

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.)	

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL’S
MOTION TO COMPEL AND MOTION FOR SANCTIONS FOR VIOLATION OF THE
COURT’S DECEMBER 16, 2022 AND DECEMBER 27, 2022 ORDERS**

Pursuant to 16 C.F.R. §§ 1025.23, 1025.31(i), 1025.33, 1025.34, 1025.36 and 1025.37, Complaint Counsel respectfully submits this Memorandum in Support of its Motion to Compel and Motion for Sanctions. As discussed below, Leachco has failed to fully comply with this Court’s December 16, 2022 [Dkt No. 51] and December 27, 2022 [Dkt No. 55] Orders granting Complaint Counsel’s Motion to Compel, imposing a January 17, 2023 deadline to produce documents and information, and respond adequately to requests for admission. These discovery failures are sanctionable. Further, Leachco should be immediately compelled to produce the approximately 23,000 documents it has withheld, along with a full and complete privilege log.

I. FACTS

A. Leachco’s Late Production in Violation of this Court’s December 27, 2022 Order

On September 7, 2022, during a prehearing conference, this Court directed a discovery “reset” in the expectation that the parties would work cooperatively to complete discovery. Despite the Court’s directive, however, and despite numerous efforts by Compliant Counsel to

amicably resolve issues through meet and confers, Leachco has consistently failed to adequately respond to discovery requests.¹

Complaint Counsel has been seeking basic and fundamental discovery regarding Leachco employee communications relating to the Podster since March 2022. These efforts have included two sets of requests for production and the filing of a motion to compel on November 17, 2022. On December 16, 2022, this Court issued a ruling granting Complaint Counsel's motion to compel and directing that "Respondent is ORDERED to produce documents responsive to RFP No. 27 and RFA Nos. 3, 4, and 5" because, among other things, "the requested discovery is relevant to Complaint Counsel's claim." December 16, 2022 Order at 1, 9 [Dkt. No. 51].

Thereafter, on December 23, 2022, the parties submitted a joint motion to schedule compliance with the December 16, 2022 Order and a joint proposed deposition schedule. This joint motion also included a request by Complaint Counsel to withdraw its separate motion to compel depositions, filed on December 21, 2022. Complaint Counsel only agreed to withdraw that motion based on Leachco's purported good faith representations that it would agree to a deposition schedule and it would timely produce all responsive documents to the second request for production by the agreed-upon January 17, 2023 date. This was a critical part of the agreement so that Complaint Counsel would have enough time to review the documents ahead of the scheduled depositions.

On December 27, 2022, the Court adopted the joint proposal and ordered that "Leachco will fully comply with the Order by producing responsive documents and amending its responses no later than January 17, 2023." December 27, 2022 Order at 1 [Dkt. No. 55]. On Friday,

¹ By contrast, Complaint Counsel has made four productions of documents prior to the September 7, 2022 prehearing conference, and two productions thereafter pursuant to the Court's direction. Complaint Counsel also submitted a privilege log on September 2, 2022 and an even more detailed amended privilege log on October 3, 2022.

January 13, 2023, Leachco’s counsel represented to Complaint Counsel that “[w]e are on schedule to produce the documents on Tuesday [January 17, 2023]” as was agreed to by the parties and ordered by this Court. [See Exhibit A at 4].

But Leachco did not produce documents as ordered. Instead of providing an explanation to Complaint Counsel or seeking an extension of time for failure to produce documents on time, Leachco offered vague excuses and no specific timeframe for which it would comply with the Court’s Orders. For example, on January 17, 2023 at 4:46 p.m.—the day the documents were due—Leachco’s outside counsel informed Complaint Counsel that it would not be complying with the Court’s Orders, saying in part: “unfortunately, we ran into problems over the weekend, and we will not be able to produce the documents today. I apologize, but we are working as fast as we can. And we will produce the documents as quickly as possible.” [See Exhibit A at 3-4]. Leachco’s email did not provide any specifics on the nature of the “problems,” nor offer a specific timeframe for when the “problems” would be remedied and the documents would be produced as required by the Court. Nor did Leachco explain why it waited until 4:46 p.m. on Tuesday, January 17, 2023, the due date, to notify Complaint Counsel of problems Leachco experienced “over the weekend.” However, while Leachco failed to abide by this Court’s Order, it is notable that Leachco was able to meet one deadline on January 17; it filed its appellate brief in the 10th Circuit for its federal court litigation.²

After failing to receive any further updates and no documents by mid-day on January 18, 2023, the day after they were due per Court Order, Complaint Counsel wrote to Leachco’s counsel:

Leachco was required to produce documents yesterday pursuant to the December 27 Court-ordered deadline for document production.

² *Appellant Leachco, Inc.’s Opening Brief*, filed January 17, 2023, in *Leachco v. Consumer Product Safety Commission*, No. 22-7060 (10th Cir.).

At 4:46 p.m. yesterday, you informed us that you would be unable to meet this deadline due to an issue that arose over the weekend. Half of today already has gone by, yet we still have not received the production. Please produce the documents by the end of the day today. If you do not, we will take appropriate action, including possibly filing a request for sanctions. Your failure to produce documents per the Court's orders is causing us prejudice. Depositions will begin in less than two weeks, and we had anticipated receiving Leachco's documents yesterday and promptly being able to use them in our preparations.

[See Exhibit A at 2].

Leachco responded to Complaint Counsel's email with another vague excuse, claiming "we were unable to" comply, all without any representations about when the documents would be produced, stating simply they will "produce the document as soon as they are ready." [See Exhibit A at 1-2].

In response, Complaint Counsel reiterated that Leachco was in continued noncompliance with the Court's Orders and could not rely on Leachco's vague explanations and failure to provide a date upon which it would comply and produce documents. [See Exhibit A at 1].

