *Oyler v. Boles*, 365 U.S. 448, 456 (1962). To be improper, the selection must be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.*; *see also U.S. v. Armstrong*, 517 U.S. 456 469–71 (1996) (holding that to obtain discovery in a selective prosecution claim, a criminal defendant must make a credible showing of disparate treatment based on a constitutionally protected category). Leachco has not even *alleged* that Complaint Counsel has engaged in such impermissible discriminatory conduct, let alone provided evidence of such conduct. Without evidence, Leachco is not entitled to discovery in support of its selective prosecution claim.

Nor is Leachco's complaint regarding the Commission use of its enforcement authority persuasive. Leachco baselessly claims that Commission should have initiated rulemaking instead of seeking a recall of the Subject Products.[34] There is nothing improper about the initiation of this action. Recalls take dangerous products out of consumers' homes and provide a refund or

[33] CPSC Press Release No. 21-198, The Boppy Company Recalls Over 3 Million Original Newborn Loungers, Boppy Preferred Newborn Loungers and Pottery Barn Kids Boppy Newborn Loungers After 8 Infant Deaths; Suffocation Risk | CPSC.gov.
[34] Memorandum, p. 4.

other remedy. Rulemaking, on the other hand, provides prospective relief, and does nothing to address products already in commerce. The Complaint alleges that two infants suffocated; the Complaint seeks to remove the products from homes nurseries to prevent any future fatalities.

With the enactment of the CPSA, Congress granted the Commission the authority to use adjudicative proceedings to compel firms to recall hazardous products and take other remedial action, and *also* gave it the authority to enact product safety rules. 15 U.S.C. §§ 2058, 2064. Nothing prevents the Commission from exercising its section 15 authority and later, or simultaneously, promulgating a rule applicable to a product. *See, e.g.*, *Zen Magnets, LLC v. Consumer Product Safety Commission*, 968 F.3d 1156, 1167–68 (10th Cir. 2020) (no due process violation where CPSC Commissioners participated in adjudication and rulemaking concerning the same subject matter). It is well-established that agencies may choose which path to take. *See SEC v. Chenery*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

IV. Conclusion

For all the reasons stated above, Complaint Counsel asserts that all non-privileged, relevant documents have been produced or will be produced to Respondent, without waiving objections or applicable privileges.

Leachco has failed to meet its burden to show that the Presiding Officer should compel Complaint Counsel to produce any additional documents or information. Given the information that has been or will shortly be produced, Complaint Counsel maintains that the bulk of this motion is moot.

In regard to Leachco's argument that Complaint Counsel is targeting the company unfairly, as argued above, Complaint Counsel disagrees.

Complaint Counsel requests that the Presiding Officer deny Leachco's Motion to Compel, or in the alternative, defer its ruling to allow the parties to complete productions and revisit the status of the production disputes at the September 7 hearing currently scheduled before this court.

Dated this 29th day of August, 2022,

Respectfully submitted,

/s/ Caitlin O'Donnell

Leah Ippolito, Supervisory Attorney
Brett Ruff, Trial Attorney
Rosalee Thomas, Trial Attorney
Caitlin O'Donnell, Trial Attorney

Division of Enforcement and Litigation
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7809

Complaint Counsel for
U.S. Consumer Product Safety Commission

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2022, I served Complaint Counsel's Opposition to Leachco's Motion to Compel Discovery on all parties and participants of record in these proceedings as follows:

By email to the Secretary:

Alberta E. Mills
Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
Email: AMills@cpsc.gov

By email to the Presiding Officer:

Judge Michael G. Young
Presiding Officer and Administrative Law Judge
Federal Mine Safety and Health Review Commission
1331 Pennsylvania Ave., N.W., Ste. 520N
Washington, DC 20004-1710
Email: myoung@fmshrc.gov
cjannace@fmshrc.gov

By email to Counsel for Respondent:

Oliver J. Dunford
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Email: ODunford@pacificlegal.org

John F. Kerkhoff
Frank D. Garrison
Pacific Legal Foundation
3100 Clarendon Boulevard, Suite 610
Arlington, VA 22201
Email: JKerkhoff@pacificlegal.org
FGarrison@pacificlegal.org

Cheryl Falvey
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, D.C. 20004-2595

