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December 16, 2022

In the Matter of

LEACHCO, INC., CPSC Docket No. 22-1

Respondent.

ORDER DENYING LEACHCO, INC.'S MOTION FOR PROTECTIVE ORDER ORDER GRANTING 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

The parties have continued efforts to agree upon required discovery since the Discovery Conference held on September 7, 2022. Continued disputes resulted in a Complaint Counsel moving to compel production regarding its second set of requests for all non-privileged documents and information responsive to the requests, including all communications between January 1, 2008, and February 9, 2022, to and from stated current and former Leachco personnel containing listed search terms. *See* Mem. in Supp. of Compl. Counsel's Mot. to Compel Produc. of Elec. Commc'ns Pursuant to Compl. Counsel's 2d Set of Reqs. for Produc. of Docs. to Resp't, at 15–16 (Nov. 17, 2022) [Compl. Counsel Mem.].

Respondent thereafter moved for a protective order, precluding Complaint Counsel from obtaining responses to RFP No. 27 and RFA Nos. 3, 4, and 5. *See* Leachco, Inc.'s Mot. for Protective Order, at 1 (Nov. 21, 2022) [Resp't Mot.]. I granted a joint request for extension and mutual deadline for responses in opposition to both motions. Order Granting Stipulation and Joint Mot. for Extension of Time to Respond to Pending Disc. Mots. (Nov. 22, 2022). The parties timely submitted responses on December 2, 2022. For the reasons below, Respondent's motion for a protective order of the designated requests is DENIED; Complaint Counsel's motion to compel production is GRANTED; and Respondent is ORDERED to produce documents responsive to RFP No. 27 and RFA Nos. 3, 4, and 5.

I. Background

A. Complaint Counsel's Requests and Respondent's Responses

Complaint Counsel asserts that Respondent has refused to produce any documents in response to its request for internal and external communications to and from seven current and

former Leachco employees, within a specified date range, using specific search terms. *See* Compl. Counsel's Mot. to Compel Produc. of Elec. Commc'ns Pursuant to Compl. Counsel's 2d Set of Reqs. for Produc. of Docs. to Resp't, at 1 (Nov. 17, 2022) [Compl. Counsel Mot.]. Complaint Counsel initially requested the associated production in Request for Production ("RFP") Nos. 9, 10, and 11, and Respondent initially objected to each, asserting the requests were vague, overbroad, and unlimited in time and scope, and that they sought irrelevant information and that protected by attorney-client or work product privileges. Compl. Counsel Mem. Ex. 2 [Leachco, Inc.'s Suppl. Objs. & Resps. to CPSC's Reqs. for Produc. of Docs. Nos. 9, 10, & 11 (Oct. 3, 2022)], at 1–4.

Request No. 9 was stated as follows:

> 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.

Id. Ex. 2, at 1. Request No. 10 was stated as follows:

> 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.

Id. Ex. 2, at 3. Request No. 11 was states as follows:

> 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, bot limited to, whether the Podsters pose a suffocation risk or other risk to infants.

Id. Ex. 2, at 4.

After a September 19, 2022, meeting, Complaint Counsel memorialized certain action items, apparently narrowing the scope of the requested discovery from RFP Nos. 9, 10, and 11 to include seven persons, a specified date range, and search terms to be used. *Id.* at Ex. A [Email from Brett Ruff, Trial Attorney for Consumer Product Safety Commission, to Oliver J. Dunford, Attorney for Respondent (Sept. 20, 2022)], at 2. Respondent similarly objected to each in supplemental responses.

In each, Respondent asserted that January 20, 2022, is the proper cut-off date for relevant materials because the Commission published its press release alleging that the Podster was defective then, rather than February 9, 2022. *Id.* Ex. 2, at 2, 4, 5. It objected to RFP No. 9 for remaining overly broad by seeking "documents and communications related to "'the Documents

requested here, and/or the Podsters,' which is unlimited and therefore outside the scope of permissible discovery." *Id.* Ex. 2, at 2. It further asserted that its understanding of the litigation subject matter was the "alleged risk of suffocation through a variety of interactions between and infant and the Podster." *Id.* Finally, it stated that it produced external communications, from July 2007 to January 20, 2022, regarding the risk of suffocation, and that it would produce external communications for that timeframe regarding the following:

> [P]otential 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.