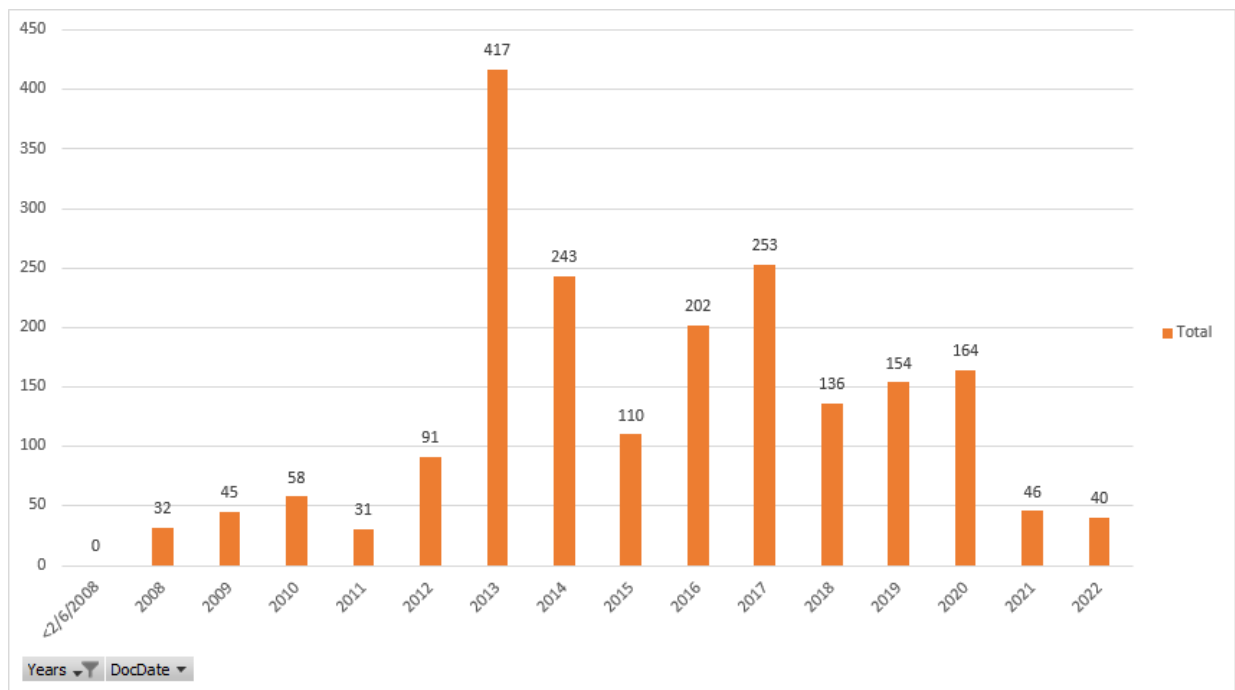
Brazenly ignoring this Court's order to produce those documents by the January 17, 2023 deadline, Leachco ultimately provided Complaint Counsel a limited partial production in the late afternoon of January 19, 2023 for only two of the seven custodians [See Exhibit B at 1]. And on Friday night, January 20, 2023 at about 10:30 p.m., well-past regular business hours and heading into a weekend, Leachco provided the balance of the documents for the other five custodians. [See Exhibit C at 1]. As a result, documents produced by Leachco were almost a week late, leaving Complaint Counsel with only about one week to review them after being able to access them on the next business day, January 23, 2023, ahead of the planned depositions starting on January 31, 2023.

In addition to being late without excuse, Leachco’s production was exceptionally small in light of the number of custodians, timeframe, and search terms. The total number of documents produced was just over 2,000, many of which were duplicative. In some instances, Leachco’s production was redacted with the statement “[n]on-[r]esponsive.” Yet there should be no “non-responsive” documents because Complaint Counsel’s Second Request for Production—as ordered by this Court—sought “[a]ll electronic communications” for specified custodians including specified key-terms. The 2,000 documents was the sum total for seven (7) key Leachco employees, for electronic documents containing the keyword “podster” along with other search terms for an approximate 14-year time period.

On a February 2, 2023 meet and confer call, Leachco, for the first time, orally informed Complaint Counsel that it had collected approximately 24,000-plus documents from these Court-ordered searches. [See Exhibit D at 1]. On February 3, 2023, Leachco belatedly answered Complaint Counsel’s interrogatories (they were due January 20, 2023) and stated in writing that it had indeed collected approximately 25,000 documents in total, yet only produced around 2,000. Thus, Leachco continues to improperly withhold some 23,000 documents. Given the extraordinary measures required here compelling production due to Leachco’s lack of cooperation, all nonprivileged documents responsive to Complaint Counsel’s Second Request for Production should have been produced by the Court-ordered deadline (January 17, 2023); Leachco has no discretion to now decide what is nonresponsive after being ordered to produce “all electronic communications” according to specified search parameters.

To get a sense of how minimal the production was, take for example, the case of Jamie Leach, Leachco’s Vice-President, co-founder and creator of the Podster. Leachco produced only 344 electronic communications for Jamie Leach. That means Leachco only produced about two

(2) emails per month on average that were responsive to the search terms that included “Podster.” Complaint Counsel recently learned that Leachco actually collected 4,145 documents for Jamie Leach, yet Leachco failed to disclose this total until February 3, 2023. This low level of production is also reflected in the overall production set for all custodians – in four of the years produced, Leachco only provided less than 50 responsive documents. This is illustrated in the following chart:



Number of Documents Produced by Leachco in its January 19 and 20, 2023
Productions Per Year

As a further example of how Leachco’s blatant disregard for deadlines and Court Orders has already prejudiced Complaint Counsel, we note that Leachco represents that it collected 8,873 documents for both Mabry Ballard and Tonya Barrett, two employees that Complaint Counsel deposed on January 31, 2023 and February 1, 2023, respectively. However, prior to such depositions, *Leachco only produced 537 documents for both of these deponents, combined.* Pursuant to the Court’s Order, Complaint Counsel was entitled to all of these

documents (subject to privilege) and the fact that Leachco failed to provide them not only disadvantaged Complaint Counsel during these depositions, but is also a waste of resources, both for Complaint Counsel and this Court.

Although Leachco's has now responded to Complaint Counsel's interrogatories that sought the total number of responsive documents, it is important to note that Complaint Counsel served these specifically because of Leachco's prior evasive responses and its lack of cooperation, and the responses were served two weeks late without justification. On December 21, 2022, Complaint Counsel served its Second Set of Interrogatories to Respondent. Among those interrogatories included Nos. 29 and 30 that sought information on the total number of documents located for each of the seven custodians and the number of documents withheld by Leachco:

INTERROGATORY NO. 29: Describe in detail the results of the searches for electronic communications in response to Request for Production No. 27 and pursuant to the December 16, 2022 Order, including, but not limited to, the total number of electronic communications located for: (1) Jamie Leach; (2) Clyde Leach; (3) Alex Leach; (4) Mabry Ballard; (5) Tonya Barrett; (6) Dan Marshall; and (7) Leah Barnes, as well as the separate subtotal number of electronic communications responsive for each of the 20 individual search terms listed in Request for Production No. 27 for each person listed in this interrogatory.

RESPONSE: Objection, this interrogatory calls for information protected by the attorney-client and attorney work product privileges. Subject to and without waiving this objection, the information responsive to this Interrogatory was not immediately available upon completion of production. Leachco will supplement this response.

INTERROGATORY NO. 30: Describe in detail the number of electronic communications withheld by Leachco in response to Request for Production No. 27 and pursuant to the December 16, 2022 Order including, but not limited, the number of electronic communications withheld for: (1) Jamie Leach; (2) Clyde Leach; (3) Alex Leach; (4) Mabry Ballard; (5) Tonya Barrett; (6) Dan Marshall; and (7) Leah Barnes. If any electronic communications are withheld, describe the reason for withholding them, and provide a detailed privilege log pursuant to Instructions I and J of Complaint Counsel's First Set of Interrogatories, March 14,

2022 at pages 5-6, as well as pursuant to the Presiding Officer's September 9, 2022 Order Providing Guidance for Privilege Logs.