Email: cfalvey@crowell.com

Bettina Strauss
Bryan Cave Leighton Paisner LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102
Email: bjstrauss@bclplaw.com

/s/ Caitlin O'Donnell

_____

Caitlin O'Donnell
Complaint Counsel for
U.S. Consumer Product Safety Commission

EXHIBIT 1

From: Workspaces Notifications <messages-noreply@post.watchdox.com>
Sent: Friday, April 8, 2022 2:54 PM
To: Ruff, Brett <BRuff@cpsc.gov>
Subject: Your secured file has been shared

Your file has been shared

CPSC0000001toCPSC0000195.pdf
View | Download | Go to inbox

Sent to:

rbthomas@cpsc.gov , lippolito@cpsc.gov , bjstrauss@bclplaw.com , codonnell@cpsc.gov , cfalvey@crowell.com , jgilbert@crowell.com , fperilla@cpsc.gov

Brett Ruff wrote:

Cheri and Bettina:

The enclosed PDF contains CPSC's Product Safety Assessment Reports regarding the Podster and the IDI information related to the two fatal incidents. We have designated these materials as "Confidential" under the proposed protective order that now is on file in this matter. If the ALJ rejects the proposed protective order, we would ask that you promptly meet and confer with us to ensure the proper treatment of the material contained in this PDF.

To the extent this production constitutes a limited waiver of any protection or privilege, such as the deliberative process privilege, that waiver is restricted to this production, and this production should not be construed as a broader waiver of any protection or privilege.

You will notice that there are some redactions in these materials. Those redactions were made to remove sensitive personal identity information and references to products other than the Podster.

Also, the PDF is password protected. I will send the password in a follow-up message.

- Brett Ruff

Perilla, Frank Robert

From: Ruff, Brett
Sent: Monday, June 6, 2022 8:35 AM
To: Falvey, Cheryl; bjstrauss@bclplaw.com
Cc: Ippolito, Leah; Thomas, Rosalee; ODonnell, Caitlin
Subject: Leachco Podster -- Call re discovery

Bettina and Cheri:

Let's schedule a time this week to discuss Leachco's discovery responses. There are several responses to CPSC's discovery requests that strike us as incomplete or evasive. Below is a high-level list of discovery deficiencies we would like to discuss.

- Document Production / Requests for Production
  - Lack of correspondence or email communications by Leachco, whether internal or external.
  - Lack of documents regarding Leachco's archiving or storage policies.
  - Lack of deposition transcripts for the deponents listed in response to Interrogatory No. 19.
  - Leachco's rewriting of RFP No. 10. Leachco's response states: "Subject to these objections, to the extent this request calls for the production of documents 'created for the purpose of these responses,' there are no such documents." But "created for the purpose of these responses" appears nowhere in the RFP.
- Interrogatories
  - Failure to fully "Identify" the people listed in the responses.

Brett Ruff
Trial Attorney
U.S. Consumer Product Safety Commission
Division of Enforcement and Litigation | Office of Compliance and Field Operations
4330 East West Highway | Bethesda, MD 20814

Perilla, Frank Robert

From: Strauss, Bettina <BJStrauss@bclplaw.com>
Sent: Tuesday, June 21, 2022 2:32 PM
To: Ruff, Brett
Cc: Falvey, Cheryl; Ippolito, Leah; Thomas, Rosalee; ODonnell, Caitlin; Strauss, Bettina; Emanuel, James
Subject: RE: Leachco Podster -- Call re discovery

Brett,

I understand while I was away there was some confusion about my schedule. Sorry for that and also that I am not available tomorrow at the time you proposed.

However, Cheri and James will proceed with the call tomorrow without me. I've had a chance to speak to them and confirm that.

Also, we have some issues to raise about the agency's discovery responses as well. We trust both discovery sets can be addressed at tomorrow's discussion.

Thanks,

Bettina

BETTINA J. STRAUSS
Partner
BRYAN CAVE LEIGHTON PAISNER LLP - St. Louis, MO USA
bjstrauss@bclplaw.com
T: +1 314 259 2525 M: +1 314 412 2525

Perilla, Frank Robert

From: Ruff, Brett
Sent: Thursday, June 23, 2022 4:22 PM
To: Falvey, Cheryl; james.emanuel@bclplaw.com; bjstrauss@bclplaw.com
Cc: Ippolito, Leah; Thomas, Rosalee; ODonnell, Caitlin
Subject: Leachco Discovery

Cheri and James,

Thank you for speaking with us yesterday about Leachco discovery. James, let us know if the meeting I proposed for 2 p.m. Eastern next Tuesday works for a follow-up call about the discovery.

