

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
)	
)	
LEACHCO, INC.)	CPSC DOCKET NO. 22-1
)	
)	
Respondent.)	
)	

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL’S
MOTION TO COMPEL PRODUCTION OF ELECTRONIC COMMUNICATIONS
PURSUANT TO COMPLAINT COUNSEL’S SECOND SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS TO RESPONDENT**

Pursuant to 16 C.F.R. §§ 1025.23, 1025.31(c), (i), 1025.33, and 1025.36, Complaint Counsel respectfully submits this Memorandum in Support of its Motion to Compel Production of Electronic Communications Pursuant to Complaint Counsel’s Second Set of Requests for Production to Respondent. As discussed more fully below, Complaint Counsel has requested, and is entitled to obtain, non-privileged discovery relating to electronic communications within Respondent Leachco, Inc. (“Leachco”), and between Leachco and third parties, related to the subject matter of this litigation. The discovery requested is relevant and within the scope of discovery set forth in 16 C.F.R. § 1025.31(c).

On September 7, 2022, during a prehearing conference, this Court directed a discovery “reset” in the expectation that the parties would work cooperatively to complete discovery. Despite the Court’s directive, however, and despite numerous efforts by Compliant Counsel to amicably resolve issues through meet and confers, Leachco *has not produced a single additional*

document since the September 7, 2022 conference.¹ The Motion to Compel should be granted because (1) the requested electronic communications are **directly relevant** to several matters at issue in Complaint Counsel’s affirmative case, including foreseeable use and risk of injury, and are **directly relevant** to denials made by Leachco in its Answer; (2) production of potential witnesses’ electronic communications using search terms is a well-established and permissible method of discovery that is appropriate here; and, (3) to the extent Leachco and its employees may testify at trial about foreseeable use and risk of injury, Complaint Counsel is entitled to review and cross-examine those witnesses regarding their own contemporaneous communications, so that the Court can evaluate witness credibility. In sum, the wholesale withholding of Leachco’s electronic communications is not justified, and Leachco should be compelled to produce them.

I. LEACHCO IMPROPERLY REFUSES TO PRODUCE DOCUMENTS IN RESPONSE TO COMPLAINT COUNSEL’S WRITTEN DISCOVERY REQUESTS REGARDING LEACHCO’S EXTERNAL AND INTERNAL COMMUNICATIONS CONCERNING THE PODSTER

For approximately eight months Complaint Counsel has attempted to obtain basic and fundamental discovery regarding the external and internal communications of a limited group of Leachco employees. Complaint Counsel served two sets of requests for production, engaged in numerous meet-and-confers,² correspondence and previous motion practice, all to no avail. Complaint Counsel must be permitted to obtain relevant discovery which at its core must include a witness’ own electronic communications. Literally, the safety and lives of newborns and infants are at stake, and time is of the essence. *See* 16 C.F.R. § 1025.2 (noting that adjudicative

¹ By contrast, Complaint Counsel has made four productions of documents prior to the September 7, 2022 prehearing conference, and two productions thereafter pursuant to the Court’s direction. Complaint Counsel also submitted a privilege log on September 2, 2022 and an even more detailed amended privilege log on October 3, 2022. On the other hand, Leachco has not produced any documents since this Court ordered a discovery “reset” and has not produced any privilege log.

² Complaint Counsel met and conferred with Leachco counsel about Leachco’s discovery responses on September 19, October 25, and November 9, 2022.

proceedings should be “conducted expeditiously” and “the Presiding Officer and all parties shall make every effort at each stage of any proceedings to avoid unnecessary delay.”).

A. Complaint Counsel’s First Requests for Production

On March 14, 2022, Complaint Counsel served its First Set of Requests for Production of Documents and Things to Respondent. Dkt. No. 7. On May 13, 2022, Leachco served objections and responses to those Requests. In its response to Complaint Counsel’s Requests for Production Nos. 9, 10, and 11, Leachco refused to provide substantive responses and, instead, lodged meritless objections based on vagueness, overbreadth, and relevance. All three requests relate to communications, both internal to Leachco and with third parties, regarding the safety of the Podster. Those requests, as well as Leachco’s objections, are quoted in full below:

REQUEST NO. 9: All nonprivileged Documents relating to each Communication, whether in person, by telephone, or by some other means, whether in a discussion, meeting, or other setting, relating to the subject matter of this litigation, the Complaint, the Answer, the Documents requested here, and/or the Podsters, between, among, by, or with any Persons, including, but not limited to: the Respondent; the Respondent’s employees, former employees, agents, contractors, and/or representatives; retailers, dealers, distributors, or other similar third parties; and customers or users.

RESPONSE TO REQUEST NO. 9: Objection, this request is vague, overbroad, unlimited in time and scope and unanswerable in its current form. The request also seeks information not relevant to the claims or defenses in this case, which is outside the scope of permissible discovery under 16 CFR § 1025.31(c)(1).

REQUEST NO. 10: All Documents and Communications created by any person identified in response to Requests Nos. 1, 2, 6-9, 12, 14-15, 16d, 17, and 19³ of the Interrogatories relating to the subject matter of this litigation, the Complaint, or the Answer.

RESPONSE TO REQUEST NO. 10: Objection, this request is vague, overbroad, unlimited in time and scope and unanswerable in its current form. The request

³ These Interrogatories ask Leachco to identify various individuals with knowledge about and involvement in the subject matter of this case. See Dkt. No. 6 at 8–13.

also seeks information not relevant to the claims or defenses in this case, which is outside the scope of permissible discovery under 16 CFR § 1025.31(c)(1).

REQUEST NO. 11: All Documents and Communications between Respondent and any retailer, dealer, distributor, consumer, or other Person related to any safety issue posed by the Podsters, including, but not limited to, whether the Podsters pose a suffocation risk or other risk to infants.

RESPONSE TO REQUEST NO. 11: Objection, this request is vague as to “any safety issue” and “other Person.” Additionally, the request is overbroad, unlimited in time and scope, and seeks information not relevant to the claims or defenses in this case. This request also calls for information protected by the attorney-client privilege and work product privileges.

Between May and August, 2022, the parties exchanged emails and held meet-and-confer calls in an attempt to resolve the discovery dispute without intervention by the Presiding Officer, as further detailed in Complaint Counsel’s Motion to Compel, filed on August 10, 2022. *See* Dkt. Nos. 14 and 15 (at 4-8). At the September 7, 2022 prehearing conference, the Court directed the parties to engage in a discovery “reset” and thereafter ordered further responses to the pending written discovery requests by October 3, 2022. *See* Exhibit 1, Hearing Transcript of September 7, 2022 Prehearing Conference at 11:5-16 and Dkt. No. 35, Order on Prehearing Schedule, September 16, 2022 at 1. The Court also ruled that the pending discovery disputes were moot and ordered the parties to move forward with discovery based on the Court’s guidance. Dkt. No. 32, Order Providing Guidance for Privilege Logs at 5.

B. Leachco’s Supplemental Objections and Responses Submitted After the September 7, 2022 Prehearing Conference are at Odds with the Court’s Admonition

On October 3, 2022, Leachco served its Supplemental Objections and Responses to CPSC’s Requests for Production of Documents Nos. 9, 10, and 11 (*See* Exhibit 2). Leachco *did not produce a single document* in response to the Court’s September 16, 2022 Order. Instead, Leachco continued to argue that Complaint Counsel’s requests were overbroad, and also outside the scope of relevant discovery:

REQUEST NO. 9: All nonprivileged Documents relating to each Communication, whether in person, by telephone, or by some other means, whether in a discussion, meeting, or other setting, relating to the subject matter of this litigation, the Complaint, the Answer, the Documents requested here, and/or the Podsters, between, among, by, or with any Persons, including, but not limited to: the Respondent; the Respondent's employees, former employees, agents, contractors, and/or representatives; retailers, dealers, distributors, or other similar third parties; and customers or users.

ORIGINAL RESPONSE: Objection, this request is vague, overbroad, unlimited in time and scope and unanswerable in its current form. The request also seeks information not relevant to the claims or defenses in this case, which is outside the scope of permissible discovery under 16 CFR § 1025.31(c)(1).

SUPPLEMENTAL RESPONSE: Based on the Commission's September 20, 2022 Letter (attached hereto as Ex. A), Leachco understands that Request No. 9 is now limited to (1) the time period July 1, 2007 to February 9, 2022 and (2) communications involving Jamie Leach, Clyde Leach, Alex Leach, Mabry Ballard, Tonya Barrett, Leah Barnes, and Dan Marshall. But even with this narrowing, Request No. 9 remains overly broad because it seeks documents and communications related to "the Documents requested here, and/or the Podsters," which is unlimited and therefore outside the scope of permissible discovery under 16 CFR § 1025.31(c)(1). Further, while the Commission filed its administrative complaint on February 9, 2022, the Commission published its press release alleging that the Podster was defective on January 20, 2022. Thus, Leachco submits that January 20, 2022 is the proper cutoff date for relevant materials in this case. Finally, Leachco understands the subject matter of this litigation is the alleged risk of suffocation through a variety of interactions between an infant and the Podster. *See generally* CPSC Complaint.

Subject to and without waiving any objections asserted in its original or supplemental response, Leachco has searched for and produced communications between Leachco and retailers, dealers, distributors, and consumers, from July 2007 to January 20, 2022 regarding the issues raised by the CPSC in this litigation—namely, the risk of suffocation. Leachco has further searched and will produce communications, if any, between Leachco and retailers, dealers, distributors, and consumers, from July 2007 to January 20, 2022, regarding the potential risk or concern about obstruction of an infant's nose or mouth in contact with the Podster, potential for airflow obstruction from contact by the infant with the Podster fabric, potential risk of suffocation from an infant's rolling off the Podster and becoming suffocated as a result, and potential risk of suffocation through bedsharing of the parents with the infant. *See* Compl. ¶¶ 21–34.

REQUEST NO. 10: All Documents and Communications created by any person identified in response to Requests Nos. 1, 2, 6–9, 12, 14–15, 16d, 17, and 19 of the Interrogatories relating to the subject matter of this litigation, the Complaint, or the Answer.

ORIGINAL RESPONSE: Objection, this request is vague, overbroad, unlimited in time and scope and unanswerable in its current form. The request also seeks information not relevant to the claims or defenses in this case, which is outside the scope of permissible discovery under 16 CFR § 1025.31(c)(1). 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.

SUPPLEMENTAL RESPONSE: Based on the Commission’s September 20, 2022 Letter (attached hereto as Ex. A), Leachco understands that Request No. 10 is now limited to (1) the time period July 1, 2007 to February 9, 2022 and (2) communications involving Jamie Leach, Clyde Leach, Alex Leach, Mabry Ballard, Tonya Barrett, Leah Barnes, and Dan Marshall. But even with this narrowing, Request No. 10 still seeks documents outside the scope of permissible discovery under 16 CFR § 1025.31(c)(1). While the Commission filed its administrative complaint on February 9, 2022, the Commission published its press release alleging that the Podster was defective on January 20, 2022. Thus, Leachco submits that January 20, 2022 is the proper cut-off date for relevant materials in this case. Finally, Leachco understands the subject matter of this litigation is the alleged risk of suffocation through a variety of interactions between an infant and the Podster. *See generally* CPSC Complaint. Subject to and without waiving any objections asserted in its original or supplemental response, see responses and documents produced in response to Request No. 9.

REQUEST NO. 11: All Documents and Communications between Respondent and any retailer, dealer, distributor, consumer, or other Person related to any safety issue posed by the Podsters, including, not limited to, whether the Podsters pose a suffocation risk or other risk to infants.

ORIGINAL RESPONSE: Objection, this request is vague as to “any safety issue” and “other Person.” Additionally, the request is overbroad, unlimited in time and scope, and seeks information not relevant to the claims or defenses in this case. This request also calls for information protected by the attorney-client and work product privileges.

SUPPLEMENTAL RESPONSE: Based on the Commission’s September 20, 2022 Letter (attached hereto as Ex. A), Leachco understands that Request No. 11 is now limited to (1) the time period July 1, 2007 to February 9, 2022 and (2) communications involving Jamie Leach, Clyde Leach, Alex Leach, Mabry Ballard, Tonya Barrett, Leah Barnes, and Dan Marshall. But even with this narrowing, Request No. 11 remains overly broad because it seeks “all” documents and communications involving anyone in the world (based on the Commission’s definition of “Person” in its document requests) related to “any safety issue” posed by the Podsters. As such, this request seeks documents outside the scope of permissible discovery under 16 CFR § 1025.31(c)(1). Further, while the Commission filed its administrative complaint on February 9, 2022, the Commission published its press release alleging that the Podster was defective on January 20, 2022. Thus, Leachco submits that January 20,

2022 is the proper cut-off date for relevant materials in this case. Finally, the only alleged safety issue in this case is the (alleged) risk of suffocation through a variety of interactions between an infant and the Podster. *See generally* CPSC Complaint. Subject to and without waiving any objections asserted in its original or supplemental response, see responses and documents produced in response to Request No. 9.

