

UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION

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

**COMPLAINT COUNSEL’S OPPOSITION TO LEACHCO, INC.’S MOTION TO  
COMPEL DISCOVERY [DKT. NO. 73]**

The motion to compel filed by Respondent Leachco, Inc. (“Leachco”) seeks to compel materials purportedly related to “defenses” that Leachco has never pleaded and consumer products that are not related to the products that are the subject of this litigation. *See* Dkt. Nos. 73 & 74.<sup>1</sup> The motion should be denied.

**I. INTRODUCTION**

On February 9, 2022, Complaint Counsel filed an Administrative Complaint against Leachco, alleging that its infant lounging pillows (“Podsters”) contain defects that create a Substantial Product Hazard under Section 15(a)(2) of the Consumer Product Safety Act (“CPSA”) and pose a potentially fatal threat to infants that use them. Compl. ¶¶ 1, 6-7, 20-34, 48-52. Pursuant to the Court’s September 16, 2022 Order on Prehearing Schedule, the hearing in this matter is scheduled to commence on August 7, 2023. Dkt. No. 35. Fact discovery closed on March 20, 2023. *Id.*

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<sup>1</sup> Leachco did not attempt to meet and confer with Complaint Counsel before filing this motion to compel.

Between the commencement of the lawsuit and October 2022, Complaint Counsel produced more than 10,000 pages of documents to Leachco and responded to Leachco's 51 requests for production, as well as Leachco's 38 interrogatories.<sup>2</sup>

But, near the close of fact discovery, Leachco elected to serve an additional 37 requests for production, 34 interrogatories, and 363 requests for admission. Most of those discovery requests were duplicative of earlier requests and/or sought information outside the appropriate scope of discovery, many sought communications made after the filing of the administrative complaint in this matter, some were incomprehensible, and others, such as the requests for admission, were so clearly improper and oppressive that Complaint Counsel was forced to file a motion for a protective order. *See* Dkt. Nos. 59 & 60. Aside from the discovery requests that were the subject of the motion for a protective order, Complaint Counsel timely responded to Leachco's requests, posed appropriate objections, and produced a few hundred additional pages of documents.

Leachco did not express any concerns over those discovery responses or Complaint Counsel's supplemental production, nor did Leachco ever seek to meet and confer about them. But then, two business days before the close of fact discovery, Leachco filed the instant motion to compel without warning or prior notice. Rather than attempt to bear its burden of establishing why each of the 27 discovery requests it seeks to compel are appropriate in this matter, Leachco lumps requests for production and interrogatories alike into two broad categories and makes broad arguments about why Leachco believes the requested information should be compelled.

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<sup>2</sup> Complaint Counsel proposed that the Court "[a]dopt[] Federal Rule of Civil Procedure's 33(a)(1)'s limitation of 25 interrogatories per party." Dkt. No. 13 at 6. Leachco contested that limit on the grounds that: "Respondent does not agree to a limit to interrogatories in this matter as interrogatories will likely prove to be a more efficient and economical means of obtaining information on the government's position in this matter than depositions." *Id.* Leachco nevertheless took the depositions of five CPSC employees in March 2023.

Leachco's motion should be denied for several reasons. *First*, Leachco seeks discovery about "defenses" that it has not pleaded and has no basis to plead in this proceeding. *Second*, Leachco demands discovery of post-complaint communications while itself proclaiming that "January 20, 2022 [a date prior to the filing of the complaint] is the proper cutoff date for relevant materials in this case."<sup>3</sup> *Third*, Complaint Counsel produced months ago much of the material Leachco appears to demand, and Leachco seeks wide-ranging and irrelevant discovery about other consumer products and other evaluations conducted by CPSC staff.

## II. LEGAL STANDARD

The Commission's Rules of Practice for Adjudicative Proceedings permit parties to "obtain discovery regarding any matter, not privileged . . . relevant to the subject matter involved in the proceedings, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. . . ." 16 C.F.R. § 1025.31(c)(1) (emphasis added). "While the standard of relevancy in discovery is a liberal one, it is not so liberal as to allow a party to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so." *Food Lion, Inc. v. United Food & Comm. Workers Int'l Union*, 103 F.3d 1007, 1012–14 (D.C. Cir. 1997) (holding that lower court abused its discretion in permitting "wide-ranging, intrusive, and ultimately irrelevant discovery") (citation omitted). For example, one is not entitled to obtain discovery regarding defenses that have not been pleaded. *See Sapir v. United States*, 154 Fed. Cl. 587, 593 (2021) (a party may not use "bad-faith tactics" such as "plead[ing] unsupported defenses or engag[ing] in fishing-expeditions during discovery in the hopes of identifying defenses."); *see Hashem v. Hunterdon Cnty.*, No. 15-cv-8585, 2017 WL 2215122, at \*3 (D.N.J. May 18, 2017) ("Discovery is not a

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<sup>3</sup> Ex. 1 (Leachco's Supplemental Objections and Responses to Complaint Counsel's Second Set of RFPs) at 3.

fishing expedition for potential claims or defenses.”) (citation omitted). Indeed, Section 1025.31(c)(1) permits discovery that “relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party,” but it does not contemplate discovery with respect to un-pleaded defenses.

Although the Commission’s adjudicative rules do not expressly address the burden of proof in a motion to compel discovery, courts applying the Federal Rules have adopted the traditional principle that the movant bears the initial burden of persuasion: “When a party seeks to compel discovery, it first has the burden of demonstrating the relevance of the information to the lawsuit.” *Bethea v. Comcast*, 218 F.R.D. 328, 329 (D.D.C. 2003) (denying motion to compel premised on “vague assertion” and “conjecture” by movant). “Specifically, the party moving to compel bears the burden of informing the court (1) which discovery requests are the subject of the motion to compel, (2) which of the responses are disputed, (3) why the party believes the response is deficient, (4) why any objections are not justified, and (5) why the information sought through discovery is relevant to the prosecution of this action.” *O’Connor v. Perez*, No. 2:18-cv-1057-DBP, 2020 WL 4748096, at \*2 (E.D. Cal. Aug. 17, 2020) (denying motion to compel where movant failed to satisfy its initial burden); *accord McCoy v. Ramirez*, No. 1:13-cv-1808-MJS, 2016 WL 3196738, at \*2 (E.D. Cal. June 9, 2016) (denying motion where “Plaintiff seeks documents responsive to all 18 Requests without addressing any of the objections asserted by Defendant.”).

Leachco has not carried its burden here, and its requests for relief should be summarily denied.



### III. ARGUMENT

#### A. Leachco Inappropriately Requests Documents and Information Related to Defenses It Has Not Pleaded

As a threshold matter, Leachco cannot meet its burden of establishing that the requested discovery is relevant to this proceeding because, on the one hand, Leachco contends the discovery relates to its defenses while, on the other, Leachco has not pleaded those purported defenses in the more than thirteen months that the case has been pending.

The thrust of Leachco’s motion is that it is “entitled to discovery on its *defenses*” and the discovery it requests in the motion to compel is related to those defenses. *See* Dkt. No. 74 at 2 (emphasis in original). But a review of the defenses Leachco attempts to articulate reveals that the purported defenses appear nowhere in the Answer that Leachco filed in March 2022. Dkt. 2. Instead, at the close of fact discovery, Leachco now improperly relies on un-pleaded, speculative “defenses” to burden Complaint Counsel with last-minute discovery demands.

For example, Leachco contends that its “requests go to basic administrative law defense: whether the Commission’s action is arbitrary and capricious. 5 U.S.C. § 706(2)(A).” Dkt. 74 at 7. 5 U.S.C. § 706 is a provision from the Administrative Procedure Act (“APA”) that pertains to the scope of a federal court’s review of a final administrative agency act. Yet, nowhere in Leachco’s Answer does it plead that this administrative litigation—or, more appropriately, any final agency action—is arbitrary and capricious or violative of the APA.

The same is true of Leachco’s other purported APA or “separation of functions” defense that supposedly provides a basis for discovery. Dkt. 74 at 10. Nowhere in its Answer does Leachco plead the “separation of functions” defense, a violation of the APA, or a violation of the Commission regulations Leachco cites.

Nor does Leachco plead a “Due Process” violation premised on “the appearance of bias.” Dkt. 74 at 10. Its Answer contains no reference to “Due Process,” nor to bias. Thus, the Court is not faced with an example of Leachco’s defenses “being swept away—and its due process rights ignored,” as Leachco hyperbolically contends. Dkt. No. 74 at 12. Instead, the Court is faced with a situation in which Leachco is justifying these discovery requests by references to “defenses” that it has not pleaded and in fact could not plead because there is no support in the record for such assertions. Leachco is employing the “bad-faith tactic[]” of “engag[ing] in fishing-expeditions during discovery in the hopes of identifying defenses.” *Sapir*, 154 Fed. Cl. at 593. Such a fishing expedition should not be allowed, and Leachco’s motion should be denied. *Hashem*, 2017 WL 2215122 at \*3 (quashing subpoenas that “make no attempt to limit the documents requested to subject matter relevant to the claims or defenses in this action” and explaining that: “Discovery is not a fishing expedition for potential claims or defenses.”). Indeed, Leachco has cited *no* case law holding that it can somehow obtain discovery based on unpleaded, factually unsubstantiated defenses and as such has not even attempted to meet its burden of establishing that such discovery is appropriate in this case.

Perhaps Leachco believes that the requested discovery may assist it in the federal litigation it has initiated against CPSC and its Commissioners.<sup>4</sup> But that does not mean that Leachco is entitled to the discovery in this proceeding, nor should Leachco be permitted to delay this proceeding to obtain that discovery. This action should remain on schedule in order to adjudicate promptly whether the Podsters pose a substantial product hazard and to effect, as appropriate, a mandatory recall to ensure the safety of infants.

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<sup>4</sup> *Leachco, Inc. v. CPSC*, Nos. 6:22-cv-00232-RAW (E.D. Ok.) & 22-7060 (10th Cir.).

## **B. Leachco Inappropriately Requests Documents and Information Related to Speculative Defenses that Are Without Basis**

Leachco did not plead the defenses it asserts as the basis for its last-minute discovery blitz because there is in fact no valid basis to plead those defenses in this proceeding.

### **1. This Matter Does Not Involve a Final Agency Decision Subject to the “Arbitrary and Capricious” Standard of Review**

For example, Leachco’s reliance on 5 U.S.C. § 706(2)(A) and its “arbitrary and capricious” standard are not applicable in this administrative proceeding. Section 706 articulates the standard of review under the APA for federal court review of *final* agency decisions. *See Faison v. United States*, 102 Fed. Cl. 637, 641 (2012) (“[T]he APA grants jurisdiction over judicial review of final agency decisions to the United States district courts . . . .”); *R.R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430, 431 (7th Cir. 1991) (dismissing petition of a respondent in an administrative litigation seeking federal review of an interlocutory ruling and holding that “review is limited to the Commission’s ‘final’ orders”).

But there has been no final agency action in this matter: CPSC staff’s preliminary determination of a substantial product hazard is not a final agency action susceptible to review under Section 706, nor was the Commission’s decision to file the administrative complaint a final agency action under the APA. As the Supreme Court explained in *F.T.C. v. Standard Oil Co. of California*, “The Commission’s issuance of its [administrative] complaint was not final agency action,” and a premature challenge to an agency’s enforcement action risks “piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary.” 449 U.S. 232, 239–43 (1980) (internal quotation marks omitted); *accord Donnelley*, 931 F.2d at 431 (“[T]he filing of a complaint [by an agency] is not a final decision even though it finally determines that there is reasonable cause to proceed.”).

Premature challenges to administrative adjudications “would delay resolution of the ultimate question whether the [relevant statute] was violated.” *Standard Oil*, 449 U.S. at 242. Here, there will be no final agency action susceptible to APA/Section 706 review until after the Commission has reviewed the Presiding Officer’s post-hearing decision and entered its final decision and order.