We understand that you intend to confirm the following questions with your client:

- Whether Leachco is withholding any communications—whether internal to Leachco or with external entities—responsive to CPSC's RFPs.
- Whether Leachco is withholding any documents related to its document retention or archiving policies.
- Whether Leachco is withholding any documents based on its objection that it believed certain RFPs were "unlimited in time". *See, e.g.*, Leachco's Response to RFP No. 7. Your understanding is that Leachco is not withholding any documents on this basis, and we seemed to agree that the relevant time period for discovery in this case began in 2008 (when Leachco designed the Podster).
- Whether Leachco is withholding any documents on the basis of privilege. You requested that we identify for you the RFPs with respect to which we would like to know whether Leachco is withholding anything on the basis of privilege. The RFPs include: 11, 13, 20, and 24.

We believe you also intended to get us the information called for by the definition of "Identify" in paragraph 5 on page 2 of the Interrogatories with respect to each of the individuals mentioned in Leachco's interrogatory responses, excluding the experts identified in response to Interrogatories 10 & 14 and any individuals mentioned in response to Interrogatory 19 that are not affiliated with Leachco.

Thank you,

Brett Ruff
Trial Attorney
U.S. Consumer Product Safety Commission
Division of Enforcement and Litigation | Office of Compliance and Field Operations
4330 East West Highway | Bethesda, MD 20814

Perilla, Frank Robert

From: Emanuel, James <james.emanuel@bclplaw.com>
Sent: Monday, June 27, 2022 7:08 PM
To: Ruff, Brett; Ippolito, Leah; Thomas, Rosalee; ODonnell, Caitlin
Cc: Strauss, Bettina; Falvey, Cheryl
Subject: CPSC v. Leachco - CPSC's Discovery Responses

Brett,

This e-mail outlines the deficiencies we identified in the Agency's discovery responses, many of which were discussed on our call on June 22. Please let us know your position on these issues.

As a general matter, the Agency has objected to each and every interrogatory and request for production propounded with lengthy and repetitive boilerplate objections, often spanning more than a half page each. These objections are improper and do not sufficiently provide a basis for the Agency's position that would allow us to fairly evaluate and/or respond to your objections. Please remove the boilerplate objections and, for each, provide only specific objections tailored to the interrogatory/RFP as the rules require.

Please confirm in writing your representation that where the Agency has indicated it will produce non-privileged documents "if any," that it has in fact produced all responsive documents (*see, e.g.*, RFP 16).

Below are the categories of responses that are deficient:

- Information regarding other infant lounger products **RFPs 6, 28, 29, 30, 33, 35, 36, 37, 38, 39, 40, 42, 44, 49, 51; ROGs 9, 21, 23, 25, 27, 28, 29, 33, 34,**
    - The Agency has failed to provide any responsive information to requests seeking information regarding other infant lounger products. As discussed on our call, to the extent the Agency intends to rely on or reference other infant lounger products at hearing on this matter, such information must certainly be produced. In fact, even if the Agency does not intend to rely on such evidence, this information is relevant and discoverable and should be produced. Please advise whether the Agency will stipulate that no other infant lounger products will be referenced in this matter and we will consider whether to pursue our requests for this information.

- Communication that are not privileged, including third-party communications **RFPs 8, 9, 10, 11, 12, 15, 17, 18, 38, 45; ROGs 37, 38**
    - The Agency's discovery responses contain broad privilege objections, many of which are clearly without merit, as the requests seek communications with third parties, which are inherently not privileged. *See, e.g.,* RFP No. 8, requesting "[a]ll documents and communications among the staff and/or commissioners and among the CPSC and third parties, regarding or pertaining to the Podster." Please remove these objections to such non-privileged communications, and produce all responsive communications.