C. Leachco's Refusal to Produce a Single Document in Response to Complaint Counsel's Second Set of Requests for Production Contravenes this Court's Order

After Leachco failed to produce *any* external or internal electronic communications in response to its First Set of Requests for Production, and in response to the Court's September 16, 2022 Order, Complaint Counsel served its Second Set of Requests for Production on October 5, 2022 (*See* Exhibit 3). Because Leachco had previously interposed objections based on overbreadth, Complaint Counsel served a very simple, direct request for electronic communications for a specified timeframe, from a list of seven current and former Leachco employees, that included a specified set of search terms. In response, on November 4, 2022, Leachco again *did not produce a single document*, and instead interposed objections, claiming that Leachco external and internal documents about the Podster were not relevant in this litigation:

Request No. 27: All electronic communications (including, but not limited to, internal and external emails, instant messages, and text messages) to and from the following persons, whether involving third parties and/or other Leachco personnel, between January 1, 2008 and the date the Complaint was filed in this matter (February 9, 2022) containing the following search terms:

a. Persons to search:

1. Jamie Leach;
2. Clyde Leach;
3. Alex Leach;
4. Mabry Ballard;
5. Tonya Barrett;
6. Dan Marshall; and,
7. Leah Barnes.

b. Search Terms:

1. “Podster” and “safety” or “safe”;
2. “Podster” and “suffocation” or “suffocate” or “suffocating”;
3. “Podster” and “incident”;
4. “Podster” and “breathing” or “breathe”;
5. “Podster” and “obstruction” or “obstructing”;
6. “Podster” and “injury” or “injure” or “injuries”;
7. “Podster” and “hazard” or “hazardous”;
8. “Podster” and “death” or “died” or “dying”;
9. “Podster” and “sleep”;
10. “Podster” and “warnings” or “warn” or “warned”;
11. “Podster” and “prone” or “face down”;
12. “Podster” and “roll” or “move”;
13. “Podster” and “unsupervised” or “supervise”;
14. “Podster” and “crib”;
15. “Podster” and “bed”;
16. “Podster” and “nap”;
17. “Podster” and “asphyxia”;
18. “Podster” and “defect”;
19. “Podster” and “recall”; and
20. “Podster” and “CPSC”.

RESPONSE: Objections. While the Commission filed its administrative complaint on February 9, 2022, the Commission published its press release alleging that the Podster was defective on January 20, 2022. Thus, Leachco submits that January 20, 2022 is the proper cutoff date for relevant materials in this case. Further, Leachco understands the subject matter of this litigation to be the objectively reasonably foreseeable misuse of the Podster that could lead to an alleged risk of suffocation through a variety of interactions between an infant and the Podster. *See generally* CPSC Complaint. And the Commission does not allege that Leachco failed to provide adequate warnings. Accordingly, Leachco’s internal communications have no bearing on the issues in this proceeding, and Request No. 27 seeks information that is neither relevant nor reasonably calculated to lead to the discovery of evidence for the claims asserted by the Commission. 16 C.F.R. § 1025.31(c)(1).

See Leachco, Inc.’s Objections and Responses to CPSC’s Second Set of Requests for Production of Documents, November 4, 2022 at 2-3 (Exhibit 4). The parties met and conferred on November 9, 2022 in an attempt to resolve the issues in this motion without intervention of the court, but were unable to reach an agreement.

II. THE LAW SUPPORTS AN ORDER COMPELLING THE REQUESTED DISCOVERY

A. The Scope of Relevant Discovery is Broad

In this proceeding, “[p]arties may obtain discovery regarding any matter, not privileged . . . relevant to the subject matter involved. . . .” 16 C.F.R. § 1025.31(c)(1). As we will demonstrate, Complaint Counsel’s requests are well within the appropriate scope of discovery and the Firm’s refusal to voluntarily produce them warrant compulsory action by the court.

Although the Federal Rules of Civil Procedure do not govern here, many administrative proceedings have looked to them for guidance on construing applications for which there is not an exact administrative mechanism. *See, e.g., In re Healthway Shopping Network*, Exch. Act Rel. No. 89374, 2020 WL 4207666, at *2 (Jul. 22, 2020) (SEC administrative proceeding guided by Federal Rules for interpretation of its Rules of Practice).

The practice under the Federal Rules, and as emphasized by the U.S. Supreme Court, is that discovery is “accorded a broad and liberal treatment.” *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). “In general, discovery is permissible with respect to ‘any nonprivileged matter that is relevant to any party’s claim.’” *Kelley v. Microsoft Corp.*, No. C07-0475MJP, 2008 WL 5000278, at *1 (W.D. Wash. Nov. 21, 2008) (quoting Fed. R. Civ. P. 26(b)(1)). “Although not unlimited, relevance, for purposes of discovery, is an extremely broad concept.” *Copantitla v. Fiskardo Estiatorio, Inc.*, No. 09 CIV. 1608 RJH JCF, 2010 WL 1327921, at *9 (S.D.N.Y. Apr. 5, 2010) (quotation marks and citation omitted).

Further, the Supreme Court of the United States expressly has interpreted language from the Federal Rules similar to that contained in Section 1025.31(c)(1) to “encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Saunders*, 437 U.S. 340, 350 (1978) (examining

the phrase “relevant to the subject matter involved in the pending action” in former F.R.C.P. 26(b)(1)). In *Oppenheimer*, Supreme Court made it clear that “discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues.” *Id.*

B. The Requested Communications Fall Squarely Within the Broad Scope of Discovery

The documents Complaint Counsel seeks through this motion are non-privileged external and internal communications that fall squarely within the scope of permissible discovery in this matter and will assist Complaint Counsel in preparing for the hearing in this matter, as well as the depositions of witnesses. These communications potentially relate to Complaint Counsel’s affirmative case regarding foreseeable use and the risk of injury posed by the Podsters. Even a cursory review of certain of Complaint Counsel’s allegations, and Leachco’s denials in its Answer, demonstrate why Leachco’s electronic communications are relevant. For example, the Complaint alleges in paragraphs 38 through 41 (*see* Dkt. No. 1) as follows:

The Substantial Risk of Injury Posed by the Podsters

38. It is foreseeable that caregivers will use the Podster for infant sleep, despite the instructions and warnings. It is also foreseeable that caregivers will use the Podster without supervision.

39. It is foreseeable that some caregivers will not place infants on their backs in the Podster.

40. It is foreseeable that caregivers will place infants in Podsters and use the Podster for bedsharing in an adult bed.

In its Answer, Leachco denied these allegations in its Answer (*see* Dkt. No. 2):

37. Leachco denies the allegations contained in Paragraph 38 of the Complaint.

38. Leachco denies the allegations contained in Paragraph 39 of the Complaint.

39. Leachco denies the allegations contained in Paragraph 40 of the Complaint.

Thus, foreseeability of use of the Podster and risk of injury are clearly “any issue that is or may be in the case” *Oppenheimer*, 437 U.S. at 350. Complaint Counsel must be able to review electronic communications to and from Leachco employees so we adequately may question them during depositions and at trial. Withholding these documents is clearly improper given the dispute between the parties with respect to the Complaint’s allegations and the Answer’s denials.

In addition to the external and internal communications being necessary to resolve Leachco’s denials in the pleadings, Complaint Counsel must be permitted to review key witness communications to rebut various statements made by those witnesses which may be restated on the stand at trial. For example, Leachco’s own website states in part that “[t]he Podster provides upper body elevation which can help aid in digestion and breathing.” (*See* Exhibit 5 at 3, available at <https://leachco.com/collections/baby/products/podster>). If Leachco’s principals Clyde Leach or Jamie Leach (or other witnesses) provide testimony regarding that statement on their website, or make similar independent statements, Complaint Counsel is entitled to review their external or internal communications that may tend to support or refute those statements.

Another example demonstrating the need for external and internal communications relates to consumer complaints and inquiries. Communications from consumers can help support whether a product creates an unreasonable risk of serious injury or death under CPSA regulations. *See* 16 C.F.R. § 1115.6(a) (stating that for CPSA reporting “[s]uch information can include . . . consumer or customer complaints.”). Complaint Counsel has obtained a very limited set of external electronic communications between consumers and Leachco, but it is entitled to obtain a comprehensive and complete production. Among other things, this limited set of external emails shows retailer and consumer concerns regarding the safety of the Podster and questions about whether it can be used for sleep. Leachco cannot unilaterally declare that

discovery is limited to “objectively reasonably foreseeable misuse” when that phrase does not appear in Complaint Counsel’s complaint and neither the Rules of Practice for Adjudicative Proceedings, 16 C.F.R. §§ 1025.1-72, nor the regulations governing substantial product hazards, 16 C.F.R. §§ 1115.1-29 are so limited.

C. Although Electronic Discovery of Specified Custodians Using Search Terms is a Well-Recognized Method of Obtaining Relevant Discovery, the Firm Refuses to Produce Responsive Documents

Complaint Counsel’s request for the external and internal electronic communications of a limited set of designated custodians and for a specified timeframe using specific keywords is a well-recognized method of obtaining relevant discovery and is appropriate here. *See, e.g., No Spill, LLC v. Scepter Canada, Inc.*, Case No. 18-CV-2681-HLT-KGG, 2021 WL 4860556, *9 (D. Kan. Oct. 19, 2021) (permitting use of search terms for a designated list of custodians of electronically stored information and finding the search terms may produce relevant information); *DeGeer v. Gillis*, 755 F.Supp.2d 909, 930 (N.D.Ill. 2010) (directing parties to produce emails of key data custodians, for specific date ranges using appropriate search terms); *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 109-10 (E.D.Pa. 2010) (compelling parties to produce electronic communications using search terms, custodians and date ranges); *Capitol Records, Inc. v. MP3tunes, LLC*, 261 F.R.D. 44, 54 (S.D.N.Y 2009) (directing parties to produce emails from designated custodians using search terms).

Complaint Counsel’s Second Set of Requests for Production make it clear and easy for Leachco to identify which custodians to search, the timeframe of the search, and the search terms to use. Leachco, in turn, has not argued that it does not possess the electronic communications, or that the production of the communications would be burdensome. In fact, Leachco has confirmed that it searched for and identified documents responsive to the search terms. Leachco has simply

refused to produce any electronic communications, claiming Complaint Counsel’s allegations are limited to “the objectively reasonably foreseeable misuse of the Podster” when in fact nothing in the Complaint alleges such or even uses the words “objectively reasonably foreseeable misuse.” Leachco does not get to mischaracterize the Complaint Counsel’s case, and then refuse to produce any communications because they do not fit within what Leachco thinks this matter is about. Indeed, Leachco’s objections are without legal underpinning. Not only does Leachco mischaracterize the allegations of the Complaint, it misapprehends the appropriate scope of discovery in this proceeding. Discovery is not constrained to allegations within the four corners of the complaint, whether mischaracterized or otherwise: “discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues.” *Oppenheimer*, 437 U.S. at 350. The authorities cited above stand for the proposition that discovery, including electronic communications, are permissible using a custodian and search term methodology, and this well-established method of discovery must be directed here.

D. Complaint Counsel is Entitled to the Contemporaneous Electronic Communications of Potential Witnesses to Test Credibility

Further bolstering the broad scope of discovery in this matter is a party’s entitlement to discovery on matters that bear on a potential witness’s credibility. *See, e.g., Adelman v. Boy Scouts of America*, 276 F.R.D. 681, 688-89 (citing the Official Committee Notes to the 2000 Amendment to Fed.R.Civ.P. 26 which explained that “‘a variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action’ and citing an example as ‘information that could be used to impeach a likely witness.’”). The court in *Adelman* rejected relevance objections to producing documents, noting that “[t]he scope of discovery is not circumscribed by the specific allegations or claims in the complaint. It is far broader, and covers documents and information concerning claims, defenses,

and a smorgasbord of factual issues including the identity of witnesses, bias, **credibility**, **potential impeachment**” *Id.* at 697 (emphasis added); *see also Behler v. Hanlon*, 199 F.R.D. 553, 560-61 (D.Md. 2001) (“[f]acts bearing on the credibility of witnesses are relevant to the claims and defenses raised by the pleadings” and “a party legitimately may seek discovery” of information concerning interest, motive, bias and prejudice); *United States v. Cathcart*, No. 07–4762, 2009 WL 1764642, at *2 (N.D.Cal. June 18, 2009) (noting that the “scope of discovery under the Federal Rules is extremely broad,” explaining that the relevancy question for discovery should be construed “liberally and with common sense” and holding that plaintiff may discover information about the identity and other information concerning the source of payment of defendant's legal fees because it is relevant to the defendant's “credibility and bias”—even though it “might not bear directly on any disputed fact”).

The parties have not yet determined whom they will call as witnesses for trial. Pursuant to the Court’s September 16, 2022 Order, witness lists are due July 14, 2023. In order to adequately prepare for the potential trial testimony of Leachco employees, Complaint Counsel should be entitled to review their communications, and potentially question them at depositions so that at trial any potential impeachment material or information that would test their credibility is available. Leachco’s unreasonable refusal to produce any of its electronic communications runs counter to this basic tenet of trial preparation and must not be permitted to stand.