Id. Ex. 2, at 2–3 (citing Compl. ¶ 21–34 (Feb. 9, 2022)).

Respondent objected to RFP No. 10 for seeking documents outside the scope of permissible discovery, and it noted its response and documents produced in response to RFP No. 9. *Id.* Ex. 2, at 3–4. Finally, it objected to RFP No. 11 for remaining overbroad and seeking documents outside the scope of permissible discovery by requesting "'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." *Id.* Ex. 2, at 5. It similarly noted its response and documents produced in response to RFP No. 9. *Id.*

Complaint Counsel claimed these responses were insufficient and served a second set of requests to obtain the information originally requested, now as RFP No. 27. *Id.* Ex. 3 [Compl. Counsel's 2d Set of Reqs. for Produc. of Docs. to Resp't (Oct. 5, 2022)], at 2–3. The request specified a date range of January 1, 2008, and February 9, 2022, seven persons, and twenty search terms. *Id.* Respondent again objected to the request, asserting: (1) that January 20, 2022, is the proper cut-off date for relevant materials; (2) that the subject matter is 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; and (3) that the Commission did not allege Respondent failed to provide adequate warnings—meaning its internal communications "have no bearing on the issues in this proceeding," and the request therefore seeks information "neither relevant nor reasonably calculated to lead to the discovery of evidence for the claims asserted by the Commission." *Id.* Ex. 4 [Leachco, Inc.'s Objs. & Resps. to CPSC's 2d Set of Reqs. for Produc. of Docs. (Nov. 4, 2022)], at 3.

B. Complaint Counsel's Motion to Compel Production and Respondent's Response in Opposition

Complaint Counsel makes four assertions in support of its motion to compel. First, that the scope of relevant discovery is broad, noting section 1025.31(c)(1)'s language's similarity to the Federal Rules of Civil Procedure ("FRCP"). Compl. Counsel Mem. at 9 (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350 (1978)). Next, that its request falls within that broad scope of discovery. *Id.* at 10 (noting the potential relation to its case regarding foreseeable use and risk of injury). Next, that the E-Discovery of specified custodians using

search terms is a well-recognized method of obtaining relevant discovery, citing precedent from multiple jurisdictions. *Id.* at 12. Finally, that it is entitled to communications of potential witnesses to test credibility. *Id.* at 13 (citing *Adelman v. Boy Scouts of Am.*, 276 F.R.D. 681, 688–89 (S.D. Fla. 2011)).

Respondent asserts that Complaint Counsel's discovery request is irrelevant to the stated claim and is intended to develop new claims not in the pleadings. Leachco, Inc.'s Opp'n to the Comm'n's Mot. to Compel at 3 (Dec. 2, 2022) [Resp't Opp'n Mem.] (citing Fed. R. Civ. P. 26(b)(1); *Torch Liquidating Trust ex. Rel. Bridge Assocs. L.L.C. v. Stockstill*, 561 F.3d 377, 392 (5th Cir. 2009)). It claims the requested material is irrelevant because its subjective knowledge has nothing to do with the alleged claim—that 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." *Id.* at 4 (quoting Compl. ¶ 50 (citing 15 U.S.C. § 2064(a)(2) (2022))).

Within its relevance argument, Respondent makes three further assertions. First, that its denials do not transform the foreseeability question from a reasonable person standard to one of subjective intent or knowledge. *Id.* at 5 (citing *Guevara v. Constar Fin. Servs., LLC*, No. 3:17-CV-2282, 2020 WL 3001390, at *4, *5 (M.D. Pa. June 4, 2020)). Next, that Complaint Counsel did not explain why Respondent's knowledge of pre-Complaint testing is relevant. *Id.* Finally, that the argument for communications to impeach possible witnesses is based only on conjecture. *Id.* at 6 (citing *Alvarado v. GC Dealer Servs. Inc.*, 18-cv-2915 (SJF)(SIL), 2018 WL 6322188, at *4 (E.D.N.Y. Dec. 3, 2018) (quoting *Dzanis v. JPMorgan Chase & Co.*, No. 10-cv-3384, 2011 WL 5979650, at *6 (S.D.N.Y. Nov. 30, 2011))) (requiring good cause for discovery solely for potential impeachment material).

