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March 2, 2023

In the Matter of

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

Respondent.

ORDER DENYING IN PART AND GRANTING IN PART COMPLAINT COUNSEL'S MOTION TO COMPEL DISCOVERY AND FOR SANCTIONS

Complaint Counsel moved to compel production and for sanctions, claiming Respondent violated this Court's orders, on February 6, 2023. Complaint Counsel stated that Respondent failed to meet the agreed upon January 17, 2023, deadline for the request for production ("RFP"), and it was not completed until January 23, 2023. *See* Memo. in Supp. of Compl. Counsel's Mot. to Compel & Mot. for Sanctions for Violation of the Court's Dec. 16, 2022 and Dec. 27, 2022 Orders, at 4 (Feb. 6, 2023) ("Memo.").

Counsel for Leachco, Inc. ("Leachco"), responded to Complaint Counsel's motion on February 16 and promised to produce a privilege log immediately. On February 17, the Court ordered Leachco to produce the privilege log by noon, February 20. Leachco complied with the order.

The Court convened a prehearing conference to address Complaint Counsel's motion and to discuss other prehearing matters. For the reasons set forth below, Complaint Counsel's motion is **DENIED** in part and **GRANTED** in part.

I. Complaint Counsel's Motion is Denied as to the RFP and Interrogatories 29 and 30.

A. Complaint Counsel's Motion to Compel Production of Documents and Responses to Interrogatories 29 and 30 is Denied as Moot.

Complaint Counsel averred that Leachco had provided a chart identifying nearly 25,000 records that were within the scope of a request for documents sought using specific electronic search terms. Leachco ultimately provided fewer than 4,000 responsive documents, and Complaint Counsel objected to Leachco withholding the remaining documents in contravention of this Court's previous orders.

Leachco responded by recertifying on the record that it had produced all non-privileged documents responsive to Complaint Counsel's request. It explained that the difference in number reflected the large number of documents within those identified as potentially responsive that did not include *both* "Podster" and one of the other search terms requested by Complaint Counsel. It further explained that one term often appeared in one email in a string of messages, and that the other term appeared in another message, in a context that was not responsive to the discovery request.[1]

I find Leachco's explanation to be reasonable, in light of its certification that it had produced all documents responsive to the request. The explanation is consistent with common experience with email systems and message strings created in them.

Having found that Leachco has produced the requested materials and responded appropriately to the interrogatories, I hold that the motion to compel is **DENIED** as moot.

B. Complaint Counsel's Motion for Sanctions is Denied.

Complaint Counsel sought sanctions for Leachco's failure to respond to discovery. I have held that it did provide the non-privileged documents requested. However, Complaint Counsel also noted that Leachco had not complied with the Court's deadlines for responding to its requests and questioned the withholding of certain types of documents identified in Leachco's privilege log.

It is true that Leachco did not respond within the deadlines established for production of documents. Certainly, the better practice is to request an extension from an opponent or the court, rather than unilaterally delaying a response—particularly when, as here, a party intends to use the requested materials to prepare for and take upcoming depositions.

In its response, Leachco noted that the brief delay did not prejudice Complaint Counsel's planned depositions or delay those that had been scheduled. In the prehearing conference, Complaint Counsel acknowledged it was not claiming continuing prejudice or disadvantage.

I have also considered the extraordinary number of documents that were potentially within the scope of the request, and the effort required to ensure non-responsive and privileged documents were not provided. This is an undertaking that will benefit both parties. The exclusion of materials that are immaterial saves Complaint Counsel from reviewing and

[1] This is a common problem and how to address emails within a string has not been resolved. *See U.S. v. Davita, Inc.*, 301 F.R.D. 676, 684–85 (2014) (citing cases that have addressed the issue). "The emerging majority view appears to be that individual emails within a string should be separately logged in some fashion." *Id.* at 685 (citing *BreathableBaby, LLC v. Crown Crafts, Inc.*, No. 12–CV–94, 2013 WL 3350594, at *10 (D. Minn. May 31, 2013)). Leachco has identified discrete emails, and not strings, in its privilege log. Where a string exists, the emails appear to be listed separately. While *Davita* examined this problem in consideration of claims privileged material—a context also relevant to this order—I find that considering documents separately, as Leachco has done in its discovery response here, is also appropriate.

screening thousands of pages of material that may have no utility to its preparation for hearing. The exercise also should give Leachco a clearer picture of the evidence in its possession that may be important to the case.

