

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

IN THE MATTER OF

LEACHCO, INC.,

Respondent.

CPSC DOCKET NO. 22-1

**MEMORANDUM IN SUPPORT
OF LEACHCO, INC.'S MOTION FOR PROTECTIVE ORDER**

Respondent Leachco, Inc., pursuant to 16 C.F.R. §§ 1025.23 & 1025.31(d), respectfully moves for a protective order to stop the Commission's discovery fishing expedition. The CPSC seeks Leachco's internal communications concerning its subjective knowledge of irrelevant matters. But this information has absolutely nothing to do with the CPSC's allegations, and it is not remotely calculated to lead to the discovery of admissible evidence. When asked to explain the relevance, the CPSC has refused on the ground that such an explanation would divulge trial strategy.

A Protective Order should be issued for three reasons.

First, Leachco's subjective knowledge is irrelevant. The CPSC alleges a single claim, that Leachco's infant lounger—the Podster—presents a substantial product hazard under the Consumer Product Safety Act (CPSA). The Act defines “substantial product hazard” as “a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.” 15 U.S.C. § 2064(a)(2). According to the CPSC, a “defect” exists here because “it is foreseeable that caregivers will use the product for infant sleep and it is foreseeable that caregivers will leave infants unattended

in the product,” which—upon the occurrence of various contingencies (*e.g.*, bedsharing)—could lead to the obstruction of an infant’s nose or mouth. Compl. ¶ 50. The crux of the CPSC’s claim, therefore, is the (allegedly) objective, reasonably foreseeable misuse by consumers that could lead to a suffocation risk—not whether and to what extent Leachco knew about this consumer misuse.

Second, the CPSC seeks information to prove a claim it has ***not*** alleged. The CPSC has ***not*** alleged that Leachco violated the reporting requirements of 15 U.S.C. § 2064(b). But in support of its recent Motion to Compel, the CPSC expressly relies on 16 C.F.R. § 1115.6, which relates solely to the reporting requirements of §2064(b). This all but confirms that the CPSC’s requests for Leachco’s internal communications have no bearing on the claim (based on §2064(***a***)) that the CPSC did allege.

Third, the CPSC by its own admission needs no further information except expert testimony. As the Court will recall, the CPSC previously represented that it “is not relying on technical staff’s preliminary analysis to prove its case against Leachco” and that instead it “intends to produce expert witness testimony to establish” its claim. *CPSC Opp. to Leachco’s Mtn. to Compel* [Dkt. No. 29], p. 9.

In sum, (1) the CPSC’s sole claim against Leachco is based on the (allegedly) objective, reasonable foreseeability of consumer misuse; (2) Leachco’s internal knowledge relates to—if anything at all—a claim that the CPSC has *not* alleged; and (3) the CPSC intends to prove its claim through expert-witness testimony. This information, therefore, is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. 16 C.F.R. § 1025.31(d). A Protective Order should issue.

BACKGROUND

The parties' discovery

Since 2009, Leachco has sold over 180,000 Podsters, loungers that provide a safe, secure spot to place an infant on its back as a caregiver supervises hands-free. The CPSC alleges that Podsters present a “substantial product hazard” based on *two* incidents of consumer misuse.

In the course of discovery—indeed, even before this proceeding started, because of the CPSC’s investigation—Leachco has produced voluminous records, including documents related to the Podster’s design, testing, and Leachco’s communications with consumers and retailers concerning the risk of suffocation.

Leachco objected to several of the CPSC’s discovery requests, RFP Nos. 9, 10, and 11. Most problematic was the CPSC’s demand for “all” communications between Leachco and anyone in the world¹ “relating . . . to any safety issue posed by the Podsters,” CPSC RFP No. 11, since this proceeding relates to only a single “safety issue.” Following this Court’s discovery conference on September 7, 2022, the parties have met and conferred on numerous occasions. After the Commission narrowed its document requests through a letter (Ex. 2), Leachco supplemented its responses to RFP Nos. 9, 10, and 11 (*see* Ex. 3). Since then, the CPSC served a second document request, RFP No. 27, to which Leachco responded, and a set of Requests for Admission. *See* Exs. 4, 5,

¹ RFP No. 11 seeks communications between Leachco and “any Person,” and the Commission defines “Person” as “any natural person, entity, group, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental, and whether foreign or domestic.” CPSC Requests for Production pp. 1–2. *See* Ex. 1 (Definition of “Person” from CPSC RFPs).

and 6, respectively. The parties continued to meet and confer about the new requests but have been unable to resolve their disputes. *See* Ex. 7.

LAW AND ARGUMENT

The CPSC may obtain nonprivileged discovery that is relevant to the subject matter of the proceedings or reasonably calculated to lead to the discovery of admissible evidence. 16 C.F.R. § 1025.31(c)(1). But it may not obtain discovery “beyond the pleadings’ allegations to attempt finding additional violations or claim.” *Blankenship v. Fox News Network, LLC*, 2020 WL 918873, at *15 (S.D. W.Va. Sept. 21, 2020). Indeed, discovery is “designed to assist a party to prove a claim it reasonably believes to be viable *without discovery*, not to find out if it has any basis for a claim.” *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1327 (Fed. Cir. 1990) (citations omitted). Therefore, that “discovery might uncover evidence showing that [the CPSC] has a legitimate claim *does not justify* the discovery request.” *Id.* (emphasis added).

The CPSC’s allegations vs. traditional products-liability law

As noted above, the CPSC alleges a single claim, that Leachco’s infant lounger—the Podster—presents a substantial product hazard under the Consumer Product Safety Act. The CPSA defines “substantial product hazard” as “a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.” 15 U.S.C. § 2064(a)(2). According to the CPSC, a “defect” exists here because “it is foreseeable that caregivers will use the product for infant sleep and it is foreseeable that caregivers will leave infants unattended in the product,” which—upon the

occurrence of various contingencies (*e.g.*, bedsharing)—could lead to the obstruction of an infant’s nose or mouth. Compl. ¶ 50. This claim, however, is a Frankenstein mash-up of products-liability law.

First, because the CPSA does not define the word “defect,” the term carries its common-law meaning. *See Gilbert v. United States*, 370 U.S. 650, 655 (1962) (Courts apply the “common-law meaning” of the term “at the time the . . . statute was enacted. For in the absence of anything to the contrary it is fair to assume that Congress used that word in the statute in its common-law sense.”). Courts have long held that “statutes will not be interpreted as changing the common law unless they effect the change with clarity.” ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 318 (2012). Therefore, “words undefined in a statute are to be interpreted and applied according to their common-law meanings.” *Id.* at 320.