Respondent lastly asserts that the requested discovery relates—if at all—only to a claim not alleged. *Id.* at 7. It states that a regulation cited by Complaint Counsel—16 C.F.R. § 1115.6 (2022)—only relates to a manufacturer's reporting requirements under 15 U.S.C. § 2064(b)(3), which was not alleged. *Id.*

C. Respondent's Motion for Protective Order and Complaint Counsel's Response in Opposition

Respondent seeks a protective order precluding Complaint Counsel from obtaining responses to RFP No. 27 and Request for Admission ("RFA") Nos. 3, 4, and 5. Resp't Mot. at 1. The specifics of RFP No. 27 are described above, *supra* Section I.A. The RFAs state:

> **CPSC RFA No. 3:** Admit that, prior to the filing of the Complaint, Leachco had knowledge that consumers were allowing infants to sleep on Podsters.
>
> **CPSC RFA 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.

> **CPSC RFA No. 5:** Admit that, prior to filing of the Complaint, Leachco had knowledge that there were reviews on Amazon.com in which consumers referenced infants sleeping on Podsters.

Resp't Mot. at 2.

Respondent requests the protective order because: (1) its employees' subjective knowledge is irrelevant to the alleged claim; (2) Complaint Counsel is attempting discovery to prove a claim not alleged; and (3) Complaint Counsel has admitted its intent to rely on expert testimony, acknowledging that it is "not relying on technical staff's preliminary analysis to prove its case." Mem. in Supp. of Leachco, Inc.'s Mot. for Protective Order at 1–2 (Nov. 21, 2022) [Resp't Mem.].

Recognizing entitlement to relevant, nonprivileged discovery, Respondent asserts that Complaint Counsel may not obtain discovery "beyond the pleadings' allegations." *Id.* at 4 (quoting *Blankenship v. Fox News Network, LLC*, 2020 WL 918873, at *15 (S.D. W. Va. Sept. 21, 2020)). It claims Complaint Counsel is engaged in a fishing expedition for evidence of additional claims, relying on regulations related to a section of the CPSA not alleged. *Id.* at 8–9.

Respondent further asserts that common law products liability should govern the requirements for a defect because the CPSA does not define "defect." *Id.* at 5 (citing *Gilbert v. United States*, 370 U.S. 650, 655 (1962); Restatement (Third) of Torts: Products Liability § 2). It argues that only a "design-defect" claim remains because Complaint Counsel has not alleged a manufacturing or inadequate warning defect. *Id.* It claims that Complaint Counsel would have to prove that a reasonable alternative was, or reasonably could have been, available at the time of distribution. *Id.* at 6. It asserts, therefore, that Complaint Counsel's claim of reasonably foreseeable consumer misuse that could lead to a suffocation risk requires objectively, reasonably foreseen consumer misuse. *Id.* at 7.

Finally, Respondent asserts that Complaint Counsel improperly relies on 16 C.F.R. § 1115.4—providing factors the CPSC may, but need not, consider, including "other factors"—to claim internal communications are relevant. *Id.* Respondent claims this regulation is an interpretive rule, lacking the force and effect of law. *Id.* (citing *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015)). It also asserts that the regulation should be void for vagueness. *Id.* (citing *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)). Respondent states all this to claim Complaint Counsel is "hid[ing] the ball" by refusing the identify the elements of its claim. *Id.* at 8. It claims Complaint Counsel will likely argue a substantial risk regardless of Respondent's knowledge and therefore has no reason to demand discovery of evidence related to internal knowledge. *Id.*

Complaint Counsel points to Commission regulations permitting the Presiding Officer "for good cause shown" to issue a protective order "which justice requires to protect a party or person from annoyance, embarrassment, competitive disadvantage, oppression or undue burden or expense," Compl. Counsel's Opp'n to Resp't Leachco, Inc.'s Mot. for Protective Order at 1–2 (Dec. 2, 2022) [Compl. Counsel Opp'n] (quoting 16 C.F.R. § 1025.31(d) (2022)), and it argues that Respondent bears a "heavy burden" to establish why discovery should be denied "[u]nder

the liberal discovery principles of the [FRCP]," *id.* at 2 (quoting *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975)). It therefore argues that Respondent's motion does not comply with Commission regulations because it is premised on relevance rather than a valid ground provided for a protective order. *Id.* at 2–3.