To illustrate this, we ask the Court to consider just one example of information that is relevant to whether a product potentially creates an unreasonable risk of serious injury or death under CPSA regulations: consumer product testing. *See* 16 C.F.R. § 1115.4(a). Leachco produced to CPSC staff certain limited test reports as part of its Full Report Response. *See* Exhibit 6 (Exhibit 3 to Leachco’s November 10, 2020 Full Report). Complaint Counsel and/or

Leachco may call witnesses to testify at trial about the tests that they had performed on the Podster, conducted in January 2020. *Id.* In order for Complaint Counsel to adequately cross-examine a Leachco witness about its Podster testing, and determine whether or not the testimony is credible, Complaint Counsel must be permitted to see what Leachco was communicating externally and internally about the tests, and to ensure that any potential impeachment material is available that would tend to refute or undermine any direct testimony from a Leachco witness.

Another example of why Complaint Counsel needs access to Leachco's electronic communications can be seen by a review of Leachco's website claims. As noted above, among other things, Leachco claims on its website that the Podster "provides a safe, secure spot to place an infant" *See* Exhibit 7 at 3, available at <http://leachco.com-pages-important-info>). If Complaint Counsel or Leachco calls a witness, including possibly Clyde Leach, Leachco's President and CEO, or Jamie Leach, Leachco's Vice President (and designer of the Podster), or both, to testify about the website statements that the Podster is a "safe, secure" product, Complaint Counsel is surely entitled to test that witnesses' credibility and to have possible impeachment of that testimony by reviewing communications regarding this topic

III. CONCLUSION

Thus, for the reasons noted above, Complaint is entitled to a full and complete production responsive to its discovery requests seeking external and internal Leachco communications. Complaint Counsel respectfully requests that the Presiding Officer issue an Order compelling Leachco to, within ten (10) days, make a full and complete production of all nonprivileged documents and information responsive to Complaint Counsel's Second Set of Requests for Production, Request No. 27, including all electronic communications between January 1, 2008 and February 9, 2022 to and from the following current and former Leachco personnel (1) Jamie

Leach; (2) Clyde Leach; (3) Alex Leach; (4) Mabry Ballard; (5) Tonya Barrett; (6) Dan Marshall; and, (7) Leah Barnes, that contain the following search terms:

1. “Podster” and “safety” or “safe”;
2. “Podster” and “suffocation” or “suffocate” or “suffocating”;
3. “Podster” and “incident”;
4. “Podster” and “breathing” or “breathe”;
5. “Podster” and “obstruction” or “obstructing”;
6. “Podster” and “injury” or “injure” or “injuries”;
7. “Podster” and “hazard” or “hazardous”;
8. “Podster” and “death” or “died” or “dying”;
9. “Podster” and “sleep”;
10. “Podster” and “warnings” or “warn” or “warned”;
11. “Podster” and “prone” or “face down”;
12. “Podster” and “roll” or “move”;
13. “Podster” and “unsupervised” or “supervise”;
14. “Podster” and “crib”;
15. “Podster” and “bed”;
16. “Podster” and “nap”;
17. “Podster” and “asphyxia”;
18. “Podster” and “defect”;
19. “Podster” and “recall”; and
20. “Podster” and “CPSC”.

Dated this 17th day of November, 2022

Respectfully submitted,

A handwritten signature in blue ink, reading "Michael J. Rogal". The signature is written in a cursive style with a horizontal line underneath it.

Gregory M. Reyes, Supervisory Attorney
Brett Ruff, Trial Attorney
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EXHIBIT 1

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

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On behalf of the Respondent:

Bettina Strauss, Esq.

James Emanuel, Esq.

Bryan Cave Leighton Paisner

211 N. Broadway, Suite 3600

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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

C O N T E N T S

Appearances of Counsel

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1 P R O C E E D I N G S

2 JUDGE YOUNG: That said, we will come to order
3 and go on the record in the matter of Leachco, Inc.,
4 CPSC Docket No. 22-1. I believe we have all of the
5 parties well-represented by numerous counsel here. We
6 have Ms. DiPadova representing the Commission. And her
7 assistance has been very helpful to me in these
8 proceedings. Is anybody aware of anybody who was
9 supposed to be on this call who is not present at this
10 moment?

11 MS. STRAUSS: Not for the Defendant, Your
12 Honor.

13 MR. RUFF: No, Your Honor, not for complaint
14 counsel.

15 JUDGE YOUNG: Very well. We will proceed. I
16 called this conference because it appears the parties
17 are having some difficulty with discovery in this case.
18 And perhaps you seem to have a misunderstanding of the
19 purpose of discovery. So I thought I would take a
20 moment to explain to you what the purpose of discovery
21 is. It is not a tool to help your client win the case.
22 It is not a thicket or a game you play to help you

1 conceal inconvenient facts. The purpose of discovery
2 is this. It is to ensure that the parties efficiently
3 collect and transmit to and from one another all of the
4 relevant and non-privileged evidence in this case so
5 that you, the counsel, may distill from me, the Judge,
6 the evidence that you believe is necessary and that I
7 will find necessary to render a just decision in this
8 case. That's it.

9 Anything extraneous to, distracting from,
10 detracting from, demeaning to that process, I'm not
11 going to view favorably from this point forward. We
12 did agree to some limits on discovery. We discussed
13 further limits. These are safeguards that could be
14 imposed or have been imposed, but they are not the only
15 limits. I'm a golden rule guy. You don't want or
16 would not want to see certain conduct from your
17 opponent, your adversary in this case. Do not
18 demonstrate or exhibit that kind of behavior yourself.

19 In this case in particular, I think you ought
20 to bear in mind your role and your responsibility and
21 your capabilities because I do. We have something in
22 the Mine Act. We're talking about knowledge and

1 notice, the reasonable mine operator standard, which
2 holds an operator to know things that a reasonable mine
3 operator would know if -- if he or she is familiar with
4 the mine, the mining industry and the protective
5 purpose of the standard at issue.

6 You're even greater than that. I'm going to
7 hold you to a higher standard because you are, in fact,
8 the subject matter experts in this case. And you are
9 professional counsel who have a duty to one another and
10 to the tribunal to conduct yourselves professionally in
11 these discovery pretrial proceedings.

12 We have a trial date that has been set for
13 June of 2023. When we set that trial date in April, it
14 seemed a long way away. But time passes, and it's
15 precious. It's a nonrenewable resource. And once you
16 are in an undertaking like this, you have to bear that
17 in mind and make sure that you don't waste the time and
18 the energy and the effort and your clients' resources
19 on things that do not serve the purpose that I just
20 stated for you in the discovery process.

21 So, for example, I'm going to pick on you all
22 a little bit. Mr. Ruff, is it true that, as Mr.

1 Dunford has alleged in an email, that in response to an
2 interrogatory, you didn't produce any of the facts or
3 refused to produce any facts supporting the decision to
4 bring and initiate this matter against the Respondent?

5 MR. RUFF: No, Your Honor. At this point, we
6 produced 4800 pages of documents related to the -- the
7 evidence that has been cultivated here. The -- the --
8 the quotation that -- that Mr. Dunford used in his
9 email was a quotation from our opposition to the motion
10 to compel discovery in which we were telling the Court
11 how we intended to produce at the hearing in June, how
12 we intend to present this evidence.

13 But at this stage, Your Honor, we've produced
14 internal product safety assessments by a mechanical
15 engineer, a physiologist and a human factors engineer.
16 We produced those back in April. We've also produced
17 the in-depth investigation reports about the two fatal
18 incidents in this case. And we've made a variety of
19 other productions. And so we have produced the
20 evidence at issue in this case. The -- the particular
21 quotation that was taken from our brief was talking
22 about how that would be presented at the ultimate

1 hearing here.

2 JUDGE YOUNG: All right. That's some --
3 somewhat reassuring. Ms. Strauss?

4 MS. STRAUSS: May I address what Mr. Ruff just
5 said?

6 JUDGE YOUNG: Sure.

7 MS. STRAUSS: Because we -- we absolutely take
8 issue with that statement. And I think a -- an
9 evaluation of their responses shows that that is not
10 completely true. And I'm sorry to have to say it that
11 way. First of all, I don't know what 4800 documents
12 he's talking about. We received, initially, 295
13 documents, 40 of which have anything to do with the
14 issues in this case that we didn't already have.
15 Pardon me.

16 JUDGE YOUNG: I hate to be rude and interrupt,
17 but I think we're wandering off into something that
18 might not be relevant in light of what I said at the
19 beginning of this conference.

20 MS. STRAUSS: I apologize if that's the case,
21 Your Honor. We --

22 JUDGE YOUNG: It's understandable. And, you

1 know, I --

2 MS. STRAUSS: No, if --

3 JUDGE YOUNG: I understand your need to
4 respond and picking, in turn, on you all, I would note
5 that submitting responses to interrogatories that
6 pretend you don't know what the case is about and which
7 contain boilerplate language that has been specifically
8 prohibited by the Federal Rules of Civil Procedure,
9 which I understand don't apply here, that's not viewed
10 favorably either.

11 As I said, subject matter experts, that's the
12 standard. So as you go forward in conducting
13 discovery, my expectation is this, that when you get a
14 response, you think about it. You look at it as the
15 subject matter experts with full knowledge about what
16 this case is about and what the relevant evidence in
17 this case is and think about it from your opponent's
18 standpoint, the evidence that you believe your opponent
19 is going to want, and ask yourself two questions.

20 Is it relevant to the issues in this case, and
21 is it privileged? Three questions. And is it
22 responsive to the -- to the interrogatory? You know,

1 the interrogatories and requests for admission are
2 fantastic tools if you use them well. But you got to
3 -- you got to think before you send these things out.
4 We had a discussion about limits on interrogatories.

5 And I'm not going to extend limits and may
6 impose limits that are more severe if the
7 interrogatories are not thoughtfully undertaken by the
8 parties in this case. And I promise you, you don't
9 want me involved in micromanaging the discovery
10 process. What you do want to do is leave this
11 conference, go back and rethink the approach you have
12 undertaken so far and basically use the opportunity for
13 a reset to be responsive to the reasonable requests of
14 your opponents and narrow your objections down to the
15 things that are truly objectionable and that might
16 provide a necessity for me to get involved.

17 I don't mind getting involved if there is a
18 good-faith dispute about something. And that may
19 happen and is probably going to happen. But you have
20 to narrow that field, and you can't chew up the
21 available time that we have pretrial because, I mean,
22 if you're going to take Moscow, you need to understand

1 the logistical difficulties of that and appreciate the
2 fact that winter is coming. And I mean that literally
3 here because, before long, it's going to be
4 Thanksgiving. And then it's going to be the winter
5 holiday season.

6 And you don't know what difficulties you may
7 encounter. These are just the things we know about on
8 the way to keeping this thing on track for a trial in
9 June. And I intend to keep it on track for trial in
10 June. So having explained it that way, I'll begin with
11 Mr. Ruff and ask the parties do counsel have any
12 questions or issues that they need to bring to my
13 attention at this point so that we can go forward with
14 a clear understanding of what discovery is for and what
15 you are to do going forward from here.

16 MR. RUFF: No, Your Honor. We understand. We
17 will -- we will convene internally, and then we will
18 reach out to opposing counsel and I -- I think try to
19 work through the issues that have been breached before
20 Your Honor, hopefully able to -- to work for it without
21 involving you unless there is an acute issue that --
22 that needs your attention.

1 JUDGE YOUNG: Ms. Strauss and/or Mr. Dunford,
2 both of you, either of you?

3 MS. STRAUSS: Judge, I am aware that the right
4 answer here is the one that Mr. Ruff just provided. I
5 will tell you, however, that extensive effort has been
6 made to get from complaint counsel the basis for this
7 action. And it is -- they -- they have maintained
8 privilege and relevance objections that have kept from
9 us the very basis for this lawsuit. We just received,
10 on Friday, a privilege log with more than 500 entries
11 which actually refer to more than 700 documents. And
12 we don't have enough information even in the privilege
13 log to address whether privilege applies. And that
14 dwarfs the 40 docked pages that we received that
15 actually evaluated our product.

16 Last night, we received, apparently, 1500
17 pages after I left the office. And I haven't had any
18 opportunity to review those. But I am mindful and
19 quite fearful, Your Honor, about your comments about
20 keeping this case on track because when we wait more
21 than three months for a privilege log that contains 10
22 times the number of materials we received and doesn't

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

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

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

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

1 Leachco's part, but we have made productions that --
2 that show why we believe that the Podster is a
3 substantial product hazard.

4 MS. STRAUSS: I think Your Honor can see the
5 statements in counsel's opposition that undermine that
6 statement. I don't believe it's true. We haven't
7 received the data. What we've received is a summary
8 that addresses other products, not ours, comparisons to
9 other products, not ours, and no data that support that
10 because they maintain, apparently, a privilege and a
11 relevance objection.