Not only has there been no final agency action in this matter, we are not in a federal court forum in which Section 706’s standard of review applies. *See Faison*, 102 Fed. Cl. at 641. Leachco’s reliance on the APA, Section 706, and the “arbitrary and capricious” standard are thus irrelevant in this administrative adjudication where there has been no final agency action.

Against this backdrop, it makes sense that the *Zen Magnets* case cited by Leachco employed the Section 706 standard of review. In that case, a federal district court was reviewing a final agency decision—the Commission’s final decision and order regarding the Zen Magnets administrative litigation. 2018 WL 2938326 at \*1. But that is not the procedural posture in this matter: there has been no final agency action, and we are not in federal district court.

The cases Leachco cites in support of its APA argument also are inapposite. *See* Dkt. No. 74 at 7–8. All involve federal court review of final agency action, and none involves the question whether Section 706 review is appropriate in administrative litigation. And no case, other than *Zen Magnets*, even involves review of administrative litigation. The cases simply involve rulemaking, rescission of agency rules, or decisions not to prepare environmental impact statements.<sup>5</sup>

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<sup>5</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983) (reviewing rescission of agency rule); *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360 (1989) (reviewing agency decision not to prepare supplemental environmental impact statement); *DHS v. Regents of the Univ. of CA*, 140 S. Ct. 1891 (2020) (reviewing agency decision to rescind DACA); *Troy Corp. v. Browner*, 120 F.3d 277 (D.C. Cir. 1997) (reviewing agency rulemaking).

**2. There Is No Basis for Leachco’s Demand for Post-Complaint Communications or Other Discovery Purportedly Related to Its Un-Pleaded “Separation of Functions” and “Bias” Defenses**

There also is no basis for Leachco’s un-pleaded defenses of “separation of functions” and “bias” in this case. *See* Dkt. No. 74 at 10–12. Leachco invokes those theories to compel Complaint Counsel to produce documents in response to eight requests for production that all request internal CPSC communications involving Complaint Counsel “on or after February 9, 2022”—that is, after the administrative complaint was filed in this matter. As an initial matter, requests for post-complaint communications involving trial counsel generally are improper and call for presumptively privileged materials. *See Hiramaneck v. Clark*, No. 13-cv-228-RMW, 2016 WL 217255, at \*6 (N.D. Cal. Jan. 19, 2016) (denying motion to compel where movant sought information about counsel’s communications and work product that were developed after litigation commenced). The use of the filing date as a clear delineation of the temporal limits on acceptable discovery is legally and factually sound: anything else opens up the discovery rules to chaos. Complaint Counsel should not be required to produce such materials outside the traditional timeframe, nor should it be required to create a privilege log detailing them. *In re Snap Inc. Securities Litigation*, 17-cv-3679-SVW-AGR, 2018 WL 7501294, at \*1 (N.D. Cal. Nov. 18, 2018) (“Courts in this circuit routinely deny a motion to compel a privilege log of attorney-client communications or work product dated after commencement of litigation.”); *United States v. Bouchard Transp.*, No. 09-cv-4490-NCG-ALC, 2010 WL 1529248, at \*2 (E.D.N.Y. April 14, 2010) (“[P]rivilege logs are commonly limited to documents created before the date litigation was initiated. This is due to the fact that, in many situations, it can be assumed that all documents created after charges have been brought or a lawsuit has been filed and withheld on the grounds of privilege were created ‘because of’ that pending litigation.”).

Leachco itself has taken the position in this matter that post-complaint documents are not discoverable, so it is improper and unfair for Leachco to assert post-complaint documents should be produced by Complaint Counsel. Specifically, Leachco has refused to produce documents from after January 20, 2022, arguing:

“While the Commission filed its administrative complaint on February 9, 2022, the Commission published its press release alleging that the Podster was defective on January 20, 2022. Thus, Leachco submits that January 20, 2022 is the proper cutoff date for relevant materials in this case.”

Ex. 1 at 3. It is inequitable for Leachco to state that “January 20, 2022 is the proper cutoff date for relevant materials in this case” and to refuse to produce materials after that date, but to then demand that Complaint Counsel be compelled to do so.

It also is inequitable and inappropriate for Leachco to demand that Complaint Counsel “at the very least . . . note [its post-Complaint] communications on a privilege log.” Dkt. No. 74 at 12. The privilege log Leachco lodged with the Court on February 21, 2023 ends on February 2, 2022—a week before the Complaint was issued in this matter.

Leachco also is not entitled to seek discovery about the internal workings of a federal agency simply because it believes the discovery might help it design an un-pleaded defense. As the D.C. Circuit has explained: “While the standard of relevancy in discovery is a liberal one, it is not so liberal as to allow a party to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.” *Food Lion*, 103 F.3d at 1012–13. Leachco’s theory seems to be that discovery into post-complaint communications by Complaint Counsel *might* help it craft a defense, but discovery based on speculation—particularly discovery targeting post-complaint communications involving trial counsel—is inappropriate and should be barred. *See Bethea*, 218 F.R.D. at 329 (denying motion to compel based on “vague assertion”, “speculating”, and “conjecture”).

The cases Leachco cites are again inapposite and do not counsel in favor of discovery here. *See* Dkt. No. 74 at 10–12. The cases do not deal with discovery or administrative litigation. Instead, they are simply examples of instances in which bias existed or could be presumed to exist.<sup>6</sup> They do not stand for the proposition that a party is entitled to speculative discovery into whether bias *might* exist in a proceeding.

Nor does Leachco provide any factual basis for why it should be entitled discovery of post-complaint communications involving Complaint Counsel. Rather, it appears that Leachco simply disagrees with the general principles of federal administrative litigation in which agencies can approve the initiation of an administrative complaint and render the final order on the matter. Dkt. No. 74 at 11–12. But this system is commonplace and proper. *See, e.g., Standard Oil*, 449 U.S. at 240–42 (explaining the process through which the FTC may issue a complaint, litigate it before an ALJ via complaint counsel, and decide any appeal from the ALJ’s decision); *Pierce v. SEC*, 737 F. Supp. 2d 1068, 1070–71 (N.D. Cal. 2010) (SEC initiated cease-and-desist proceedings against respondent and ultimately rendered the ALJ’s decision final).

Leachco also vaguely states that: “The Commission’s own documents reveal that numerous individuals review and communicate about information related to the Podster and Leachco” and that In-Depth Investigation reports “include attorneys, compliance officers, field investigators, and potentially more individuals.” Dkt. No. 74 at 12. But such vague statements about CPSC staff collaboration do not mean that there is any bias or “separation of functions”

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<sup>6</sup> *In re Murchison*, 349 U.S. 133 (1955) (judge could not preside over criminal contempt charges arising out of alleged contempt during secret one-man-grand-jury proceedings conducted by the same judge); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009) (judgment debtor donated \$3 million to a judge’s election coffers in an effort to get judge elected in order to overturn \$50 million judgment); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (district attorney involved in death penalty prosecution could not, after having been appointed to the state supreme court, preside over appeal from the same matter involving allegations of prosecutorial misconduct).

issues with respect to this proceeding. Leachco is simply engaged in a make-work fishing expedition, and it should be prevented from doing so.

### **3. A Review of Leachco's Discovery Requests Demonstrates Their Impropriety**

Leachco does not discuss the actual text of its discovery requests in its motion to compel nor Complaint Counsel's objections to those requests, and so Leachco does not bear its burden of establishing the relevance of each of the requests that it seeks to compel. *See O'Connor, 2020 WL 4748096 at \*2*. Leachco makes only sweeping arguments about why it believes the discovery should be compelled. But a review of the discovery requests reveals that the requests and motion are really a make-work fishing expedition, not serious, valid requests with a basis in law or fact.

As an example, one of the Requests for Production Leachco seeks to compel is RFP No. 74. That Request demands:

“All Communications—on or after February 9, 2022—between Complaint Counsel and the Division of Enforcement and Litigation Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco. CPSC Secretary”

Ex. 2 (Leachco's Second Set of RFPs to Complaint Counsel) at 10. Such a Request for post-Complaint “Communications” is incomprehensible and clearly outside the realm of valid discovery. As an initial matter, “Communications” is not defined in Leachco's Requests for Production. And, as noted in the signature block of each Complaint Counsel filing in this matter, Complaint Counsel are members of the Division of Enforcement and Litigation. It therefore appears that Leachco is seeking all of Complaint Counsel's post-Complaint “Communications” among the case team, which clearly would be improper and would be directly targeted at privileged information and work product. It also is unclear how such communications would have anything to do with Leachco's un-pleaded defenses of bias or APA violations. Finally, the



Request refers to the “CPSC Secretary” without more, which makes the Request all the more inscrutable.

In another example, RFP No. 66 is similarly ill-tailored and improper. It seeks:

All Communications—on or after February 9, 2022—between Complaint Counsel and the Office of Compliance and Field Operations Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.

Ex. 2 at 8. Again, as is apparent from Complaint Counsel’s signature block, Complaint Counsel are members of the Office of Compliance and Field Operations, so it is unclear what non-privileged “Communications,” if any, Leachco is seeking and, regardless, those “Communications” would have no relevance to Leachco’s purported defenses. The Request is a fishing expedition and an effort to make work for Complaint Counsel and this Court.<sup>7</sup> Leachco’s motion to compel should be denied.

**C. Leachco Already Has Received Discovery Related to Other Products Relied upon by CPSC Staff, and It Is Not Entitled to Wide-Ranging Information about Other Investigations or Other Infant Products**

**1. Complaint Counsel Already Has Produced the Materials Leachco Discusses in Its Motion**

Leachco's motion also should be denied because it seeks to compel numerous documents that already have been produced. Complaint Counsel has provided Leachco with discovery about other products CPSC staff reviewed when analyzing the Podster, but Complaint Counsel submits that Leachco’s requests for wide-ranging discovery into other consumer products and other CPSC data are not relevant to this matter. Simply put, Leachco is not entitled to dig through all

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<sup>7</sup> As part of Leachco’s make-work effort, they also attempt to compel post-complaint communications between Complaint Counsel and the CPSC Commissioners about this proceeding. However, 16 C.F.R. § 1025.68(c) precludes Complaint Counsel from discussing the merits of this matter with Commissioners, and Complaint Counsel is unaware of communications between Complaint Counsel and the Commissioners regarding the merits of this matter. Regardless, it is improper and irrelevant for Leachco to inquire into such communications.

of CPSC’s files on thousands of different consumer products simply because Complaint Counsel has alleged that its Podster poses a substantial product hazard.

Leachco devotes nearly a full page to discussing how a CPSC Technical Officer reviewed In-Depth Investigation (“IDI”) reports relating to other products in connection with preparing his Product Safety Assessment (“PSA”) with respect to the Podster. Dkt. No. 74 at 5.<sup>8</sup> But what Leachco conspicuously omits from its motion is that Complaint Counsel already produced to Leachco in September 2022 all the IDI reports the CPSC Technical Officer reviewed in preparing the Podster PSA.<sup>9</sup> Leachco also fails to note that Leachco deposed that Technical Officer this month.<sup>10</sup>

Similarly, although Leachco spends considerable space discussing a PSA’s citation to the “Mannen Report,”<sup>11</sup> Leachco fails to acknowledge that Complaint Counsel produced that publicly available report to Leachco in October 2022 *and* that Leachco asked the author of the PSA questions about the Mannen Report during her deposition this month.<sup>12</sup> In fact, the “Definitions and Instructions” portion of the Requests for Production Leachco seeks to compel expressly identifies the Bates number Complaint Counsel stamped on the document before

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<sup>8</sup> On the same page, Leachco makes a passing statement that the PSAs “undermin[e] any objection from the Commission that ‘safety’ or ‘safe’ is vague and ambiguous.” It is not clear what Leachco is trying to argue or achieve with this parenthetical, but it is an odd position for Leachco to adopt given that Leachco objected three times in its own responses to Complaint Counsel’s RFAs that “The term ‘safety’ is also vague . . .” Ex. 6 (Leachco’s Objections and Responses to Complaint Counsel’s First Set of RFAs) at 7–8.