RESPONSE: Objection, this interrogatory calls for information protected by the attorney-client and attorney work product privileges. Subject to and without waiving this objection, documents were withheld because they were non-responsive or covered by a privilege. Leachco will supplement this response and provide a privilege log.

Instead of providing a response, Leachco unilaterally afforded themselves an extension of time without consulting Complaint Counsel, indicated vaguely that “the information was not immediately available” and that it would supplement its response. Leachco’s response to Interrogatory No. 30 indicates that “documents were withheld because they were not responsive or covered by a privilege” and yet Leachco failed to timely provide the total number of documents obtained and did not provide a privilege log; information which is not covered by the attorney-client or work product privileges. Only weeks after the deadline for responding (January 20, 2023)—and after two depositions were completed—did Leachco finally orally provide an approximate number during a February 2, 2023 teleconference, and finally in writing on February 3, 2023 [*See Exhibit E*]. To date, Leachco has also not provided a privilege log.

Given its obstinance, Leachco was ordered to produce all documents for the seven custodians based on the terms and timeframe ordered by the Court. Thus, only privileged documents should have been withheld and all nonprivileged documents should have been produced. However, weeks later and after Complaint Counsel began taking depositions, more than 23,000 documents continue to be improperly withheld. Leachco has blatantly defied the Court’s Orders.

B. Leachco Failed to Adequately Respond to Complaint Counsel's Request for Admission Nos. 3, 4 and 5

The Court's December 16, 2022 and December 27, 2022 Orders granted Complaint Counsel's motion to compel responses to its Requests for Admission Nos. 3, 4 and 5 [Dkt Nos. 51 and 55].

Leachco, however, provided incomplete responses to these requests for admission:

REQUEST NO. 3:

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

RESPONSE: Objection. This Request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Leachco has filed a Motion for Protective Order (Nov. 21, 2022) objecting to this Request, and Leachco incorporates the objections set forth in that Motion here.

SUPPLEMENTAL RESPONSE: Leachco incorporates by reference, and thereby preserves, all previous objections to this Request. In accordance with the December 16, 2022 Order denying Leachco's Motion for Protective Order and granting the Commission's Motion to Compel, Leachco responds as follows. Leachco objects to the term "allowing" because, among other things, it suggests Leachco can know what consumers did and intended to do. Subject to and without waiving any objections, Leachco admits that, before the Commission's Administrative Complaint was filed, it received communications concerning the Podster and sleep. To the extent a further response is required, Leachco denies any remaining parts of this Request.

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.

RESPONSE: Objection. This Request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Leachco has filed a Motion for Protective Order (Nov. 21, 2022) objecting to this Request, and Leachco incorporates the objections set forth in that Motion here.

SUPPLEMENTAL RESPONSE: Leachco incorporates by reference, and thereby preserves, all previous objections to this Request. In accordance with the December 16, 2022 Order denying Leachco's Motion for Protective Order and granting the Commission's Motion to Compel, Leachco responds as follows. Leachco objects to the term "advertised," as it suggests that Leachco confirmed how or whether any Retailers

“advertised” the Podster. Subject to and without waiving any objections, Leachco admits that, before the Commission filed its Administrative Complaint, it had knowledge that Amazon erroneously included the Podster in what appears to be a category or style called “Sleep Positioners”. Leachco denies that it ever approved of this description or ever approved of any marketing, designation, or otherwise to suggest that the Podster should be used for sleep. To the extent a further response is required, Leachco denies any remaining parts of this Request.

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.

RESPONSE: Objection. This Request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Leachco has filed a Motion for Protective Order (Nov. 21, 2022) objecting to this Request, and Leachco incorporates the objections set forth in that Motion here.

SUPPLEMENTAL RESPONSE: Leachco incorporates by reference, and thereby preserves, all previous objections to this Request. In accordance with the December 16, 2022 Order denying Leachco’s Motion for Protective Order and granting the Commission’s Motion to Compel, Leachco responds as follows. Leachco objects to the Request on the ground that it cannot confirm whether “reviews” on Amazon.com were made by actual consumers or by actual consumers of the Podster. Nor can Leachco know whether any “reviews” were accurate in whole or in part. Subject to and without waiving any objections, Leachco admits that, before the Commission filed its Administrative Complaint, it had knowledge that purported reviews on Amazon.com referenced infants sleeping on Podsters. To the extent a further response is required, Leachco denies any remaining parts of this Request.

The information requested in RFA Nos. 3, 4, and 5 falls squarely within the scope of discovery. These requests ask for Leachco’s knowledge about how Podsters were used and how they were advertised. Leachco’s knowledge about how Podsters were used by parents and caregivers and how the Podsters were marketed clearly is relevant to the question of foreseeable use. That knowledge and the basis for it provide datapoints from which a finder of fact can evaluate how the Podsters are likely to be used. The Court agreed that these requests for admission were relevant and issued an Order directing Leachco to answer them.

Pursuant to Rule 1025.34 of the Rules of Practice for Adjudicative Proceedings, with respect to requests for admission, “[t]he answer 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.” 16 C.F.R. § 1025.34(b). Yet Leachco did not specifically admit or deny the matter or “fairly meet the substance” of Complaint Counsel’s Requests for Admission 3, 4, and 5 as required by this Court’s December 16, 2022 and December 27, 2022 Orders. Instead, Leachco claimed that it did not know what the terms “allowing” or “advertised” meant for Requests for Admission 3 and 4, and claimed it could not determine whether “reviews” on Amazon.com were legitimate or not, and therefore did not provide a clean admission or denial of the request for admission. It is apparent that Leachco again needs to be compelled to provide complete requests to these RFAs, despite the Court’s earlier Orders regarding them.

Complaint Counsel attempted to resolve this matter without court intervention and met and conferred with Leachco’s counsel, but the parties were unable to resolve this matter [*See* Exhibits A and D].

II. BECAUSE LEACHCO HAS FAILED TO PRODUCE DOCUMENTS AND INFORMATION AS DIRECTED BY THE PRESIDING OFFICER’S ORDERS, SANCTIONS ARE APPROPRIATE PURSUANT TO 16 C.F.R. § 1025.37

In addition to its general authority to govern the proceedings pursuant to 16 C.F.R. § 1025.42, this Court can impose sanctions for failure to comply specifically with discovery orders pursuant to the Rules of Practice of Adjudicative Proceedings, 16 C.F.R. § 1025.37. This rule permits a Presiding Officer to impose sanctions “[i]f a party fails to obey an order to provide or permit discovery” and provides “the Presiding Officer may take such action as is just, including but not limited to” seven specified sanctions in subsections (a) through (g). 16 C.F.R. §

1025.37. Thus, the plain language of the rule is broad and non-exclusive, permitting the Presiding Officer to impose sanctions that are “just,” and the sanctions are not limited to the specific sanctions in subsections (a) through (g) of 1025.37.