Under the common law, a product is defective “when, at the time of sale or distribution, [a] it contains a manufacturing defect, [b] is defective in design, or [c] is defective because of inadequate instructions or warnings.” *Restatement (Third) of Torts: Products Liability [Restatement]* § 2. The Commission does not allege a manufacturing defect or an inadequate-warning defect, leaving only a design-defect claim. *See* Compl. ¶¶ 50–52.²

² In response to Leachco’s Interrogatory No. 5, the CPSC stated that the “issue in this matter is whether the Podsters present a substantial product hazard, not whether a product with modified warnings or instructions would pose a hazard. Complaint Counsel does not have the burden of proving or providing any alternative warning or instruction for the Podsters in order to establish that they present a substantial product hazard under” 15 U.S.C. § 2064(a)(2).” In its supplement responses, the CPSC confirmed that “it is not making contentions about any ‘warning or instruction’ Leachco ‘provided improperly or failed to provide in connection with the Podster.’” *CPSC Supp. Resp. to Leachco ROG No. 5. See* Ex. 8.

According to the *Restatement*, a product is “defective in design when [1] the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller . . . , and [2] the omission of the alternative design renders the product not reasonably safe.” *Id.* § 2(b). Therefore, to establish liability for a design defect, the plaintiff—here the CPSC—would have to prove that “such a reasonable alternative was, or reasonably could have been, available at time of sale or distribution.” *Id.* cmt. *d.*

But the CPSC does *not* allege that the (supposedly) foreseeable risks could have been reduced or avoided through a reasonable alternative design, nor does the Commission allege that the “omission of the alternative design renders the product not reasonably safe.” *Restatement* § 2(b). To the contrary, the CPSC has repeatedly advised that (1) this case does not involve the question “whether a modified product would pose a hazard,” and (2) the CPSC “does not have the burden of proving or providing any ‘alternative design[s]’ for the Podsters in order to establish that they present a substantial product hazard under” 15 U.S.C. § 2064(a)(2). *CPSC Resp. to Leachco ROG Nos. 4 & 5. See* Ex. 8. Indeed, in supplemental discovery responses, the CPSC confirmed that “it is not making contentions about ‘alternative designs or modification[s]’ that would ‘reduce or eliminate the defect and/or hazard’ posed by the Podster.” *CPSC Supp. Resp. to Leachco ROG No. 4. See* Ex. 8.³

³ Note also the connection between design defects and the failure to provide adequate warnings. Generally, a safer design is preferred over an adequate warning. *Restatement* cmt. *l.* But “when an alternative design to avoid risks cannot reasonably be implemented, adequate instructions and warnings will normally be sufficient to render the product reasonably safe.” *Id.* Again, the CPSC has confirmed here that this is not a “warning” case, and it has disclaimed a duty to prove that a feasible alternative design would have rendered the product reasonably safe.

Therefore, the crux of the CPSC’s claim against Leachco is the (allegedly) reasonably foreseeable consumer misuse that could, if other things occur, lead to a suffocation risk. *See* Compl. ¶¶ 50–52. In other words, the CPSC’s claim is based on whether a *reasonable* manufacturer in Leachco’s position would have *objectively/reasonably* foreseen the type of consumer misuse alleged in the complaint.

The CPSC disagrees and says that Leachco’s internal communications are relevant. But it fails to explain how. To be sure, the CPSC has pointed to 16 C.F.R. § 1115.4, which has a laundry list of factors that the CPSC may—but need not consider—including “other factors” that the CPSC alone deems relevant to the determination. But there are two problems with the CPSC’s reliance on §1115.4. First, it is an interpretive rule—mere guidance. And “[i]nterpretive rules ‘do not have the force and effect of law and are not accorded that weight in the adjudicatory process.’” *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 97 (2015) (citation omitted).

Second, even if §1115.4 were binding, it is hopelessly vague. A fundamental precept of the rule of law is that “laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citation omitted). The void-for-vagueness doctrine “addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” *Id.* And, most relevant here, “a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather

because it is unclear as to what fact must be proved.” *Id.* The CPSC’s amorphous reasonably-foreseeable-design-defect claim fails to provide Leachco with fair notice of what conduct is forbidden or required, and it is unclear—at best—as to what facts must be proved.

The CPSC cannot hide the ball. It cannot refuse to identify the elements of its claim. And it is not enough to declare, in conclusory fashion, the Leachco’s internal communications are relevant.

Consider the following. If Leachco could prove that it had zero knowledge of potential misuses of the Podster, would Leachco be relieved of liability under Consumer Product Safety Act? The CPSC will no doubt respond that the Podster presents a “substantial product hazard” no matter what Leachco knew. That is, the CPSC will likely argue that because “it is *reasonably* foreseeable” that consumers will misuse the product and that misuse could lead to substantial risk, the Podster presents a substantial product hazard *regardless of Leachco’s knowledge* of the consumer misuse. If that is so, the CPSC has no reason to demand production of documents related to Leachco’s internal knowledge.

The Commission is engaged in a classic fishing expedition

Parties are not entitled to discovery “beyond the pleadings’ allegations to attempt finding additional violations or claim.” *Blankenship*, 2020 WL 918873, at *15. But the CPSC is attempting to do just that—mine for evidence of additional claims that it did not raise in its complaint. As noted above, the CPSC has ***not*** alleged that Leachco violated the reporting requirements of 15 U.S.C. § 2064(b). But in support of its recent

Motion to Compel, the CPSC expressly relies on 16 C.F.R. § 1115.6, which relates solely to the reporting requirements of §2064(b).⁴ Because discovery is “designed to assist a party to prove a claim it reasonably believes to be viable *without discovery*, not to find out if it has any basis for a claim,” *Micro Motion*, 894 F.2d at 1327, the CPSC’s demands for Leachco’s internal communications—to try to prove a claim it has ***not*** alleged—are improper.