<sup>9</sup> The IDIs were produced to Leachco on September 6, 2022.

<sup>10</sup> The CPSC Technical Officer, Zachary Foster, was deposed by Leachco on March 8, 2023.

<sup>11</sup> Dkt. No. 74 at 6. The “Mannen Report” is a publicly available report from 2019 titled “Biomechanical Analysis of Inclined Sleep Products.” Erin Mannen, Ph.D, an Assistant Professor of Orthopaedic Surgery at the University of Arkansas for Medical Sciences, was the principal investigator of the paper, and three medical doctors and three other Ph.D.’s served as co-investigators for the paper. The Mannen Report was produced to Leachco on October 3, 2022.

<sup>12</sup> The CPSC Technical Officer, Hope Nesteruk, was deposed by Leachco on March 15, 2023.

producing it to Leachco. Ex. 2 at 1 ¶ 1.<sup>13</sup> For Leachco to imply that it does not have the IDIs reviewed by technical staff or enough information about the Mannen Report is therefore misleading at best. Leachco has information about other products CPSC Staff reviewed in drafting their PSAs, it has the Mannen report itself, and Leachco had an opportunity to depose each of the authors of the PSAs related to the Podster.

Leachco’s motion also is misleading to the extent it suggests that Complaint Counsel entirely has refused to produce materials responsive to “RFPs 83–88”. Dkt. No. 74 at 1. With respect to each of these discovery requests that Leachco seeks to compel, Complaint Counsel expressly referred “Leachco to Complaint Counsel’s prior document productions” for responsive materials. *See, e.g.*, Dkt. No. 74, Ex. A at 27–31. There is good reason for this: the discovery requests Leachco propounded toward the close of discovery are largely make-work and duplicative of requests Leachco previously made.<sup>14</sup> Complaint Counsel already had produced responsive documents related to the Podster and CPSC staff’s investigation into the Podster—a fact Leachco’s motion omits.

## **2. Leachco Is Not Entitled to Wide-Ranging Information about Other Investigations or Other Infant Products**

Although Complaint Counsel has produced materials related to other products that CPSC staff reviewed in preparing their assessments of the Podsters, Complaint Counsel should not be compelled to produce documents, or provide information, in response Leachco’s broad requests

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<sup>13</sup> Leachco’s inclusion of a definition of the “2019 Mannen Report” in the Definitions and Instructions portion of Leachco’s Second Set of Requests for Production further illustrates that those requests for production were little more than hastily drafted requests designed to make work for Complaint Counsel. Although the “2019 Mannen Report” is defined on the first page of Leachco’s Second Set of Requests for Production, there is no reference to the report anywhere else in the document, including the requests for production themselves.

<sup>14</sup> Take, for example, one of the requests Leachco seeks to compel, RFP No. 88. That request demands: “All Documents reflecting Tests on which the Commission relied to initiate its Complaint.” Ex. 2 at 12. But Leachco already made that request in a variety of different ways in March 2022. *See, e.g.*, Ex. 3 (Leachco’s First Set of RFPs to Complaint Counsel) at 4 ¶¶ 5–6 & 5 ¶¶ 7, 13.

for information related to other consumer products. As already has been explained, a party should not be permitted “to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.” *Food Lion*, 103 F.3d at 1012–13.

Leachco seeks to roam in those shadow zones and asks the Court to compel discovery requests that are overly broad in substance and in time. That request should be denied, as the materials Leachco demands are outside the scope of appropriate discovery. Perhaps that is why Leachco does not attempt to meet its burden of establishing why each discovery request should be compelled but instead makes sweeping arguments untethered to its actual requests. However, a review of the requests Leachco seeks to compel reveals how broad and inappropriate they are.

For example, Leachco seeks to compel RFP No. 84, which demands: “All Documents from 2000 to the present, reflecting data Concerning deaths of infants involving consumer products.” Ex. 2 at 11. Starting with the date range, there is no rational basis for Leachco to demand “All Documents” for the past 23 years in a litigation involving a product that was first sold in 2009. As to substance, there is no plausible explanation for why Leachco needs “All Documents” related to “deaths of infants” involving all “consumer products.” This sort of sweeping and broad discovery request is outside the scope of permissible discovery and appears targeted at making work for Complaint Counsel, not at acquiring useful discovery in this matter about the Podster.

But at least RFP No. 84 is limited to some temporal scope. RFP No. 85, which Leachco also seeks to compel, is not: “All Documents and data evaluated by the CPSC, and/or anyone acting on behalf of or at the direction of the CPSC, Concerning infant deaths related to sleep, including Sudden Infant Death Syndrome (SIDS).” Ex. 2 at 11. Nor is, for example, RFP 85’s

near duplicate, RFP 86: “All Documents and data evaluated by the CPSC, and/or anyone acting on behalf of or at the direction of the CPSC, Concerning Sudden Unexplained Infant Death.”

Thus, Leachco apparently is asking for “All Documents and data evaluated by” CPSC staff and affiliates, including studies, articles, testing data, newspaper clippings, etc. (whether originating at CPSC or not), regarding “infant deaths related to sleep” since the CPSC was founded in 1972. Such a broad timeframe and such a broad substantive request for documents are absurd and bear no relation to the matter at issue in this proceeding: whether the specific product at issue this case, the Podster, poses a substantial product hazard.

The interrogatories as to which Leachco seeks to compel responses similarly seek information outside the permissible scope of discovery “relevant to the subject matter involved in the proceedings.” For example, Leachco seeks to compel a response to Interrogatory No. 48, which directs Complaint Counsel to “Identify any infant product category on the market in which no infant deaths have occurred.” Ex. 4 (Leachco’s Second Set of Interrogatories to Complaint Counsel) at 9. This interrogatory has no temporal limitation, nor does Leachco define what it means by “infant product category.” Complaint Counsel is therefore faced with a request to identify any “infant product category” in which “no infant deaths have occurred” for all of time. Not only is this interrogatory hopelessly broad and vague in substantive and temporal scope, it does nothing to assist in the resolution of this case, which involves whether the Podster poses a substantial product hazard. Whether there are undefined “infant product categories” in which infants have not died is irrelevant to the case at hand.

Not content with demanding that Complaint Counsel answer that interrogatory once, Leachco served a nearly identical interrogatory on Complaint Counsel eight days later. In Interrogatory No. 59, which Leachco also seeks to compel, Leachco again demands that

Complaint Counsel: “Identify any infant product category in which no infant deaths have occurred.” Ex. 5 (Leachco’s Third Set of Interrogatories to Complaint Counsel) at 8. But Leachco again failed to define “infant product category” or supply a temporal limitation. And, even more importantly, Leachco failed to tailor the interrogatory to the items actually at issue in this case, just as it did failed to do so with respect to the other discovery requests it seeks to compel.

Not only are these requests broad and outside the scope of relevant discovery and improperly duplicative, Leachco provides no valid reason why it is entitled to information or documents about other consumer products or evaluations reviewed by CPSC staff. Its argument that “[i]t would be arbitrary and capricious for the Commission to deem the Podster a hazard while ignoring other products” does not win the day. Dkt. No. 74 at 8. This argument is rooted in a theory of selective prosecution or enforcement, but such theories are routinely rejected in enforcement proceedings. In the Commission’s Final Decision in *In re Dye and Dye*, the Commission rejected arguments from a manufacturer of worm probes that it was being unfairly targeted based on the fact that a competing manufacturer “had not had a complaint brought against it.” 1989 WL 435534, at \*17 (C.P.S.C. July 17, 1991). The Commission held: “the alleged defense of discriminatory enforcement, however, is not available. The Commission is entitled to use its prosecutorial discretion to decide which companies to proceed against first, or at all.” *Id.* at \*18. Similarly, as the Northern District of Ohio observed in a decision rejecting document requests relating to past FTC enforcement actions that allegedly demonstrated the FTC’s “inconsistent standards,” “courts have rejected the type of ‘why me’ defense [or] an ‘everybody else is doing it’ justification.” *Federal Trade Commission v. Chemence, Inc.*, 209 F. Supp. 3d 981, 985–86 (N.D. Ohio 2016). Enforcement actions “relate[] to the conduct of a

*defendant* in the lawsuit, not the conduct of other industry participants.” *Id.* at 985. “Even if [the defendant] could demonstrate that its competitors had violated the FTC Act but were not prosecuted, that would be irrelevant to the current lawsuit.” *Id.*

Leachco has pointed to no applicable law or facts that establish that a different approach is appropriate here. Simply put, Leachco is not entitled to discovery of all documents and data in CPSC’s files related to broad categories of products not specifically tied to the specific product at issue in this case: the Podster. Leachco is entitled to discovery “relevant to the subject matter involved in the proceedings”—whether the Leachco Podster poses a substantial product hazard. Leachco has received that discovery.

#### **IV. CONCLUSION**

For the reasons set forth herein, Complaint Counsel requests that this Court deny Leachco’s motion to compel discovery. Leachco is not entitled to discovery related to defenses it has not pleaded and could not viably plead, nor is it entitled to a fishing expedition into post-Complaint communications by trial counsel or into wide-ranging information and documents about other consumer products. Leachco’s motion should be denied.

Dated this 27th day of March, 2023

Respectfully submitted,

/s/ Brett Ruff

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

## **CERTIFICATE OF SERVICE**

I hereby certify that on March 27, 2023, I served Complaint Counsel's Opposition to Leachco, Inc.'s Motion to Compel Discovery on all parties and participants of record in these proceedings as follows:

*By email to the Secretary:*

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

*By email to the Presiding Officer:*

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

*By email to Counsel for Respondent:*

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

John F. Kerkhoff  
Frank D. Garrison  
Jessica L. Thompson  
Pacific Legal Foundation  
3100 Clarendon Boulevard, Suite 610  
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/s/ Brett Ruff  
Complaint Counsel for  
U.S. Consumer Product Safety Commission



# **EXHIBIT 1**

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

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

**General Objections**

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

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

\* \* \*

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

a. Persons to search:

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

b. Search Terms:

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

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

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


**SUPPLEMENTAL RESPONSE:** Leachco incorporates by reference, and thereby preserves, all previous objections to Request No. 27. In light of the December 16, 2022 Order denying Leachco’s Motion for Protective Order and granting the Commis-

sion's Motion to Compel, Leachco will produce non-privileged documents responsive to this Request.

\* \* \*

Dated: January 17, 2023.

Respectfully submitted,



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Indiana Bar No. 34024-49  
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Fax: 916.419.7747  
ODunford@pacificlegal.org

*Counsel for Respondent Leachco, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2023, I served, by electronic mail, the foregoing upon all parties of record in these proceedings:

<p><b>Leah Ippolito</b>, Supervisory Attorney <b>Brett Ruff</b>, Trial Attorney <b>Rosalee Thomas</b>, Trial Attorney <b>Caitlin O'Donnell</b>, Trial Attorney <b>Michael Rogal</b>, Trial Attorney <b>Frederick C. Millett</b> <b>Gregory M. Reyes</b> 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><b>Mary B. Murphy</b> Director, Div. of Enforcement &amp; Litigation U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 mmurphy@cpsc.gov</p> <p><b>Robert Kaye</b> 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>
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Oliver J. Dunford  
*Counsel for Respondent Leachco, Inc.*

# **EXHIBIT 2**

**CONSUMER PRODUCT  
SAFETY COMMISSION**

**IN THE MATTER OF**

**LEACHCO, INC.**

CPSC Docket No. 22-1

HON. MICHAEL G. YOUNG  
PRESIDING OFFICER

**LEACHCO, INC.'S SECOND SET OF REQUESTS FOR  
PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to 16 C.F.R. § 1025.33, Respondent Leachco, Inc. hereby requests that the Commission produce the following documents and/or things for inspection and copying within 30 days of service hereof.