At the same time, the detailed privilege log provides a basis for questioning witnesses about conversations, events, and evidence that may be non-privileged. As I reminded the parties, the attorney-client privilege attaches to *communications* between attorneys and their clients—not to underlying evidence—and is not absolute where it exists.

C. Leachco Has Made Only a Prima Facie Showing That the Material in its Privilege Log is Protected from Discovery.

Leachco's privilege log is well-organized and extensive. I held in the prehearing conference that I would presume that conversations where *only* attorneys and Leachco senior management, officers, or directors were addressees should be viewed as presumptively within the privilege. Conversely, I noted that the privileges involved are not inviolate and may be subject to an appropriate challenge.

The attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client" and its purpose is "'to encourage clients to make full disclosure to their attorneys.'" *Upjohn v. United States*, 449 U.S. 383, 389 (1981) (internal citations omitted). The party asserting a privilege against disclosure bears the burden of establishing its existence. *Davita*, 301 F.R.D. at 680 (citing *In re Grand Jury Investigation* (*Schroeder*), 842 F.2d 1223, 1225 (11th Cir. 1987)).[2]

In this context, Leachco's crucial legal communications arose not only from the instant proceedings, but from civil litigation involving the same product. That context is crucial to consideration of documents identified as privileged on Leachco's log. Even communications between or among lower-level attorneys might reasonably contain, or be expected to expose, the essence of privileged communications. *See generally Upjohn*, 449 U.S. at 393 (discussing privileged communications in corporate context and insulating communications among lower-level employees where they were within the scope of their corporate duties and aware that the questions were asked so that the corporation could obtain legal advice).

The attorney work product privilege should also be respected to ensure that the thoughts, memoranda, and personal recollections of attorneys be afforded "a certain degree of privacy."

[2] The party claiming the privilege must generally establish the following elements: (1) the holder of privilege is a client; (2) the person to whom communication was made is a member of the bar and that person is acting as a lawyer in connection with the communication; (3) the communication relates to a fact of which attorney was informed by the client without the presence of strangers for the purpose of securing legal advice; and (4) the privilege is claimed and not waived by the client. *See In re Grand Jury Proceedings 88–9 (MIA)* (*Newton*), 899 F.2d 1039, 1042 (11th Cir. 1990).

Upjohn, 449 U.S. at 397–98.[3] Consistent with Rule 26, the Supreme Court has held that such material may not be accessed based "simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Upjohn*, 449 U.S. at 401.

Despite the venerable nature of the privileges at issue, a privilege log does not establish that the privilege exists. Rather, the log is created "to alert the opposing parties that documents have been withheld on grounds of privilege, and to provide enough information about the basis of the claim to 'enable other parties to assess the claim.'" *Davita,* 301 F.R.D. at 684 (citing Fed. R. Civ. P. 26(b)(5)(A)(ii)).

I find that Leachco's log provides such a basis. If Complaint Counsel raises a reasonable challenge to any of the listed materials, Leachco will be obligated to defend its assertion of the privilege by "competent evidence." *Id.* (citing *Zelaya v. Unicco Serv. Co.*, 682 F. Supp. 2d 28, 38 (D.D.C. 2010)). The evidence provided must support each element of the claimed privilege, so that the Court may "determin[e] whether the privilege has been properly invoked." *Zelaya*, 682 F. Supp. 2d at 28 (citing *Alexander v. FBI*, 192 F.R.D. 42, 45 (D.D.C. 2010)).