***The CPSC intends to prove its case with expert testimony
and needs no further evidence from Leachco***

The CPSC “is not relying on technical staff’s preliminary analysis to prove its case against Leachco” but instead “intends to produce expert witness testimony to establish” its claim. *CPSC Opp. to Leachco’s Mtn. to Compel* [Dkt. No. 29], p. 9. Further, the CPSC already has, among other things, (1) models of the Podster, which technical staff has examined and which its expert witnesses may examine; (2) Leachco’s testing records; (3) Leachco’s quality-assurance plan; (4) Podster labels and warnings; (5) Leachco’s sales records of the Podster; (6) communications between Leachco and retailers and consumers concerning the concerning the risk of suffocation; and (7) relevant IDIs and PSAs. As a result, it’s hard to see what additional information the CPSC needs.


⁴ This is not the first time the CPSC has sought wholly irrelevant information. In its first set of document requests, the CPSC demanded “all” communications “related to *any* safety issue” allegedly posed by the Podster—even though the CPSC alleges only one safety issue (suffocation). CPSC RFP No. 11 (emphasis added). As discussed below, Leachco objected to this request. But the CPSC continues to improperly seek information to find additional claims. *See Blankenship*, 2020 WL 918873, at *15 (“Discovery is a fishing expedition when it goes beyond the pleadings’ allegations to attempt finding additional violations or claim.”).

CONCLUSION

The Court should enter a Protective Order to preclude the CPSC's fishing expedition.

DATED: November 21, 2022.

Respectfully submitted,



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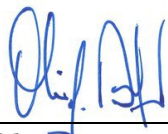
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Counsel for Respondent Leachco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2022, the foregoing was served upon all parties and participants of record as follows:

<p>Honorable Michael G. Young Federal Mine Safety and Health Review Commission Office of the Chief Administrative Law Judge 1331 Pennsylvania Ave., N.W., Suite 520N Washington, D.C. 20004-1710 myoung@fmshrc.gov cjannace@fmshrc.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>
<p>Alberta Mills Secretary of the U.S. Consumer Product Safety Commission U.S. Consumer Product Safety Commission 4330 East West Highway Bethesda, MD 20814 amills@cpsc.gov ndipadova@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>



Oliver J. Dunford
Counsel for Respondent Leachco, Inc.

Exhibit 1

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

**COMPLAINT COUNSEL’S
FIRST SET OF REQUESTS FOR PRODUCTION
OF DOCUMENTS AND THINGS 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.

DEFINITIONS

1. “You,” “your,” “Respondent,” and “Leachco” mean the Respondent to whom these discovery requests are directed (including if previously known under different names), including all past and present officers, directors, representatives, agents, and employees of the Respondent, all other past and present persons acting or purporting to act on Respondent’s behalf (including, but not limited to, all past or present agents and employees exercising discretion, discharging duties, making policy, or making decisions with respect to Respondent), and all past and present parents, subsidiaries, divisions, or branches of Respondent.

2. “Person” means any natural person, entity, group, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority,

commission, office, or other business or legal entity, whether private or governmental, and whether foreign or domestic.

3. “Document” shall be interpreted as the term is used in Federal Rule of Civil Procedure 34, and includes electronically stored information.

4. “Relating to” or “related to” means consisting of, referring to, describing, discussing, constituting, evidencing, containing, mentioning, concerning, pertaining to, citing, summarizing, analyzing, or bearing any logical or factual connection with the matter discussed.

5. “Identify” or “identity,” when used with respect to an individual, means to provide the individual’s present or last known name, residential address, telephone number, occupation, job or position, job title(s), employer, employer department and/or subject area in which the individual works, business affiliation, and business or employment address, and the individual’s relationships or associations, if any, to the Respondent.

6. “Identify” or “identity,” when used with respect to a business, entity, building, or place, means the present or last known name, address, and telephone number, and all former names, of that business, entity, building, or place, its state of incorporation, registration, or organization, the identity and address of its registered agent in each state where it is present and doing business or has a place of business, its present officers, directors, and shareholders, and its relationship, if any, to the Respondent.

7. “Identify” or “identity,” when used with respect to a Document, means the name or title of the Document, a description of the Document or record, including its date of preparation and transmission, the author, sender, and recipient, a summary of the subject matter, and the identity of the Person who currently has custody of, possession of, or control over the

Exhibit 2



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

Brett Ruff
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September 20, 2022

Via Email: ODunford@pacificlegal.org

Oliver J. Dunford
Senior Attorney
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
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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

**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

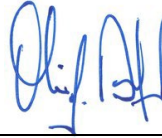
limited to (1) the time period July 1, 2007 to February 9, 2022 and (2) communications involving Jamie Leach, Clyde Leach, Alex Leach, Mabry Ballard, Tonya Barrett, Leah Barnes, and Dan Marshall. But even with this narrowing, Request No. 11 remains overly broad because it seeks “all” documents and communications 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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FGarrison@pacificlegal.org

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>
--	---



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@pacificlegal.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:

**U.S. Consumer Product
Safety Commission**
4330 East-West Highway
Bethesda, MD 20814

**National Product Testing
& Evaluation Center**
5 Research Place
Rockville, MD 20850

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 4

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 5

**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";

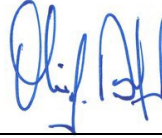
12. “Podster” and “roll” or “move”;
13. “Podster” and “unsupervised” or “supervise”;
14. “Podster” and “crib”;
15. “Podster” and “bed”;
16. “Podster” and “nap”;
17. “Podster” and “asphyxia”;
18. “Podster” and “defect”;
19. “Podster” and “recall”; and
20. “Podster” and “CPSC”.

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

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FRANK D. GARRISON

Indiana Bar No. 34024-49

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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 6

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
FIRST SET OF REQUESTS FOR ADMISSION TO RESPONDENT

Pursuant to 16 C.F.R. § 1025.34, 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 for Admission set forth below.

DEFINITIONS

1. “You,” “your,” “Respondent,” and “Leachco,” means the Respondent to whom these discovery requests are directed (including if previously known under different names), including all past and present officers, directors, representatives, agents, and employees of the Respondent, all other past and present persons acting or purporting to act on Respondent’s behalf (including, but not limited to, all past or present agents and employees exercising discretion, discharging duties, making policy, or making decisions with respect to Respondent), and all past and present parents, subsidiaries, divisions, or branches of Respondent.

2. “Person” means any natural person, entity, group, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority,

commission, office, or other business or legal entity, whether private or governmental and whether foreign or domestic.

3. “Podster” or “Subject Product” means the Leachco Podster, Podster Plush, Bummzie, and Podster Playtime.