Although the Federal Rules of Civil Procedure do not govern here, the case law on failure to comply with discovery orders is instructive. Federal courts evaluating sanctions for failure to comply with discovery orders have noted that “[w]here, as here, the nature of the alleged breach of a discovery obligation is the non-production of evidence,’ Rule 37(b) affords a court ‘broad discretion in fashioning an appropriate sanction.’” *Chevron Corp. v. Donziger*, 296 F.R.D. 168, 208 (S.D.N.Y. 2013) (granting in part and denying in part motion for sanctions for failure to comply with order to produce documents) (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir.2002)); *see also Syntel Sterling Best Shores Mauritius Limited v. TriZetto Group*, 328 F.R.D. 100, 120 (S.D.N.Y. 2018) (granting in part and denying in part motion for sanctions for violation of a discovery order, noting that a court has broad discretion to determine sanctions based on all facts). Federal Rule of Civil Procedure 37 and 1025.37 both employ the term “just” which according to the district court in *Chevron v. Donziger* meant that “‘the severity of the sanction must be commensurate with the non-compliance.’” *Chevron*, 296 F.R.D. at 208 (quoting *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 140 (2d Cir. 2007)). Sanctions for failing to comply with a discovery order should “‘insofar as possible . . . restore the prejudiced party to the same position [it] would have been in absent the wrongful [withholding] of evidence by the opposing party.’” *Id.* (quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)).

The court in *Chevron v. Donziger* made it clear that the law does not permit a party to unilaterally determine which orders of the court it will comply with and which orders it will

ignore: “A party ordered to furnish discovery must comply with that order subject to any appellate recourse that may be open to it. Refusal to comply risks the imposition of sanctions.” *Id.* at 209. It is important to recognize that willfulness or bad faith may be relevant to the court’s sanctions determination, but sanctions may be granted “notwithstanding a lack of willfulness or bad faith” See *U & I Corp. v. Advanced Medical Design, Inc.*, 251 F.R.D. 667, 674 (M.D. Fla. 2008) (imposing sanctions for violation of discovery order requiring production of emails).

Complaint Counsel requests that this Court impose two modest and specific sanctions that are commensurate with the discovery violations, plus any other sanctions that the Court deems just. The two sanctions requested in Complaint Counsel’s motion for sanctions are as follows:

- (1) Order that, because of Leachco’s this late production of documents, Complaint Counsel, in its sole discretion, may elect to take depositions of any Leachco employee past the March 20, 2023 discovery deadline with no time limits (16 C.F.R. § 1025.37); and,
- (2) Order that Complaint Counsel’s Request for Admissions Nos. 3, 4 and 5 be deemed admitted because Leachco failed to adequately respond to them as required by the December 16, 2022 and December 27, 2022 Orders (16 C.F.R. § 1025.37 and 16 C.F.R. 1025.34(b)).

In addition, Complaint Counsel would request that this Court impose any other such sanction as it finds “just” under the circumstances. (16 C.F.R. § 1025.37). Each of these sanctions are just and appropriate under the circumstances. Indeed, in *United States v. Arnold*, OCAHO Case No. 88100172, 1989 WL 433961, **11-12 (O.C.A.H.O December 29, 1989), a case in which an ALJ imposed monetary sanctions against a party for failure to comply with

discovery order, that presiding officer observed that “[s]uccessful management of cases depends largely on ALJs having authority to control abuse in the litigation process.” Although prejudice is demonstrated on these facts because Complaint Counsel has not received a complete document production as ordered by this Court and has not had the time it anticipated to prepare for the upcoming depositions, courts have “consistently rejected a ‘no harm, no foul’ standard for evaluating discovery sanctions” and “[t]hus, a showing of prejudice is not required.” *Syntel Sterling*, 328 F.R.D. at 120.

Here, permitting Complaint Counsel to take additional depositions past the deadline is warranted because of Leachco’s late and to date massively incomplete production. Depositions have already started in accordance with the Court-ordered schedule, and yet to date, Complaint Counsel has only received a small fraction of the complete document production (approximately 2,000 out of the almost 25,000 documents). Because Complaint Counsel will need additional time to review any late produced information, and may need to question witnesses about subsequently produced documents, it is only fair that it be permitted to take additional depositions necessitated by Leachco’s tardy responses. Given the significant safety hazard posed by the Podsters—as evidenced by a third death that was recently reported to the Commission³—Complaint Counsel is not requesting any other changes to other Court-ordered deadlines, and only makes this request for a modest change to rectify any potential prejudice from Leachco’s blatant disregard of its Court-ordered discovery obligations.

Further, the rules of practice plainly permit a request for admission to be deemed admitted if the response does not “fairly meet the substance” of the request. 16 C.F.R. § 1025.34(b). This is appropriate here, where Leachco was under Court Order to respond to

³ CPSC In-Depth Investigation 220916HCC1454 (produced to Leachco on January 20, 2023, CPSC0010501-65).

Requests for Admission 3, 4 and 5, and did not do so. Instead, Leachco claimed that it did not know what the terms “allowing” or “advertised” meant for Requests for Admission 3 and 4, and claimed it could not determine whether “reviews” on Amazon.com were legitimate or not for Request for Admission 5, and therefore did not provide a clean admission or denial of the request for admission. This is precisely the type of discovery abuse that requires the sanction authorized in 16 C.F.R. § 1025.34(b); *see also, e.g. A. Farber & Partners, Inc. v. Garber*, 237 F.R.D. 250, 255-56 (C.D.Cal. 2006) (deeming certain requests for admission admitted for failure to comply with Fed.R.Civ.P. 36).

III. LEACHCO MUST BE COMPELLED TO IMMEDIATELY PRODUCE ANY WITHHELD DOCUMENTS AND A PRIVILEGE LOG

Leachco served a document upon Complaint Counsel entitled “Leachco, Inc.’s Objections and Responses to CPSC’s Second Set of Interrogatories” by the due date January 20, 2023. [See Exhibit D]. But its responses to Interrogatories Nos. 29 and 30 were incomplete—Leachco essentially gave itself a unilateral extension of time without consulting Complaint Counsel or this Court, simply representing that the information on total number of documents was not immediately available and it would “supplement” its response with a privilege log.

But a party cannot simply interject a placeholder saying it “will supplement” and unilaterally extend time for discovery responses with no deadline. Representing that it “will supplement” has been found to be a “useless answer” for which a party is essentially “pretending that it was an answer” and was therefore subject to an order granting a motion to compel and for sanctions. *Williams v. Johanns*, 498 F.Supp.2d 113, 115-17 (D.D.C. 2007).

The responses to the interrogatories were due on January 20, 2023. Yet Leachco waited until two depositions were completed and only after a meet and confer call to provide the information. Leachco has not provided any credible explanation as to why it could provide that

information by the deadline, instead waiting until February 3, 2023 to supplement its interrogatory responses. Until that time, Complaint Counsel was unable to be sure that the production was incomplete.