- Regulatory Evaluations, and Data/Material Relied Upon by Experts **RFPs 7, 16, 32, 33, 34, 35, 41, 46, 47, 48, 49**
    - The Agency objects to several requests regarding regulatory evaluations (including inspections, risk assessments, photographs, etc.) conducted on the Podster, and in several instances instead references the April 8, 2022 Product Safety Assessment. These responses are insufficient. The Agency has not produced the underlying test data or a complete set of photographs, which is responsive to these requests, discoverable and not subject to any privilege. Please produce all responsive information

regarding the evaluations/inspections sought in these RFPs, including among other things a complete set of photographs and test data, inspection notes, etc.
    - The Agency also objects to producing basic information regarding its experts, including information provided to the experts and the experts' CVs. This information is relevant and responsive, and should be produced.

- Information regarding witnesses and incidents, which is currently redacted **ROGs 2, 8, 30, 31, 35**
    - The Agency has not provided identifying information regarding the witnesses to the incidents it cites in its complaint. Instead, it refers Leachco to the IDIs produced. However, the IDIs are redacted, and do not provide identifying information regarding several individuals who allegedly witnessed these incidents. Please identify these witnesses and produce non-redacted copies of the IDIs referenced.

- Information regarding warnings contentions and alternative design **ROGs 4, 5**
    - The Agency has not provided any substantive response to interrogatories seeking information regarding the Agency's contentions with respect to alternative design/warnings. Instead, the Agency lodges several boilerplate relevance/scope objections and privilege objections, claiming that the information is not relevant to the question of whether the product poses a substantial hazard. To the contrary, the question of whether an alternative design exists is squarely relevant to whether the product presents a substantial hazard; indeed, the Code of Federal Regulation, under the subsection "SUBSTANTIAL PRODUCT HAZARD REPORTS" requires companies to consider, in deciding whether to report unreasonable risk of serious injury or death associated with their products, "the availability of alternative designs or products." *See* 16 C.F.R. § 1115.6. Please remove your objections to these interrogatories and provide substantive responsive information.

- Incomplete Response **ROG 32**
    - As discussed on our call, the substantive response to Interrogatory No. 32 appears to have been inadvertently omitted. It is our understanding that you are looking into this issue and will provide a substantive response.

We look forward to your response on the above issues. Thank you,

James

JAMES EMANUEL, JR.
Associate
james.emanuel@bclplaw.com
T: +1 314 259 2263

BRYAN CAVE LEIGHTON PAISNER LLP
One Metropolitan Square, 211 North Broadway, Suite 3600, St. Louis, MO 63102

bclplaw.com

This electronic message is from a law firm. It may contain confidential or privileged information. If you received this transmission in error, please reply to the sender to advise of the error and delete this transmission and any attachments.

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Perilla, Frank Robert

From: Ruff, Brett
Sent: Friday, July 1, 2022 12:31 PM
To: Emanuel, James; Falvey, Cheryl; Strauss, Bettina
Cc: Ippolito, Leah; Thomas, Rosalee; ODonnell, Caitlin; Perilla, Frank Robert
Subject: RE: Leachco Discovery

James,

We thought we had a constructive call with Cheri and you on June 22, so we were disappointed in your response below. We proposed a call so that we could have a candid, real-time discussion of our discovery concerns, but your post-hoc email undermines much of the progress we thought we had made. It is an example of how focusing on posturing to defend a motion to compel can undercut the discovery process. We previewed our concerns in an email before the call; discussed our concerns with Cheri and you on our call (during which you seemed to understand them, though you asked for specific RFP citations on the privilege question); and then we reiterated them in the email below and gave specific citations for our privilege-related concern, per your request from the call. We trust that you will be able to speak with your client about our concerns.

While you speak with your client about the responsive communications it may have had with third parties, we would encourage you to review Ms. Leach's deposition transcript from the McMullen litigation. In it, Ms. Leach acknowledges the existence of email communications with at least one retailer and various consumers regarding the Podster and whether it may be used for sleep.

Please note that Ms. Leach's transcript itself is a document that Leachco inappropriately withheld. RFP No. 25 expressly calls for "deposition transcripts," such as Ms. Leach's, but Leachco did not produce any such transcripts. We thus had to resort to other means to obtain the transcripts.

We will look into the discovery concerns that Leachco articulated in your Monday email, and we hope that you will be able to find some time after the long weekend to discuss discovery with us.

