

**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

**MEMORANDUM IN SUPPORT OF LEACHCO, INC.'S MOTION *IN LIMINE*
TO EXCLUDE (1) ALL POST-FACT-DISCOVERY EVIDENCE AND (2) TESTIMONY AND
DOCUMENTS REGARDING ALLEGED DEFECTS IN THE PODSTER'S WARNINGS**

Pursuant to the Commission's Rules of Practice, 16 C.F.R. §§ 1025.23, 1025.43, and this Court's Order on Prehearing Schedule, Docket No. 35, Respondent Leachco, Inc. moves to exclude (1) post-fact-discovery evidence including documents, exemplars, and expert testimony, and (2) any testimony or documents related to any alleged deficiencies, defects, or inadequacies in the Podster's warnings and instructions.¹ Use of and reliance on late-produced evidence and new legal theories is improper and would prejudice Leachco. The Court should thus preclude the Commission from using these documents and testimony at the hearing.

BACKGROUND

The Commission filed its Complaint in February 2022. Fact discovery closed on March 20, 2023. *See* Dkt. 35, Order on Prehearing Schedule. For more than a year, then, the parties worked through discovery on numerous issues to narrow the scope of the claims and defenses and streamline the case for trial.

¹ Leachco uses the term "warning" in this motion to refer to warnings, instructions, and marketing materials.

© 2006 The Authors
Journal compilation © 2006 Blackwell Publishing Ltd

--	--

--	--	--	--	--

Country	Year	Value
Algeria	1990	0.00
Algeria	1991	0.00
Algeria	1992	0.00
Algeria	1993	0.00
Algeria	1994	0.00
Algeria	1995	0.00
Algeria	1996	0.00
Algeria	1997	0.00
Algeria	1998	0.00
Algeria	1999	0.00
Algeria	2000	0.00
Algeria	2001	0.00
Algeria	2002	0.00
Algeria	2003	0.00
Algeria	2004	0.00
Algeria	2005	0.00
Algeria	2006	0.00
Algeria	2007	0.00
Algeria	2008	0.00
Algeria	2009	0.00
Algeria	2010	0.00
Algeria	2011	0.00
Algeria	2012	0.00
Algeria	2013	0.00
Algeria	2014	0.00
Algeria	2015	0.00
Algeria	2016	0.00
Algeria	2017	0.00
Algeria	2018	0.00
Algeria	2019	0.00
Algeria	2020	0.00
Algeria	2021	0.00
Algeria	2022	0.00
Algeria	2023	0.00
Algeria	2024	0.00
Algeria	2025	0.00
Algeria	2026	0.00
Algeria	2027	0.00
Algeria	2028	0.00
Algeria	2029	0.00
Algeria	2030	0.00
Algeria	2031	0.00
Algeria	2032	0.00
Algeria	2033	0.00
Algeria	2034	0.00
Algeria	2035	0.00
Algeria	2036	0.00
Algeria	2037	0.00
Algeria	2038	0.00
Algeria	2039	0.00
Algeria	2040	0.00
Algeria	2041	0.00
Algeria	2042	0.00
Algeria	2043	0.00
Algeria	2044	0.00
Algeria	2045	0.00
Algeria	2046	0.00
Algeria	2047	0.00
Algeria	2048	0.00
Algeria	2049	0.00
Algeria	2050	0.00
Algeria	2051	0.00
Algeria	2052	0.00
Algeria	2053	0.00
Algeria	2054	0.00
Algeria	2055	0.00
Algeria	2056	0.00
Algeria	2057	0.00
Algeria	2058	0.00
Algeria	2059	0.00
Algeria	2060	0.00
Algeria	2061	0.00
Algeria	2062	0.00
Algeria	2063	0.00
Algeria	2064	0.00
Algeria	2065	0.00
Algeria	2066	0.00
Algeria	2067	0.00
Algeria	2068	0.00
Algeria	2069	0.00
Algeria	2070	0.00
Algeria	2071	0.00
Algeria	2072	0.00
Algeria	2073	0.00
Algeria	2074	0.00
Algeria	2075	0.00
Algeria	2076	0.00
Algeria	2077	0.00
Algeria	2078	0.00
Algeria	2079	0.00
Algeria	2080	0.00
Algeria	2081	0.00
Algeria	2082	0.00
Algeria	2083	0.00
Algeria	2084	0.00
Algeria	2085	0.00
Algeria	2086	0.00
Algeria	2087	0.00
Algeria	2088	0.00
Algeria	2089	0.00
Algeria	2090	0.00
Algeria	2091	0.00
Algeria	2092	0.00
Algeria	2093	0.00
Algeria	2094	0.00
Algeria	2095	0.00
Algeria	2096	0.00
Algeria	2097	0.00
Algeria	2098	0.00
Algeria	2099	0.00
Algeria	2100	0.00
Algeria	2101	0.00
Algeria	2102	