**DEFINITIONS AND INSTRUCTIONS**

1. “2019 Mannen Report” means the report titled, “Biomechanical Analysis of Inclined Sleep Products,” initially completed on September 18, 2019, and updated October 25, 2019, whose Principal Investigator was Erin M. Mannen, Ph.D., produced at CPSC0004996–CPSC0005072.

2. “Caregiver” means an adult who is responsible to care for a child, including parents and daycare employees.

3. “Claim” means the sole claim alleged against Leachco, namely Count I in Your Complaint.

4. “Commissioners” means current and former Commissioners of the CPSC and their staff.

5. “Complaint” means your Complaint filed on or about February 9, 2022 in this Proceeding.



6. “Concerning” shall mean concerning, referencing, referring to, related to, and relating to.

7. “CPSA” means the Consumer Product Safety Act.

8. “CPSC Secretary” means the CPSC’s Office of the Secretary, including all staff and agents thereof.

9. “Division of Enforcement and Litigation” means the Commission’s Division of Enforcement and Litigation, and all staff and agents thereof.

10. “Division of Regulatory Enforcement” means the Commission’s Division of Regulatory Enforcement, and all staff and agents thereof.

11. “Document” shall mean the original and all non-identical copies of all written, printed, typed, graphic, and photographic matter of any kind or nature, and all mechanical or electronic audio and/or visual recordings or transcripts thereof, however produced or reproduced, and all entries in a computer or electronic database (including Twitter and any other form of social media) of any kind, including but not limited to: correspondence, telexes, telegrams, telephone messages, statements, voice mail, electronic mail, and all other computer files or data, claim forms, incident reports, intake forms or histories, summaries or records of telephone conversations, memoranda, records, summaries or records of personal conversations or interviews, medical records, X-rays, MRIs, CT-scans, ultrasound images, and all other radiologic or radiographic films, invoices, contracts, agreements, orders, books, calendars, diaries, reports, notebooks, photographs, videos (digital or otherwise), slides, charts,

notes, plans, drawings, sketches, maps, summaries or records of meetings or conferences, drafts or letters, now or formerly in Your possession, custody, or control.

12. “General Counsel” means the CPSC’s Office of General Counsel, including all staff and agents thereof.

13. “Identify,” “State the Identity of,” “Identification,” or “Describe” means:

a. When used in reference to an individual, shall mean to state his or her full name, maiden or former names, social security number, present or last known home and business address and telephone numbers, and present or last known occupation, employer and job title or description; or if none of the information is known, then the name, present home and business address, and telephone numbers of all individuals who likely or may be able to provide all or part of the information.

b. When used in reference to an organization of any kind, shall mean to state its full name, its state of incorporation (if applicable), the address of its principal place of business, and its telephone numbers.

c. When used in reference to a Document, shall mean to state the type of Document, its date, the identity of its author(s), and its recipient(s); any title and/or serial number or file number appearing on the Document; the identity of its present custodian; its present location; and a brief description of its subject matter. If any such Document was, but no longer is, in your possession or control or in existence, state whether it (i) is missing or lost, (ii) has been destroyed, (iii) has been transferred to others, or (iv) has been otherwise

disposed of. In lieu of identifying a Document, a copy of the Document can be produced.

14. “IDI 160519CCC2600” means the Commission’s Epidemiological Investigation Report 160519CCC2600, produced as CPSC0000039–138, CPSC0010224–0010327.

15. “IDI 200917CCC3888” means the Commission’s Epidemiological Investigation Report 200917CCC3888, produced as CPSC0000139–195, CPSC0010328–0010384.

16. “IDI 220916HCC1454” means the Commission’s Epidemiological Investigation Report 220916HCC1454, produced as CPSC0010501–65.

17. “Incident A” refers to the death, and the surrounding circumstances thereof, of Infant A on or about December 16, 2015.

18. “Incident B” refers to the death, and the surrounding circumstances thereof, of Infant B on or around January 27, 2018.

19. “Incident C” refers to the death, and the surrounding circumstances thereof, of Infant C on or around October 25, 2021.

20. “Infant” means an individual under the age of one year.

21. “Infant A” means the four-month-old infant who, according to paragraph 36 of the Complaint, “suffocated after being placed face-up or on their side in the Podster in a crib.”

22. “Infant B” means the 17-day-old infant who, according to paragraph 37 of the Complaint, “suffocated after being placed face up in the Podster on an adult bed between two caregivers.”

23. “Infant C” means the infant identified in the Commission’s Epidemiological Investigation Report 220916HCC1454, produced as CPSC0010501–65.

24. “Infant Lounger Product(s)” means any product(s) marketed, intended, designed, or manufactured for infant lounging, including but not limited to the Boppy Pillow, and/or any product similar to the Podster. This term does not include products marketed, intended, designed, or manufactured for infant sleep; this term also does not include “inclined sleeper for infants” as that term is defined in 15 U.S.C. § 2057d(b).

25. “Infant Sleep Product(s)” means any product marketed, intended, or designed for infant sleep, including “inclined sleeper for infants” as that term is defined in 15 U.S.C. § 2057d(b).

26. “Office of Communications” means the Commission’s Office of Communications, and all staff and agents thereof.

27. “Office of Compliance and Field Operations” means the Commission’s Office of Compliance and Field Operations, including all staff and agents thereof.

28. “Office of Hazard Identification & Reduction” means the Commission’s Office of Hazard Identification & Reduction, and all staff and agents thereof.

29. “Person” means any natural person, corporation, partnership, unincorporated association, joint venture, trust, estate, public or quasi-public entity, or any other legal entity.

30. “Podster” means the products referred to in paragraphs 7 and 9 of Your Complaint.

31. “Proceeding” means this administrative action, *In the Matter of Leachco, Inc.*, CPSC Docket No. 22-1.

32. “Product Defect” means “product defect” as used in 15 U.S.C. § 2064(a)(2).

33. “Staff” means the CPSC staff.

34. “Substantial Product Hazard” means “substantial product hazard” as defined in 15 U.S.C. § 2064(a)(2).

35. “Substantial Risk of Injury” means “substantial risk of injury” as used in 15 U.S.C. § 2064(a)(2).

36. “Test” means any examination, inspection, analysis, result, or other assessment.

37. “You” or “Your” or “Commission” or CPSC” means the Consumer Product Safety Commission, including the Commissioners, Secretary, directors, officers, employees, staff, Complaint Counsel, and all other agents.

38. “Useful” includes the terms “usefulness” and “utility” and has the same meaning as these terms are used in 16 C.F.R. § 1115.4.

39. The words “and” and “or” shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

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

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

42. Pursuant to 16 C.F.R. Part 1025, the Commission is under a continuing duty to supplement its responses to these discovery requests without further request from Leachco. Where the Commission has responded to a discovery request with a response that was complete when made, the Commission is under a duty to supplement that response to include information later obtained.

\* \* \*

#### **SECOND SET OF REQUESTS FOR PRODUCTION**

52. All Documents and Communications Concerning Your responses to, or upon which You relied in answering, Leachco’s First Set of Requests for Admission and Second Set of Interrogatories.

53. All Communications Concerning Infant C.

54. All Communications Concerning Incident C.

55. All Communications Concerning IDI 220916HCC1454.

56. All Documents Concerning Infant C.

57. All Documents Concerning Incident C.

58. All Documents Concerning IDI 220916HCC1454.

59. All Documents Concerning the “6 incidents” mentioned on the document produced as CPSC0000001.

60. All Communications Concerning the “6 incidents” mentioned on the document produced as CPSC0000001.

61. All “reports within CPRMS” Concerning the “6 incidents” mentioned in the document produced as CPSC0000001.

62. All Documents and Communications Concerning existing Commission investigations of injuries, deaths, or any other incidents allegedly caused by or associated with the use of a Podster.

63. All Communications—between January 20, 2022 and February 9, 2022—between Complaint Counsel and Commissioners Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.

64. All Communications—on or after February 9, 2022—between Complaint Counsel and Commissioners Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.

65. All Communications—between January 20, 2022 and February 9, 2022—between Complaint Counsel and the Office of Compliance and Field Operations Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.

66. All Communications—on or after February 9, 2022—between Complaint Counsel and the Office of Compliance and Field Operations Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.

67. All Communications—between January 20, 2022 and February 9, 2022—between Complaint Counsel and the General Counsel Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.

68. All Communications—on or after February 9, 2022—between Complaint Counsel and the General Counsel Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.

69. All Communications—between January 20, 2022 and February 9, 2022—between Complaint Counsel and the Office of Communications Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.

70. All Communications—on or after February 9, 2022—between Complaint Counsel and the Office of Communications Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.

71. All Communications—between January 20, 2022 and February 9, 2022—between Complaint Counsel and the Division of Regulatory Enforcement Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.

72. All Communications—on or after February 9, 2022—between Complaint Counsel and the Division of Regulatory Enforcement Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.

73. All Communications—between January 20, 2022 and February 9, 2022—between Complaint Counsel and the Division of Enforcement and Litigation Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.



74. All Communications—on or after February 9, 2022—between Complaint Counsel and the Division of Enforcement and Litigation Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco. CPSC Secretary

75. All Communications (except Communications in which Leachco's counsel were copied)—between January 20, 2022 and February 9, 2022—between Complaint Counsel and the CPSC Secretary Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco. Communications in which Leachco's counsel were copied need not be produced in response to this Request.

76. All Communications (except Communications in which Leachco's counsel were copied)—on or after February 9, 2022—between Complaint Counsel and the CPSC Secretary Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.

77. To the extent not captured above, all Communications—between January 20, 2022 and February 9, 2022—between Complaint Counsel and all other employees of the Commission Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.

78. To the extent not captured above, all Communications—on or after February 9, 2022—between Complaint Counsel and all other employees of the Commission Concerning the Proceeding, Your Complaint, the Podster, and/or Leachco.

79. A detailed organizational chart of the Commission, including the identification of all offices, divisions, and employees.

80. All Documents reflecting statements of Leachco and/or its employees or agents, including but not limited to, statements contained in deposition transcripts, affidavits, interviews, and websites.

81. All Documents authored by Leachco and/or its employees or agents that were obtained from sources other than Leachco.

82. All materials and Documents considered or evaluated by the Commission, or anyone acting on behalf of or at the direction of the CPSC, to determine that the Podster is defective.

83. All Documents reflecting studies, reports, or investigations relating to consumer misuse of infant products, including but not limited to, infant-lounger products.

84. All Documents, from 2000 to the present, reflecting data Concerning deaths of infants involving consumer products.

85. All Documents and data evaluated by the CPSC, and/or anyone acting on behalf of or at the direction of the CPSC, Concerning infant deaths related to sleep, including Sudden Infant Death Syndrome (SIDS).

86. All Documents and data evaluated by the CPSC, and/or anyone acting on behalf of or at the direction of the CPSC, Concerning Sudden Unexplained Infant Death.

87. All Documents and data evaluated by the CPSC, and/or anyone acting on behalf of or at the direction of the CPSC, Concerning consumer products that create or pose a risk of suffocation to infants.

88. All Documents reflecting Tests on which the Commission relied to initiate its Complaint.

\* \* \*

DATED: January 25, 2023.

Respectfully submitted,



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Fax: 916.419.7747  
ODunford@pacificlegal.org

*Counsel for Respondent Leachco, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2023, I served, by electronic mail, the foregoing **Leachco, Inc.'s Second Set of Requests for Production** upon all parties and participants of record in these proceedings:

<p><b>Leah Ippolito</b>, Supervisory Attorney <b>Brett Ruff</b>, Trial Attorney <b>Rosalee Thomas</b>, Trial Attorney <b>Caitlin O'Donnell</b>, Trial Attorney <b>Michael Rogal</b>, Trial Attorney <b>Frederick C. Millett</b> <b>Gregory M. Reyes</b> 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><b>Mary B. Murphy</b> Director, Div. of Enforcement &amp; Litigation U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 mmurphy@cpsc.gov</p> <p><b>Robert Kaye</b> 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>
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Oliver J. Dunford  
*Counsel for Respondent Leachco, Inc.*

# **EXHIBIT 3**

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

In the Matter of  
  
LEACHCO, INC.