Brett Ruff
Trial Attorney
U.S. Consumer Product Safety Commission
Division of Enforcement and Litigation | Office of Compliance and Field Operations
4330 East West Highway | Bethesda, MD 20814

Perilla, Frank Robert

From: Strauss, Bettina <BJStrauss@bclplaw.com>
Sent: Monday, July 11, 2022 5:12 PM
To: Ruff, Brett; Emanuel, James; Falvey, Cheryl
Cc: Ippolito, Leah; Thomas, Rosalee; ODonnell, Caitlin; Perilla, Frank Robert; Strauss, Bettina
Subject: RE: Leachco Discovery

Brett,

I don't have a direct number for you, or I would give you a call. Perhaps you can call me when time permits so we can resolve whatever disconnect exists. We have simply asked for a written response on the issues we raised several weeks ago by phone and then also provided in writing. That allows us to consider your position and discuss it with some forethought. This, as you know, is fairly typical in litigation and good practice in our view.

Thank you for your anticipated courtesy. I look forward to talking with you.

Bettina

BETTINA J. STRAUSS
Partner
BRYAN CAVE LEIGHTON PAISNER LLP - St. Louis, MO USA
bjstrauss@bclplaw.com
T: +1 314 259 2525 M: +1 314 412 2525

Perilla, Frank Robert

From: Ruff, Brett
Sent: Tuesday, July 12, 2022 4:31 PM
To: Strauss, Bettina; Emanuel, James; Falvey, Cheryl
Cc: Ippolito, Leah; Thomas, Rosalee; ODonnell, Caitlin; Perilla, Frank Robert
Subject: RE: Leachco Discovery

Bettina,

We are disappointed that Leachco now is insisting on holding discovery discussions in writing rather than talking through potential concerns. We are reiterating our offer to engage in a constructive, good-faith discussion with Leachco rather than engage in a lengthy, testy email campaign. We are available on Thursday afternoon between 2 and 4:30 p.m. Eastern to discuss discovery. Please let us know before Thursday whether your team will be willing to speak about discovery and at what time on Thursday.

Brett Ruff
Trial Attorney
U.S. Consumer Product Safety Commission
Division of Enforcement and Litigation | Office of Compliance and Field Operations
4330 East West Highway | Bethesda, MD 20814

Perilla, Frank Robert

From: Strauss, Bettina <BJStrauss@bclplaw.com>
Sent: Monday, July 18, 2022 1:21 PM
To: Ruff, Brett; Emanuel, James; Falvey, Cheryl
Cc: Ippolito, Leah; Thomas, Rosalee; ODonnell, Caitlin; Perilla, Frank Robert; Strauss, Bettina
Subject: RE: Leachco Discovery

Brett,

We appreciate your agreement to put pen to paper on the issues we raised June 22 and then memorialized in writing thereafter June 24 and June 27. We have not received one yet, but as soon as we do we look forward to scheduling a call to see if we can make further progress.

We obviously disagree with the aspersions you cast in your email and we will not respond in kind. We will note, however, that in all your emails you have not provided a single writing or supplement since the call on June 22. We hope your written note will be productive in this regard. We certainly would like to avoid filing and responding to lengthy competing motions to compel. It would seem that providing us something in writing would be less burdensome and much more productive than that.

In advance of our call, we provide the following supplement to our responses to address two of the issues you raised:

1) For RFP No. 5, Leachco is not withholding documents due to document retention or archiving policies.

2) For the identity of the individuals we referenced in Leachco's interrogatory responses, Leachco provides the following supplement. Each of these persons may be contacted only through counsel.

   Clyde Leach – President/Chief Executive Officer, Leachco – 130 E. 10th Street, Ada, OK 74820.
   Jamie Leach – Vice President/Chief of Product Development, Leachco – 130 E. 10th Street, Ada, OK 74820.
   Alex Leach – Chief of Operations/Chief Marketing Strategist Leachco – 130 E. 10th Street, Ada, OK 74820.
   Stephen Ballard – Chief Financial Officer/Director of Human Resources, Leachco – 130 E. 10th Street, Ada, OK 74820.
   Tonya Barrett – Office Manager/New Accounts/Compliance Coordinator, Leachco – 130 E. 10th Street, Ada, OK 74820.
   Leah Barnes – Former Marketing Director, Leachco – 130 E. 10th Street, Ada, OK 74820.
   Mabry Ballard – Executive Assistant to VP/Customer Service Supervisor – 130 E. 10th Street, Ada, OK 74820.