Complaint Counsel further asserts that the information sought is relevant and within the scope of discovery. First, it states that the request relates to the foreseeable use and risk of injury posed by the product. *Id.* at 3 ("If Leachco employees were corresponding about risks posed by the Podsters and how the Podsters were being used—particularly if they were being used for sleep or were being used unsupervised, those communications are directly relevant."). It also specifically argues that the RFAs fall within the scope of discovery because they regard knowledge about how the product is used, how it was advertised, and the effectiveness of the warnings and instructions. *Id.* at 4–5.

Complaint Counsel also notes that the requested communications are relevant to denials in Respondent's answer regarding the foreseeability of caregiver use for infant sleep. *Id.* at 3. It further reaffirms its argument that it should be able to review key witnesses' communications to rebut testimony. *Id.* at 4.

Complaint Counsel refutes Respondent's claim that the case is solely about objective, reasonably foreseeable misuse by customers. *Id.* at 5. First, it asserts that Respondent is in the best position to have communications about consumer use and risks. *Id.* Next, it notes that employee knowledge and subjective beliefs are relevant to potential witness credibility. *Id.* at 6. Finally, it emphasizes that Respondent is also in a good position to have information about how the product is used—relevant to evaluating the reasonably foreseeable uses. *Id.*

Complaint Counsel also refutes Respondent's argument to adopt a common law definition of "defect." *Id.* at 9. It states that there is in fact a regulation defining it, and that that regulation also provides detailed examples. *Id.* at 10 (citing 16 C.F.R. § 1115.4(e) (2022)). Complaint Counsel claims it should be afforded "expansive interpretation" because of the remedial nature of the CPSA. *Id.* (citing *CPSC v. Chance Mfg. Co.*, 441 F. Supp. 228, 231 (D.D.C. 1977); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)).

Finally, Complaint Counsel argues that Respondent misconstrues the nature of expert testimony because experts are entitled to review discovery materials in developing their testimony. *Id.* (citing *Garcia v. Progressive Choice Ins. Co.*, No. 11-cv-466-BEN, 2011 WL 4356209, at *4 (S.D. Cal. Sept. 16, 2011)). It therefore claims that the requested communications can assist its experts in developing the analysis of the hazards posed and foreseeable uses. *Id.* at 11.

II. Disposition

A. Respondent's Motion Failed to Provide Valid Grounds Justifying a Protective Order.

The Commission regulation governing protective orders states:

> Upon motion by a party and for good cause shown, the Presiding Officer may make any order which justice requires to *protect a party or person from annoyance, embarrassment, competitive disadvantage, oppression, or undue burden or expense* . . . . If a motion for a protective order is denied in whole or in part, the Presiding Officer may, on such terms or conditions as are appropriate, order that any party provide or permit discovery.

16 C.F.R. § 1025.31(d) (emphasis added). These proceedings are governed by the Commission's procedural rules. The party seeking a protective order must therefore show good cause why the requested discovery imposes one of the listed issues.

Here, Respondent has alleged none of those reasons in its motion, which is predicated on relevance and purported need. *See* Resp't Mem. at 1–2; *see also* Compl. Counsel Opp'n at 2–3 (arguing that Respondent's motion does not comply with Commission regulations). At best, Respondent's contention that Complaint Counsel seeks irrelevant information, or such to prove a claim that has not been alleged, *implies* that a "fishing expedition" is unduly burdensome. I cannot agree with that, however, because I find also that the requested discovery is relevant to the claim alleged. *See* Section II.B.2.b., *infra*.

Respondent has therefore failed to meet its burden of demonstrating good cause to support a protective order under Commission regulations. Its arguments regarding Complaint Counsel's claim and irrelevance of the requested discovery are similarly unsupported.

B. The Information Requested by Complaint Counsel is Relevant and Within the Broad Scope of Allowable Discovery.[1]

1. The claim in this proceeding is governed by Commission regulations, and not by common law products liability.

Complaint Counsel alleges a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2). Compl. ¶ 52. The statute provides:

> For the purposes of this section, the term "substantial product hazard" means . . . (2) 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) (2022). The claim alleged includes the existence of a product defect. "Defect" is defined:

[1] Respondent claimed, in its responses to Complaint Counsel's first request, that some of the material sought is privileged. *See* Resp't Mem. Ex.3 [Leachco, Inc.'s Suppl. Objs. & Resps. to CPSC's Reqs. for Produc. of Docs. Nos. 9, 10, & 11 (Oct. 3, 2022)], at 4. This Court has provided requirements for addressing such materials in a privilege log. Respondent may log and withhold such properly-qualified material.