4. “Complaint” shall mean the Complaint, and any amendments to the Complaint, filed in this action, CPSC Docket No. 22-1.

5. “Tests” shall mean any examination, inspection, analysis, results, or other assessment.

6. “Retailer” shall mean any Person who sold the Podsters to consumers in the United States.

INSTRUCTIONS

A. Each request shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated. If an objection is made only to part of a request, that part shall be specified. A response should not be supplied solely by reference to the response to another request or subpart, unless the response is completely identical to the response to which reference is made.

B. The responses to these requests for admission shall specifically admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission.

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

D. The words “and” and “or” shall be construed conjunctively or disjunctively, as

necessary to make the request inclusive rather than exclusive. The word “including” shall be construed to mean without limitation. The words “any” and “all” shall be construed so as to make the request inclusive rather than exclusive.

E. The use of the past tense shall include the present tense, and the use of the present tense shall include the past tense, so as to make all definitions and discovery requests inclusive rather than exclusive.

F. The singular shall include the plural, and vice versa.

G. These requests for admission shall be read, interpreted, and answered in accordance with these instructions and the definitions set forth herein. If the meaning of any word or phrase used herein is unclear, Respondents’ attorneys are requested to contact Complaint Counsel to resolve any ambiguity. If any request cannot be answered in full after exercising the required diligence, it shall be answered to the extent possible, with a full statement of all efforts to fully answer and of all reasons a full answer cannot be made.

H. Pursuant to 16 C.F.R. § 1025.31, the Respondent is under a continuing duty to supplement its responses to these discovery requests without further request from Complaint Counsel. Where the Respondent has responded to a discovery request with a response that was complete when made, Respondent is under a duty to supplement that response to include information later obtained.

REQUESTS FOR ADMISSION

REQUEST NO. 1:

Admit that since 2008 Leachco has not had any document management policies other than those contained in the Quality Assurance Plan produced by Leachco with Bates numbers Leachco – CPSC – 000003 through Leachco – CPSC – 000022.

REQUEST NO. 2:

Admit that Leachco has marketed the Podster as a product that “provides upper body elevation which can help aid in digestion and breathing.”

REQUEST NO. 3:

Admit that, prior to the filing of the Complaint, Leachco had knowledge that consumers were allowing infants to sleep on Podsters.

REQUEST NO. 4:

Admit that, prior to the filing of the Complaint, Leachco had knowledge that at least one Retailer advertised the Podster as a product in which infants can sleep.

REQUEST NO. 5:

Admit that, prior to the filing of the Complaint, Leachco had knowledge that there were reviews on Amazon.com in which consumers referenced infants sleeping on Podsters.

REQUEST NO. 6:

Admit that at least one infant died after being left unsupervised on a Podster.

REQUEST NO. 7:

Admit that an infant can suffocate on the Podster.

REQUEST NO. 8:

Admit that, prior to selling the Podsters, Leachco conducted no Tests to assess potential infant movement while on the Podsters.

REQUEST NO. 9:

Admit that, after beginning to sell the Podsters, Leachco conducted no Tests to assess potential infant movement while on the Podsters.

REQUEST NO. 10:

Admit that, prior to selling the Podsters, Leachco conducted no Tests to evaluate whether the Podsters pose a suffocation risk.

REQUEST NO. 11:

Admit that, after beginning to sell the Podsters, Leachco conducted no Tests to evaluate whether the Podsters pose a suffocation risk.

REQUEST NO. 12:

Admit that, prior to selling the Podsters, Leachco conducted no Tests regarding how consumers may use the Podsters.

REQUEST NO. 13:

Admit that, after beginning to sell the Podsters, Leachco conducted no Tests regarding how consumers may use the Podsters.

REQUEST NO. 14:

Admit that, prior to selling the Podsters, Leachco conducted no Tests regarding the effectiveness of the Podsters' warnings and instructions.

REQUEST NO. 15:

Admit that, after beginning to sell the Podsters, Leachco conducted no Tests regarding the effectiveness of the Podsters' warnings and instructions.

REQUEST NO. 16:

Admit Leachco has no safety department to assess the safety of its products.

REQUEST NO. 17:

Admit Leachco has no safety committee to assess the safety of its products.

REQUEST NO. 18:

Admit Leachco has no employee whose position at Leachco focuses solely on product safety.

REQUEST NO. 19:

Admit Leachco has no written company policies regarding consumer safety.

REQUEST NO. 20:

Admit Leachco has no written company procedures regarding consumer safety.

REQUEST NO. 21:

Admit that Leachco employees sent emails regarding the Podsters, including emails containing the term "Podster", using the customerservice@leachco.com email address.

REQUEST NO. 22:

Admit that Leachco employees received emails regarding the Podsters, including emails containing the term "Podster", using the customerservice@leachco.com email address.

REQUEST NO. 23:

Admit that Jamie Leach sent emails to other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the jamieleach@leachco.com email address.

REQUEST NO. 24:

Admit that Jamie Leach received emails from other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the jamieleach@leachco.com email address.

REQUEST NO. 25:

Admit that Tonya Barrett sent emails to other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the tbarrett@leachco.com email address.

REQUEST NO. 26:

Admit that Tonya Barrett received emails from other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the tbarrett@leachco.com email address.

REQUEST NO. 27:

Admit that Leah Barnes sent emails to other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the lbarnes@leachco.com email address.

REQUEST NO. 28:

Admit that Leah Barnes received emails from other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the lbarnes@leachco.com email address.

REQUEST NO. 29:

Admit that Mabry Ballard sent emails to other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the mballard@leachco.com email address.

REQUEST NO. 30:

Admit that Mabry Ballard received emails from other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the mballard@leachco.com email address.

Dated this 31st 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
Tel: (301) 504-7220

Complaint Counsel for
U.S. Consumer Product Safety Commission

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2022, I served Complaint Counsel's First Set of Requests for Admission on 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

/s/ Brett Ruff

Complaint Counsel for
U.S. Consumer Product Safety Commission

Exhibit 7

From: [Oliver J. Dunford](#)
To: [Ruff, Brett](#); [Thomas, Rosalee](#); [ODonnell, Caitlin](#); [Rogal, Michael](#); [Millett, Frederick](#); [Reyes, Gregory](#); [Perilla, Frank Robert](#)
Cc: [Frank Garrison](#); [John F. Kerkhoff](#)
Subject: RE: In the Matter of Leachco, Inc. - CPSC Docket No. 22-1
Date: Thursday, November 17, 2022 10:06:00 AM
Attachments: [image001.png](#)

Sounds good. Thank you.