Also, I remain available for a quick discussion as I previously offered, to clear up any confusion and to work cooperatively. That is always our approach and benefits our client as well. As I mentioned, I would call you but I don't have a number and you haven't provided one.

Regards,

Bettina

Perilla, Frank Robert

From: Ruff, Brett
Sent: Tuesday, July 19, 2022 1:22 PM
To: Emanuel, James; Ippolito, Leah; Thomas, Rosalee; ODonnell, Caitlin
Cc: Strauss, Bettina; Falvey, Cheryl
Subject: RE: CPSC v. Leachco - CPSC's Discovery Responses

James,

We now understand that Leachco is unwilling to speak with us about our purported discovery deficiencies until after we respond in writing to your written demands. Such a unilateral posture undermines good-faith discovery discussions, but we will provide you with responses to try to move along the process. Our responses are below. As always, we would be happy to talk them through.

Leachco's Contention:

- Information regarding other infant lounger products **RFPs 6, 28, 29, 30, 33, 35, 36, 37, 38, 39, 40, 42, 44, 49, 51; ROGs 9, 21, 23, 25, 27, 28, 29, 33, 34,**
    - The Agency has failed to provide any responsive information to requests seeking information regarding other infant lounger products. As discussed on our call, to the extent the Agency intends to rely on or reference other infant lounger products at hearing on this matter, such information must certainly be produced. In fact, even if the Agency does not intend to rely on such evidence, this information is relevant and discoverable and should be produced. Please advise whether the Agency will stipulate that no other infant lounger products will be referenced in this matter and we will consider whether to pursue our requests for this information.

CPSC's Response:

As an initial matter, this position is different than the one that Leachco took during our June 22 call. During that call, Leachco agreed that information about other infant lounger products would not be within the scope of discovery unless CPSC intended to use evidence about those products in its affirmative case during the hearing. Now Leachco apparently has shifted its position and, without explanation, contends: "even if the Agency does not intend to rely on such evidence, this information is relevant and discoverable and should be produced. . . . and we will consider whether to pursue our requests for this information." We stand by our objections about such information being outside the scope of permissible discovery.

We also note that CPSC does not intend to introduce evidence regarding infant loungers other than the Podster products in CPSC's affirmative case. CPSC expects that one or more of its expert witnesses may be familiar with incidents involving other infant products from other work the experts have done, but we do not yet know whether their testimony will reference or cite incidents involving other infant loungers. We expect to have better clarity on this topic within the next few months and will let you know by October 3, 2022 whether our experts will be referencing or citing incidents involving other infant loungers. That date obviously is much earlier than the April 14, 2023 deadline for expert testimony, but we want to provide Leachco with the courtesy of advance notice if the experts will be citing such incidents.

Leachco's Contention:

- Communication that are not privileged, including third-party communications **RFPs 8, 9, 10, 11, 12, 15, 17, 18, 38, 45; ROGs 37, 38**
    - The Agency's discovery responses contain broad privilege objections, many of which are clearly without merit, as the requests seek communications with third parties, which are inherently not privileged. *See, e.g.,* RFP No. 8, requesting "[a]ll documents and communications among the staff and/or commissioners and among the CPSC and third parties, regarding or pertaining to the Podster." Please remove these objections to such non-privileged communications, and produce all responsive communications.

CPSC's Response:

CPSC already has produced the non-privileged third-party communications responsive to Leachco's requests. We note that Leachco has produced no communications at all, whether with third parties or internal to the company. As we noted in our July 1 email (to which we have received no substantive response), while you speak with your client about the responsive communications it may have had with third parties, we would encourage you to review Ms. Leach's deposition transcript from the McMullen litigation. In it, Ms. Leach acknowledges the existence of email communications with at least one retailer and various consumers regarding the Podster and whether it may be used for sleep.

Leachco's Contention:

- Regulatory Evaluations, and Data/Material Relied Upon by Experts **RFPs 7, 16, 32, 33, 34, 35, 41, 46, 47, 48, 49**
    - The Agency objects to several requests regarding regulatory evaluations (including inspections, risk assessments, photographs, etc.) conducted on the Podster, and in several instances instead references the April 8, 2022 Product Safety Assessment. These responses are insufficient. The Agency has not produced the underlying test data or a complete set of photographs, which is responsive to these requests, discoverable and not subject to any privilege. Please produce all responsive information regarding the evaluations/inspections sought in these RFPs, including among other things a complete set of photographs and test data, inspection notes, etc.
    - The Agency also objects to producing basic information regarding its experts, including information provided to the experts and the experts' CVs. This information is relevant and responsive, and should be produced.