12 And instead, what they've said is they are not
13 going to rely on that material. They are going to have
14 experts who are going to prove the product defect. So
15 it's a bait-and-switch and a hide-the-ball, and we are
16 in a very compromised position. But we appreciate Your
17 Honor's comment about the motion to dismiss. And if
18 that's what's necessary, we can certainly pursue that
19 because I think Your Honor will see that they haven't
20 produced a basis. And they have almost said that they
21 are not going to produce a basis.

22 JUDGE YOUNG: It's too early to tell. Again,

1 I told you what I believe about discovery, what I
2 expect and anticipate will happen in conformance to
3 that expectation. If it does not, I'll deal with it.
4 We can -- we can continue having these conferences, and
5 we will as much as necessary. But while I recognize I
6 don't have any formal, clear and express means of
7 sanctioning parties and counsel in this case, the
8 evidence is going to come in, in my discretion.

9 And how you present that and when is going to
10 be important. You need to be clear and careful and
11 circumspect in how you respond to these discovery
12 requests and how you submit them to one another to make
13 sure that you're not being abusive, evasive, that
14 you're not relying on an opportunity to try and spring
15 this case into some shape-shifting form at some later
16 stage if that may be what's -- what's happening here.

17 Mr. Ruff, this is a serious matter. I mean --
18 and I know you appreciate that, and I know the CPSC
19 fully appreciates the gravity of bringing an action
20 against a private company in a way that may be fatal to
21 their -- their economic interests and their -- and
22 their lifeblood. You need to have the basis to have

1 initiated that action, or it's arbitrary and
2 capricious. So if they ask for the facts that led you
3 to bring this action against them, be clear about it.
4 And Ms. Strauss, likewise. If they ask for data and
5 information about the product, if they want to know
6 what you knew in product development, what you've
7 learned since then, the experiences, they ask you these
8 things, three questions. Is it responsive? Is it
9 relevant? And is it privileged? And that's it.

10 And --

11 MS. STRAUSS: We understand that.

12 JUDGE YOUNG: And I expect the parties to
13 conduct themselves accordingly. I don't want to harp
14 on this any further. So -- and I don't want to
15 continue to argue particular points. My hope is you
16 all will go back and look at what you're doing and
17 decide is it or is it not in conformance to what I
18 expect you to be doing at this stage of the proceeding
19 and to move forward and try to get this thing back on
20 the rails so that we can have the trial in June because
21 I'm not inclined to continue a trial date except for
22 agencies that aren't within the control of the parties

1 to this matter. And wasting time is something that is
2 within your control wholly. So don't do it.

3 MR. DUNFORD: Your Honor, Oliver Dunford. May
4 I --

5 JUDGE YOUNG: Yes, sir.

6 MR. DUNFORD: Thank you. As -- obviously, as
7 you've seen, Ms. Strauss has been taking the lead so
8 far because we at PLF are still catching up. I think
9 we intend, and we can meet the June trial deadline.
10 But we do need some time to catch up. Ms. Strauss will
11 be taking a backseat here.

12 We are -- because of the economics of the
13 situation, we are taking the lead. We do need some
14 time to catch up on the discovery that has been
15 produced as well as the -- just getting up to speed on
16 -- on the issues. And I understand that there was an
17 agreement on discovery dates, although I -- I don't see
18 anything on the public docket.

19 And so I'm asking whether we can push some of
20 those dates back to allow us some time, again, without
21 -- without pushing back the -- the June trial deadline.

22 JUDGE YOUNG: That's an excellent transition.

1 I was hoping that we could maybe agree to a discovery
2 timetable that works for everybody in light of the
3 goals and expectations that we've talked about
4 previously in this conference. I know that there were
5 some depositions noticed. And it's difficult to take
6 depositions without having the documentary evidence in
7 advance. I -- I really like to see us set up a
8 timetable here where we agree on when you're going to
9 produce the documentary evidence that's been requested
10 and when you're going to have a cut-off if you're going
11 to, for example, submit requests for admissions and
12 then proceed with the deposition schedule and have kind
13 of a horizon for completing the depositions. Does that
14 sound reasonable to everybody or are we not in a
15 position to make those kinds of decisions today?

16 MS. STRAUSS: Your Honor, I would like to be
17 in a position to do that. That's obviously an
18 important and basic function in litigation of the
19 parties. And we thought we were able to do that when
20 we first met with Your Honor. But as I mentioned --
21 and I'm sorry to keep harping on this -- we served
22 discovery in the spring. We received responses May

1 31st. And we didn't get the privilege log until Friday
2 of Labor Day weekend. The privilege log has more than
3 500 entries. And it refers to attachments in another
4 nearly 200 instances that dwarfs any production.

5 And until the CPSC counsel decides to take
6 Your Honor at his word and limit their privilege
7 claims, we simply don't have any ability to get those
8 documents, and we've lost three months in this process.
9 So --

10 JUDGE YOUNG: All right. So we're looking at
11 -- I mean, I'm looking at the discovery timetable that
12 was established. And we'll look into the fact that
13 it's -- it's not posted to the docket. But this is
14 a -- an order that was entered into -- see if I got a
15 date on here -- it was agreed upon April 21st by Ms.
16 Falvey and Mr. Ruff. It's titled "Joint Initial
17 Proposed Prehearing Schedules and Statement of
18 Prehearing Conferences."

19 And it had an initial response date of May
20 13th, well in the past for first set of requests for
21 production of documents, first set of interrogatories.
22 We now know that that is not attainable and has not

1 been attained. The last day to serve any written
2 discovery request was October 14th. I would tend to
3 agree with Mr. Dunford that that doesn't seem
4 especially realistic in light of the position we find
5 ourselves in. And discovery was to have closed on
6 November 16th, which again is not realistic in light of
7 the events that have transpired.

8 So I -- I'd like to see what -- what are the
9 realistic dates for these timetable events which you
10 did agree to previously. May 13th for the responses, a
11 first set of requests for production, first set of
12 interrogatories, October 14th. The last day for
13 written discovery and discovery closing on December
14 16th -- and pardon me -- November 16th with the motions
15 for summary judgment due on or before December 16th.

16 MS. STRAUSS: Your Honor, if I might respond
17 to that, I would suggest that we have a three-month
18 continuance of each of the dates because of the time
19 that's been lost. And if we work together quickly and
20 counsel take you at your word, we can get back up to
21 speed. That would allow Mr. Dunford and his team to
22 get fully up to speed.

1 The only hiccup I see in that is if a motion
2 to dismiss is necessary, as Your Honor has suggested,
3 in which case, I think the times would be altered
4 depending on how long it takes Your Honor to address
5 that. But we'll hope that three months would be
6 sufficient. That would be our proposal.

7 JUDGE YOUNG: Mr. Ruff?

8 MR. RUFF: Your Honor, just to back up one
9 moment to ensure that we're working off of the -- the
10 right framework for deadlines, so in that -- the joint
11 statement that Your Honor just read from, there is a
12 proposal by complaint counsel on the second page. And
13 then on the third page, there is the proposal by the
14 Respondent that --

15 JUDGE YOUNG: Oh, I apologize.

16 MR. RUFF: -- puts --

17 JUDGE YOUNG: You're -- you're right.

18 MR. RUFF: And I believe that's --

19 MS. STRAUSS: That's correct.

20 MR. RUFF: That's the one that -- that Your
21 Honor adopted. And -- and we do see -- we do recognize
22 that -- that opposing counsel has -- well, that Leachco

1 has new lead counsel and that a modest continuance of
2 discovery may be appropriate. But at the same time, we
3 are guided by the principles and the rules at 1025.1
4 and 1025.2 to keep moving this along expeditiously.

5 So looking at these -- these deadlines, we do
6 have discovery closing in January, the end of January
7 2023. We don't think we need to push that back three
8 months. But we do understand that -- that a modest
9 continuance of that and the corresponding deadlines may
10 be appropriate to give Mr. Dunford an opportunity to --
11 to adequately prepare.

12 MS. STRAUSS: Your Honor, I was going to
13 address that, and I appreciate Mr. Ruff doing that
14 because we did have a -- we submitted different
15 schedules. That said, it's disingenuous for complaint
16 counsel to say he wants to efficiently move things
17 along when they tell us they are going to give us a
18 privilege log on May 31st.

19 JUDGE YOUNG: Please. I do not want arguments
20 about particular issues at this point.

21 MS. STRAUSS: Yes, sir.

22 JUDGE YOUNG: I understand that you have a

1 concern about that. I'm going to accommodate a
2 reasonable delay. Three months seems kind of long to
3 me, and I worry about pushing -- pushing things too far
4 down the road and making it difficult to achieve that
5 June trial date. Would two months be sufficient, Mr.
6 Dunford?

7 MR. DUNFORD: Just to clarify, two months from
8 which dates?

9 JUDGE YOUNG: Well, I mean, even two months,
10 if we're looking at the -- the dates -- and again, this
11 is my mistake because -- because the dates that were
12 agreed upon were the later set of dates proposed by the
13 Respondent. So if we're looking at two months, it
14 would be -- last date of served written discovery would
15 be February 2nd, roughly. Discovery would close March
16 20th. Motions for summary decision would be due May
17 3rd. And the responses thereto, looks like -- what is
18 that? -- about six weeks afterwards. So you can -- we
19 can still get the prehearing done if we moved it two
20 months forward. But I would note, I mean, I know you
21 need time to catch up. But it's not as though Leachco
22 has been unrepresented or has been pro se and nothing

1 has been done. It seems like three months is a long
2 time.

3 MS. STRAUSS: Your Honor?

4 JUDGE YOUNG: Yes, ma'am?

5 MS. STRAUSS: Tired of hearing about the
6 privilege log. But again, we don't have the documents.
7 We only learned about them, their existence, this last
8 Friday, which was more than three months from the time
9 that complaint counsel asserted the privileges. They
10 are still not identified sufficiently. So I -- I find
11 myself a little bit confused about how complaint
12 counsel can say anything about moving things forward in
13 less than three months when this delay has been
14 entirely on their hands. We don't --

15 JUDGE YOUNG: More time doesn't seem to be the
16 solution to that problem, Ms. Strauss. I mean, what we
17 need is responsiveness to the purpose of discovery as
18 I've outlined it. And the -- the need of the parties
19 to gather and transmit this evidence and this
20 information to one another. The -- at some point,
21 whether it's one month, two months or three months,
22 that doesn't solve your problem with the privilege log.

1 I know you need some more time to deal with this and
2 perhaps to bring another motion to this Court if that
3 remains unremedied.

4 And I'm willing to give some additional time
5 for things like that. It just seems like three months
6 is not going to work. Two months still seems kind of
7 long. I'm trying to figure out what is the time that
8 will be just and fair to the Respondent. And I want to
9 make sure that we accommodate that, while at the same
10 time, keeping this on track because, I mean, looking at
11 -- from the standpoint of both of you, we have a public
12 safety concern raised by the federal government, which
13 is a serious matter and needs to be addressed as soon
14 as practicable to protect the public health and safety
15 if that's the issue and, at the same time, your client,
16 Ms. Strauss, Mr. Dunford, that they're -- they're being
17 strangled here from -- from significant commercial
18 opportunities because you're in limbo. And the longer
19 this drags on, that doesn't seem to be in your client's
20 interest either.

21 MS. STRAUSS: That's true, Your Honor. And if
22 I didn't have to give these documents to experts after

1 evaluating them, I would be able to immediately look at
2 them and sort them out. But I don't have them in my
3 possession, and I have third parties that need to
4 evaluate them. And that just simply takes time. So I
5 would still ask for three months. And of course I --
6 whatever Your Honor decides, we -- we have to accept.
7 But I just don't think complaint counsel can hide those
8 documents for all this time. And maybe they'll turn
9 them over right away. But we still have to evaluate
10 them and hand them off to others.

11 JUDGE YOUNG: I understand that. I -- I'm not
12 going to give more than two months. I'll hear from Mr.
13 Ruff about whether two months -- Mr. Dunford, what was
14 that?

15 MR. DUNFORD: I'd just like -- perhaps one way
16 to approach this is that if we go with the two-month
17 extension but, in the meantime, set some sort of
18 deadline for production and resolution of the privilege
19 log issue sooner rather than later -- and that way,
20 hopefully, that would obviate the need for further
21 extension later.

22 JUDGE YOUNG: Mr. Ruff, you can address both

1 of those issues, the privilege log claim and the -- the
2 extension of the deadline by two months.

3 MR. RUFF: Yes, Your Honor. So as -- as we
4 noted before, we do think a modest extension is
5 appropriate. One month is probably preferable. But --
6 but we -- we could do two months if -- if necessary
7 here. This privilege log issue, Your Honor, we haven't
8 received a privilege log from Leachco yet. They
9 asserted privilege with respect to eight of our -- our
10 RFPs. And we've been asking for mutual exchange of
11 privilege logs. But we learned after filing our motion
12 to compel that they apparently no longer are asserting
13 privilege as to any documents. So they won't be
14 producing a privilege log.

15 So I -- I do expect there is going to be some
16 time needed to -- to delve into sort of the privilege
17 issues that Leachco is asserting as well. And I -- I
18 don't think that we need to set a particular deadline
19 for those. I think those were all things that will be
20 captured in this discovery deadline of -- of resolving
21 all these issues as we move forward.