[illegible]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

_____ 2

© 2006 The Authors
Journal compilation © 2006 Blackwell Publishing Ltd

See Ex. 6, CPSC Resp. to Leachco ROG No. 30; *id.* 31

[REDACTED]

see also id., CPSC Resp. to Leachco’s 1st ROGs Nos. 21, 23, 25, 27, 28, 30, 31, 33, 34, 38. On document requests, the Commission [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See, e.g.*, Ex. 7, CPSC’s Resp. to Leachco’s 1st RFPs No. 28.

Additionally, throughout discovery, the Commission [REDACTED]

[REDACTED]

[REDACTED] *See, e.g.*, Ex. 6, CPSC First Supp. Resp. to ROG No. 5 [REDACTED]

[REDACTED]

[REDACTED]; *see also* CPSC Resp. to Leachco Mtn. S.D. at 17 n.48 (Commission admitting that the Podster’s warnings are “irrelevant arguments” because they relate to “what Complaint Counsel is *not* alleging.” (emphasis in original)). The Commission was clear that it was not alleging defective, deficient, or inadequate warnings.

Finally, during fact discovery, Leachco [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

see Ex. 5, Leachco RFP No. 50. As to the Interrogatory, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. 6, First Supp. Resp. to ROG No.

36. And in that same response, [REDACTED]

[REDACTED]

[REDACTED]

As to RFP No. 50, the Commission [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] Ex. 7, CPSC Resp. RFP No. 50. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 10, Depo. Tr. of Hope Nesteruk,

at 88:1–7 (testifying she reviewed two samples). In short, then, the Commission [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The state of discovery changed on April 28, 2023—a month *after* fact discovery closed—when the parties exchanged expert reports. *First*, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Second, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Third, the Commission's experts [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Ex. 4, Leachco ROG No. 36; Ex. 5, Leachco

RFP No. 50. [REDACTED]

[REDACTED]

[REDACTED] Moreover, [REDACTED]

[REDACTED]

[REDACTED] see Ex. 1, Katwa Report at 5, 17, [REDACTED]

[REDACTED]

As this Court previously made clear:

[REDACTED]

Ex. 11, Feb. 24, 2023, Hearing Tr., 33:14–34:5.

Leachco now moves to exclude documents and testimony based on the Commission’s improper discovery tactics.

ARGUMENT

I. THE COURT SHOULD EXCLUDE LATE-PRODUCED DOCUMENTS AND EXEMPLARS, AND ANY TESTIMONY BASED ON THOSE SOURCES

The documents the Commission produced on April 28, 2023, came more than a *month* after fact discovery closed. Yet, [REDACTED]

[REDACTED]

[REDACTED] *See, e.g.*, Ex. 4, Leachco ROG Nos. 21, 25, 27–29, 31. On top of that, the Commission’s expert [REDACTED]

[REDACTED] And because Leachco lacked access to these documents—and could not provide them to its own expert or review them at all—Leachco has suffered prejudice.

The case law is clear: Parties cannot smuggle factual information through experts. To the contrary, experts are “in effect locked-in to the factual record as of the time fact discovery closed.” *Apple Inc. v. Samsung Elec. Co.*, No 11-CV-01846, 2012 WL 3155574, at *5 (N.D. Cal. Aug. 2, 2012). And “facts upon which experts may base

their opinions . . . are distinct from the expert opinions themselves” and are “subject to the . . . fact discovery deadline.” *Gore v. 3M Co.*, No. 5:16-CV-716-BR, 2017 WL 5076021, at *2 (E.D.N.C. Nov. 3, 2017).³

And “even though the documents might well become information considered by an expert in forming his opinion,” such *factual* documents cannot be “served well after the close of fact discovery.” *Sparton Corp. v. United States*, 77 Fed. Cl. 10, 15 (Fed. Cl. 2007) (emphasis added); *see also United States v. N. E. Med. Servs.*, No. 10-cv-01904-CW (JCS), 2014 WL 7208627, at *5 (N.D. Cal. Dec. 17, 2014) (“Documents that have a direct bearing on the factual disputes in the case are the subject of fact discovery, which often (as here) concludes before expert discovery so that the parties may rely on a complete factual record to inform their own experts and depose their opponents’ experts.”).