Respondent.

CPSC DOCKET NO. 22-1

**RESPONDENT'S FIRST SET OF REQUESTS FOR PRODUCTION  
OF DOCUMENTS AND THINGS TO THE  
CONSUMER PRODUCT SAFETY COMMISSION**

Pursuant to 16 C.F.R. § 1025.33, Respondent Leachco, Inc. ("Leachco") hereby requests that the Consumer Product Safety Commission ("CPSC") produce the following documents and/or things for inspection and copying within 30 days of service hereof.

**DEFINITIONS AND INSTRUCTIONS**

A. In the following requests:

1. "You," or "your," shall mean the CPSC and includes the staff and, where applicable, the Commissioners. References to the "staff" and the "Commissioners" shall refer to the staff and Commissioners (including without limitation the Office of Compliance and Field Operations and the Office of Communications) of the CPSC, respectively.

2. "Document" shall mean the original and all non-identical copies of all written, printed, typed, graphic, and photographic matter of any kind or nature, and all mechanical or electronic audio and/or visual recordings or transcripts thereof, however produced or reproduced, and all entries in a computer or electronic database (including Twitter and any other form of social media) of any kind, including but not limited to: correspondence, telexes, telegrams, telephone messages, statements, voice mail, electronic mail, and all other computer files or data, claim forms, incident reports, intake forms or histories, summaries or records of telephone conversations, memoranda, records, summaries or records of personal conversations or interviews, medical records, X-rays, MRIs, CT-scans, ultrasound images, and all other

radiologic or radiographic films, invoices, contracts, agreements, orders, books, calendars, diaries, reports, notebooks, photographs, videos (digital or otherwise), slides, charts, notes, plans, drawings, sketches, maps, summaries or records of meetings or conferences, drafts or letters, now or formerly in the possession, custody or control of CPSC, CPSC's attorneys, representatives, employees or agents.

3. "Person" shall mean any natural person, corporation, partnership, unincorporated association, joint venture, trust, estate, public or quasi-public entity, or any other legal entity.

4. The term "Complaint" shall mean your Complaint filed against Leachco in the above-captioned matter.

5. The term "Podster" shall mean the products referred to in paragraph 7 and 9 of your Complaint.

6. The term "Infant Lounger Product(s)" shall mean any product marketed, intended, or designed for infant lounging, including but not limited to the Boppy Pillow, and/or any product similar to the Podster.

7. The term "Infant Sleep Product(s)" shall mean any product marketed, intended, or designed for infant sleep.

B. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

C. These document production requests shall be deemed continuing to the extent permitted by 16 C.F.R. § 1025.31(f) so as to require prompt further responses if additional information or Documents are obtained between the time the responses were served and the time of trial.

D. If any privilege is claimed with respect to any document, please state with

respect to each such claim of privilege the identity of the item with respect to which the privilege is claimed with sufficient particularity to enable the matter to be brought before the Court for a ruling on such a claim, and state the alleged ground of privilege and the complete factual basis for such a claim. Among other things, please: 1) state the date, nature, and subject matter of the Document; 2) identify each author of the Document; 3) identify each preparer of the Document; 4) identify each Person who is an addressee or an intended recipient of the Document; 5) identify each Person from whom the Document was received; 6) state the present location of the Document and all copies thereof; 7) identify each Person who has or ever had possession, custody, or control of the Document or any copy thereof; 8) State the number of pages, attachments, appendices, and exhibits; and 9) provide all further information concerning the Document and the circumstances upon which the claim of privilege is asserted.

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

### **DOCUMENT PRODUCTION REQUESTS**

1. All Documents described in your "List and Summary of Documentary Evidence" filed in these proceedings.
2. All Documents in your possession that support the allegations in the Complaint.
3. All Documents that you intend to introduce in evidence at the hearing on this matter.



4. All Documents referred to, or relied upon in answering, any Interrogatories propounded to you by Leachco.

5. All Documents in your possession relating to any assessments, evaluations, analysis and testing, including without limitation any Product Safety Assessments (PSA), performed by or on behalf of the CPSC, or upon which the CPSC relies or has relied, with respect to any aspect of the Podster, including but not limited to:

- a. Design
- b. Warnings
- c. Construction
- d. Instructions
- e. Packaging
- f. Advertising and marketing
- g. Any other issue

6. All Documents in your possession relating to any assessments, evaluations, analysis and testing, including without limitation any Product Safety Assessments (PSA), performed by or on behalf of the CPSC, or upon which the CPSC relies or has relied, with respect to any aspect of any Infant Lounger Product, including but not limited to:

- a. Design
- b. Warnings
- c. Instructions
- d. Packaging
- e. Advertising and marketing
- f. Any other issue

7. All Documents in your possession relating to or documenting any inspections and testing of any Podster.

8. All Documents and communications among the staff and/or Commissioners, and among the CPSC and third parties, regarding or pertaining to the Podster.

9. All Documents and communications among the staff and/or Commissioners, and among the CPSC and third parties, regarding or pertaining to the Complaint, its preparation, filing or approval.

10. All Documents relating to meetings or communications between any member of the staff and any Commissioner relating to the Complaint, its preparation or filing.

11. All Documents relating to meetings or communications between any member of the CPSC and any third party other than Leachco, relating to the Complaint, Leachco, and/or the Podster.

12. All Documents relating to any reports under section 15 of the Consumer Product Safety Act, whether initiated by a company or requested by the CPSC staff, involving a Podster, including without limitation any Documents relating to (i) any Preliminary Determination that arose of any such report; and (ii) any corrective action that arose out of any such report, whether or not the corrective action followed a Preliminary Determination.

13. All Documents relating to the decision to file the Complaint.

14. All Documents in your possession relating to any incidents, injuries, or deaths involving the Podster, including without limitation consumer reports to CPSC, Epidemiological Investigation Reports (also known as In-Depth Investigation Reports, or IDI Reports) and/or reports submitted to CPSC via [saferproducts.gov](https://saferproducts.gov) (whether or not eligible for publication).

15. All Documents relating to CPSC consideration of issuance of any safety alert or release involving the Podster, including by not limited to the CPSC's January 20, 2022 Release Number 22-056.

16. All Documents relating to any analysis performed by or on behalf of the CPSC, or upon which the CPSC relies or has relied, of consumer reviews of: (a) the Podster on retailer websites; or (b) the Podster on any third-party website or forum.

17. All Documents relating to any communications by the CPSC to any retailers regarding the Podster.

18. All Documents relating to any communications between the CPSC and nongovernmental organizations including, without limitation, consumer advocacy groups or other similar organizations regarding the Podster.

19. All Documents that support the allegations in Paragraph 20 of the Complaint, including subsections a. – e. that it is foreseeable that caregivers will use the Podster without supervision and that it is foreseeable that caregivers will use the Podster for infant sleep.

20. All Documents that support the allegation in Paragraph 24 of the Complaint that the Podster is “defective because it can cause airflow obstruction if an unsupervised infant rolls, moves, or is placed in a position where the infant’s nose and mouth are obstructed by the Podster.”

21. All Documents that support the allegation in Paragraph 25 of the Complaint that the Podster “is defective because it is constructed of thick, soft padding that has a concave shape which can envelop an infant’s face and cause airflow obstruction if an unsupervised infant rolls, moves, or is placed in a position where the infant’s nose and mouth are obstructed by the Podster.”

22. All Documents that support the allegation in Paragraph 26 of the Complaint that the Podster is defective because “it lacks rigid underlying components, which can impede the

ability of an infant to self-rescue in the event that the infant rolls, moves, or is placed in a position where the infant's nose and mouth are obstructed by the Podster."

23. All Documents that support the allegation in Paragraph 27 of the Complaint that the Podster is defective because "it facilitates an infant's movement on the Podster, enhancing the risk that the infant's nose and mouth will be obstructed by the Podster."

24. All Documents that support the allegation in Paragraph 28 of the Complaint that the Podster is defective because "it facilitates an infant's movement off the Podster, enhancing the risk that the infant's nose and mouth will be obstructed by another object in the infant's environment, such as soft bedding."

25. All Documents that support the allegations in Paragraphs 29 and 30 of the Complaint that the Podster may allow an infant to roll or move off the Podster.

26. All Documents that support the allegations in Paragraphs 31 and 32 of the Complaint that the Podster can lead to unsafe bedsharing with caregivers.

27. All Documents that support the allegations in Paragraphs 39 and 40 of the Complaint that it is foreseeable that caregivers will not place infants on their backs in the Podster and that caregivers will use the Podster for bedsharing in an adult bed.

28. All Documents relating to any analysis performed by or on behalf of the CPSC, or upon which the CPSC relies or has relied, comparing the number or frequency of incidents, injuries, or deaths involving the Podster with the number or frequency of incidents, injuries, or deaths involving any other infant Lounger Product or any Infant Sleep Product.

29. All Documents relating to any analysis performed by or on behalf of the CPSC, or upon which the CPSC relies or has relied, comparing the number or frequency of incidents, injuries, or deaths involving the Podster with the number or frequency of incidents, injuries, or deaths involving any other product.

30. All Documents relating to any analysis performed by or on behalf of the CPSC, or upon which the CPSC relies or has relied, comparing the Podster in any way with any other Infant Lounger Product or any Infant Sleep Product.

31. All Documents in your possession relating to any incident, injury, or death, involving the Podster that you allege to have occurred.

32. All Documents relating to any analysis performed by or on behalf of the CPSC, or upon which the CPSC relies or has relied, considering the utility to consumers of the Podster.

33. All Documents relating to any analysis performed by or on behalf of the CPSC, or upon which the CPSC relies or has relied in this case, considering the utility to consumers of any Infant Lounger Product.

34. All Documents relating to any regulatory evaluation conducted by or on behalf of the CPSC, or upon which the CPSC relies or has relied to evaluate the effectiveness of the warning labels and instructions for the Podster.

35. All Documents relating to any regulatory evaluation conducted by or on behalf of the CPSC, or upon which the CPSC relies or has relied to evaluate the effectiveness of the warning labels and instructions for any Infant Lounger Product and/or any Infant Sleep Product.

36. All Documents in your possession relating to the actions of any manufacturers to address the risk of product misuse of Infant Lounger Products.

37. All Documents in your possession relating to the actions of any manufacturer to warn consumers regarding Infant Lounger Products.

38. All Documents relating to communications between the CPSC and any persons, their parents, guardians or attorneys, who alleged any incident, injury, or death involving any Infant Lounger Product.

39. All Documents relating to any analysis performed by or on behalf of the CPSC, or upon which the CPSC relies or has relied, with respect to the National Electronic Injury Surveillance System (NEISS) and:

- (a) the Podster;
- (b) other Infant Lounger Products; or
- (c) any Infant Sleep Product.

40. All Documents relating to any analysis performed by or on behalf of the CPSC, or upon which the CPSC relies or has relied, with respect to any comparison of the performance, risks, or any other aspect of the Podster to the performance, risks, or any other aspect of any other product.

41. All Documents in your possession relating to any risk assessment involving the Podster.

42. All Documents in your possession relating to any risk assessment involving other Infant Lounger Products.

43. All Documents in your possession relating to any retailer advertising or marketing of the Podster.

44. All Documents in your possession relating to consideration by any voluntary standards organization of a voluntary standard with respect to Infant Lounger Products.

45. All Documents relating to communications between the CPSC and any persons who own, used or where involved in any incidents allegedly involving a Podster.

46. Any photograph of any Podster related to the relief requested in the Complaint, whether taken by you or by any other person.