22 JUDGE YOUNG: Well, I -- I'm -- I'm not sure

1 about that because, you know, part of the problem is we
2 -- we have a deadline for completing tasks. But we
3 have tasks that are in motion right now. And to the
4 extent that -- that those things remain unresolved,
5 unanswered, there should be some sort of timetable for
6 ensuring that the existing discovery request, written
7 discovery request -- you know, we're going to put off
8 depositions until after you have a chance to conduct
9 your written discovery.

10 But -- but -- but I think that the discovery
11 requests that are outstanding, it would seem to me that
12 maybe it's more efficient to provide an interim
13 deadline for the resolution of those requests as a --
14 as a precursor to the completion of the written
15 discovery. What do -- what do the parties think about
16 that?

17 MS. STRAUSS: We would agree with that, Your
18 Honor.

19 MR. RUFF: Yes, Your Honor. We -- we would
20 agree with a reciprocal deadline for resolving the
21 outstanding written discovery.

22 JUDGE YOUNG: Okay. Well, the deadline

1 originally for that, even if I extended it to May 13th,
2 will be in July, which, as we know, is a happy memory
3 to all of us and an ever-distant one now. So what --
4 what would you propose for a reasonable deadline to
5 deal with the outstanding first -- first set of
6 requests for production for documents and first set of
7 interrogatories?

8 The response deadline has passed. The
9 extended deadline would have passed almost two months
10 ago now. So what do you -- what do you propose? Your
11 October 1st? That work?

12 MS. STRAUSS: That would be fine with the
13 Defendant, Your Honor.

14 JUDGE YOUNG: Mr. Ruff?

15 MR. RUFF: Yes, Your Honor. And one -- one --

16 JUDGE YOUNG: I don't even know what day of
17 the week October 1st is, and I apologize for that.
18 I'll have to look at a calendar but --

19 MS. STRAUSS: I think it's a Tuesday. It's a
20 Monday.

21 JUDGE YOUNG: Of course it's a Saturday.

22 MS. STRAUSS: Oh, okay.

1 JUDGE YOUNG: Yeah. It's a Saturday. Why
2 don't we go with October 3rd, which is a Monday?

3 MS. STRAUSS: That would be fine. Your Honor,
4 might we get some similar advice from you about the
5 issue of privilege logs, general advice, not raising
6 any issues specifically?

7 JUDGE YOUNG: All right.

8 MS. STRAUSS: First, I'll say that I've told
9 Mr. Ruff on at least four occasions that we raised
10 privilege only because his requests were so broad, but
11 we were not withholding any specific documents and,
12 therefore, we don't have a privilege log. So there is
13 no issue on the Defense side in that regard.

14 In terms of the Respondent's privilege log,
15 the entries for the privilege log do not provide
16 factual information. They read, "Email reflecting the
17 predecisional deliberative opinions and recommendations
18 of CPSC staff prepared as part of the decision-making
19 process concerning follow-up on full report." And then
20 the privilege asserted is deliberative process so that
21 the description is essentially the same as the
22 privilege that is asserted. There is no factual

1 information or topic identified in the vast majority of
2 this privilege log.

3 And again, that's with respect to 500-plus
4 documents. So Your Honor, at this point, we would
5 simply ask you to give us some of your input upon what
6 type of information should be disclosed in a privilege
7 log that would allow the parties to have meaningful
8 discussion about whether the privilege applies.

9 JUDGE YOUNG: That's a good question, and I am
10 going to defer that answer. But it won't be deferred
11 for long. I'd like to get that to you in the next
12 couple of days.

13 MS. STRAUSS: Thank you so much, Your Honor.

14 JUDGE YOUNG: But in terms of the remainder of
15 the discovery, two things about the breadth of
16 interrogatories and document requests. A, again,
17 you're the subject matter experts. When somebody sends
18 you something, you know what they are looking for. You
19 know what's at issue in this case. The issues in the
20 case define what's responsive, what's relevant.

21 If it's relevant and responsive, you could
22 narrow it down yourself as long as you're not

1 conveniently omitting things that are actually relevant
2 and responsive because you seem to think that they
3 might be -- that you might get a pass because of the
4 vagueness or the overbreadth of the request. Again, I
5 want everything to go from party to party that's not
6 privileged that's relevant to these proceedings.

7 But the second thing is this. When you make
8 discovery requests, if you make the -- give me the
9 universe request, you should bear in mind -- and I've
10 been there personally. The situation that arises where
11 you have a battalion of lawyers in a warehouse and a
12 forklift getting pallet after pallet, hundreds of boxes
13 and thousands of boxes and millions and millions of
14 pages of discovery responses and a battalion just
15 sitting there like in a sweatshop Monday through Friday
16 before they go back to their home cities. And then
17 they come back and do it again.

18 You don't want that either. You want to be
19 responsive, but you want to make sure that you do a
20 good job crafting your written discovery so that you
21 are asking for what you need to present to me at
22 hearing. That's what I'm interested in.

1 I want to find the facts that are needed to
2 decide this case justly and appropriately. So that's
3 your guidance. And -- and make sure that you bear in
4 mind that, yeah, I'm going to hold you to know what
5 this case is about when people are asking you to
6 produce things. And I -- privilege needs to be
7 asserted in good faith. And I'm not suggesting, Mr.
8 Ruff, that you're not asserting it in good faith or,
9 Ms. Strauss, that you haven't produced a privilege log
10 in bad faith.

11 But what I'm saying is that -- that you need
12 to think carefully about whether the privilege applies
13 and how much information you can transmit in responding
14 to the privilege or need to transmit in responding so
15 that the opposing party would have a reasoned
16 opportunity to challenge the privilege. And if it's
17 just a regurgitation of something, I don't know that
18 your opponent has that reasonable opportunity.

19 And I don't want us to get bogged down in
20 preliminary errata here dealing with minutiae like what
21 needs to be produced and what is privileged if that's
22 something that you can figure out on your own. If it

1 becomes -- and it may be already -- you know, as I
2 said, I'd like some time to think about it and to look
3 into it -- a sophisticated legal question that needs to
4 be resolved where there is a good-faith dispute about
5 it. I'm happy to do that.

6 And -- and like I said, we may be at that
7 point. I don't know yet. But I'm going to look at it
8 and give further guidance to the parties in the next
9 couple of days on that question.

10 MS. STRAUSS: Thank you, Your Honor.

11 MR. RUFF: Thank you, Your Honor. And Your
12 Honor, one -- one point I just wanted to follow up on.
13 Your Honor mentioned that the depositions would --
14 would follow some of this written discovery work that
15 we're -- we're doing. I -- I think there is prudence
16 to finishing up these responses by October 3rd to the
17 initial round of written discovery before we proceed
18 with depositions.

19 But we would ask that we follow the relevant
20 rules here and not sequence discovery further than that
21 because sometimes, depositions can indicate that there
22 are documents that have been withheld or other

1 information that could be followed up on with -- with
2 written discovery. So we would ask that there not be a
3 formal sequencing but that depositions happen after we
4 -- we resolve this -- this first wave of written
5 discovery.

6 MS. STRAUSS: Your --

7 JUDGE YOUNG: Yeah. I apologize if I seemed
8 to suggest that. I'm not suggesting that. What I --
9 what I meant to say, if I did not say this clearly, was
10 that it usually makes sense to get your written
11 discovery underway and underfoot before you conduct the
12 deposition because, in my experience, you want to use
13 the documents as opposed to witness or question the
14 witness about the certain documents.

15 That doesn't mean that you can't take a
16 deposition of a witness until you have all of the
17 written discovery out of the way. And I wouldn't
18 sequence it that way. I leave it to the parties. I
19 don't necessarily want to be involved in the discovery
20 decisions that you make. But you should make good
21 decisions because there may not be latitude to go back
22 and redo something that could have been accomplished

1 correctly the first time.

2 MS. STRAUSS: Your Honor, the parties did
3 already have a sequencing of written discovery
4 initially and then depositions following. And it was
5 our contention that the complaint counsel's failure to
6 provide us with the discovery necessary meant the
7 deposition should be delayed. We have not issued any
8 deposition notices for CPSC staff for that reason. And
9 they jumped the gun and sent deposition notices, even
10 though, at that time, we still hadn't even received
11 information about --

12 JUDGE YOUNG: If --

13 MS. STRAUSS: -- what they are withholding.

14 JUDGE YOUNG: I'm sorry to keep interrupting
15 you. But if that's -- if that was a problem, it has
16 been forgiven to this point. If it continues to be a
17 problem, we'll deal with it as an ongoing and
18 continuing problem. But at this point, you know, I'm
19 hopeful that you all will go forward with a renewed
20 sense of purpose and deal with each other a little more
21 forthrightly than seems to have been the case to this
22 point, and, you know, not take actions such as

1 preemptively noticing depositions without coordinating
2 them with counsel or, on the alternative, not making
3 reasonable efforts to make people available for
4 depositions if it comes to that.

5 And I'm not saying that that was an issue
6 previously. But, you know, these -- these are things
7 that maybe down the road -- the things that happened in
8 the past regarding the deposition notices and the
9 nonproduction, etc., I don't care as long as it's not
10 an ongoing problem.

11 But if it becomes an ongoing problem, we'll
12 deal with it. And if it's -- if -- if the problem
13 reflects a continued misunderstanding, you're not going
14 to get the -- gotten today.

15 MS. STRAUSS: Thank you, Your Honor.

16 JUDGE YOUNG: So we're looking at extending
17 the deadlines generally as follows. The deadline for
18 responses to the first set of written discovery now is
19 going to be October 3rd, which is a Monday. And then
20 we will -- and I -- I need to get the -- the
21 calculations. But it's going to be roughly a two-month
22 extension of written discovery to early February of

1 2022. And I'll need to calendar that. But it's going
2 to be around -- or pardon me -- February 2nd.

3 Similarly, March 20th for discovery closing
4 and then May 3rd for the motions for summary decision
5 and then the responses then would be -- well, that
6 doesn't work, does it? If we're having the trial in
7 June, you can't have a motion for --

8 MS. STRAUSS: Your Honor, nobody has said the
9 trial date won't work, but the trial date won't work
10 given the need for the extension of the deadlines. If
11 we -- if we could help Your Honor, we'd be happy to put
12 together a schedule that moves everything, including
13 the trial date, two months, work with complaint counsel
14 to get those dates calendared and submit a final order
15 that the Court can just enter. Since we had competing
16 deadlines, I think that may have contributed to there
17 being no final deadline entered. And we can make that
18 easier for Your Honor.

19 JUDGE YOUNG: I would greatly appreciate that,
20 Ms. Strauss. Thank you. Mr. Ruff, you all right with
21 that?

22 MR. RUFF: That sounds -- sounds prudent to

1 us. Thank you, Your Honor.

2 JUDGE YOUNG: Mr. Dunford, you good with that?

3 MR. DUNFORD: Yes, sir. Thank you.

4 JUDGE YOUNG: Excellent. So what we'll do,
5 then, moving forward is you will present to me revised
6 schedule for the completion of discovery and pretrial
7 motions and conferences. And then I will provide to
8 you in the next couple of days my view on privilege
9 logs and what may -- must be included in the
10 explanation of why material has been withheld because
11 of privilege. That sound fair?

12 MS. STRAUSS: Yes, Your Honor. Thank you.

13 MR. RUFF: Yes, Your Honor. Thank you.

14 JUDGE YOUNG: Does any party or any person
15 have anything they need to bring to my attention beyond
16 what we've discussed and set forward already?

17 MR. RUFF: No, Your Honor.

18 MR. DUNFORD: No, thank you.

19 JUDGE YOUNG: All right then. Well, I
20 appreciate everyone's time, and I appreciate your
21 good-faith efforts. Mr. Jannace?

22 MR. JANNACE: Yes, sir. I apologize. I

1 thought we were talking substantively. We do have one
2 administrative thing we need to get done that Ms.
3 DiPadova pointed out. And for the court reporter and
4 for the sake of this record, we need to get all the
5 counsel on the conference to state their names and
6 positions for the court reporter. As opposed to
7 figuring out who is going to talk when, I think I could
8 just call people out for how they are situated if they
9 don't mind. Ms. Strauss, would you start?

10 MS. STRAUSS: Yes. Bettina Strauss on behalf
11 of Leachco, the Defendant. And with me is my
12 associate, James Emanuel.

13 MR. JANNACE: Okay. Mr. Dunford?

14 MR. DUNFORD: Oliver Dunford for Leachco, Inc.

15 MR. JANNACE: Mr. Rogal?

16 MR. ROGAL: Michael Rogal, CPSC.

17 MR. JANNACE: Mr. Garrison?

18 MR. GARRISON: Frank Garrison on behalf of
19 Leachco.

20 MR. JANNACE: Mr. Ruff?

21 MR. RUFF: Brett Ruff for complaint counsel.

22 MR. JANNACE: Ms. Thomas?

1 MS. THOMAS: Rosalee Thomas on behalf of
2 complaint counsel.

3 MR. JANNACE: Ms. Ippolito?

4 MS. IPPOLITO: Leah Ippolito on behalf of
5 complaint counsel.

6 MR. JANNACE: Mr. Kerkhoff?

7 MR. KERKHOFF: John Kerkhoff on behalf of
8 Leachco, Inc.

9 MR. JANNACE: Mr. Perilla?

10 MR. PERILLA: Frank Robert Perilla, paralegal
11 for CPSC.

12 MR. JANNACE: And is there anybody else on the
13 call that I don't see? I will take that as a no, and
14 that's all for me, sir.