“Strategic manipulation of the discovery process”—producing factual documents late—is grounds for exclusion. *Aetna Inc. v. Mednax, Inc.*, No. 18-cv-2217, 2021 WL 949454, at *4 (E.D. Pa. Mar. 12, 2021). By disclosing information “after the close of fact discovery, Plaintiffs effectively deprived Defendants of the tools necessary to challenge the underlying assumptions of Plaintiffs’ expert—i.e., the documents or and deposition testimony that would speak to the factual matters being evaluated by the expert.” *Ritchie Risk-Linked Strategies Trading (Ireland) Ltd. v. Coventry First LLC*, 280 F.R.D. 147, 160 (S.D.N.Y. 2012).

³ Leachco has separately moved to exclude the Commission’s proffered expert testimony for its failure to disclose factual information during fact discovery. *See Leachco’s Motion to Exclude the Expert Testimony Proffered by the Consumer Product Safety Commission.*

In short, a party cannot “withh[o]ld . . . information that bears on [opposing party’s] case while simultaneously providing that same information to its own expert.” *Brown v. Wal-Mart Store, Inc.*, No. 09-CV-02229-EJD, 2018 WL 2011935, at *5 (N.D. Cal. Apr. 27, 2018). “By producing” documents “after the close of fact discovery” the Commission “prevent[ed] [Leachco] from conducting further fact discovery related to that information and from incorporating those findings into [Leachco’s] opening expert report.” *Id.* And “[t]he only way to restore both parties to equal footing,” is to “exclude” the information and “stri[k]e . . . the related expert report.” *Id.*

When experts do not have “an opportunity to review the withheld documents before forming their opinions,” and a party cannot “question witnesses about the withheld documents,” prejudice occurs. *Zurich Am. Ins. Co. v. Hardin*, No. 8:14-cv-775-T-23AAS, 2020 WL 1150981, at *2 (M.D. Fla. Mar. 10, 2020). Indeed, that’s true even when parties have rebuttal reports—something that Leachco does *not* have here. *Id.* at *3. Thus, Leachco faces even *more* prejudice than in a typical case. *See Aetna*, 2021 WL 949454, at *6 (prejudice not cured by a rebuttal report when “fact discovery has long since closed” because “any [rebuttal] report necessarily would rely on an artificially limited record”). In *Zurich*, the Court excluded documents and an expert opinion based on documents produced after the close of discovery—just as here. 2020 WL 1150981, at *3.

Nor may parties ignore fact-discovery obligations simply because they plan to make later disclosure during expert discovery. *MLC Intellectual Prop. LLC v. Micron Tech., Inc.*, 10 F.4th 1358 (Fed. Cir. 2021). In *MLC*, a party “argue[d] that it was not

required to disclose these specific facts and documents supporting its damages theory during fact discovery because it ultimately disclosed them during expert discovery.” *Id.* at 1369. Like the Commission here, the party in *MLC* argued that “it provided adequate responses to” interrogatories and “that anything more would have required it to disclose material designated for expert discovery.” *Id.* Of course, a party need not “disclose its expert *opinions* during fact discovery,” but it must disclose the evidence that an expert would rely on. *Id.* at 1371. Indeed, the Court rejected the argument that a party “need not disclose factual underpinnings and evidence underlying” its legal theory “*prior to* expert discovery.” *Id.* at 1372 (emphasis added); *see also Vera v. Berkshire Life Ins. Co.*, No. 19-61360-CIV-DIMITROULEAS/SNOW, 2020 WL 8184335 (S.D. Fla. Dec. 24, 2020) (precluding party from “relying on the testimony” of experts based on documents not turned over in fact discovery).