CPSC's Response:

You assert that predecisional materials generated to help formulate governmental decisions are "discoverable and not subject to any privilege," but you cite no authority for this assertion nor do you even provide an explanation for it. Please let us know if you have any legal basis for this assertion. As you may know, the deliberative process privilege protects such materials and recently has been reaffirmed by the Supreme Court. *See USFWS v. Sierra Club, Inc.*, 141 S. Ct. 777 (2021).

With respect to experts, we would refer Leachco to its own response to CPSC's Interrogatory No. 6: "At this early state of the case, Leachco has not yet identified the witnesses it intends to call at the trial or Hearing of this matter. Leachco will supplement its response to this interrogatory, in accordance with 16 CFR § 1025.31."

We agree that expert discovery is premature at this early stage in the case, but, at the appropriate time, we will provide information about our experts. We will not, however, provide information that exceeds the limited scope of expert discovery articulated in 16 CFR § 1025.31(c)(4)(i)(A).

Leachco's Contention:

- Information regarding witnesses and incidents, which is currently redacted **ROGs 2, 8, 30, 31, 35**

- The Agency has not provided identifying information regarding the witnesses to the incidents it cites in its complaint. Instead, it refers Leachco to the IDIs produced. However, the IDIs are redacted, and do not provide identifying information regarding several individuals who allegedly witnessed these incidents. Please identify these witnesses and produce non-redacted copies of the IDIs referenced.

CPSC's Response:

This is a prime example of a topic that would be more productively addressed in a phone call. Presumably you are not asking about information related to the fatal incident in Alabama. Leachco was sued by the family of the decedent in that incident, settled the case with them, and deposed numerous witnesses in that case, though Leachco inappropriately failed to produce those depositions in this matter. With respect to the fatal incident in Texas, we have requested but not obtained permission to release the identifying information of the decedent's family members. To the extent we intend to call them as witnesses at the hearing, we will identify them at the time called for by the Judge's scheduling order.

Leachco's Contention:

- Information regarding warnings contentions and alternative design **ROGs 4, 5**
  - The Agency has not provided any substantive response to interrogatories seeking information regarding the Agency's contentions with respect to alternative design/warnings. Instead, the Agency lodges several boilerplate relevance/scope objections and privilege objections, claiming that the information is not relevant to the question of whether the product poses a substantial hazard. To the contrary, the question of whether an alternative design exists is squarely relevant to whether the product presents a substantial hazard; indeed, the Code of Federal Regulation, under the subsection "SUBSTANTIAL PRODUCT HAZARD REPORTS" requires companies to consider, in deciding whether to report unreasonable risk of serious injury or death associated with their products, "the availability of alternative designs or products." *See* 16 C.F.R. § 1115.6. Please remove your objections to these interrogatories and provide substantive responsive information.

CPSC's Response:

We stand by our objections to these Interrogatories. The language you cite is irrelevant to the instant lawsuit. Section 1115.6 concerns "Reporting of unreasonable risk of serious injury or death" by *firms*. It concerns the factors a firm should consider in determining whether to report potentially defective products to CPSC, but it does not—nor does it purport to—set forth the factors CPSC should consider in determining whether a substantial product hazard exists. CPSC is not required to assess the availability of designs or products in reaching substantial product hazard determinations.

Leachco's Contention:

- Incomplete Response **ROG 32**
  - As discussed on our call, the substantive response to Interrogatory No. 32 appears to have been inadvertently omitted. It is our understanding that you are looking into this issue and will provide a substantive response.

CPSC's Response:

The following language inadvertently was included in the response to Interrogatory No. 32: "To the extent that this Interrogatory seeks additional information, Complaint Counsel responds as follows:"

That language should not have been included. Let us know if this email confirmation is sufficient or if you would like us to formally amend the response to that interrogatory.