15 JUDGE YOUNG: All right. And that was
16 Christopher Jannace, my law clerk. And I am Michael G.
17 Young, the administrative law judge in these
18 proceedings, which will be concluded, then, with --
19 with the thanks of the Court and go forward. And we
20 will all fulfill our obligations.

21 (Whereupon, the hearing was adjourned at 10:47
22 a.m., Eastern daylight time.)

EXHIBIT 2

**CONSUMER PRODUCT
SAFETY COMMISSION**

**IN THE MATTER OF
LEACHCO, INC.**

CPSC Docket No. 22-1

HON. MICHAEL G. YOUNG
PRESIDING OFFICER

**LEACHCO, INC.'S SUPPLEMENTAL OBJECTIONS AND RESPONSES TO
CPSC'S REQUESTS FOR PRODUCTION OF DOCUMENTS NOS. 9, 10, AND 11**

Pursuant to 16 C.F.R. § 1025.33 and the September 16, 2022 Order on Pre-hearing Schedule, Respondent Leachco, Inc. hereby submits its Supplemental Objections and Responses to the Commission's Requests for Production Nos. 9, 10, and 11.

SUPPLEMENTAL OBJECTIONS AND RESPONSES TO RFP NOS. 9, 10, 11

REQUEST NO. 9: All nonprivileged Documents relating to each Communication, whether in person, by telephone, or by some other means, whether in a discussion, meeting, or other setting, relating to the subject matter of this litigation, the Complaint, the Answer, the Documents requested here, and/or the Podsters, between, among, by, or with any Persons, including, but not limited to: the Respondent; the Respondent's employees, former employees, agents, contractors, and/or representatives; retailers, dealers, distributors, or other similar third parties; and customers or users.

ORIGINAL RESPONSE: Objection, this request is vague, overbroad, unlimited in time and scope and unanswerable in its current form. The request also seeks information not relevant to the claims or defenses in this case, which is outside the scope of permissible discovery under 16 CFR § 1025.31(c)(1).

SUPPLEMENTAL RESPONSE: Based on the Commission’s September 20, 2022 Letter (attached hereto as Ex. A), Leachco understands that Request No. 9 is now limited to (1) the time period July 1, 2007 to February 9, 2022 and (2) communications involving Jamie Leach, Clyde Leach, Alex Leach, Mabry Ballard, Tonya Barrett, Leah Barnes, and Dan Marshall. But even with this narrowing, Request No. 9 remains overly broad because it seeks documents and communications related to “the Documents requested here, and/or the Podsters,” which is unlimited and therefore outside the scope of permissible discovery under 16 CFR § 1025.31(c)(1). Further, while the Commission filed its administrative complaint on February 9, 2022, the Commission published its press release alleging that the Podster was defective on January 20, 2022. Thus, Leachco submits that January 20, 2022 is the proper cut-off date for relevant materials in this case. Finally, Leachco understands the subject matter of this litigation is the alleged risk of suffocation through a variety of interactions between an infant and the Podster. *See generally* CPSC Complaint.

Subject to and without waiving any objections asserted in its original or supplemental response, Leachco has searched for and produced communications between Leachco and retailers, dealers, distributors, and consumers, from July 2007 to January 20, 2022 regarding the issues raised by the CPSC in this litigation—namely, the risk of suffocation. Leachco has further searched and will produce communications, if any, between Leachco and retailers, dealers, distributors, and consumers, from July 2007 to January 20, 2022, regarding the potential risk or concern about obstruction of an infant’s nose or mouth in contact with the Podster, potential for

airflow obstruction from contact by the infant with the Podster fabric, potential risk of suffocation from an infant's rolling off the Podster and becoming suffocated as a result, and potential risk of suffocation through bedsharing of the parents with the infant. *See* Compl. ¶¶ 21–34.

* * *

REQUEST NO. 10: All Documents and Communications created by any person identified in response to Requests Nos. 1, 2, 6–9, 12, 14–15, 16d, 17, and 19 of the Interrogatories relating to the subject matter of this litigation, the Complaint, or the Answer.

ORIGINAL RESPONSE: Objection, this request is vague, overbroad, unlimited in time and scope and unanswerable in its current form. The request also seeks information not relevant to the claims or defenses in this case, which is outside the scope of permissible discovery under 16 CFR § 1025.31(c)(1). 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.

SUPPLEMENTAL RESPONSE: Based on the Commission's September 20, 2022 Letter (attached hereto as Ex. A), Leachco understands that Request No. 10 is now limited to (1) the time period July 1, 2007 to February 9, 2022 and (2) communications involving Jamie Leach, Clyde Leach, Alex Leach, Mabry Ballard, Tonya Barrett, Leah Barnes, and Dan Marshall. But even with this narrowing, Request No. 10 still seeks documents outside the scope of permissible discovery under 16 CFR §

1025.31(c)(1). While the Commission filed its administrative complaint on February 9, 2022, the Commission published its press release alleging that the Podster was defective on January 20, 2022. Thus, Leachco submits that January 20, 2022 is the proper cut-off date for relevant materials in this case. Finally, Leachco understands the subject matter of this litigation is the alleged risk of suffocation through a variety of interactions between an infant and the Podster. *See generally* CPSC Complaint.

Subject to and without waiving any objections asserted in its original or supplemental response, see responses and documents produced in response to Request No. 9.

* * *

REQUEST NO. 11: All Documents and Communications between Respondent and any retailer, dealer, distributor, consumer, or other Person related to any safety issue posed by the Podsters, including, not limited to, whether the Podsters pose a suffocation risk or other risk to infants.

ORIGINAL RESPONSE: Objection, this request is vague as to “any safety issue” and “other Person.” Additionally, the request is overbroad, unlimited in time and scope, and seeks information not relevant to the claims or defenses in this case. This request also calls for information protected by the attorney-client and work product privileges.

SUPPLEMENTAL RESPONSE: Based on the Commission’s September 20, 2022 Letter (attached hereto as Ex. A), Leachco understands that Request No. 11 is now

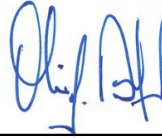
limited to (1) the time period July 1, 2007 to February 9, 2022 and (2) communications involving Jamie Leach, Clyde Leach, Alex Leach, Mabry Ballard, Tonya Barrett, Leah Barnes, and Dan Marshall. But even with this narrowing, Request No. 11 remains overly broad because it seeks “all” documents and communications involving anyone in the world (based on the Commission’s definition of “Person” in its document requests) related to “any safety issue” posed by the Podsters. As such, this request seeks documents outside the scope of permissible discovery under 16 CFR § 1025.31(c)(1). Further, while the Commission filed its administrative complaint on February 9, 2022, the Commission published its press release alleging that the Podster was defective on January 20, 2022. Thus, Leachco submits that January 20, 2022 is the proper cut-off date for relevant materials in this case. Finally, the only alleged safety issue in this case is the (alleged) risk of suffocation through a variety of interactions between an infant and the Podster. *See generally* CPSC Complaint.

Subject to and without waiving any objections asserted in its original or supplemental response, see responses and documents produced in response to Request No. 9.

* * *

Dated: October 3, 2022.

Respectfully submitted,



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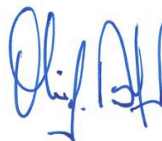
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Counsel for Respondent Leachco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, I served, by electronic mail, the foregoing Joint Proposed Prehearing Schedule upon all parties and participants of record in these proceedings:

<p>Mary B. Murphy Director, Div. of Enforcement & Litigation U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 mmurphy@cpsc.gov</p> <p>Robert Kaye Assistant Executive Director Office of Compliance and Field Operations U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 rkaye@cpsc.gov</p>	<p>Leah Ippolito, Supervisory Attorney Brett Ruff, Trial Attorney Rosalee Thomas, Trial Attorney Caitlin O'Donnell, Trial Attorney Michael Rogal, Trial Attorney Frederick C. Millett Gregory M. Reyes Complaint Counsel Office of Compliance and Field Operations U.S. Consumer Product Safety Comm'n Bethesda, MD 20814 lippolito@cpsc.gov bruff@cpsc.gov rbthomas@cpsc.gov codonnell@cpsc.gov mrogal@cpsc.gov fmillett@cpsc.gov greyes@cpsc.gov</p>
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Oliver J. Dunford
Counsel for Respondent Leachco, Inc.

Exhibit A



United States
Consumer Product Safety Commission
cpsc.gov | info@cpsc.gov | 800.638.2772

Brett Ruff
Trial Attorney
Division of Enforcement and Litigation
Office of Compliance and Field Operations

Tel: 301-504-7201
Email: bruff@cpsc.gov

September 20, 2022

Via Email: ODunford@pacificallegal.org

Oliver J. Dunford
Senior Attorney
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410

Re: *In the Matter of Leachco, Inc.* – CPSC Docket No. 22-1

Dear Counsel:

We appreciate your taking the time to meet with us on September 19, 2022 to discuss outstanding discovery issues for the above-referenced matter. As we noted on the call, Complaint Counsel is working diligently to comply with the guidance provided by Judge Young during our September 7, 2022 hearing.

We wanted to memorialize certain action items that we discussed on the September 19 call. Specifically, please provide responses to the following:

Barnes Subpoena. Please confirm whether you will be willing to accept service for a subpoena directed to Leah Barnes, former Marketing Director for Respondent. If we do not hear from you by October 3, 2022, we will assume you are not willing to accept service.

Document Searches. Complaint Counsel is working diligently and in good faith to comply with Judge Young's discovery order and expects that Respondent will similarly engage in the discovery "reset." To that end, we ask that Respondent conduct searches for relevant and responsive documents. It is our understanding that Respondent has not yet conducted an exhaustive search for responsive materials.

In an effort to reach a resolution on this, we are proposing that searches be conducted according to the following parameters:

Materials to Be Searched: Electronic communications (including emails, instant messages, and text messages) to and from the following persons:

1. Jamie Leach
2. Clyde Leach
3. Alex Leach
4. Mabry Ballard
5. Tonya Barrett
6. Leah Barnes
7. Dan Marshall

Date Range: July 1, 2007 to February 9, 2022 (the date on which the Administrative Complaint was filed)

Search Terms to Be Used: The following keywords and variations of the keywords. For example, “nap” includes “naps”; “napped”; and “napping”:

1. Podster and safety
2. Podster and suffocation
3. Podster and incident
4. Podster and breathing
5. Podster and obstruction
6. Podster and injury
7. Podster and hazard
8. Podster and death
9. Podster and sleep
10. Podster and warnings
11. Podster and prone
12. Podster and “roll over” or “roll” or “move”
13. Podster and unsupervised
14. Podster and crib
15. Podster and bed
16. Podster and nap
17. Podster and asphyxia
18. Podster and defect
19. Podster and recall
20. Podster and CPSC
21. Podster and cosleep
22. Podster and co-sleep

Please let us know if the proposed parameters are acceptable by September 26, 2022. Please then produce all documents responsive to these search terms by October 10, 2022. Also, please note that Complaint Counsel reserves the right to request additional searches, with other terms, individuals, or date ranges, if necessary. Additionally, it is Leachco’s duty to produce all responsive, non-privileged documents, including documents outside these proposed search terms, custodians, and date range, if any.

Privilege Log: To date, we have not received a privilege log from Respondent. We expect that Respondent will be providing a detailed privilege log on October 3, 2022 that complies with Judge Young’s September 9, 2022 guidance. If Respondent does not intend

to produce a privilege log, please let us know by no later than October 3, 2022.

We appreciate your cooperation and remain open to further teleconferences to discuss any discovery issues.

Sincerely,

/s/ Brett Ruff

Brett Ruff
Trial Attorney

cc:
Frank Garrison
John F. Kerkhoff
Bettina Strauss
James Emanuel

EXHIBIT 3

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 SECOND SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS TO RESPONDENT**

Pursuant to 16 C.F.R. § 1025.33, Complaint Counsel hereby requests that Respondent, Leachco, Inc. (“Respondent” or “Leachco”) serve upon Complaint Counsel, within thirty (30) days, written responses to each of the requests set forth below, and, within thirty (30) days, produce at Complaint Counsel’s office each of the documents and things requested below.