Here, the CPSC [REDACTED]

[REDACTED] Case after case has made clear that parties cannot wait to reveal such factual information during expert discovery. In fact, the entire *purpose* of making the expert discovery deadline *after* the fact discovery cut off is so that experts may evaluate all the relevant facts collected during fact discovery. “[D]ata for an expert report should be gathered during fact discovery and . . . the extended deadline for the expert report is provided to give the expert time to thoroughly analyze the collected data.” *Henry v. Quicken Loans Inc.*, No. 04-40346, 2008 WL 4735228, at *6 (E.D. Mich. Oct. 15, 2008); *see also ParkerVision, Inc., v. Qualcomm Inc.*, No. 3:11-cv-719-J-37-TEM, 2013 WL 3771226, at *4 (M.D. Fla. July 17, 2013) (“[T]he expert

discovery period . . . does not provide an extended period of document discovery related to the disclosed experts”).

But the Commission [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Leachco’s expert [REDACTED]

[REDACTED]

[REDACTED] Nor did Leachco [REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

That is wholly improper. And it is grounds for excluding the documents, exemplars, and all testimony that relies on such information. Otherwise, Leachco would suffer severe prejudice. *Jones v. Travelers Cas. Ins. Co. of Am.*, 304 F.R.D. 677, 681–82 (N.D. Cal. 2015) (untimely disclosure of factual material used by experts cannot be cured even by allowing additional discovery); *Brown*, 2018 WL 2011935, at *5;

Aetna, 2021 WL 949454, at *6 (party “cannot cure prejudice” resulting from late-produced information when “fact discovery has long since closed.”). The documents and testimony must be excluded.

II. The Court Should Exclude All Testimony and Documents About Alleged Deficiencies in the Podster’s Warnings

All testimony and evidence about any deficiencies, defects, or inadequacies in Podster’s warnings should also be excluded. The Commission [REDACTED]

[REDACTED]

For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In its first supplemental response, the Commission [REDACTED]

[REDACTED]

[REDACTED]

Ex. 6, CPSC First Supp. Resp. to ROG No. 5. And in its response to Leachco’s Motion for Summary Decision, the Commission once more made clear that the Podster’s warnings are “irrelevant arguments” because they relate to “what Complaint Counsel

is *not* alleging.” CPSC Resp. Leach Mtn. S.D. at 17 n.48 (emphasis in original). The Commission agreed that it is not “alleging a . . . warning defect,” so “any argument on summary decision is irrelevant.” *Id.*

Yet, after fact discovery closed, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Ex. 2, Kish Report at 1–2. [REDACTED]

[REDACTED] *Id.* at 22. [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 23. Ms. Kish [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 24. Further, Ms. Kish [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 26. Page

after page, Ms. Kish [REDACTED]

[REDACTED] [REDACTED] [REDACTED]. *Id.* at 27–31.

In addition, Dr. Katwa [REDACTED]

[REDACTED] Ex. 1, Katwa Report at 29–30. Dr. Katwa [REDACTED]

[REDACTED] *Id.* at 27;

id. [REDACTED]

[REDACTED] *id.* at 28 [REDACTED]

[REDACTED]; *id.* at 29 [REDACTED]

[REDACTED]

The Commission’s bait-and-switch cannot stand. As courts have long understood, a failure to properly reveal legal theories before expert discovery is cause for excluding expert testimony. *MLC Intellectual Prop.*, 10 F.4th at 1371; *see also Igenco Holdings, LLC v. Ace Am. Ins. Co.*, 921 F.3d 803 821–22 (9th Cir. 2019) (excluding damages theory introduced through expert that had not been previously disclosed); *Elliott v. Google, Inc.*, 860 F.3d 1151, 1162 (9th Cir. 2017) (excluding evidence of a theory offered by a party where it was “not disclosed during discovery”).

Parties cannot be forced to “glean[] . . . theories” from vague statements; the theory must be clear. *Masimo Corp v. Apple, Inc.*, No SACV2000048JVSJDEX, 2022 WL 18285029, at *7 (C.D. Cal. Nov. 22, 2022). And when a party does not “provide notice for the basis of” an expert’s opinion, “[o]ffering additional fact-question time during the relevant expert depositions would be insufficient.” *Id.* After all, parties cannot “explicitly refute[] th[e] theory of” the case “only to adopt it a few short months later” after discovery has closed. *Aetna*, 2021 WL 949454, at *6. If a party “knew it would announce its pursuit” of a new theory “in an expert report,” then failure to “disclose this . . . theory seems willful,” and a party cannot “refute[]” the theory “during fact discovery” only for the expert to “adop[t]” the theory “shortly thereafter.” *Id.* at *6 n.7.