The Court must put an end to Leachco's discovery gamesmanship and compel production of any previously unproduced documents it should have produced on January 17, 2023, along with a full and complete privilege log. Leachco was ordered to produce "all electronic communications" responsive to Complaint Counsel's Second Request for Production. Based on Leachco's interrogatory responses, almost 25,000 documents were collected in response to this Court-ordered search; however, only about 2,000 documents have been produced to Complaint Counsel to date. Thus, Leachco is in violation of the Court's Order and is completely disregarding its obligation to produce the previously compelled documents.

IV. CONCLUSION

Leachco violated this Court's December 16, 2022 and December 27, 2022 Orders requiring production of electronic communications pursuant to Complaint Counsel's Second Request for Production by January 17, 2023. Leachco has not provided the reason why it was late in its production. Instead, Leachco has vaguely claimed "problems" that have made them "unable to" meet the Court's deadline. Leachco's unjustified and unexplained delay has prejudiced Complaint Counsel's ability to adequately prepare for the seven scheduled depositions that commenced on January 31, 2023 (two depositions have been completed to date). Leachco's production likely withheld approximately 22,000 documents, while only producing approximately 2,000. Respondent also failed to adequately respond to requests for admission as ordered, and has not provided a privilege log. Leachco's conduct should not be permitted to

stand. Complaint Counsel requests an order issuing sanctions and directing discovery be compelled.

Dated this 6th day of February, 2023

Respectfully submitted,

A handwritten signature in blue ink, reading "Michael J. Rogal".

Gregory M. Reyes, Supervisory Attorney
Brett Ruff, Trial Attorney
Michael J. Rogal, 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

EXHIBIT A

From: [Ruff, Brett](#)
To: [Oliver J. Dunford](#); [Reyes, Gregory](#); [Rogal, Michael](#); [Perilla, Frank Robert](#); [Millett, Frederick](#)
Cc: [Frank Garrison](#); [John F. Kerkhoff](#)
Subject: RE: In re Leachco -- Document Production
Date: Wednesday, January 18, 2023 3:21:13 PM
Attachments: [image001.png](#)

Oliver,

We are surprised that Leachco still has not produced the Court-ordered documents given its assurances last Friday that the documents would be produced on time. Please provide specific information regarding what issue arose, when exactly you learned about this issue, and what has been done to resolve it.

Additionally, we need a firm date by which the production will be made. We cannot rely on a vague timeline and your statements that documents will be provided “as soon as they are ready.”

Further, we are not going to delay the depositions due to Leachco’s continued discovery delays. We jointly decided on the current dates in light of Leachco’s representation that it would be able to serve the Court-ordered production by January 17—over a month after the Court granted the motion to compel. At this point, Leachco has delayed the production of documents responsive to our RFPs for months and now has delayed compliance with the Court’s order. We will not also delay the depositions, and we reserve the right to seek appropriate evidentiary sanctions.

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: Wednesday, January 18, 2023 1:39 PM
To: Ruff, Brett <BRuff@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>
Cc: Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>
Subject: RE: In re Leachco -- Document Production

Brett,

We had anticipated meeting the deadline, but we were unable to. We are working as fast as we can, and we will produce the documents as soon as they are ready. In any event, this very brief delay is unfortunate—and, again, I apologize—and inconvenient. But it is not causing prejudice. If nothing else, we can rearrange the deposition schedule if you need additional time. But that seems unnecessary, particularly in light of your argument, earlier in this case, that the Commission should proceed with depositions before written discovery and document production had been completed.

We continue to work on this and will produce as soon as we can.

--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
FOUNDATION**

Defending Liberty and Justice for All.

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

Sent: Wednesday, January 18, 2023 12:08 PM

To: Oliver J. Dunford <ODunford@pacificlegal.org>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>

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

Subject: RE: In re Leachco -- Document Production

Oliver,

Leachco was required to produce documents yesterday pursuant to the December 27 Court-ordered deadline for document production. At 4:46 p.m. yesterday, you informed us that you would be unable to meet this deadline due to an issue that arose over the weekend. Half of today already has gone by, yet we still have not received the production. Please produce the documents by the end of the day today. If you do not, we will take appropriate action, including possibly filing a request for sanctions. Your failure to produce documents per the Court's orders is causing us prejudice. Depositions will begin in less than two weeks, and we had anticipated receiving Leachco's documents yesterday and promptly being able to use them in our preparations.

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: Tuesday, January 17, 2023 4:46 PM

To: Ruff, Brett <BRuff@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

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

Subject: RE: In re Leachco -- Document Production

Brett,

I've attached Leachco's supplemental responses to the Commission's Second RFP and to the Commission's RFA Nos. 3, 4, & 5.

Also, unfortunately, we ran into some problems over the weekend, and we will not be able to produce the documents today. I apologize, but we are working as fast as we can. And we will produce the documents as quickly as possible.

Finally, Ms. Barnes has no documents to produce. When we complete production, let's talk about her deposition.

Thank you,
Oliver

Oliver J. Dunford | Senior Attorney

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



**PACIFIC LEGAL
FOUNDATION**

Defending Liberty and Justice for All.

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

Sent: Tuesday, January 17, 2023 11:34 AM

To: Oliver J. Dunford <ODunford@pacificlegal.org>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

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

Subject: RE: In re Leachco -- Document Production

Oliver,

Thank you for confirming that Leachco is on schedule to produce the materials today. We also thank you for letting us know that your firm will be representing Ms. Barnes in connection with the subpoena. Will you also be producing her documents today? By our calculation, today is the deadline for her production.

With respect to her deposition, is Ms. Barnes available for a deposition on February 22 or 23? We anticipate deposing Ms. Barnes virtually.

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, January 13, 2023 2:18 PM

To: Ruff, Brett <BRuff@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

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

Subject: RE: In re Leachco -- Document Production

Brett,

We are on schedule to produce the documents on Tuesday, in the format described below. We will have Sam Chang reach out to Mr. Perilla as needed.

Also, we are representing Leah Barnes for purposes of the Commission's subpoena. Please direct any questions for her to us.

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
FOUNDATION**

Defending Liberty and Justice for All.

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

Sent: Thursday, January 5, 2023 4:13 PM

To: Oliver J. Dunford <ODunford@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>

Cc: Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

Subject: In re Leachco -- Document Production

Oliver,

To facilitate the processing and review of the materials Leachco will be producing by January 17, we are writing to confirm that Leachco will be producing the materials in the format specified in the Requests for Production: "Please provide all responsive Documents, including hardcopy, electronic and e-mail Documents in electronic format Document level searchable text, all fielded data, and metadata should be delivered in a Relativity-compatible load file (DAT and OPT) accompanied by Bates-numbered single page Group IV TIFF images representing each page of production."

We would ask that the materials be uploaded to the Watchdox folder at

<https://cpsc.watchdox.com/ngdox/workspaces/bbcc1567-3d7f-4cc2-951f-75427aabf467/da794a70-0111-4ccf-9fa5-21b16a728ef6> to avoid potential firewall issues.