47. Any X-ray or other recorded radiographic or diagnostic study of the Podster or any component part thereof (including without limitation fluoroscopy, ultrasonography,

scanning electron microscopy, light microscopy, or energy dispersive analysis x-ray (EDAX)), or any other physical evidence related to the relief requested in the Complaint.

48. Any document provided to, or prepared by, for, or at the direction of, or which in any way was relied upon or forms the basis for the opinions of, any person you expect to call as an expert witness at trial or any hearing in this matter, including the expert's complete file and any communications between the expert and the CPSC.

49. The curriculum vitae, resume or other summary of the qualifications of any person you expect to call as an expert witness at trial or any hearing in this matter, including without limitation a list of all publications authored or co-authored by the witness, the amount of and basis for the compensation of the witness, and a list of cases (described by name of case, jurisdiction, case number, and date of testimony) in which the witness has testified.

#### **REQUESTS FOR PRODUCTION OF THINGS**

50. Produce at a reasonable time and place for non-destructive examination any Podster which you have obtained, analyzed and/or tested related to any of the allegations in the Complaint.

51. Produce at a reasonable time and place for non-destructive examination any Infant Lounger Product and/or Infant Sleep Product which you have obtained, analyzed and/or tested related to any of the allegations in the Complaint.

Dated: March 14, 2022

**CROWELL & MORING LLP**

By: /s/ Cheryl A. Falvey  
Cheryl A. Falvey  
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Washington, D.C. 20004-2595  
Telephone: (202) 624-2675  
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**BRYAN CAVE LEIGHTON PAISNER  
LLP**

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Facsimile: (314) 259-2020  
bjstrauss@bclplaw.com

*Attorneys for Leachco, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on March 14, 2022, a true and correct copy of Respondent's First Set of Requests for Production was served by e-mail and first class U.S. mail, postage prepaid, on the following:

Alberta Mills  
Secretary of the U.S. Consumer Product Safety Commission  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814  
[amills@cpsc.gov](mailto:amills@cpsc.gov)

Mary B. Murphy, Director, Division of Enforcement and Litigation  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814  
[mmurphy@cpsc.gov](mailto:mmurphy@cpsc.gov)

Robert Kaye  
Assistant Executive Director  
Office of Compliance and Field Operations  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814  
[rkaye@cpsc.gov](mailto:rkaye@cpsc.gov)

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



Office of Compliance and Field Operations  
U.S. Consumer Product Safety Commission  
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/s/ Cheryl A. Falvey  
Cheryl A. Falvey

# **EXHIBIT 4**

**CONSUMER PRODUCT  
SAFETY COMMISSION**

**IN THE MATTER OF**

**LEACHCO, INC.**

CPSC Docket No. 22-1

HON. MICHAEL G. YOUNG  
PRESIDING OFFICER

**LEACHCO, INC.'S SECOND SET OF INTERROGATORIES**

Pursuant to 16 C.F.R. § 1025.32, Respondent Leachco, Inc. hereby requests that the Commission answer each of the following interrogatories under oath and in writing within 30 days of service hereof.

**DEFINITIONS AND INSTRUCTIONS**

1. “2019 Mannen Report” means the report titled, “Biomechanical Analysis of Inclined Sleep Products,” initially completed on September 18, 2019, and updated October 25, 2019, whose Principal Investigator was Erin M. Mannen, Ph.D., produced at CPSC0004996–CPSC0005072.

2. “Caregiver” means an adult who is responsible to care for a child, including parents and daycare employees.

3. “Claim” means the sole claim alleged against Leachco, namely Count I in Your Complaint.

4. “Commissioners” means current and former Commissioners of the CPSC and their staff.

5. “Complaint” means your Complaint filed on or about February 9, 2022 in this Proceeding.

6. “Concerning” shall mean concerning, referencing, referring to, related to, and relating to.

7. “CPSA” means the Consumer Product Safety Act.

8. “CPSC Secretary” means the CPSC’s Office of the Secretary, including all staff and agents thereof.

9. “Division of Enforcement and Litigation” means the Commission’s Division of Enforcement and Litigation, and all staff and agents thereof.

10. “Division of Regulatory Enforcement” means the Commission’s Division of Regulatory Enforcement, and all staff and agents thereof.

11. “Document” shall mean the original and all non-identical copies of all written, printed, typed, graphic, and photographic matter of any kind or nature, and all mechanical or electronic audio and/or visual recordings or transcripts thereof, however produced or reproduced, and all entries in a computer or electronic database (including Twitter and any other form of social media) of any kind, including but not limited to: correspondence, telexes, telegrams, telephone messages, statements, voice mail, electronic mail, and all other computer files or data, claim forms, incident reports, intake forms or histories, summaries or records of telephone conversations, memoranda, records, summaries or records of personal conversations or interviews, medical records, X-rays, MRIs, CT-scans, ultrasound images, and all other radiologic or radiographic films, invoices, contracts, agreements, orders, books, calendars, diaries, reports, notebooks, photographs, videos (digital or otherwise), slides, charts,

notes, plans, drawings, sketches, maps, summaries or records of meetings or conferences, drafts or letters, now or formerly in Your possession, custody, or control.

12. “General Counsel” means the CPSC’s Office of General Counsel, including all staff and agents thereof.

13. “Identify,” “State the Identity of,” “Identification,” or “Describe” means:

a. When used in reference to an individual, shall mean to state his or her full name, maiden or former names, social security number, present or last known home and business address and telephone numbers, and present or last known occupation, employer and job title or description; or if none of the information is known, then the name, present home and business address, and telephone numbers of all individuals who likely or may be able to provide all or part of the information.

b. When used in reference to an organization of any kind, shall mean to state its full name, its state of incorporation (if applicable), the address of its principal place of business, and its telephone numbers.

c. When used in reference to a Document, shall mean to state the type of Document, its date, the identity of its author(s), and its recipient(s); any title and/or serial number or file number appearing on the Document; the identity of its present custodian; its present location; and a brief description of its subject matter. If any such Document was, but no longer is, in your possession or control or in existence, state whether it (i) is missing or lost, (ii) has been destroyed, (iii) has been transferred to others, or (iv) has been otherwise

disposed of. In lieu of identifying a Document, a copy of the Document can be produced.

14. “IDI 160519CCC2600” means the Commission’s Epidemiological Investigation Report 160519CCC2600, produced as CPSC0000039–138, CPSC0010224–0010327.

15. “IDI 200917CCC3888” means the Commission’s Epidemiological Investigation Report 200917CCC3888, produced as CPSC0000139–195, CPSC0010328–0010384.

16. “IDI 220916HCC1454” means the Commission’s Epidemiological Investigation Report 220916HCC1454, produced as CPSC0010501–65.

17. “Incident A” refers to the death, and the surrounding circumstances thereof, of Infant A on or about December 16, 2015.

18. “Incident B” refers to the death, and the surrounding circumstances thereof, of Infant B on or around January 27, 2018.

19. “Incident C” refers to the death, and the surrounding circumstances thereof, of Infant C on or around October 25, 2021.

20. “Infant” means an individual under the age of one year.

21. “Infant A” means the four-month-old infant who, according to paragraph 36 of the Complaint, “suffocated after being placed face-up or on their side in the Podster in a crib.”

22. “Infant B” means the 17-day-old infant who, according to paragraph 37 of the Complaint, “suffocated after being placed face up in the Podster on an adult bed between two caregivers.”

23. “Infant C” means the infant identified in the Commission’s Epidemiological Investigation Report 220916HCC1454, produced as CPSC0010501–65.

24. “Infant Lounger Product(s)” means any product(s) marketed, intended, designed, or manufactured for infant lounging, including but not limited to the Boppy Pillow, and/or any product similar to the Podster. This term does not include products marketed, intended, designed, or manufactured for infant sleep; this term also does not include “inclined sleeper for infants” as that term is defined in 15 U.S.C. § 2057d(b).

25. “Infant Sleep Product(s)” means any product marketed, intended, or designed for infant sleep, including “inclined sleeper for infants” as that term is defined in 15 U.S.C. § 2057d(b).

26. “Office of Communications” means the Commission’s Office of Communications, and all staff and agents thereof.

27. “Office of Compliance and Field Operations” means the Commission’s Office of Compliance and Field Operations, including all staff and agents thereof.

28. “Office of Hazard Identification & Reduction” means the Commission’s Office of Hazard Identification & Reduction, and all staff and agents thereof.

29. “Person” means any natural person, corporation, partnership, unincorporated association, joint venture, trust, estate, public or quasi-public entity, or any other legal entity.

30. “Podster” means the products referred to in paragraphs 7 and 9 of Your Complaint.

31. “Proceeding” means this administrative action, *In the Matter of Leachco, Inc.*, CPSC Docket No. 22-1.

32. “Product Defect” means “product defect” as used in 15 U.S.C. § 2064(a)(2).

33. “Staff” means the CPSC staff.

34. “Substantial Product Hazard” means “substantial product hazard” as defined in 15 U.S.C. § 2064(a)(2).

35. “Substantial Risk of Injury” means “substantial risk of injury” as used in 15 U.S.C. § 2064(a)(2).

36. “Test” means any examination, inspection, analysis, result, or other assessment.

37. “You” or “Your” or “Commission” or CPSC” means the Consumer Product Safety Commission, including the Commissioners, Secretary, directors, officers, employees, staff, Complaint Counsel, and all other agents.

38. “Useful” includes the terms “usefulness” and “utility” and has the same meaning as these terms are used in 16 C.F.R. § 1115.4.



39. The words “and” and “or” shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

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

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

42. Pursuant to 16 C.F.R. Part 1025, the Commission is under a continuing duty to supplement its responses to these discovery requests without further request from Leachco. Where the Commission has responded to a discovery request with a response that was complete when made, the Commission is under a duty to supplement that response to include information later obtained.

\* \* \*

#### **SECOND SET OF INTERROGATORIES**

39. Identify each Person with knowledge of your efforts to respond to this Second Set of Interrogatories, Leachco’s First Set of Requests for Admission, and Leachco’s Second Set of Requests for Production of Documents. For each Person identified, indicate the time period of his or her involvement, and describe the Person’s responsibility, role, and contribution.

40. If you responded to any Request for Admission with other than an unqualified, “Admit,” explain the reason(s) for not so admitting.

39. Identify the date when the Commission first learned of Infant C and/or Incident C.

40. Is the Commission investigating injuries, deaths, or any other incidents allegedly caused by or associated with the use of a Podster? If so, describe each investigation, including but not limited to the date the Commission first learned of the injury(ies), death(s), or incident(s); the means and manner by which each investigation was conducted or is being conducted; the name, employer, job description, and contact information of each individual who was or is investigating each injury, death, or incident; the name, employer, job description, and contact information of each individual supervising all individuals who were or are investigating each injury, death, or incident; the name, employer, job description, and contact information of each individual who has reviewed any part of each investigation; the name, employer, job description, and contact information of each person interviewed in connection with each investigation.

41. Is the Commission investigating injuries, deaths, or any other incidents allegedly caused by or associated with the use of any Infant Lounger Product? If so, describe each investigation, including but not limited to the date the Commission first learned of the injury(ies), death(s), or incident(s); the means and manner by which each investigation was conducted or is being conducted; the name, employer, job description, and contact information of each individual who was or is investigating each injury, death, or incident; the name, employer, job description, and contact information of each individual supervising all individuals who were or are investigating each injury, death, or incident; the name, employer, job description, and contact information of each individual who has reviewed any part of each investigation;

the name, employer, job description, and contact information of each person interviewed in connection with each investigation.

42. Identify everyone who Tested the Podster.

43. Identify all individuals involved in the determination that the Podster was defective.

44. Identify every Test conducted on the Podster to determine whether it was defective.

45. Identify every other product Tested using the same Tests described in response to the previous Interrogatory.

46. Identify every other product Tested by the same people who Tested the Podster.

47. Identify all Infant Lounger Products on the market that the agency has determined are safe.

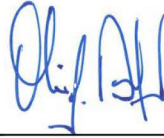
48. Identify any infant product category on the market in which no infant deaths have occurred.