Oliver J. Dunford | Senior Attorney

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



**PACIFIC LEGAL
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Defending Liberty and Justice for All.

From: Ruff, Brett <BRuff@cpsc.gov>
Sent: Thursday, November 17, 2022 10:04 AM
To: Oliver J. Dunford <ODunford@pacificlegal.org>; Thomas, Rosalee <RBThomas@cpsc.gov>; ODonnell, Caitlin <CODonnell@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>
Cc: Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>
Subject: RE: In the Matter of Leachco, Inc. - CPSC Docket No. 22-1

Oliver,

We appreciate your offer for a joint extension on the opposition briefs. A deadline of December 2 for both opposition briefs sounds reasonable to us, as long as your motion is filed by November 21 as anticipated.

With respect to our own motion, we intend to file it today or tomorrow. But we still will stipulate to a December 2 deadline for your response. We do not need to alert the judge to the filing of the motions, but it would be prudent for us to file a joint stipulation/motion regarding the opposition deadlines on Monday or Tuesday of next week. We can take the pen on a first draft.

Brett Ruff

Trial Attorney

U.S. Consumer Product Safety Commission

Division of Enforcement and Litigation | Office of Compliance and Field Operations
4330 East West Highway | Bethesda, MD 20814

From: Oliver J. Dunford <ODunford@pacificlegal.org>
Sent: Thursday, November 17, 2022 8:35 AM

To: Ruff, Brett <BRuff@cpsc.gov>; Thomas, Rosalee <RBThomas@cpsc.gov>; O'Donnell, Caitlin <CODonnell@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>
Cc: Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>
Subject: RE: In the Matter of Leachco, Inc. - CPSC Docket No. 22-1

Brett,

Thank you for the offer to reasonably extend the response deadline. Because we intend to file a Motion for a Protective Order, we will extend the same courtesy. Do you want to agree to a briefing schedule? I might suggest that we file our competing motions Monday, Nov. 21 with opposition briefs due either Dec. 2 (Friday) or Dec. 5 (Monday).

Also, should we alert Judge Young and his law clerk that this briefing will be coming?

Oliver

Oliver J. Dunford | Senior Attorney
Pacific Legal Foundation
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916.503.9060 (Direct) | 216.702.7027 (Cell)



**PACIFIC LEGAL
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Defending Liberty and Justice for All.

From: Ruff, Brett <BRuff@cpsc.gov>
Sent: Tuesday, November 15, 2022 4:54 PM
To: Oliver J. Dunford <ODunford@pacificlegal.org>; Thomas, Rosalee <RBThomas@cpsc.gov>; O'Donnell, Caitlin <CODonnell@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>
Cc: Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>
Subject: RE: In the Matter of Leachco, Inc. - CPSC Docket No. 22-1

Oliver,

Thank you for evaluating that issue and getting back to us. It appears that we will need to file papers on this topic. We anticipate moving forward with a motion to compel on the RFP responses in the near future. If you would like, we are willing to stipulate to a reasonable extension of time for your response brief given the imminent Thanksgiving holiday.

Brett Ruff

Trial Attorney

U.S. Consumer Product Safety Commission

Division of Enforcement and Litigation | Office of Compliance and Field Operations
4330 East West Highway | Bethesda, MD 20814

From: Oliver J. Dunford <ODunford@pacificlegal.org>

Sent: Monday, November 14, 2022 1:09 PM

To: Ruff, Brett <BRuff@cpsc.gov>; Thomas, Rosalee <RBThomas@cpsc.gov>; ODonnell, Caitlin <CODonnell@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Reyes, Gregory <GREyes@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

Cc: Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>

Subject: RE: In the Matter of Leachco, Inc. - CPSC Docket No. 22-1

Brett,

We will not be able to amend Leachco's answer to obviate the discovery dispute.

I think we should set a briefing schedule for Judge Young.

Let us know what you think.

Oliver

Oliver J. Dunford | Senior Attorney

Pacific Legal Foundation

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**PACIFIC LEGAL
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From: Ruff, Brett <BRuff@cpsc.gov>

Sent: Wednesday, November 9, 2022 3:19 PM

To: Oliver J. Dunford <ODunford@pacificlegal.org>; Thomas, Rosalee <RBThomas@cpsc.gov>; ODonnell, Caitlin <CODonnell@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Reyes, Gregory <GREyes@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

Cc: Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>

Subject: RE: In the Matter of Leachco, Inc. - CPSC Docket No. 22-1

Oliver,

Thank you for the call today. We think we understand Leachco's position with respect to the RFPs and RFAs, but—as we noted during the call—we respectfully disagree. The appropriate

scope of discovery likely will be an issue as to which we will need to submit papers and get a ruling from the judge.

You mentioned during the call that Leachco may amend its answer. Could you please let us know by next Monday whether Leachco intends to move forward with such revisions? That may help both sides' consideration of the issue.

Brett Ruff

Trial Attorney

U.S. Consumer Product Safety Commission

Division of Enforcement and Litigation | Office of Compliance and Field Operations
4330 East West Highway | Bethesda, MD 20814

From: Ruff, Brett

Sent: Friday, November 4, 2022 3:40 PM

To: Oliver J. Dunford <ODunford@pacificlegal.org>; Thomas, Rosalee <RBThomas@cpsc.gov>; O'Donnell, Caitlin <CODonnell@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

Cc: Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>

Subject: RE: In the Matter of Leachco, Inc. - CPSC Docket No. 22-1

Let's plan to speak at 1. We will send a calendar invitation.

From: Oliver J. Dunford <ODunford@pacificlegal.org>

Sent: Friday, November 4, 2022 2:55 PM

To: Ruff, Brett <BRuff@cpsc.gov>; Thomas, Rosalee <RBThomas@cpsc.gov>; O'Donnell, Caitlin <CODonnell@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

Cc: Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>

Subject: RE: In the Matter of Leachco, Inc. - CPSC Docket No. 22-1

We're available any time between 12:30 and 4:00.