Here, Ms. Kish and Dr. Katwa [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

But Leachco, naturally, did not focus on the warnings, instructions, and marketing during discovery because the Commission claimed it was not relevant. Thus, introduction of any testimony or evidence claiming the warnings, instructions, or marketing are defective, deficient, or inadequate would severely prejudice Leachco. All such evidence must be excluded.

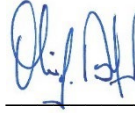
CONCLUSION

This Court should grant Leachco's Motion *in Limine* and exclude all late-produced documents, late-produced exemplars, all testimony relying on such information, and all testimony and documents about any alleged deficiencies, inadequacies, or defects in the Podster's warnings.

DATED: July 14, 2023.

JOHN F. KERKHOFF
Ohio Bar No. 0097134
FRANK D. GARRISON
Indiana Bar No. 34024-49
Pacific Legal Foundation
3100 Clarendon Boulevard, Suite 1000
Arlington, VA 22201
Telephone: 202.888.6881
Fax: 916.419.7747
JKerkhoff@pacificlegal.org
FGarrison@pacificlegal.org

Respectfully submitted,



OLIVER J. DUNFORD
Florida Bar No. 1017791
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Telephone: 916.503.9060
Fax: 916.419.7747
ODunford@pacificlegal.org

Counsel for Respondent Leachco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2023, I served, by electronic mail, the foregoing upon all parties and participants of record:

<p>Honorable Michael G. Young Federal Mine Safety and Health Review Commission Office of the Chief Administrative Law Judge 1331 Pennsylvania Ave., N.W., Suite 520N Washington, D.C. 20004-1710 myoung@fmshrc.gov cjannace@fmshrc.gov whodnett@fmshrc.gov</p>	<p>Mary B. Murphy Director, Div. of Enforcement & Litigation U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 mmurphy@cpsc.gov</p> <p>Robert Kaye Assistant Executive Director Office of Compliance and Field Operations U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 rkaye@cpsc.gov</p>
<p>Alberta Mills Secretary of the U.S. Consumer Product Safety Commission U.S. Consumer Product Safety Commission 4330 East West Highway Bethesda, MD 20814 amills@cpsc.gov</p>	<p>Leah Ippolito, Supervisory Attorney Brett Ruff, Trial Attorney Rosalee Thomas, Trial Attorney Caitlin O'Donnell, Trial Attorney Michael Rogal, Trial Attorney Frederick C. Millett, Trial Attorney Gregory M. Reyes, Supervisory Attorney Complaint Counsel Office of Compliance and Field Operations U.S. Consumer Product Safety Comm'n Bethesda, MD 20814 lippolito@cpsc.gov bruff@cpsc.gov rbthomas@cpsc.gov codonnell@cpsc.gov mrogal@cpsc.gov fmillett@cpsc.gov greyes@cpsc.gov</p>

Oliver J. Dunford
Counsel for Respondent Leachco, Inc.

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

**IN THE MATTER OF

LEACHCO, INC.**

CPSC DOCKET No. 22-1

**[PROPOSED] ORDER GRANTING
RESPONDENT LEACHCO, INC.'S MOTION *IN LIMINE***

Now before the Court is Respondent Leachco, Inc.'s Motion *in Limine* to Exclude (1) All Post-Fact-Discovery Evidence and (2) Testimony and Documents Regarding Alleged Defects in the Podster's Warnings. Having considered the Motion and finding good cause therefor, **IT IS HEREBY:**

ORDERED that Leachco's Motion *in Limine* to Exclude (1) All Post-Fact-Discovery Evidence and (2) Testimony and Documents Regarding Alleged Defects in the Podster's Warnings is **GRANTED**; and further

ORDERED that Complaint Counsel is precluded from introducing at the hearing any evidence that was not produced during fact discovery; and further

ORDERED that Complaint Counsel is precluded from introducing at the hearing any evidence concerning alleged defects in the Podster's warnings.

ORDERED that a copy of this Order and accompanying Memorandum Opinion shall be entered on the docket and proceedings before the Presiding Officer are terminated.

Dated: _____

Hon. Michael G. Young
Administrative Law Judge