49. Describe in detail the “6 incidents” mentioned on the document produced as CPSC0000001, including the nature of each incident, all facts and circumstances relating thereto, all Persons who have information about each incident, all Commission personnel who reviewed or investigated each incident, all Documents and Communications concerning each incident, and all reports concerning each incident.

\* \* \*

DATED: January 25, 2023.

Respectfully submitted,



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FRANK D. GARRISON  
Indiana Bar No. 34024-49  
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*Counsel for Respondent Leachco, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2023, I served, by electronic mail, the foregoing **Leachco, Inc.'s Second Set of Interrogatories** upon all parties and participants of record in these proceedings:

<p><b>Leah Ippolito</b>, Supervisory Attorney <b>Brett Ruff</b>, Trial Attorney <b>Rosalee Thomas</b>, Trial Attorney <b>Caitlin O'Donnell</b>, Trial Attorney <b>Michael Rogal</b>, Trial Attorney <b>Frederick C. Millett</b> <b>Gregory M. Reyes</b> 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><b>Mary B. Murphy</b> Director, Div. of Enforcement &amp; Litigation U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 mmurphy@cpsc.gov</p> <p><b>Robert Kaye</b> 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>
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Oliver J. Dunford  
*Counsel for Respondent Leachco, Inc.*

# **EXHIBIT 5**

**CONSUMER PRODUCT  
SAFETY COMMISSION**

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

CPSC Docket No. 22-1

HON. MICHAEL G. YOUNG  
PRESIDING OFFICER

**LEACHCO, INC.'S THIRD SET OF INTERROGATORIES**

Pursuant to 16 C.F.R. § 1025.32, Respondent Leachco, Inc. hereby requests that the Commission answer each of the following interrogatories under oath and in writing within 30 days of service hereof.

**DEFINITIONS AND INSTRUCTIONS**

1. “2019 Mannen Report” means the report titled, “Biomechanical Analysis of Inclined Sleep Products,” initially completed on September 18, 2019, and updated October 25, 2019, whose Principal Investigator was Erin M. Mannen, Ph.D., produced at CPSC0004996–CPSC0005072.

2. “Caregiver” means an adult who is responsible to care for a child, including parents and daycare employees.

3. “Claim” means the sole claim alleged against Leachco, namely Count I in Your Complaint.

4. “Commissioners” means current and former Commissioners of the CPSC and their staff.

5. “Complaint” means your Complaint filed on or about February 9, 2022 in this Proceeding.

6. “Concerning” shall mean concerning, referencing, referring to, related to, and relating to.

7. “CPSA” means the Consumer Product Safety Act.

8. “CPSC Secretary” means the CPSC’s Office of the Secretary, including all staff and agents thereof.

9. “Division of Enforcement and Litigation” means the Commission’s Division of Enforcement and Litigation, and all staff and agents thereof.

10. “Division of Regulatory Enforcement” means the Commission’s Division of Regulatory Enforcement, and all staff and agents thereof.

11. “Document” shall mean the original and all non-identical copies of all written, printed, typed, graphic, and photographic matter of any kind or nature, and all mechanical or electronic audio and/or visual recordings or transcripts thereof, however produced or reproduced, and all entries in a computer or electronic database (including Twitter and any other form of social media) of any kind, including but not limited to: correspondence, telexes, telegrams, telephone messages, statements, voice mail, electronic mail, and all other computer files or data, claim forms, incident reports, intake forms or histories, summaries or records of telephone conversations, memoranda, records, summaries or records of personal conversations or interviews, medical records, X-rays, MRIs, CT-scans, ultrasound images, and all other radiologic or radiographic films, invoices, contracts, agreements, orders, books, calendars, diaries, reports, notebooks, photographs, videos (digital or otherwise), slides, charts,



notes, plans, drawings, sketches, maps, summaries or records of meetings or conferences, drafts or letters, now or formerly in Your possession, custody, or control.

12. “Durable Infant or Toddler Product(s)” has the same meaning as used by the Commission here: <https://www.cpsc.gov/Business--Manufacturing/Business-Education/Durable-Infant-or-Toddler-Products>.

13. “General Counsel” means the CPSC’s Office of General Counsel, including all staff and agents thereof.

14. “Identify,” “State the Identity of,” “Identification,” or “Describe” means:

a. When used in reference to an individual, shall mean to state his or her full name, maiden or former names, social security number, present or last known home and business address and telephone numbers, and present or last known occupation, employer and job title or description; or if none of the information is known, then the name, present home and business address, and telephone numbers of all individuals who likely or may be able to provide all or part of the information.

b. When used in reference to an organization of any kind, shall mean to state its full name, its state of incorporation (if applicable), the address of its principal place of business, and its telephone numbers.

c. When used in reference to a Document, shall mean to state the type of Document, its date, the identity of its author(s), and its recipient(s); any title and/or serial number or file number appearing on the Document; the identity of its present custodian; its present location; and a brief description

of its subject matter. If any such Document was, but no longer is, in your possession or control or in existence, state whether it (i) is missing or lost, (ii) has been destroyed, (iii) has been transferred to others, or (iv) has been otherwise disposed of. In lieu of identifying a Document, a copy of the Document can be produced.

15. “IDI 160519CCC2600” means the Commission’s Epidemiological Investigation Report 160519CCC2600, produced as CPSC0000039–138, CPSC0010224–0010327.

16. “IDI 200917CCC3888” means the Commission’s Epidemiological Investigation Report 200917CCC3888, produced as CPSC0000139–195, CPSC0010328–0010384.

17. “IDI 220916HCC1454” means the Commission’s Epidemiological Investigation Report 220916HCC1454, produced as CPSC0010501–65.

18. “Incident A” refers to the death, and the surrounding circumstances thereof, of Infant A on or about December 16, 2015.

19. “Incident B” refers to the death, and the surrounding circumstances thereof, of Infant B on or around January 27, 2018.

20. “Incident C” refers to the death, and the surrounding circumstances thereof, of Infant C on or around October 25, 2021.

21. “Infant” means an individual under the age of one year.

22. “Infant A” means the four-month-old infant who, according to paragraph 36 of the Complaint, “suffocated after being placed face-up or on their side in the Podster in a crib.”

23. “Infant B” means the 17-day-old infant who, according to paragraph 37 of the Complaint, “suffocated after being placed face up in the Podster on an adult bed between two caregivers.”

24. “Infant C” means the infant identified in the Commission’s Epidemiological Investigation Report 220916HCC1454, produced as CPSC0010501–65.

25. “Infant Lounger Product(s)” means any product(s) marketed, intended, designed, or manufactured for infant lounging, including but not limited to the Boppy Pillow, and/or any product similar to the Podster. This term does not include products marketed, intended, designed, or manufactured for infant sleep; this term also does not include “inclined sleeper for infants” as that term is defined in 15 U.S.C. § 2057d(b).

26. “Infant Sleep Product(s)” means any product marketed, intended, or designed for infant sleep, including “inclined sleeper for infants” as that term is defined in 15 U.S.C. § 2057d(b).

27. “Office of Communications” means the Commission’s Office of Communications, and all staff and agents thereof.

28. “Office of Compliance and Field Operations” means the Commission’s Office of Compliance and Field Operations, including all staff and agents thereof.

29. “Office of Hazard Identification & Reduction” means the Commission’s Office of Hazard Identification & Reduction, and all staff and agents thereof.

30. “Person” means any natural person, corporation, partnership, unincorporated association, joint venture, trust, estate, public or quasi-public entity, or any other legal entity.

31. “Podster” means the products referred to in paragraphs 7 and 9 of Your Complaint.

32. “Proceeding” means this administrative action, *In the Matter of Leachco, Inc.*, CPSC Docket No. 22-1.

33. “Product Defect” means “product defect” as used in 15 U.S.C. § 2064(a)(2).

34. “Staff” means the CPSC staff.

35. “Substantial Product Hazard” means “substantial product hazard” as defined in 15 U.S.C. § 2064(a)(2).

36. “Substantial Risk of Injury” means “substantial risk of injury” as used in 15 U.S.C. § 2064(a)(2).

37. “Test” means any examination, inspection, analysis, result, or other assessment.

38. “You” or “Your” or “Commission” or CPSC” means the Consumer Product Safety Commission, including the Commissioners, Secretary, directors, officers, employees, staff, Complaint Counsel, and all other agents.

39. “Useful” includes the terms “usefulness” and “utility” and has the same meaning as these terms are used in 16 C.F.R. § 1115.4.

40. The words “and” and “or” shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.

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

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

43. Pursuant to 16 C.F.R. Part 1025, the Commission is under a continuing duty to supplement its responses to these discovery requests without further request from Leachco. Where the Commission has responded to a discovery request with a response that was complete when made, the Commission is under a duty to supplement that response to include information later obtained.

\* \* \*

### **THIRD SET OF INTERROGATORIES**

50. Identify all Infant Lounger Products that You have determined are unsafe.

51. Identify all infant products, including but not limited to any Durable Infant or Toddler Products and Infant Sleep Products, that You have determined are unsafe.

52. Identify all Infant Lounger Products that You have determined present a Substantial Product Hazard.

53. Identify all infant products, including but not limited to any Durable Infant or Toddler Products and Infant Sleep Products, that You have determined present a Substantial Product Hazard.

54. Identify all Infant Lounger Products that You have determined present a Substantial Risk of Injury.

55. Identify any infant products, including but not limited to any Durable Infant or Toddler Products Infant Sleep Products, that You have determined present a Substantial Risk of Injury.

56. Identify each and every Infant Lounger Product whose risk of injury is outweighed by the usefulness of the product which is made possible by the same aspect which presents the risk of injury.

57. Identify each and every infant product, including but not limited to each and every Durable Infant or Toddler Product or Infant Sleep Product, whose risk of injury is outweighed by the usefulness of the product which is made possible by the same aspect which presents the risk of injury.

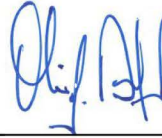
58. Identify any infant product category in which no infant injuries have occurred.

59. Identify any infant product category in which no infant deaths have occurred.

\* \* \*

DATED: February 2, 2023.

Respectfully submitted,



JOHN F. KERKHOFF

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*Counsel for Respondent Leachco, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2023, I served, by electronic mail, the foregoing **Leachco, Inc.'s Third Set of Interrogatories** upon all parties and participants of record in these proceedings:

<p><b>Leah Ippolito</b>, Supervisory Attorney <b>Brett Ruff</b>, Trial Attorney <b>Rosalee Thomas</b>, Trial Attorney <b>Caitlin O'Donnell</b>, Trial Attorney <b>Michael Rogal</b>, Trial Attorney <b>Frederick C. Millett</b> <b>Gregory M. Reyes</b> 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><b>Mary B. Murphy</b> Director, Div. of Enforcement &amp; Litigation U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 mmurphy@cpsc.gov</p> <p><b>Robert Kaye</b> 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>
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Oliver J. Dunford  
*Counsel for Respondent Leachco, Inc.*



# **EXHIBIT 6**

**CONSUMER PRODUCT  
SAFETY COMMISSION**

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

CPSC Docket No. 22-1

HON. MICHAEL G. YOUNG  
PRESIDING OFFICER

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

Pursuant to 16 C.F.R. § 1025.34, Respondent Leachco, Inc. submits its objections and responses to the Commission's First Set of Requests for Admissions. Leachco objects to any definitions or instructions in the Commission's Requests 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.

\* \* \*

**REQUEST NO. 1:** Admit that since 2008 Leachco has not had any document management policies other than those contained in the Quality Assurance Plan produced by Leachco with Bates numbers Leachco-CPSC-000003 through Leachco-CPSC-000022.

**RESPONSE:** Admit.

**REQUEST NO. 2:** Admit that Leachco has marketed the Podster as a product that "provides upper body elevation which can help aid in digestion and breathing."