Robert Perilla, our paralegal who is copied here, will be able to coordinate with your side

regarding any technical questions that may arise. I understand that we had good success in working with Mr. Chang on your side to ensure our productions were compliant with your firm's needs, and we hope to be able to similarly ensure a smooth production by Leachco by January 17. Mr. Chang and all three PLF attorneys have access to the Watchdox folder noted above. We can add anyone else you would like.

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

*****!!! Unless otherwise stated, any views or opinions expressed in this e-mail (and any attachments) are solely those of the author and do not necessarily represent those of the U.S. Consumer Product Safety Commission. Copies of product recall and product safety information can be sent to you automatically via Internet e-mail, as they are released by CPSC. To subscribe or unsubscribe to this service go to the following web page:

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

Email secured by Check Point

Email secured by Check Point

Email secured by Check Point

EXHIBIT B

From: [Oliver J. Dunford](#)
To: [Ruff, Brett](#); [Reyes, Gregory](#); [Rogal, Michael](#); [Perilla, Frank Robert](#); [Millett, Frederick](#)
Cc: [Frank Garrison](#); [John F. Kerkhoff](#)
Subject: RE: In re Leachco -- Document Production
Date: Thursday, January 19, 2023 4:28:08 PM
Attachments: [image001.png](#)

Brett,

We have uploaded some documents. We should have the rest tomorrow.

--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
FOUNDATION**

Defending Liberty and Justice for All.

From: Ruff, Brett <BRuff@cpsc.gov>
Sent: Wednesday, January 18, 2023 3:21 PM
To: Oliver J. Dunford <ODunford@pacificlegal.org>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>
Cc: Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>
Subject: RE: In re Leachco -- Document Production

Oliver,

We are surprised that Leachco still has not produced the Court-ordered documents given its assurances last Friday that the documents would be produced on time. Please provide specific information regarding what issue arose, when exactly you learned about this issue, and what has been done to resolve it.

Additionally, we need a firm date by which the production will be made. We cannot rely on a vague timeline and your statements that documents will be provided "as soon as they are ready."

Further, we are not going to delay the depositions due to Leachco's continued discovery delays. We jointly decided on the current dates in light of Leachco's representation that it would be able to serve the Court-ordered production by January 17—over a month after the Court granted the motion to compel. At this point, Leachco has delayed the production of documents responsive to our RFPs for months and now has delayed compliance with the Court's order. We will not also delay the depositions, and we reserve the right to seek appropriate evidentiary sanctions.

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: Wednesday, January 18, 2023 1:39 PM

To: Ruff, Brett <BRuff@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>

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

Subject: RE: In re Leachco -- Document Production

Brett,

We had anticipated meeting the deadline, but we were unable to. We are working as fast as we can, and we will produce the documents as soon as they are ready. In any event, this very brief delay is unfortunate—and, again, I apologize—and inconvenient. But it is not causing prejudice. If nothing else, we can rearrange the deposition schedule if you need additional time. But that seems unnecessary, particularly in light of your argument, earlier in this case, that the Commission should proceed with depositions before written discovery and document production had been completed.

We continue to work on this and will produce as soon as we can.

--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
FOUNDATION**

Defending Liberty and Justice for All.

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

Sent: Wednesday, January 18, 2023 12:08 PM

To: Oliver J. Dunford <ODunford@pacificlegal.org>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>

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

Subject: RE: In re Leachco -- Document Production

Oliver,

Leachco was required to produce documents yesterday pursuant to the December 27 Court-ordered deadline for document production. At 4:46 p.m. yesterday, you informed us that you would be unable to meet this deadline due to an issue that arose over the weekend. Half of today already has gone by, yet we still have not received the production.

Please produce the documents by the end of the day today. If you do not, we will take appropriate action, including possibly filing a request for sanctions. Your failure to produce documents per the Court's orders is causing us prejudice. Depositions will begin in less than two weeks, and we had anticipated receiving Leachco's documents yesterday and promptly being able to use them in our preparations.

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: Tuesday, January 17, 2023 4:46 PM

To: Ruff, Brett <BRuff@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

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

Subject: RE: In re Leachco -- Document Production

Brett,

I've attached Leachco's supplemental responses to the Commission's Second RFP and to the Commission's RFA Nos. 3, 4, & 5.

Also, unfortunately, we ran into some problems over the weekend, and we will not be able to produce the documents today. I apologize, but we are working as fast as we can. And we will produce the documents as quickly as possible.

Finally, Ms. Barnes has no documents to produce. When we complete production, let's talk about her deposition.

Thank you,
Oliver

Oliver J. Dunford | Senior Attorney

Pacific Legal Foundation

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

916.503.9060 (Direct) | 216.702.7027 (Cell)



**PACIFIC LEGAL
FOUNDATION**

Defending Liberty and Justice for All.

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

Sent: Tuesday, January 17, 2023 11:34 AM

To: Oliver J. Dunford <ODunford@pacificlegal.org>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

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

Subject: RE: In re Leachco -- Document Production

Oliver,

Thank you for confirming that Leachco is on schedule to produce the materials today. We also thank you for letting us know that your firm will be representing Ms. Barnes in connection with the subpoena. Will you also be producing her documents today? By our calculation, today is the deadline for her production.

With respect to her deposition, is Ms. Barnes available for a deposition on February 22 or 23? We anticipate deposing Ms. Barnes virtually.

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, January 13, 2023 2:18 PM

To: Ruff, Brett <BRuff@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

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

Subject: RE: In re Leachco -- Document Production

Brett,

We are on schedule to produce the documents on Tuesday, in the format described below. We will have Sam Chang reach out to Mr. Perilla as needed.

Also, we are representing Leah Barnes for purposes of the Commission's subpoena. Please direct any questions for her to us.

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
FOUNDATION**

Defending Liberty and Justice for All.

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

Sent: Thursday, January 5, 2023 4:13 PM

To: Oliver J. Dunford <ODunford@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>

Cc: Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Perilla, Frank Robert <FPerilla@cpsc.gov>

Subject: In re Leachco -- Document Production

Oliver,

To facilitate the processing and review of the materials Leachco will be producing by January 17, we are writing to confirm that Leachco will be producing the materials in the format specified in the Requests for Production: "Please provide all responsive Documents, including hardcopy, electronic and e-mail Documents in electronic format Document level searchable text, all fielded data, and metadata should be delivered in a Relativity-compatible load file (DAT and OPT) accompanied by Bates-numbered single page Group IV TIFF images representing each page of production."

We would ask that the materials be uploaded to the Watchdox folder at <https://cpsc.watchdox.com/ngdox/workspaces/bbcc1567-3d7f-4cc2-951f-75427aabf467/da794a70-0111-4ccf-9fa5-21b16a728ef6> to avoid potential firewall issues.

Robert Perilla, our paralegal who is copied here, will be able to coordinate with your side regarding any technical questions that may arise. I understand that we had good success in working with Mr. Chang on your side to ensure our productions were compliant with your firm's needs, and we hope to be able to similarly ensure a smooth production by Leachco by January 17. Mr. Chang and all three PLF attorneys have access to the Watchdox folder noted above. We can add anyone else you would like.