> [A] defect is a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function. A defect, for example, may be the result of a manufacturing or production error; that is, the consumer product as manufactured is not in the form intended by, or fails to perform in accordance with, its design. In addition, the design of and the materials used in a consumer product may also result in a defect. Thus, a product may contain a defect even if the product is manufactured exactly in accordance with its design and specifications, if the design presents a risk of injury to the public. A design defect may also be present if the risk of injury occurs as a result of the operation or use of the product or the failure of the product to operate as intended. A defect can also occur in a product's contents, construction, finish, packaging, warnings, and/or instructions. With respect to instructions, a consumer product may contain a defect if the instructions for assembly or use could allow the product, otherwise safely designed and manufactured, to present a risk of injury.

16 C.F.R. § 1115.4 (incorporating also dictionary and commonly accepted meaning of the word). The definition therefore includes a risk posed by the design, use, or instructions for use.

The provision further provides examples to assist firms in understanding the concept of a defect as used by the CPSC. These examples include lack of adequate instructions or safety warnings where a reasonably foreseeable consumer use or misuse could result in injury, *id.* § 1115.4(d), and a failure to perform as intended or advertised where users rely on that performance, *id.* § 1115.4(e).

The definition therefore includes reasonably foreseeable consumer use or misuse and consumer reliance on expected function. Complaint Counsel correctly notes that Respondent is in the best position to possess such knowledge, and that any such reports are relevant to the claim alleged.

This definition was promulgated through agency action that included significant discussion of public comments. *Interpretation, Policy, and Procedure for Substantial Product Hazards*, 43 Fed. Reg. 34,988, 34,988–98 (Aug. 7, 1978). This definition is potentially an "authoritative," "official position" of the CPSC, published in the Federal Register, implicating the Commission's substantive expertise, and reflecting the Commission's "fair and considered judgment." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416–17 (2019).

The definition of defect described by Complaint Counsel may be afforded expansive interpretation because of the remedial nature of the statute.[2] *CPSC v. Chance Mfg. Co.*, 441 F. Supp. 228, 231 (D.D.C. 1977) (acknowledging the CPSA as remedial legislation and construing the definition of "consumer product" broadly "to advance the Act's articulated purpose of protecting consumers from hazardous products"). A remedial statute is one with the singular

[2] This is a preliminary motion, and the full scope of the definition advanced by the CPSC should be recognized at this stage for the purposes of discovery. The CPSC has in fact provided a definition, and absent some argument or authority suggesting why the definition is unreasonable, I will permit it as a basis for reasonable injury.

purpose of accomplishing a humane or health outcome.[3] The CPSA has a singular purpose of protecting consumers.

Complaint Counsel has not therefore "hid[den] the ball" regarding the elements of the claim. Similarly, Complaint Counsel has in fact defined "defect," and Commission regulation governs this proceeding rather than common law products liability. As explained below, the requested discovery is relevant to Complaint Counsel's claim regarding reasonably foreseeable use and potential hazards.

2. The scope of relevant discovery is sufficiently broad to include the requested materials.

The language of FRCP 26 regarding the scope of discovery has been incorporated by the CPSC and, in that context, has been construed very broadly by the Supreme Court. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). There, the language in question was:

> Parties may obtain discovery regarding any matter, not privileged, which is *relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Fed. R. Civ. P. 26(b)(1) (emphasis added). The Commission provision incorporated this language word-for-word, with the addition of requiring the matter to be "within the Commission's statutory authority" in addition to being relevant. 16 C.F.R. § 1025.31(c)(1).

The Court construed the phrase "relevant to the subject matter involved in the pending action" broadly 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.*, 437 U.S. at 351 (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). The Court only stated thereafter that discovery should be denied for matters relevant only to claims or defenses that have been stricken, or to events that occurred before an applicable limitations period. *Id.* at 352.

[3] *Compare Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 784 (1952) (noting that the statutory scheme was "designed to secure the comfort and health of seamen aboard ship, hospitalization at home and care abroad"), *with Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008) (holding that the Bankruptcy Code is not a remedial statute because it does not have a singular purpose, rather it "strikes a balance between a debtor's interest in reorganizing and restructuring its debts and the creditors' interest in maximizing the value of the bankruptcy estate").

a. Complaint Counsel's specification of a date range, custodians, and search terms is an adequate method of obtaining relevant discovery.