PRELIMINARY STATEMENT

Complaint Counsel is serving these requests to obtain relevant, non-privileged discovery permitted pursuant to 16 C.F.R. § 1025.31(c)(1). Specifically, the request seeks electronic communications, including, but not limited to, emails from Leachco personnel, that are clearly relevant and important to this proceeding and that to-date Leachco has refused to search, collect, and produce. For example, if there are emails between Jamie Leach and Clyde Leach that include the search terms “Podster” and “hazard,” those should be produced to Complaint Counsel. Emails like this example and others requested herein are straightforward and ordinary requests seeking electronic communications using search terms for a defined set of custodians. And yet, Leachco has failed to produce these electronic communications, either claiming the requests are

overbroad or failing to respond to the requests at all. Such discovery gamesmanship is contrary to the Rules of Practice for Adjudicative Proceedings and Judge Young's instructions to the parties.

The requested electronic communications should have been produced long ago. They should have been produced in response to Request No. 9 of the March 14, 2022 First Set of Requests for Production of Documents and Things to Respondent. After Leachco failed to produce any internal or external electronic communications, Complaint Counsel attempted to resolve this without court intervention by sending emails and holding meet-and-confer calls that led to a motion to compel. After the September 7, 2022 hearing and the Court's September 9, 2022 and September 16, 2022 Orders, Complaint Counsel expected to receive a full production of electronic communications. Leachco's October 3, 2022 supplemental response, like its original response, however, is insufficient, and Leachco makes only a vague offer to collect and produce communications between Leachco and retailers, dealers, distributors, and consumers. *See* Leachco's Supplemental Responses to the Commission's Request for Production Nos. 9, 10, 11. Leachco also entirely failed to respond to Complaint Counsel's request for internal Leachco communications. Accordingly, Complaint Counsel has set forth this request in specific and concrete terms. Leachco must answer, search for, collect, and produce any responsive documents. This request narrows Request No. 9 to specific custodians and search terms, providing Leachco with guidance on which electronic communications to search and how to search them. As a result, this narrowed Request is not overly broad nor unduly burdensome to Leachco. Anything less than a full and complete production of responsive electronic communications will be met with a motion to compel.

DEFINITIONS AND INSTRUCTIONS

Complaint Counsel hereby incorporates by reference all of its Definitions and Instructions set forth in Complaint Counsel's First Set of Requests for Production of Documents and Things to Respondent, dated March 14, 2022.

REQUEST FOR PRODUCTION

REQUEST NO. 27:

All electronic communications (including, but not limited to, internal and external emails, instant messages, and text messages) to and from the following persons, whether involving third parties and/or other Leachco personnel, between January 1, 2008 and the date the Complaint was filed in this matter (February 9, 2022) containing the following search terms:

a. Persons to search:

1. Jamie Leach;
2. Clyde Leach;
3. Alex Leach;
4. Mabry Ballard;
5. Tonya Barrett;
6. Dan Marshall; and,
7. Leah Barnes.

b. Search Terms:

1. "Podster" and "safety" or "safe";
2. "Podster" and "suffocation" or "suffocate" or "suffocating";
3. "Podster" and "incident";
4. "Podster" and "breathing" or "breathe";

5. “Podster” and “obstruction” or “obstructing”;
6. “Podster” and “injury” or “injure” or “injuries”;
7. “Podster” and “hazard” or “hazardous”;
8. “Podster” and “death” or “died” or “dying”;
9. “Podster” and “sleep”;
10. “Podster” and “warnings” or “warn” or “warned”;
11. “Podster” and “prone” or “face down”;
12. “Podster” and “roll” or “move”;
13. “Podster” and “unsupervised” or “supervise”;
14. “Podster” and “crib”;
15. “Podster” and “bed”;
16. “Podster” and “nap”;
17. “Podster” and “asphyxia”;
18. “Podster” and “defect”;

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19. “Podster” and “recall”; and
20. “Podster” and “CPSC”.

Dated this 5th day of October, 2022

/s/ Brett Ruff

Gregory Reyes, Supervisory Attorney
Brett Ruff, Trial Attorney
Rosalee Thomas, Trial Attorney
Caitlin O’Donnell, Trial Attorney
Michael J. Rogal, Trial Attorney
Frederick Millett, Trial Attorney

Division of Enforcement and Litigation
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
301-504-7220

Complaint Counsel for
U.S. Consumer Product Safety Commission

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2022, I served Complaint Counsel's Second Set of Requests for Production of Documents to Respondent as follows:

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

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

/s/ Brett Ruff

Brett Ruff
Complaint Counsel for
U.S. Consumer Product Safety Commission

EXHIBIT 4

**CONSUMER PRODUCT
SAFETY COMMISSION**

**IN THE MATTER OF
LEACHCO, INC.**

CPSC Docket No. 22-1

HON. MICHAEL G. YOUNG
PRESIDING OFFICER

**LEACHCO, INC.'S OBJECTIONS AND RESPONSES TO
CPSC'S SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to 16 C.F.R. § 1025.33, Respondent Leachco, Inc. submits its objections and responses to the Commission's Second Set of Requests for Production of Documents.

General Objections

Leachco objects to the Commission's "Preliminary Statement" in its Second Set of Requests for Production of Documents (Requests). Among other things, the Commission here falsely asserts—again—that Leachco has refused to search for "relevant" documents. Leachco has searched for documents responsive to the Commission's RFPs—and has repeatedly so advised the Commission—but Leachco submits that most of the Commission's discovery requests are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. 16 C.F.R. § 1025.31(c)(1). Nor has Leachco failed to respond to the Commission's discovery requests. Rather, it has responded that most of the Commission's discovery requests are overly broad and not reasonably calculated to lead to the discovery of admissible

evidence. Finally, the Commission's providing custodians and search terms does not cure the overly broad nature and subject matters of the requests.

* * *

Request No. 27: All electronic communications (including, but not limited to, internal and external emails, instant messages, and text messages) to and from the following persons, whether involving third parties and/or other Leachco personnel, between January 1, 2008 and the date the Complaint was filed in this matter (February 9, 2022) containing the following search terms:

a. Persons to search:

1. Jamie Leach;
2. Clyde Leach;
3. Alex Leach;
4. Mabry Ballard;
5. Tonya Barrett;
6. Dan Marshall; and,
7. Leah Barnes.

b. Search Terms:

1. "Podster" and "safety" or "safe";
2. "Podster" and "suffocation" or "suffocate" or "suffocating";
3. "Podster" and "incident";
4. "Podster" and "breathing" or "breathe";
5. "Podster" and "obstruction" or "obstructing";
6. "Podster" and "injury" or "injure" or "injuries";
7. "Podster" and "hazard" or "hazardous";
8. "Podster" and "death" or "died" or "dying";
9. "Podster" and "sleep";
10. "Podster" and "warnings" or "warn" or "warned";
11. "Podster" and "prone" or "face down";

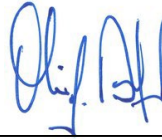
12. “Podster” and “roll” or “move”;
13. “Podster” and “unsupervised” or “supervise”;
14. “Podster” and “crib”;
15. “Podster” and “bed”;
16. “Podster” and “nap”;
17. “Podster” and “asphyxia”;
18. “Podster” and “defect”;
19. “Podster” and “recall”; and
20. “Podster” and “CPSC”.

RESPONSE: Objections. While the Commission filed its administrative complaint on February 9, 2022, the Commission published its press release alleging that the Podster was defective on January 20, 2022. Thus, Leachco submits that January 20, 2022 is the proper cutoff date for relevant materials in this case. Further, Leachco understands the subject matter of this litigation to be the objectively reasonably foreseeable misuse of the Podster that could lead to an alleged risk of suffocation through a variety of interactions between an infant and the Podster. *See generally* CPSC Complaint. And the Commission does not allege that Leachco failed to provide adequate warnings. Accordingly, Leachco’s internal communications have no bearing on the issues in this proceeding, and Request No. 27 seeks information that is neither relevant nor reasonably calculated to lead to the discovery of evidence for the claims asserted by the Commission. 16 C.F.R. § 1025.31(c)(1).

* * *

Dated: November 4, 2022.

Respectfully submitted,



JOHN F. KERKHOFF

Ohio Bar No. 0097134

FRANK D. GARRISON

Indiana Bar No. 34024-49

Pacific Legal Foundation

3100 Clarendon Boulevard, Suite 1000

Arlington, VA 22201

Telephone: 202.888.6881

Fax: 916.419.7747

JKerkhoff@pacificlegal.org

FGarrison@pacificlegal.org

OLIVER J. DUNFORD

Florida Bar No. 1017791

Pacific Legal Foundation

4440 PGA Blvd., Suite 307

Palm Beach Gardens, FL 33410

Telephone: 916.503.9060

Fax: 916.419.7747

ODunford@pacificlegal.org

Counsel for Respondent Leachco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2022, I served, by electronic mail, the foregoing upon all parties of record in these proceedings:

<p>Leah Ippolito, Supervisory Attorney Brett Ruff, Trial Attorney Rosalee Thomas, Trial Attorney Caitlin O'Donnell, Trial Attorney Michael Rogal, Trial Attorney Frederick C. Millett Gregory M. Reyes Complaint Counsel Office of Compliance and Field Operations U.S. Consumer Product Safety Comm'n Bethesda, MD 20814 lippolito@cpsc.gov bruff@cpsc.gov rbthomas@cpsc.gov codonnell@cpsc.gov mrogal@cpsc.gov fmillett@cpsc.gov greyes@cpsc.gov</p>	<p>Mary B. Murphy Director, Div. of Enforcement & Litigation U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 mmurphy@cpsc.gov</p> <p>Robert Kaye Assistant Executive Director Office of Compliance and Field Operations U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 rkaye@cpsc.gov</p>
---	--



Oliver J. Dunford
Counsel for Respondent Leachco, Inc.

EXHIBIT 5

Web Data Collection Report

Page Title

Podster - Leachco, Inc

URL

<https://leachco.com/collections/baby/products/podster>

Collection Date

Wed Oct 26 2022 15:28:02 GMT-0400 (Eastern Daylight Time)

Collected by

SDonahue@cpsc.gov (SDonahue@cpsc.gov)

IP Address

173.73.187.122

Browser Information

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File Signatures

SCREEN CAPTURE

MHTML

File Name

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2b`

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Podster®

Sling-Style Infant Lounger

The Podster provides a warm and cozy caress for infants. The deeply contoured sides help keep baby in place while the unique sling center expands with infant's weight. The adjustment tabs provide versatile support, cinch them in to create a cozier and more secure seat for smaller infants or release them to create a larger area for growing infants. The Podster provides upper body elevation which can help aid in digestion and breathing.

Also available in plush fabric.

Features +

- Generously sized lounger with unique comfort features
- Deeply contoured sides help keep infant in place
- Upper body elevation helps aid in digestion and breathing
- Unique sling center expands with baby's weight, while adjustment tabs create baby's custom fit
- Zippered removable cover

Info & Care +

URL

<https://leachco.com/collections/baby/products/podster>

Timestamp

Wed Oct 26 2022 15:28:02 GMT-0400 (Eastern Daylight Time)

File Name

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in digestion and breathing.

Also available in plush fabric.

Features +

- Generously sized lounger with unique comfort features
- Deeply contoured sides help keep infant in place
- Upper body elevation helps aid in digestion and breathing
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- Zippered removable cover

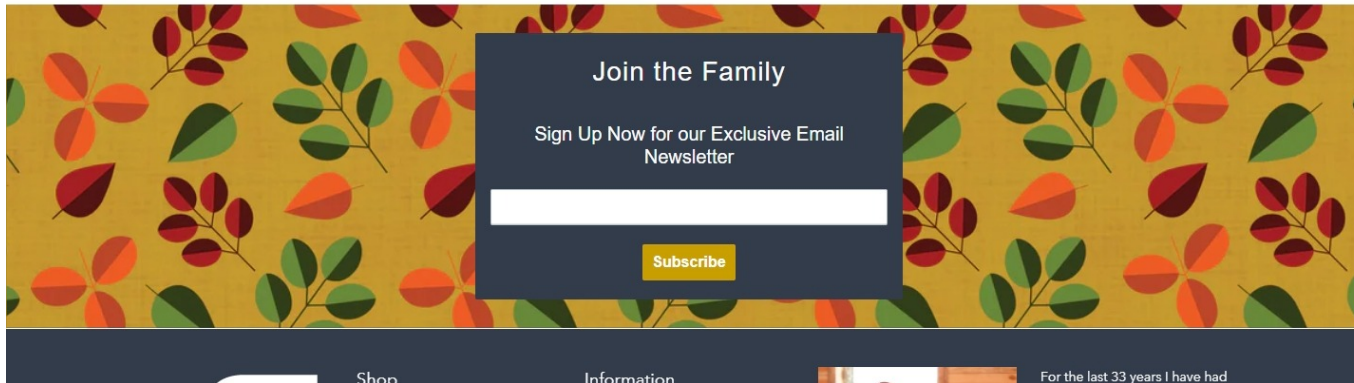
Info & Care +

Inner Lounger Care

For best results, spot clean with soapy cloth to remove soils. Do not machine wash inner lounger.

Removable Cover Care

To clean your removable cover, remove the cover from inner lounger, machine wash warm, gentle cycle. Use non-chlorine bleach if needed. Tumble dry, lowest heat setting, remove promptly.