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

*****!!! Unless otherwise stated, any views or opinions expressed in this e-mail (and any attachments) are solely those of the author and do not necessarily represent those of the U.S. Consumer Product Safety Commission. Copies of product recall and product safety information can be sent to you automatically via Internet e-mail, as they are released by CPSC. To subscribe or unsubscribe to this service go to the following web page:

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

Email secured by Check Point

Email secured by Check Point

Email secured by Check Point

Email secured by Check Point

EXHIBIT C

From: [Oliver J. Dunford](#)
To: [Ruff, Brett](#); [Rogal, Michael](#); [Reyes, Gregory](#); [Perilla, Frank Robert](#)
Cc: [John F. Kerkhoff](#); [Frank Garrison](#)
Subject: In the Matter of Leachco, Inc., CPSC Docket No. 22-1
Date: Friday, January 20, 2023 10:29:53 PM
Attachments: [image001.png](#)
[Leachco response to CPSC 2nd ROGs to Leachco - 2023.01.20 FINAL.pdf](#)

Counsel,

The remaining documents are scheduled to be uploaded. Also, I've attached Leachco's responses to the Commission's Second Set of Interrogatories.

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
FOUNDATION**

Defending Liberty and Justice for All.

Email secured by Check Point

EXHIBIT D

From: [Rogal, Michael](#)
To: [Oliver J. Dunford](#); [John F. Kerkhoff](#); [Frank Garrison](#)
Cc: [Reyes, Gregory](#); [Ruff, Brett](#)
Subject: Leachco – meet and confer call regarding discovery
Date: Thursday, February 2, 2023 4:57:00 PM
Attachments: [image002.png](#)
[image003.png](#)

Counsel – thanks for taking the time today to meet and confer regarding my January 25, 2023 email below. You told us that Leachco collected about 4,000 documents for Jamie Leach, 2,600 documents for Clyde Leach, 3,000 documents for Alex Leach, 2,700 documents for Mabry Ballard, 6,000 documents for Tonya Barrett, 2,000 documents for Dan Marshall and 4,200 documents for Leah Barnes responsive to the search parameters set forth in RFP No. 27. Suffice to say, those 24,000-plus documents are about 12 times the 2,000 documents you produced to us and all of the 24,000-plus documents must be produced pursuant to the Court’s December 16, 2022 and December 27, 2022 Orders (less any withheld for privilege or already produced).

We were not able to agree on a timeframe for supplemental responses, supplemental RFA responses, or a privilege log.

We will need any supplemental discovery responses and any supplemental production by 5 p.m. ET tomorrow, February 3, 2023. If we don’t hear from you by then, we will take appropriate action with the Court, including filing a motion to compel and for sanctions.

Thank you. Mike Rogal

Michael J. Rogal

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) 504-7528 | **Cell:** (240) 743-7330 | mrogal@cpsc.gov | www.cpsc.gov



From: Rogal, Michael
Sent: Monday, January 30, 2023 9:47 AM
To: Oliver J. Dunford <ODunford@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>
Cc: Reyes, Gregory <GReyes@cpsc.gov>; Ruff, Brett <BRuff@cpsc.gov>
Subject: RE: Leachco – request for meet and confer call regarding discovery

Counsel – yes, we can schedule a call for Wednesday, February 1 at 4:30 p.m. ET. I will distribute a WebEx invite. Thanks. Mike Rogal

From: Oliver J. Dunford <ODunford@pacificlegal.org>
Sent: Monday, January 30, 2023 8:40 AM
To: Rogal, Michael <MRogal@cpsc.gov>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>
Cc: Reyes, Gregory <GReyes@cpsc.gov>; Ruff, Brett <BRuff@cpsc.gov>
Subject: RE: Leachco – request for meet and confer call regarding discovery

Sorry for the delay.

We are available Wednesday afternoon or Friday.

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
FOUNDATION**

Defending Liberty and Justice for All.

From: Rogal, Michael <MRogal@cpsc.gov>
Sent: Thursday, January 26, 2023 12:33 PM
To: Oliver J. Dunford <ODunford@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>
Cc: Reyes, Gregory <GReyes@cpsc.gov>; Ruff, Brett <BRuff@cpsc.gov>
Subject: FW: Leachco – request for meet and confer call regarding discovery

Counsel – we have not received a response to our request for a meet and confer call. Please let us know of a date and time convenient for you. If we do not hear from you by 10 a.m. ET tomorrow, Friday Jan 27, we may take appropriate action with the court, including filing a motion to compel and for sanctions. Thank you. Mike Rogal

Michael J. Rogal

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) 504-7528 | **Cell:** (240) 743-7330 | mrogal@cpsc.gov | www.cpsc.gov



From: Rogal, Michael

Sent: Wednesday, January 25, 2023 11:35 AM

To: Oliver J. Dunford <ODunford@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>

Cc: Reyes, Gregory <GReyes@cpsc.gov>; Ruff, Brett <BRuff@cpsc.gov>

Subject: Leachco – request for meet and confer call regarding discovery

Counsel – we would like to schedule a call to meet and confer this week regarding the discovery you recently served and produced. Let us know a date and time convenient for you as soon as possible. We would like to discuss the following issues:

1. Your January 20, 2023 response to Interrogatory No. 29 is incomplete. You say “the information responsive to this Interrogatory was no immediately available upon completion of production. Leachco will supplement this response.” We need a complete answer to this interrogatory, including, but not limited to the total number of electronic communications located for each custodian. Your response did not request an extension of time nor any timeframe for the supplement. Please let us know when we can expect a full and complete response, and an explanation why you did not have that information despite making a production of documents.
2. Your January 20, 2023 response to Interrogatory No. 30 is incomplete. You did not identify the number of documents that were withheld and did not provide a privilege log. Your response did not request an extension of time nor a timeline for the supplement. In addition, you produced redacted documents that do not provide sufficient information for us to assess whether the privilege claims are appropriate. For example, the first page of the document at LEACHCO2RFP000009 is completely redacted and we cannot tell whether attorney-client privilege is appropriate. Please let us know when we can expect a full and complete response to this interrogatory and full and complete privilege log.
3. Your January 17, 2023 Supplemental RFA responses are insufficient and contrary to the Presiding Officer’s December 16, 2022 Order stating that each RFA “involves information about use, advertising, and reviews pertaining to the Podster’s use of infant sleep. They are therefore directly relevant to the claim that the Podster’s defects create a suffocation hazard.” December 16, 2022 Order at 11. Your supplemental responses that fail to squarely admit or deny the RFAs are not in accordance with Rule 1025.34(b) and the PO’s Order. We request that you supplement your responses accordingly.
4. Your production of electronic communications in response to RFP No. 27 appears to be exceptionally small under the circumstances. Since you have not provided us the number of documents you obtained per Interrogatory No. 29 and failed to produce a privilege log, we are unable to fully assess your lack of production, but for example, you produced 344 electronic documents for Jamie Leach, between February 2008 and January 2022. That would mean she, a principal of Leachco and the designer of the Podster, only sent about two electronic communications regarding the Podster per month on average. That doesn’t appear to be likely based on the discovery obtained to date. We need a full and complete explanation why you only produced a little over 2,000 documents in total, many of which are duplicative,

for seven custodians over an approximate 14 year time period.