Complaint Counsel correctly states that a request including specified custodians and search terms is a well-recognized method of e-discovery. Compl. Counsel Mem. at 12. Authority across the judicial landscape bears this out. *See No Spill, LLC v. Scepter Canada, Inc.*, No. 18-CV-2681-HLT-KGG, 2021 WL 4860556, at *9 (D. Kan. Oct. 19, 2021) (granting a discovery request involving 28 search terms the court found relevant to the RFPs); *DeGeer v. Gillis*, 755 F. Supp. 2d 909, 930 (N.D. Ill. 2010) (ordering the establishment of reasonable limits on production, "including restricting the searches to certain key data custodians and agreeing on a narrow list of search terms and date ranges"); *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 109–10 (E.D. Penn. 2010) ("[T]he Court deems it reasonable to compel the parties to confer and come to some agreement on the search terms that Defendants intend to use, the custodians they intend to search, the date ranges for their new searches, and any other essential details about the search methodology they intend to implement for the production . . . ."); *Capitol Records, Inc. v. MP3tunes, LLC*, 261 F.R.D. 44, 54 (S.D.N.Y. 2009) (acknowledging prior negotiation restricting the search be restricted to certain persons during the relevant period, the court directed a search of the emails of the limited amount of most senior persons). Respondent did not contest this technique in its response in opposition. *See generally* Resp't Opp'n (challenging only the scope of the claim, the Commission's definition of "defect," improper reliance on certain Commission provisions, and Complaint Counsel's purported reliance on expert witness testimony).

While two cases cited—*DeGeer* and *Romero*—involved the courts ordering conference and agreement on the scope of the requested information, I find it more appropriate to follow the procedure described in *No Spill, LLC* and *Capitol Records, Inc.*, and order the provision of Complaint Counsel's requested discovery, in light of the protracted and ongoing discovery disputes and the previous orders and agreements governing discovery in this case. In particular, I find that the request has been limited to an appropriate number of custodians and search terms relevant to the claim. *See* Section II.B.2.b., *infra*.

b. The requested discovery is relevant to the stated claim because it regards the foreseeability of uses and hazards.[4]

Respondent challenges RFP No. 27 and RFA Nos. 3, 4, and 5. RFP No. 27 specifies a January 1, 2008, to February 9, 2022, time period, seven current and former employee data custodians, and a list of 20 search criteria that combines the product name with search terms related to the claim. *See* Compl. Counsel Mem. Ex. 3, at 3–5. The RFAs involve Respondent knowledge of consumer use of the product (infant sleep), advertising for that use, and online reviews referencing that use. *See* Resp't Mem. Ex. 6 [Compl. Counsel's 1st Set of Reqs. for Admis. to Resp't (Oct. 31, 2022)], at 4.

The claim is a substantial product hazard from a defect that creates a substantial risk of injury to the public. *See* Section II.B.1, *supra*. That defect may result from a lack of adequate instruction or warning where a reasonably foreseeable consumer use or misuse, or a failure of the

[4] This finding makes evaluation of contentions about expert testimony unnecessary.

product to perform as advertised, could result in injury. *Id.* Knowledge, or information obtained by the manufacturer, of foreseeable misuse is relevant to the claim.

Regarding the RFAs, each involves information about use, advertising, and reviews pertaining to the Podster's use for infant sleep. They are therefore directly relevant to the claim that the Podster's defects create a suffocation hazard. *See* Compl. ¶ 21–29. Suffocation is the incident alleged to have occurred on two occasions—once in 2015, and once in 2018. *Id.* ¶ 36–37.

Regarding RFP No. 27, the search terms combined with the product name each relate to the claim. Some terms would tend to uncover information about a product hazard generally—e.g., safe, incident, injury, hazard, death, defect, recall, CPSC, and variants thereof. Some are related to the specific hazard alleged—e.g., suffocation, breathing, obstruction, and asphyxia, and variants thereof. Finally, some are related to the alleged foreseeable use and potential hazard-causing activity—e.g., sleep, prone, face down, roll, move, supervise, crib, bed, and nap.