Thanks,
Oliver

Oliver J. Dunford | Senior Attorney

Pacific Legal Foundation

4440 PGA Blvd., Suite 307 | Palm Beach Gardens, FL 33410

916.503.9060 (Direct) | 216.702.7027 (Cell)



**PACIFIC LEGAL
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From: Ruff, Brett <BRuff@cpsc.gov>
Sent: Friday, November 4, 2022 2:52 PM
To: Oliver J. Dunford <ODunford@pacificlegal.org>; Thomas, Rosalee <RBThomas@cpsc.gov>; O'Donnell, Caitlin <CODonnell@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>
Cc: Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>
Subject: RE: In the Matter of Leachco, Inc. - CPSC Docket No. 22-1

Oliver,

We agree that a meet-and-confer call would be worthwhile, as we disagree with your client's position regarding the scope of discovery. We could speak between 12:30 p.m. and 4:00 p.m. next Wednesday. Is there a time during that window that would work for your team?

Thank you,

Brett Ruff

Trial Attorney

U.S. Consumer Product Safety Commission

Division of Enforcement and Litigation | Office of Compliance and Field Operations
4330 East West Highway | Bethesda, MD 20814

From: Oliver J. Dunford <ODunford@pacificlegal.org>
Sent: Friday, November 4, 2022 1:30 PM
To: Ippolito, Leah <Lippolito@cpsc.gov>; Ruff, Brett <BRuff@cpsc.gov>; Thomas, Rosalee <RBThomas@cpsc.gov>; O'Donnell, Caitlin <CODonnell@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Murphy, Mary <MMurphy@cpsc.gov>; Kaye, Robert <RKaye@cpsc.gov>
Cc: Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>
Subject: In the Matter of Leachco, Inc. - CPSC Docket No. 22-1

Counsel,

I've attached our objections and responses to the Commission's 2nd RFPs.

Also, as we discussed last week, I promised to say whether we would be producing any other documents responsive to your First Set of RFPs. We have determined that we will not produce further documents. We believe that your complaint alleges a defect based on the (alleged) reasonably foreseeable misuse. The subjective knowledge of Leachco is irrelevant to that claim.

We have similar objections to your Requests for Admission. I propose that we schedule a meet and confer call. Would you let us know your availability next

week?

Thank you,
Oliver

Oliver J. Dunford | Senior Attorney

Pacific Legal Foundation

4440 PGA Blvd., Suite 307 | Palm Beach Gardens, FL 33410

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<http://www.cpsc.gov/en/Newsroom/Subscribe> *****!!!

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From: [Oliver J. Dunford](#)
To: [Ruff, Brett](#); [Thomas, Rosalee](#); [Reyes, Gregory](#); [Rogal, Michael](#); [ODonnell, Caitlin](#); [Millett, Frederick](#); [Perilla, Frank Robert](#); [Ippolito, Leah](#)
Cc: [John F. Kerkhoff](#); [Frank Garrison](#)
Subject: RE: In the Matter of Leachco, Inc., CPSC Docket No. 22-1
Date: Tuesday, October 25, 2022 2:16:00 PM
Attachments: [image001.png](#)
[image002.png](#)

Brett,

Thanks for talking today.

And thanks for confirming that you have produced all non privileged documents that are responsive to Leachco's discovery requests. (We, of course, reserve our rights to challenge your assertion of privilege over individual documents on your amended privilege log.) Further, you confirmed that this is not a defective warning case.

And, to reiterate my statements: We believe that the vast majority of your discovery requests are overbroad and seek information and documents far outside the scope of the issues in this proceeding. (One caveat: I need to review your 2nd RFPs again before I offer any definitive statement on the scope of the requests there.) Because these requests are overly broad, we are not withholding *relevant* privileged documents; and for that reason, there is no reason for us to prepare a privilege log. (Leachco has confirmed this point several times, including (via Ms. Strauss) at the Sept. 7 discovery conference with Judge Young.) Finally, we will respond to your 2nd RFPs by Friday, November 4. And I will let you know by that date whether we have any other documents to produce.

Thanks again for the call.

Oliver

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



**PACIFIC LEGAL
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From: Ruff, Brett <BRuff@cpsc.gov>
Sent: Monday, October 24, 2022 10:31 AM
To: Oliver J. Dunford <ODunford@pacificlegal.org>; Thomas, Rosalee <RBThomas@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; ODonnell, Caitlin

<CODonnell@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>; Ippolito, Leah <Lippolito@cpsc.gov>
Cc: John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>
Subject: RE: In the Matter of Leachco, Inc., CPSC Docket No. 22-1

Oliver,

Your request is outside the scope of the Rules of Practice (16 C.F.R. Part 1025) and Judge Young's September 16, 2022 scheduling Order. However, we are not withholding anything at this time that will be used to prove Complaint Counsel's case. Complaint Counsel will continue to produce relevant, responsive documents throughout the course of discovery if any additional information is uncovered by Complaint Counsel. Complaint Counsel also plans to introduce expert testimony at the hearing, which will be provided pursuant to the deadlines in the scheduling order in this case. As we mentioned before, your request asks for information about trial strategy, and you are not entitled to that information.

Regarding your question about the privilege log, our prior response regarding documents identified in the privilege log was clear: we do not intend to use at the hearing materials that have been included in the privilege log. Materials included in the privilege log are privileged.

We again note that, while Complaint Counsel has engaged in good faith to produce requested documents and information since the discovery "reset," Leachco has failed to provide a privilege log or a single responsive document since that date.

We are not available to speak today, but we could speak tomorrow afternoon, except from 3 to 4. Please let us know if you have some availability then.

Brett Ruff

Trial Attorney

U.S. Consumer Product Safety Commission

Division of Enforcement and Litigation | Office of Compliance and Field Operations

4330 East West Highway | Bethesda, MD 20814

From: Oliver J. Dunford <ODunford@pacificlegal.org>

Sent: Friday, October 21, 2022 4:49 PM

To: Ruff, Brett <BRuff@cpsc.gov>; Thomas, Rosalee <RBThomas@cpsc.gov>; Ippolito, Leah <Lippolito@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; ODonnell, Caitlin <CODonnell@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

Cc: John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>

Subject: RE: In the Matter of Leachco, Inc., CPSC Docket No. 22-1

Brett,

Thanks for the response. We do not, of course, ask for your trial strategy. We want to know whether Complaint Counsel is withholding facts, data, etc. that it will later use to prove its case.