Thank you. Mike Rogal

Michael J. Rogal

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) 504-7528 | **Cell:** (240) 743-7330 | mrogal@cpsc.gov | www.cpsc.gov



*****!!! Unless otherwise stated, any views or opinions expressed in this e-mail (and any attachments) are solely those of the author and do not necessarily represent those of the U.S. Consumer Product Safety Commission. Copies of product recall and product safety information can be sent to you automatically via Internet e-mail, as they are released by CPSC. To subscribe or unsubscribe to this service go to the following web page:

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

Email secured by Check Point

EXHIBIT E

**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 INTERROGATORY NOS. 29, 30**

Pursuant to 16 C.F.R. § 1025.32, Respondent Leachco, Inc. submits the following supplemental objections and responses to the Commission's Interrogatory Nos. 29 & 30. Leachco objects to any definitions or instructions in the Commission's Interrogatories that seek, or would require Leachco to disclose discovery beyond the permissible scope of discovery in the Commission's Rules of Practice for Administrative Proceedings.

SUPPLEMENTAL OBJECTIONS AND RESPONSES

INTERROGATORY NO. 29: Describe in detail the results of the searches for electronic communications in response to Request for Production No. 27 and pursuant to the December 16, 2022 Order, including, but not limited to, the total number of electronic communications located for: (1) Jamie Leach; (2) Clyde Leach; (3) Alex Leach; (4) Mabry Ballard; (5) Tonya Barrett; (6) Dan Marshall; and (7) Leah Barnes, as well as the separate sub-total number of electronic communications responsive for each of the 20 individual search terms listed in Request for Production No. 27 for each person listed in this interrogatory.

RESPONSE: Objection, this interrogatory calls for information protected by the attorney-client and attorney work product privileges. Subject to and without waiving this objection, the information responsive to this Interrogatory was not immediately available upon completion of production. Leachco will supplement this response.

SUPPLEMENTAL RESPONSE: Leachco incorporates by reference, and thereby preserves, all previous objections to Interrogatory No. 29. Subject to and without waiving any objections, Leachco refers counsel to the chart attached hereto as Exhibit A.

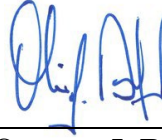
INTERROGATORY NO. 30: Describe in detail the number of electronic communications withheld by Leachco in response to Request for Production No. 27 and pursuant to the December 16, 2022 Order including, but not limited, the number of electronic communications withheld for: (1) Jamie Leach; (2) Clyde Leach; (3) Alex Leach; (4) Mabry Ballard; (5) Tonya Barrett; (6) Dan Marshall; and (7) Leah Barnes. If any electronic communications are withheld, describe the reason for withholding them, and provide a detailed privilege log pursuant to Instructions I and J of Complaint Counsel's First Set of Interrogatories, March 14, 2022 at pages 5-6, as well as pursuant to the Presiding Officer's September 9, 2022 Order Providing Guidance for Privilege Logs.

RESPONSE: Objection, this interrogatory calls for information protected by the attorney-client and attorney work product privileges. Subject to and without waiving this objection, documents were withheld because they were non-responsive or covered by a privilege. Leachco will supplement this response and provide a privilege log.

SUPPLEMENTAL RESPONSE: Leachco incorporates by reference, and thereby preserves, all previous objections to Interrogatory No. 30. Subject to and without waiving any objections, Leachco refers counsel to the chart attached hereto as Exhibit A.

Dated: February 3, 2023.

Respectfully submitted,



JOHN F. KERKHOFF

Ohio Bar No. 0097134

FRANK D. GARRISON

Indiana Bar No. 34024-49

Pacific Legal Foundation

3100 Clarendon Boulevard, Suite 1000

Arlington, VA 22201

Telephone: 202.888.6881

Fax: 916.419.7747

JKerkhoff@pacificlegal.org

FGarrison@pacificlegal.org

OLIVER J. DUNFORD

Florida Bar No. 1017791

Pacific Legal Foundation

4440 PGA Blvd., Suite 307

Palm Beach Gardens, FL 33410

Telephone: 916.503.9060

Fax: 916.419.7747

ODunford@pacificlegal.org

Counsel for Respondent Leachco, Inc.

VERIFICATION

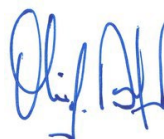
I, JAMIE LEACH, Vice President of Leachco, Inc., state that I have read Leachco's supplemental objections and responses to the Consumer Product Safety Commission's Interrogatory Nos. 29 & 30, and that the responses are true to the best of my knowledge, information, and belief.


JAMIE LEACH

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2023, 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.

LEACHCO, INC.'S SUPPLEMENTAL OBJECTIONS AND RESPONSES TO
CPSC'S INTERROGATORY NOS. 29, 30

Exhibit A

	Jamie Leach	Clyde Leach	Alex Leach	Mabry Ballard	Tonya Barrett	Dan Marshall	Leah Barnes
Total Documents [emails or attachments]	4145	2682	2935	2724	6149	2073	4212
Total Emails (or Email strings)	1952	1482	1491	1358	1908	1051	2022
Total Documents Produced	344	337	382	256	281	58	364
"Podster" and "safety" or "safe"	131	168	86	64	67	18	119
"Podster" and "suffocation" or "suffocate" or "suffocating"	5	166	104	34	75	17	115
"Podster" and "incident"	15	8	40	4	12	0	4
"Podster" and "breathing" or "breathe"	4	5	1	17	0	1	3
"Podster" and "obstruction" or "obstructing"	0	5	1	17	0	1	3
"Podster" and "injury" or "injure" or "injuries"	8	15	10	47	10	5	8
"Podster" and "hazard" or "hazardous"	7	12	34	5	7	4	3
"Podster" and "death" or "died" or "dying"	6	13	9	47	7	7	8
"Podster" and "sleep"	65	49	73	95	89	14	76
"Podster" and "warnings" or "warn" or "warned"	26	24	42	23	33	4	17
"Podster" and "prone" or "face down"	14	13	8	36	14	3	27
"Podster" and "roll" or "move"	59	131	141	100	75	14	104
"Podster" and "unsupervised" or "supervise"	0	0	0	1	1	2	0
"Podster" and "crib"	88	106	80	71	37	11	95
"Podster" and "bed"	56	140	70	63	45	23	50
"Podster" and "nap"	11	19	15	16	17	1	21
"Podster" and "asphyxia"	0	0	0	2	0	0	1
"Podster" and "defect"	9	10	7	20	3	3	5
"Podster" and "recall"	19	12	44	17	4	8	3
"Podster" and "CPSC"	7	5	61	15	12	11	8
Total Excluded	3801	2345	2553	2468	5868	2015	3848