As stated, the number of custodians and search terms is sufficiently narrow to compel production. *See* Section II.B.2.a, *supra*. The proposed time period is also acceptable. The Complaint alleged that Podsters have been manufactured and distributed since 2009. Compl. ¶ 10. The discovery range assumedly includes time spent on research, development, design, etc. More importantly, Respondent has not challenged the front end of the proposed timeframe, arguing only—*and only in its supplemental responses, neither in its motion for protective order nor its opposition to Complaint Counsel's motion to compel*—that the proper cut-off date is January 20, 2022, rather than February 9, 2022.

The reason provided is that the Commission published a press release alleging that the Podster was defective on January 20. Compl. Counsel Mem. Ex.2, at 2. Respondent cites no authority for why the press release date should be the discovery cut-off date, and I have found none to support it. I deduce, at best, that Respondent may have communicated or produced materials about the product after the press release, but before the February 9 Complaint, in a manner it believes was in anticipation of litigation. As already noted, however, nothing bars Respondent from properly asserting privilege over identified materials that are protected under the attorney-client or work product privileges.[5]

c. Respondent's cited authority and other contentions do not effectively refute the adequacy of Complaint Counsel's claim or the requested discovery's relevance to that claim.

Respondent incorrectly cites *Oppenheimer Fund, Inc.* to support its assertion that discovery cannot go beyond the issues related to the claim. Resp't Opp'n at 4 (quoting 437 U.S. at 352 n.17) ("Thus, when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied."). Such authority is irrelevant to the proceeding here.

[5] *See supra* note 1.

First, the cited footnote supports the conclusion that plaintiffs in a class action could not force information about class members' names and addresses into "relevancy" because that information does not bear on the issues of the case. 437 U.S. at 352. Here, the requested discovery is substantively relevant to the stated claim—foreseeability of uses and hazards. *See* Section II.B.2.b., *supra*.

Second, the authority cited in the footnote is factually distinguishable from the situation here. Each case cited involved denial of discovery on the subject matter of a dispute to be arbitrated. *See Mississippi Power Co. v. Peabody Coal Co.*, 69 F.R.D. 558, 565–68 (S.D. Miss. 1976); *Econo-Car Int'l, Inc. v. Antilles Car Rentals, Inc.*, 61 F.R.D. 8, 10 (V.I. 1973). Here, there is no other dispute for which the information might be used.

The footnote also includes instruction that discovery should be denied what the aim is to delay bringing a case, or to embarrass or harass the party. 437 U.S. at 352 n.17 (citing *United States v. Howard*, 360 F.2d 373, 381 (3d Cir. 1966); *Balistrieri v. Holtzman*, 52 F.R.D. 23, 24–25 (E.D. Wis. 1971)). Demonstration of such would have been an appropriate ground to contest requested discovery; it also would have been sufficient for a protective order under Commission regulations. But Respondent made no such claim or showing.

Respondent's reliance on this authority therefore seems to mirror its overall assertion that the requested discovery is irrelevant or goes beyond the pleadings. That is not the case, and Complaint Counsel's assertion that *Oppenheimer Fund, Inc.* requires, or at least permits, a broad construction of relevance is correct.

Respondent is similarly unsuccessful in pointing to *Torch Liquidating Trust ex rel. Bridge Associates L.L.C. v. Stockstill*, 561 F.3d 377 (5th Cir. 2009). Respondent cites *Stockstill* to assert that the role of discovery is "to find support for properly pleaded claims, not to find the claims themselves." Resp't Opp'n at 3 (quoting 561 F.3d at 392 (citing *Brown v. Tex. A & M Univ.*, 804 F.2d 327, 334 (5th Cir. 1986))). This decision denied leave to amend an inadequately plead complaint. 561 F.3d at 391. The court reasoned that the proposed amendment sounded like a request to discover a claim. *Id.* at 392. Regarding discovery, the court stated:

> Lacking a viable theory to support its claim if injury, plaintiff asserts that discovery would entail finding out "What would have happened?" had the Directors made their disclosures earlier.

Id. at 391–92.

This case's discussion of the role of discovery is therefore within the context of an inadequate complaint. That is not the case here. The claim involves an alleged defect—proceeding from reasonably foreseeable use and potential hazards—that creates a substantial product hazard. The requested discovery is sufficiently tailored to that claim, and there is no attempt to discover a non-pleaded or separate claim.