Your response is unclear. You write, “we will not use at the hearing the *privileged* materials that have been included in the privilege log.” This statement could be read to suggest that there are materials on the privilege log that are not privileged. In other words, your statement could be read as, “we may use at the hearing non privileged materials that have been included in the privilege log.”

So, to repeat, are there any documents, facts, data, studies, investigations, analyses, etc., collected or performed before February 9, 2022 that Complaint Counsel will use to prove its case in this proceeding?

Thank you,
Oliver

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



**PACIFIC LEGAL
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From: Ruff, Brett <BRuff@cpsc.gov>
Sent: Friday, October 21, 2022 4:23 PM
To: Oliver J. Dunford <ODunford@pacificlegal.org>; Thomas, Rosalee <RBThomas@cpsc.gov>; Ippolito, Leah <Lippolito@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; ODonnell, Caitlin <CODonnell@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>
Cc: John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>; Strauss, Bettina <BJStrauss@bclplaw.com>; james.emanuel@bclplaw.com
Subject: RE: In the Matter of Leachco, Inc., CPSC Docket No. 22-1

Oliver,

As an initial matter, we do not believe it is in the spirit of good faith discovery discussions to send an email on Friday afternoon in which you threaten to file a motion to compel on Monday if you do not receive a satisfactory response.

We also find it inappropriate for Leachco to complain about our privilege log when Leachco had failed to produce its own. Please let us know when we can expect one from Leachco.

Your email demands a response to your question about materials that “Complaint Counsel will use to prove its case in this proceeding”. To the extent Leachco is asking for Complaint Counsel’s trial strategy, Leachco is not entitled to that information. Per Judge Young’s Order on Prehearing Schedule, witness and exhibit lists are not due until July 14, 2023. We do, however, note that we will not use at the hearing the privileged materials that have been

included in the privilege log.

Finally, we agree that Judge Young emphasized during our discovery conference that the purpose of discovery is to produce all relevant evidence that will be needed to resolve this dispute. We have not received any documents from Leachco since that discovery conference and the corresponding discovery “reset”. We expect a fulsome response to our pending supplemental RFP.

Brett Ruff

Trial Attorney

U.S. Consumer Product Safety Commission

Division of Enforcement and Litigation | Office of Compliance and Field Operations

4330 East West Highway | Bethesda, MD 20814

From: Oliver J. Dunford <ODunford@pacificlegal.org>

Sent: Friday, October 21, 2022 1:22 PM

To: Thomas, Rosalee <RBThomas@cpsc.gov>; Ruff, Brett <BRuff@cpsc.gov>; Ippolito, Leah <Lippolito@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; ODonnell, Caitlin <CODonnell@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

Cc: John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>; Strauss, Bettina <BJStrauss@bclplaw.com>; james.emanuel@bclplaw.com

Subject: RE: In the Matter of Leachco, Inc., CPSC Docket No. 22-1

Counsel,

Thank you for the amended privilege log. We’ve noticed that it identifies various documents, attachments, analyses, even some “raw data” (Doc. # 463). And you’ve asserted the deliberative process privilege (DPP) for most, if not all, of those documents. The DPP is, however, to be construed narrowly. And while it may cover opinions, recommendations, or deliberations, it does not protect facts or data. The point of the privilege is to allow for candor among staff not to hide relevant factual information. Staff may have opinions or recommendations about facts, but the facts themselves are not protected from disclosure by the DPP.

Separately, as Judge Young emphasized during our discovery conference, the purpose of discovery is to produce all relevant evidence that will be needed to resolve this dispute. Therefore, the CPSC cannot both withhold (relevant factual) information from us during discovery and then use that same information to prove its claim.

You’ve previously indicated that you will not rely on “technical staff’s preliminary analysis” to prove your case but, instead, you “intend[.]” to produce expert testimony to establish the allegations in the administrative complaint. *See* CPSC

Opp. to Leachco Mtn. to Compel at 9. It's not clear what you mean. Does "preliminary analysis" refer to all pre complaint analyses, studies, investigations, etc., as well as all facts and data gathered during those analyses and investigations and studies? Did technical staff complete its "preliminary analysis" some time before February 9, 2022 and, if so, did technical staff perform additional analysis or collect additional or new data/facts that Complaint Counsel may rely on at the hearing? (Also, many entries on the Amended Privilege Log describe communications between attorneys and "staff" rather than "technical staff." Are documents in connection with "staff" excluded from the representation made in your Opposition Brief to Leachco's Motion to Compel?)

In short, are there any documents, facts, data, studies, investigations, analyses, etc., collected or performed before February 9, 2022 that Complaint Counsel will use to prove its case in this proceeding?

Please advise. We hope to avoid it, but we will file a Motion to Compel on Monday if necessary.

We do not waive any other objections about the Amended Privilege Log.

Thank you,
Oliver

Oliver J. Dunford | Senior Attorney

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916.503.9060 (Direct) | 216.702.7027 (Cell)



**PACIFIC LEGAL
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From: Thomas, Rosalee <RBThomas@cpsc.gov>

Sent: Monday, October 3, 2022 4:47 PM

To: Oliver J. Dunford <ODunford@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>; Strauss, Bettina <BJStrauss@bclplaw.com>; james.emanuel@bclplaw.com

Cc: Ruff, Brett <BRuff@cpsc.gov>; Ippolito, Leah <Lippolito@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; ODonnell, Caitlin <CODonnell@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

Subject: In the Matter of Leachco, Inc., CPSC Docket No. 22-1

Counsel,

Attached are Complaint Counsel's amended privilege log and glossary for *In the Matter of Leachco, Inc.*, CPSC Docket No. 22-1.

Thank you.

Rosalee B.C. Thomas

Trial Attorney

U.S. Consumer Product Safety Commission

Division of Enforcement and Litigation | Office of Compliance and Field Operations

4330 East West Highway | Bethesda, MD 20814

Office: (301) 504-7656 | rbthomas@cpsc.gov | www.cpsc.gov

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<http://www.cpsc.gov/en/Newsroom/Subscribe> *****!!!

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Exhibit 8

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 FIRST SUPPLEMENTAL RESPONSES
TO RESPONDENT’S FIRST SET OF INTERROGATORIES TO
CONSUMER PRODUCT SAFETY COMMISSION**

Pursuant to 16 C.F.R. § 1025.32, Complaint Counsel respectfully submits its first supplemental responses (“Responses”) to Respondent Leachco, Inc.’s (“Respondent”), First Set of Interrogatories to Consumer Product Safety Commission (“Interrogatories”).