**RESPONSE:** Admit that Leachco has stated on its website that the "Podster provides upper body elevation which can help aid in digestion and breathing." To the

extent a further response is required, Leachco denies the remaining parts, if any, of this Request.

**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.

**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.

**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.

**REQUEST NO. 6:** Admit that at least one infant died after being left unsupervised on a Podster.

**RESPONSE:** Objection. This Request is vague in that it fails to provide a relevant time frame, nor does this Request include a scenario that necessarily and directly leads from a lack of supervision to an infant's death. Without exhausting the possibilities, an infant left unsupervised in a Podster could have died directly because of a health condition or from a piece of food lodged in the infant's airways, or because a full bottle was placed in the infant's mouth, or because a caregiver rolled on top of and suffocated an infant. Leachco further objects to this Request because it assumes a consumer misuse of the Podster, a misuse that is directly contrary to Leachco's express warnings and instructions, not to mention common sense. Finally, Leachco objects that it does not have first-hand knowledge of facts of any deaths allegedly related to a Podster and that there are conflicting reports about the two incidents alleged at paragraphs 36 & 37 in the Commission's complaint. For example, the IDI related to the incident at the Alabama daycare center states that the "daycare licensing agency report (Exhibit 4) shows the boy was found unresponsive face down on the pillow, but the medical examiner's report (Exhibit 5) shows the boy was found unresponsive lying on his back on the pillow. No further information could be obtained to determine in which position the boy was found. It is unclear in what position the boy was placed on the pillow." *See* CPSC0010225.

Subject to and without waiving all objections, and based on information and belief, Leachco admits one infant died after personnel at a daycare facility placed a

baby in an infant lounger (either on the infant's side or back), which was already on a crib mattress in a crib, which also included a stuffed animal that was found near the baby's face; and after a bottle of some type of liquid was placed in the infant's mouth; and after the infant was left unattended for approximately ninety minutes.

Subject to and without waiving all objections, and based on information and belief, Leachco admits that one infant, who had occasionally made gasping sounds while breathing, died after being placed on an infant lounger, which was on top of a queen-size bed, on which a blanket was also present; and after the infant and the infant's parents co-slept on the bed (the infant, at one point in time, in the Podster between the parents); after the parents fell asleep; and after the infant was found in the bed off of the Podster.

To the extent a further response is required, Leachco denies the remaining parts, if any, of this Request.

**REQUEST NO. 7:** Admit that an infant can suffocate on the Podster.

**RESPONSE:** Objection. This Request is far too abstract to be a properly focused Request for Admission. It is possible that any person "can suffocate" in literally any location, depending on an unknown number of factors including, among other things, the person's health, the ingestion of items that could block the person's airways, the age of the person, the lack of supervision over a person who may be—because of health risks or otherwise—particularly susceptible to breathing problems. The defective nature of this Request underscores the absurdity of the CPSC's allegations in this proceeding. Accidents that lead to serious injury or death "can" occur literally

anywhere and under an unknown number of circumstances. This Request provides no information concerning the relative health of the “infant.” Nor does the Request identify the age, length, or weight of the “infant.” Further, the phrase “on the Podster” is vague as used here. Subject to and without waiving all objections, Leachco admits that an infant “can suffocate” “on the Podster” if an infant is placed on the Podster in a position contrary to Leachco’s warnings and instructions and/or if the infant is not constantly supervised.

To the extent a further response is required, Leachco denies the remaining parts, if any, of this Request.

**REQUEST NO. 8:** Admit that, prior to selling the Podsters, Leachco conducted no Tests to assess potential infant movement while on the Podsters.

**RESPONSE:** Deny.

**REQUEST NO. 9:** Admit that, after beginning to sell the Podsters, Leachco conducted no Tests to assess potential infant movement while on the Podsters.

**RESPONSE:** Deny.

**REQUEST NO. 10:** Admit that, prior to selling the Podsters, Leachco conducted no Tests to evaluate whether the Podsters pose a suffocation risk.

**RESPONSE:** Objection. This Request is far too abstract to be a properly focused Request for Admission. The phrase “suffocation risk” is vague as used here. One confronts a “suffocation risk” often—for example, at every meal or every time one goes swimming—and such a risk may be increased for those who have underlying health problems, for those who ignore product warnings and/or who lack common sense, or

for those whose caregivers ignore product warnings and/or lack common sense. Subject to and without waiving all objections, deny.

**REQUEST NO. 11:** Admit that, after beginning to sell the Podsters, Leachco conducted no Tests to evaluate whether the Podsters pose a suffocation risk.

**RESPONSE:** Objection. This Request is far too abstract to be a properly focused Request for Admission. The phrase “suffocation risk” is vague as used here. One confronts a “suffocation risk” often—for example, at every meal or every time one goes swimming—and such a risk may be increased for those who have underlying health problems, for those who ignore product warnings and/or who lack common sense, or for those whose caregivers ignore product warnings and/or lack common sense. Subject to and without waiving all objections, deny.

**REQUEST NO. 12:** Admit that, prior to selling the Podsters, Leachco conducted no Tests regarding how consumers may use the Podsters.

**RESPONSE:** Deny.

**REQUEST NO. 13:** Admit that, after beginning to sell the Podsters, Leachco conducted no Tests regarding how consumers may use the Podsters.

**RESPONSE:** Deny.

**REQUEST NO. 14:** Admit that, prior to selling the Podsters, Leachco conducted no Tests regarding the effectiveness of the Podsters’ warnings and instructions.

**RESPONSE:** Deny.

**REQUEST NO. 15:** Admit that, after beginning to sell the Podsters, Leachco conducted no Tests regarding the effectiveness of the Podsters' warnings and instructions.

**RESPONSE:** Deny.

**REQUEST NO. 16:** Admit Leachco has no safety department to assess the safety of its products.

**RESPONSE:** Objection. The phrase "safety department" is undefined and vague. The term "safety" is also vague in that it fails to describe what level of "safety" is acceptable. Leachco also objects to the CPSC's apparent premise—based on its allegations in the Complaint here—that "consumer safety" means that no consumer must ever suffer any injury or harm when using or in the vicinity of consumer products, regardless of misuse, common sense, or product warnings or instructions. Leachco further objects to the premise of this Request, *i.e.*, that a small company like Leachco would be expected to have a completely independent, lawyerly described "department" whose sole focus is the "safety" of its products. Subject to and without waiving all objections, Leachco admits that it does not have a group of people designated as a "safety department" to assess the "safety" of its products, but Leachco denies that it lacks a systematic means of assessing the safety of its products.

**REQUEST NO. 17:** Admit Leachco has no safety committee to assess the safety of its products.

**RESPONSE:** Objection. The phrase "safety committee" is undefined and vague. The term "safety" is also vague in that it fails to describe what level of "safety" is



acceptable. Leachco also objects to the CPSC's apparent premise—based on its allegations in the Complaint here—that “consumer safety” means that no consumer must ever suffer any injury or harm when using or in the vicinity of consumer products, regardless of misuse, common sense, or product warnings or instructions. Leachco further objects to the premise of this Request, *i.e.*, that a small company like Leachco would be expected to have a completely independent, lawyerly described “committee” whose sole focus is the “safety” of its products. Subject to and without waiving all objections, Leachco admits that it does not have a group of people designated as a “safety committee” to assess the “safety” of its products, but Leachco denies that it lacks a systematic means of assessing the safety of its products.

**REQUEST NO. 18:** Admit Leachco has no employee whose position at Leachco focuses solely on product safety.

**RESPONSE:** Objection. The term “safety” is vague in that it fails to describe what level of “safety” is acceptable. Leachco also objects to the CPSC's apparent premise—based on its allegations in the Complaint here—that “consumer safety” means that no consumer must ever suffer any injury or harm when using or in the vicinity of consumer products, regardless of misuse, common sense, or product warnings or instructions. Further objecting, Leachco states that from Jamie Leach and down through every employee, Leachco is focused on the safety of its products; product safety is part of every employee's job at Leachco. Subject to and without waiving all objections, Leachco admits that it does not have an employee whose position at

Leachco focuses solely on product safety, but Leachco denies that it lacks a systematic means of assessing product safety.

**REQUEST NO. 19:** Admit Leachco has no written company policies regarding consumer safety.

**RESPONSE:** Objection. The term “consumer safety” is vague in that it fails to level of “safety” is acceptable. Leachco also objects to the CPSC’s apparent premise—based on its allegations in the Complaint here—that “consumer safety” means that no consumer must ever suffer any injury or harm when using or in the vicinity of consumer products, regardless of misuse, common sense, or product warnings or instructions. Subject to and without waiving all objections, Leachco admits that it does not have written company policies regarding “consumer safety,” but Leachco denies that it lacks policies and practices regarding “consumer safety.”

**REQUEST NO. 20:** Admit Leachco has no written company procedures regarding consumer safety.

**RESPONSE:** Objections. The phrase “consumer safety” as used here is vague. Leachco also objects to the CPSC’s apparent premise—based on its allegations in the Complaint here—that “consumer safety” means that no consumer must ever suffer any injury or harm when using or in the vicinity of consumer products, regardless of misuse, common sense, or product warnings or instructions. Subject to and without waiving all objections, Leachco admits that it does not have written company procedures regarding “consumer safety,” but Leachco denies that it lacks procedures and practices regarding “consumer safety.”

**REQUEST NO. 21:** Admit that Leachco employees sent emails regarding the Podsters, including emails containing the term “Podster”, using the customerservice@leachco.com email address.

**RESPONSE:** Admit.

**REQUEST NO. 22:** Admit that Leachco employees received emails regarding the Podsters, including emails containing the term “Podster”, using the customer-service@leachco.com email address.

**RESPONSE:** Admit.

**REQUEST NO. 23:** Admit that Jamie Leach sent emails to other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the jamieleach@leachco.com email address.

**RESPONSE:** Admit.

**REQUEST NO. 24:** Admit that Jamie Leach received emails from other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the jamieleach@leachco.com email address.

**RESPONSE:** Admit.

**REQUEST NO. 25:** Admit that Tonya Barrett sent emails to other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the tbarrett@leachco.com email address.

**RESPONSE:** Admit.

**REQUEST NO. 26:** Admit that Tonya Barrett received emails from other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the tbarrett@leachco.com email address.

**RESPONSE:** Admit.

**REQUEST NO. 27:** Admit that Leah Barnes sent emails to other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the lbarnes@leachco.com email address.

**RESPONSE:** Admit.

**REQUEST NO. 28:** Admit that Leah Barnes received emails from other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the lbarnes@leachco.com email address.

**RESPONSE:** Admit.

**REQUEST NO. 29:** Admit that Mabry Ballard sent emails to other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the mballard@leachco.com email address.

**RESPONSE:** Admit.

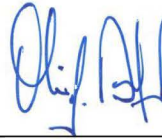
**REQUEST NO. 30:** Admit that Mabry Ballard received emails from other Leachco employees regarding the Podsters, including emails containing the term “Podster”, using the mballard@leachco.com email address.

**RESPONSE:** Admit.

\* \* \*

Dated: November 30, 2022.

Respectfully submitted,



JOHN F. KERKHOFF

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ODunford@pacificlegal.org

*Counsel for Respondent Leachco, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2022, I served, by electronic mail, the foregoing upon all parties of record in these proceedings:

<p><b>Leah Ippolito</b>, Supervisory Attorney <b>Brett Ruff</b>, Trial Attorney <b>Rosalee Thomas</b>, Trial Attorney <b>Caitlin O'Donnell</b>, Trial Attorney <b>Michael Rogal</b>, Trial Attorney <b>Frederick C. Millett</b> <b>Gregory M. Reyes</b> 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><b>Mary B. Murphy</b> Director, Div. of Enforcement &amp; Litigation U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 mmurphy@cpsc.gov</p> <p><b>Robert Kaye</b> 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>
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Oliver J. Dunford  
*Counsel for Respondent Leachco, Inc.*