Brett Ruff
Trial Attorney
U.S. Consumer Product Safety Commission
Division of Enforcement and Litigation | Office of Compliance and Field Operations
4330 East West Highway | Bethesda, MD 20814

From:	Ruff, Brett
To:	Strauss, Bettina; Ippolito, Leah; Thomas, Rosalee; Perilla, Frank Robert; ODonnell, Caitlin
Cc:	Emanuel, James; Cheryl Falvey ; Howard, Tim
Subject:	RE: CPSC v Leachco/ Discovery Conference Today
Date:	Monday, August 1, 2022 2:11:17 PM

Bettina:

Our hope has always been to resolve discovery issues collaboratively. The CPSC has initiated and requested several meet and confers with Leachco. We now have spent several weeks trying to resolve our discovery issues in this matter.

We could respond in kind to your email from Thursday, and list the number of requests to which Leachco has objected or how many times Leachco asserted privilege, or note the paucity of documents that Leachco produced, but that hardly seems productive. We also could list every deficiency in Leachco's responses, but CPSC has chosen to whittle down our concerns to a single key issue: we are entitled to documents responsive to RFP Nos. 9, 10, and 11 regarding communications within Leachco and between Leachco and third parties related to the subject matter of this litigation. We have asked you for these documents on June 6, June 23, July 1, and July 15 and during our phone calls on June 22 and July 28. That said, although we are focused on the production of Leachco's communications, we are not conceding our right to additional information requested but not produced, particularly if the withheld documents demonstrate that Leachco has additional responsive documents in its possession.

Your co-counsel indicated on June 22 that she did not believe Leachco had withheld any responsive communications but would confirm as much with Leachco. What became clear on Thursday is that Leachco has not even started to search for communications internal to the company or between any third party (retailers, dealers, distributors, consumers or any other person) and Leachco regarding the Podster. We are baffled at your assertions that this is a fishing expedition, that this request is overly broad, or that phrases like "safety issue" are incomprehensibly vague. We are surprised to hear that, two months after Leachco served their responses, they have not even started a search.

Nevertheless, in an attempt to continue moving this forward, we respond as follows to your objection: The subject matter of this litigation is the potential substantial product hazard posed by the Podster, including any consumer misuse that may contribute to the risk of injury posed by the Podster. "Safety Issue" means any issue where an infant was or could have been injured in the Podster. In RFP No. 11, we gave an example of what a safety issue includes in connection with this product: a suffocation risk. Leachco has received numerous communications from CPSC staff, including but not limited to the December 15, 2021 PD letter, IDIs, and the Complaint, in which the safety issues posed by the Podster were plainly articulated. To allege for the first time at this juncture—and over four months after the initial requests were served—that you are uncertain what staff is seeking as it pertains to this litigation is incomprehensible.

Your email requests a number of documents that implicate the deliberative process privilege. In our July 19 email, we offered Leachco the opportunity to provide us with any legal authority demonstrating that it is entitled to such materials. We have not seen any such authority from Leachco--just Leachco's assertions that it is entitled to such materials. We believe that we have provided all responsive, non-privileged documents about which we are aware, but we are happy to review any legal authority you believe permits additional discovery.

On Thursday, you asked for a privilege log. CPSC has offered to provide one and currently is preparing that document. We propose a simultaneous exchange of privilege logs with Leachco during the week of August 29.

Due to Leahco's failure to comply with our discovery requests—including our request for deposition testimony from the McMullen case, staff was required to secure the testimony from other appropriate sources. Leachco improperly objected to producing those responsive materials, raising invalid objections such as that RFP No. 25 is "compound" and "the majority of the documents . . . would be inadmissible in this proceeding." In fact, 16 CFR § 1025.31(c)(1), states that: "It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." CPSC flagged this deficiency in its June 6 correspondence with Leachco. It is fortunate that CPSC acquired these deposition transcripts because a review underscores their relevance to this litigation and also highlights that Leachco has failed to produce relevant, responsive communications that were referenced in the McMullen litigation. Ms. Leach, Ms. Ballard, and Mr. Statler all testified about the existence of communications

between Leachco and third parties that go directly to the subject matter of the instant litigation. Leachco has not claimed or demonstrated any privilege or protection associated with those communications, but consistently has refused to acknowledge they exist or produce them.

Given the Firm's continued refusal to produce material responsive to staff's discovery demands, and despite our efforts on numerous occasions to meet and confer to resolve these disputes, it appears that we may have to resolve this through judicial intervention. We are prepared to file a motion to compel if necessary.

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