File Name

https-leachco.com-collections-baby-products-podster-Oct-26-22-15-28-02-GMT-0400-(EDT)_1.jpg

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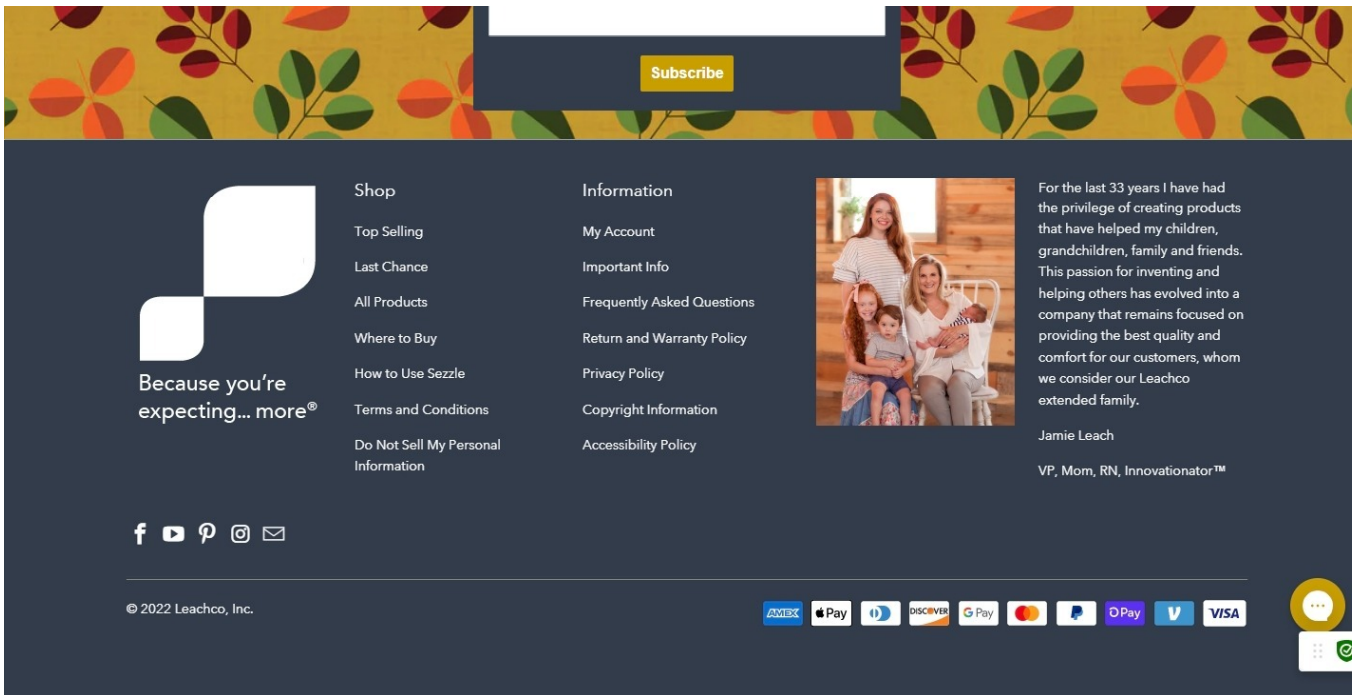
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Timestamp

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EXHIBIT 6

(FILED IN CAMERA)

EXHIBIT 7

Web Data Collection Report

Page Title

Important Info - Leachco, Inc

URL

<https://leachco.com/pages/important-info>

Collection Date

Wed Oct 26 2022 15:32:29 GMT-0400 (Eastern Daylight Time)

Collected by

SDonahue@cpssc.gov (SDonahue@cpssc.gov)

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Leachco Confirms Podster® is Safe for Infants, Rejects CPSC's Claims



Since 1988, Leachco, a family-owned company in Ada, Oklahoma, has made safe, innovative and quality products to support families and infants. The entire Leach family, including founders Clyde and Jamie Leach, and now their adult children, Mabry, Alex, and Andrew, are in the business of helping mothers, fathers and caregivers with the difficult task of caring for infants who need constant daytime care and supervision.

Leachco's Podster®, an infant lounger, is made in the United States and has been sold to nearly 180,000 families since it was introduced 13 years ago in 2009. The Podster® is specifically designed to help with daytime care of awake infants for the countless times each day when parents and caregivers need to free up their hands for the activities of daily life. The Podster® provides a safe, secure spot to place an infant on its back as the parent or caregiver supervises hands-free, able to prepare a meal, pay bills, check email, give a hand to siblings and many other daily tasks. The Podster® helps babies and is loved by parents and caregivers. The Leach family has used the Podster® for their own children and grandchildren, and they stand firmly by the safety and value of the products they provide to the public.

The Podster® is not a sleep product. Even though infants can fall asleep anywhere, safe sleep guidelines and CPSC regulations draw a clear line between products intended for sleep and products not intended for sleep. Leachco has always had clear warnings on the product and its packaging not to place it in a bed or crib or use it unsupervised or for sleep. The CPSC is wrongly telling consumers to stop using the Podster® altogether instead of explaining that no lounger should be used in a crib or bed and no lounger is safe for unsupervised sleep. The loss of an infant is truly tragic and families who suffered that loss have our deepest sympathies. Unfortunately, the statistics show that infant deaths can occur anywhere, even in cribs where sleep is the safest. Leachco supports the American Academy of Pediatrics (AAP) safe sleep guidelines and urges families to use the Podster® as intended for supervised daytime activity only—not for sleep.

Leachco believes that banning products like the Podster® will not improve safety. In fact, it will leave families and caregivers with fewer safe ways to care for awake infants. Infant care requires constant attention. It can be an exhausting job and parents and caregivers need products to help them. For as many hours of the day that infants need care, it simply is not reasonable to expect parents and caregivers to put them in a crib.

The CPSC's claims are wrong. The agency ignores the important role loungers can have for parents and makes the wrong choice for families. Leachco stands by the Podster®'s quality, safety and value of the Podster®.

Leachco has sued the CPSC in federal court to protest unfair treatment in the CPSC's biased in-house court. Leachco is represented by **Pacific**

File Name

https-leachco.com-pages-important-info-Oct-26-22-15-32-29-GMT-0400-(EDT)_0.jpg

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URL

https://leachco.com/pages/important-info

Timestamp

Wed Oct 26 2022 15:32:29 GMT-0400 (Eastern Daylight Time)

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The CPSC’s claims are wrong. The agency ignores the important role loungers can have for parents and makes the wrong choice for families. Leachco stands by the Podster®’s quality, safety and value of the Podster®.

Leachco has sued the CPSC in federal court to protest unfair treatment in the CPSC’s biased in-house court. Leachco is represented by **Pacific Legal Foundation**, a national public interest law firm.

JPMA has issued a statement in support of Leachco’s position. For more information [Click Here](#).

First Candle has also issued a statement concerning the issue. For more information [Click Here](#).

To see the press release about our lawsuit against the CPSC [Click Here](#).

###

Frequently Asked Questions

– Why does the CPSC want Leachco to recall the Podster®?

The CPSC has told us it believes that loungers, including the Podster® are not safe because parents and caregivers will ignore the warnings and use them for unsupervised sleep. We disagree because the Podster® is not a sleep product. It is intended for daytime use with awake babies. The Podster® has been on the market for 12 years and helped parents care for infants when they are not in their crib. With 180,000 sold over 12 years, parents and caregivers have shown that it can be used safely.

File Name

https-leachco.com-pages-important-info-Oct-26-22-15-32-29-GMT-0400-(EDT)_1.jpg

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URL

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Timestamp

Wed Oct 26 2022 15:32:29 GMT-0400 (Eastern Daylight Time)

- Why does the CPSC want Leachco to recall the Podster®?

The CPSC has told us it believes that loungers, including the Podster® are not safe because parents and caregivers will ignore the warnings and use them for unsupervised sleep. We disagree because the Podster® is not a sleep product. It is intended for daytime use with awake babies. The Podster® has been on the market for 12 years and helped parents care for infants when they are not in their crib. With 180,000 sold over 12 years, parents and caregivers have shown that it can be used safely.

- Is the government banning all infant loungers?

The CPSC has not acted against all infant loungers, and there are new infant loungers flooding the market every day, many of which are from non-U.S. companies. We asked the CPSC if there is something specific about the Podster® they want changed or improved, but they haven't provided any answer or suggested any improvement to the product or its warnings.

- What happens next? Will the government make Leachco recall the Podster®?

By law, the CPSC must provide Leachco with the opportunity for a hearing where Leachco will defend the safety, quality and value of the Podster®.

- Can consumers still use the Podster®?

We can confidently tell parents and caregivers the Podster® is safe for its intended use—which is adult supervised daytime or awake time use. No lounger, including the Podster® is safe for unsupervised care or sleep. The Podster® has 12 years of experience of families using it safely.

- Does Leachco plan to compensate consumers who have purchased its products?

We are following our normal process for customer satisfaction and returns if customers are not satisfied with any of our products. Customers can access us in the usual way though our website or email at customerservice@leachco.com.

File Name

https-leachco.com-pages-important-info-Oct-26-22-15-32-29-GMT-0400-(EDT)_2.jpg

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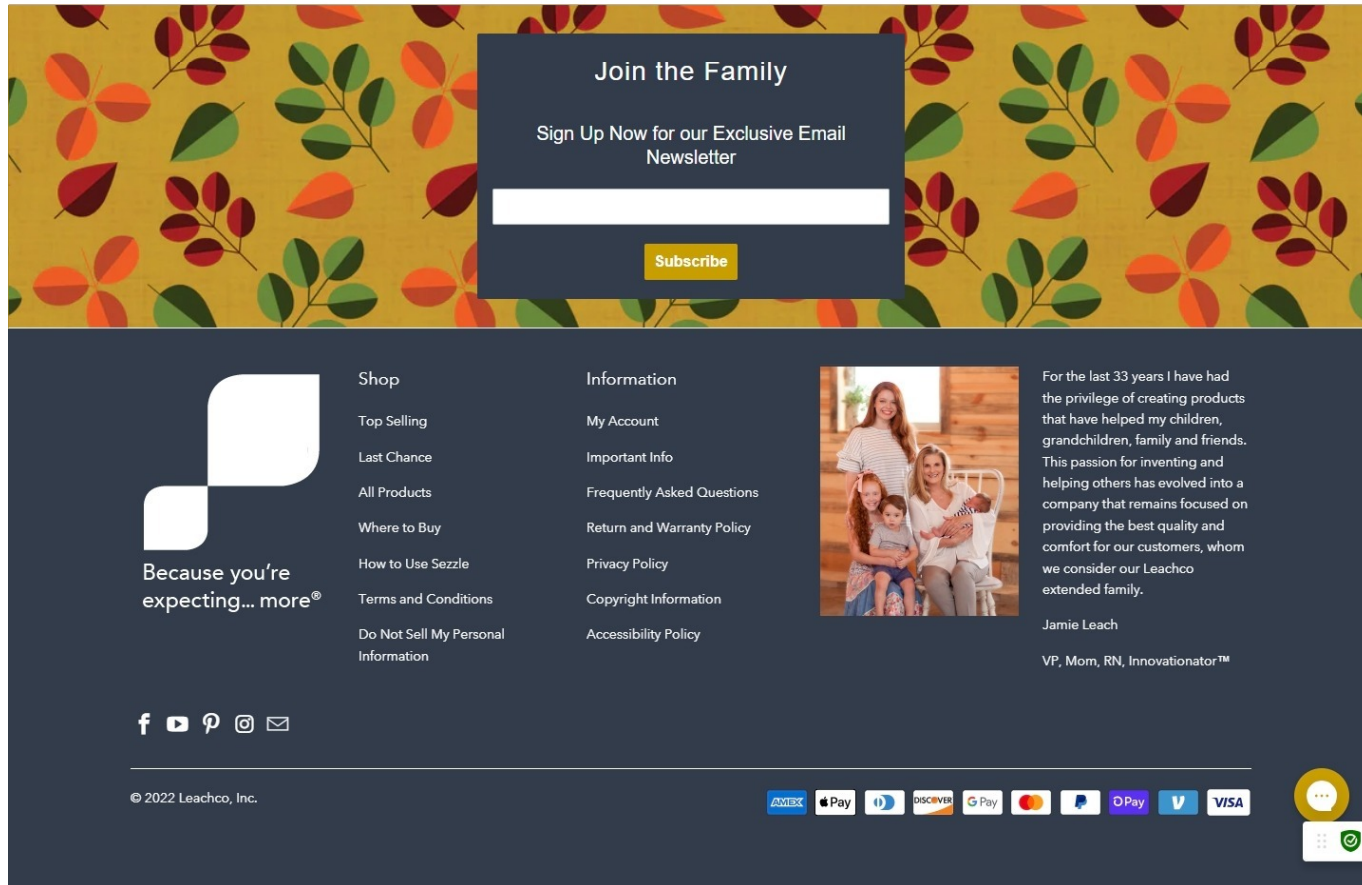
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https://leachco.com/pages/important-info

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File Name

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URL

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