PRELIMINARY STATEMENT

Complaint Counsel hereby incorporates by reference its Preliminary Statement set forth in Complaint Counsel’s Objections and Responses to Respondent’s First Set of Interrogatories to Consumer Product Safety Commission, dated May 13, 2022.

GENERAL OBJECTIONS

Complaint Counsel hereby incorporates by reference its General Objections set forth in Complaint Counsel’s Objections and Responses to Respondent’s First Set of Interrogatories to Consumer Product Safety Commission, dated May 13, 2022.

Subject to and without waiving those objections, Complaint Counsel provides the following Responses:

in connection with CPSC File Nos. PI210002 and CA220007. Complaint Counsel also states that non-privileged documents and materials supporting the basis for its contentions have been or will be produced to Respondent, as detailed in Complaint Counsel's Objections and Responses to Respondent's First Set of Requests for Production of Documents and Things to Consumer Product Safety Commission.

FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 3:

Subject to and without waiver of the foregoing general and specific objections, Complaint Counsel reiterates its objection that this Interrogatory seeks premature expert discovery. Complaint Counsel will identify the expert witnesses it expects to call at the hearing in this matter in accordance with the Court's September 16, 2022 Order. Complaint Counsel reserves the right to supplement this Response as the case progresses and as new information is received from Respondent, and will amend these responses in accordance with 16 C.F.R. § 1025.31(f), as appropriate.

INTERROGATORY NO. 4: Describe in complete detail each alternative design or modification which you contend was possible to reduce or eliminate the defect and/or hazard you contend existed in the Podster, including without limitation in your description, whether or not each design or modification is commercially available, identification of any product using the commercially available alternative design, whether or not each design or modification has been inspected, tested or otherwise analyzed by you, and if so, describe in complete detail the nature of any inspection, testing or analysis, and identify any Document concerning, involving or in any way related to your response.

RESPONSE TO INTERROGATORY NO. 4:

Complaint Counsel objects to this Interrogatory on the grounds it seeks information outside the permissible scope of discovery set forth in 16 C.F.R. § 1025.31(c), and is not reasonably calculated to lead to the discovery of admissible evidence pertaining to the issue involved in these proceedings—namely, whether Respondent's Podsters are defective and create

a substantial product hazard under Section 15 of the CPSA, 15 U.S.C. § 2064, and applicable regulations, including 16 C.F.R. Part 1115. Complaint Counsel further objects to this Interrogatory and states that it is overly broad and unduly burdensome because it seeks to impose obligations upon Complaint Counsel beyond what is required by the CPSA, 15 U.S.C. § 2015 *et seq.* The issue in this matter is whether the Podsters present a substantial product hazard, not whether a modified product would pose a hazard. Complaint Counsel does not have the burden of proving or providing any “alternative design[s]” for the Podsters in order to establish that they present a substantial product hazard under Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2). In addition, Complaint Counsel objects to this Interrogatory on the grounds it seeks information protected by privilege or other protection, including the attorney-client privilege, work product doctrine, or deliberative process privilege, by seeking the mental impressions, conclusions, opinions, or legal theories of Complaint Counsel.

FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 4:

Subject to and without waiver of the foregoing general and specific objections, Complaint Counsel states that it is not making contentions about “alternative designs or modification[s]” that would “reduce or eliminate the defect and/or hazard” posed by the Podster.

INTERROGATORY NO. 5: Describe in complete detail any warning or instruction you contend Leachco provided improperly or failed to provide in connection with the Podster, including without limitation in your description, the manner in which you contend any warning or instruction provided by Leachco was improper, the content of any warning or instruction you contend was proper or required, the manner in which you contend that warning or instruction should have been provided, whether any commercially available alternative product uses the warning or instruction you contend was proper or required, the identity of any commercially available alternative product that uses the warning or instruction you contend was proper or required, and identify any Documents concerning, involving or in any way related to your response.

RESPONSE TO INTERROGATORY NO. 5:

Complaint Counsel objects to this Interrogatory on the grounds it seeks information outside the permissible scope of discovery set forth in 16 C.F.R. § 1025.31(c), and is not reasonably calculated to lead to the discovery of admissible evidence pertaining to the issue involved in these proceedings—namely, whether Respondent’s Podsters are defective and create a substantial product hazard under Section 15 of the CPSA, 15 U.S.C. § 2064, and applicable regulations, including 16 C.F.R. Part 1115. Complaint Counsel further objects to this Interrogatory and states that it is overly broad and unduly burdensome because it seeks to impose obligations upon Complaint Counsel beyond what is required by the CPSA, 15 U.S.C. § 2015 *et seq.* The issue in this matter is whether the Podsters present a substantial product hazard, not whether a product with modified warnings or instructions would pose a hazard. Complaint Counsel does not have the burden of proving or providing any alternative warning or instruction for the [redacted] esent a substantial product hazard under Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2).

In addition, Complaint Counsel objects to this Interrogatory on the grounds it seeks information protected by privilege or other protection, including the attorney-client privilege, work product doctrine, or deliberative process privilege, by seeking the mental impressions, conclusions, opinions, or legal theories of Complaint Counsel.

FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 5:

Subject to and without waiver of the foregoing general and specific objections, Complaint Counsel states that it is not making contentions about any “warning or instruction” Leachco “provided improperly or failed to provide in connection with the Podster.”

For the Responses:

I, Brett Ruff, affirm that the foregoing First Amended Responses to Respondent's First Set of Interrogatories to Consumer Product Safety Commission are true and correct to the best of my knowledge, information, and belief.

Executed on this 3rd day of October, 2022

/s/ Brett Ruff
Brett Ruff
Trial Attorney
Division of Enforcement and Litigation
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission

For the Objections:

Dated this 3rd day of October, 2022

/s/ Brett Ruff
Mary B. Murphy, Director
Leah Ippolito, Supervisory Attorney
Gregory Reyes, Supervisory Attorney
Brett Ruff, Trial Attorney
Caitlin O'Donnell, Trial Attorney
Rosalee Thomas, 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
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Complaint Counsel for
U.S. Consumer Product Safety Commission

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, I served the foregoing COMPLAINT COUNSEL'S FIRST SUPPLEMENTAL RESPONSES TO RESPONDENT'S FIRST SET OF INTERROGATORIES upon Respondent as follows:

By email to Counsel for Respondent:

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