Respondent's failure to provide good cause under Commission regulation is a sufficient basis for denial of a protective order. *See* Section II.A., *supra*. Respondent, however, cited two

cases to argue that Complaint Counsel may not obtain discovery "beyond the pleadings' allegations to attempt finding additional violations or claim." Resp't Mem. at 4 (quoting *Blankenship v. Fox News Network, LLC*, No. 2:19-cv-00236, 2020 WL 9718873, at *15 (S.D. W. Va. Sept. 21, 2020)); *see also id.* (quoting *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1327 (Fed. Cir. 1990)) ("[D]iscovery 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.").

Complaint Counsel correctly notes that Respondent's cited authority is inadequate. *See* Compl. Counsel Opp'n at 7–9. The cited cases again rest on Respondent's argument that Complaint Counsel seeks irrelevant information, or more specifically, that it has not alleged the claim for which the information would be relevant.

The court in *Blankenship* in fact found that plaintiff was entitled to explore the requested communications. 2020 WL 9718873, at *15. It ruled *against* Respondent's assertion of a "fishing expedition:"

> Plaintiff has sufficiently demonstrated that the requested discovery could shed light on the alleged campaign to defame him, therefore, Plaintiff's production requests as they relate to FNN cannot be properly described as a "fishing expedition."

Id. Similarly, here, Complaint Counsel has alleged a claim for which the requested discovery is relevant. *See* Section II.B.2.b., *supra*.

Micro Motion, Inc. similarly involved a statement that discovery is not designed to find out if a plaintiff has a basis for a claim. 894 F.2d at 1327. But this case is no more helpful than *Stockstill*, for the same reasons. The decision in *Micro Motion* was supported by multiple cases involving the failure to provide adequate facts in a complaint. *See Netto v. AMTRAK*, 863 F.2d 1210, 1216 (5th Cir. 1989) ("[I]t is clear that a plaintiff cannot defeat a motion for summary judgment by merely restating the conclusory allegations contained in this complaint, and amplifying them only with speculation about what discovery might uncover."); *MacKnight v. Leonard Morse Hosp.*, 828 F.2d 48, 52 (1st Cir. 1987) ("Before filing the complaint, counsel had the obligation to determine that the complaint was "well grounded in fact." Fed.R.Civ.P. 11. Consequently, it was not asking too much to require plaintiff to disclose some relevant facts and basis for them before the requested discovery would be allowed."); *see also Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 592 (5th Cir. 1978) (finding discovery improper where the request encompassed "some 7,500 employees in 32 districts and 3 manufacturing plants").

Respondent here has not contended that Complaint Counsel has failed to allege sufficient facts to support a claim—only that the requested discovery relates to a provision not alleged as a basis for the CPSC's proceeding against Respondent. However, I have found that the request is relevant to the claim alleged. *See* Section II.B.2.b., *supra*. Furthermore, Complaint Counsel has alleged facts related to hazardous use and resultant injury. *See id.*; Compl. ¶ 21–29, 36–37. The requested discovery is also sufficiently narrow to distinguish it from *Marshall*. *See* Section II.B.2.a., *supra*. (noting the appropriate number of persons and terms to be searched). Thus, the authority cited by Respondent is not persuasive.

Finally, Respondent makes much of Complaint Counsel citing and "rel[ying]" on section 1115.6 to argue that it is attempting to expand discovery beyond the issues in this proceeding. That section does relate to a different section than that alleged by the claim here—reporting when it obtains information which reasonably supports the conclusion that its product creates an unreasonable risk of serious injury or death. Complaint Counsel, however, only cites this regulation once, and only as a second example demonstrating a need for external and internal communications—could help determine whether there is reasonable support from discoverable evidence for the CPSC's allegation that the product creates an unreasonable risk of serious injury or death. Because the claim alleged here involves the foreseeability of consumer uses and hazards, I find that it could be supported by such obtained information.

III. Conclusion

Respondent failed to provide valid grounds to justify a protective order under Commission regulations. Its contentions regarding relevance, even if they could justify a protective order, are insufficient. Complaint Counsel effectively demonstrated the broad scope of discovery and adequately narrowed its request to time, persons, and search terms supporting its stated claim.

Leachco, Inc.'s Motion for Protective Order is **DENIED**.

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 is **GRANTED**.

Respondent is **ORDERED** to produce documents responsive to RFP No. 27 and RFA Nos. 3, 4, and 5.

Michael G. Young
Administrative Law Judge

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