At the prehearing conference, Complaint Counsel noted that he had not had an opportunity to thoroughly review the privilege log. Because the log is only a claim subject to challenge, my decision to accept the log does not make any determination as to whether the materials identified within are in fact protected from discovery by the attorney-client or attorney work product privileges.[4]

II. Complaint Counsel's Motion is Granted in Part as to Requests for Admission Nos. 3, 4, and 5.

A. Evasive or Incomplete Answers are Subject to Sanction, Including Being Deemed Admitted.

Answers to Requests for Admission ("RFA") "shall specifically admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter," and a denial "shall fairly meet the substance of the requested admission." 16 C.F.R. § 1025.34(b). Further, an "evasive or incomplete response is to be treated as a failure to respond," *id.* § 1025.36, enabling the Presiding Officer to "order that the matter be deemed admitted or that an amended answer be served," *id.* § 1025.34(b).

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[3] Like the attorney-client privilege, the work product privilege is not absolute and may be overcome in appropriate circumstances, but it is especially protective of the attorney's own thoughts or material that would reveal an attorney's mental processes. *See Upjohn*, 449 U.S. at 399 (noting the intricacies and problems inherent in determining whether to require disclosure of materials prepared by or at the direction of an attorney).

[4] Courtesy and candor will be important to continued progress in this case, and I advise both parties that if they discover that material has been withheld that should have been disclosed, or if subsequent events render the material discoverable, the duty to produce responsive, relevant evidence is ongoing. Conversely, if a party receives material that it reasonably knows to be privileged, that evidence must be returned to the opposing party and all copies destroyed.

The CPSC's procedural rules and FRCP language for responding to RFAs similarly requires that denials fairly respond to the substance of the requested admission. *Compare* 16 C.F.R. § 1025.34(b), *with* Fed. R. Civ. P. 36(4). Both also treat "evasive or incomplete response[s]" as a failure to respond. *Compare* 16 C.F.R. § 1025.36, *with* Fed. R. Civ. P. 37(a)(4). Finally, both enable the judge or Presiding Officer to order that the facts shall be taken to be established. *Compare* 16 C.F.R. § 1025.37(b), *with* Fed. R. Civ. P. 37(b)(2)(A)(i). This Court finds it appropriate to analyze responses by case law evaluating response adequacy and possible sanctions under the FRCP.

Evasive or incomplete answers not addressing the subject of the query may be deemd admitted, or adequate answers may be compelled.[5] Ordering an RFA admitted is a severe sanction, requiring aggravated circumstances or prior notice of inadequacy from the Court. *See Asea, Inc. v. So. Pac. Transp. Co.*, 669 F.2d 1242, 1247 (9th Cir. 1981) ("[T]he district court should ordinarily first order an amended answer, and deem the matter admitted only if a sufficient answer is not timely filed . . . ."); *Am. Elec. Co. v. Parsons RCI, Inc.*, Nos. 13–00471 BMK, 14–00020 BMK, 22015 WL 878949, at *7 (D. Haw. Feb. 27, 2015) (finding it unfair to deem disputed discovery admitted where the responding party was not given notice of the inadequacy of its answer, and where it was not determined that it acted in bad faith).

B. Respondent's Supplemental Responses to RFA Nos. 3, 4, and 5 Are Evasive or Incomplete.

This Court has held that a substantial product hazard may "result[s] from a lack of adequate instruction or warning where a [sic] reasonably foreseeable consumer use or misuse, or a failure of the product to perform as advertised, could result in injury." Order Denying Leachco, Inc.'s Mot. for Protective Order & Order Granting Compl. Counsel's Mot. to Compel Prod. of Elec. Commc'ns Pursuant to Compl. Counsel's 2d Set of Reqs. for Prod. of Docs. to Resp't, at 10–11 (Dec. 16, 2023) ("Order").[6] *Respondent's knowledge*, or *information obtained by Respondent* regarding foreseeable misuse is what is requested. *See id.* at 11. Respondent's answers are generally evasive and add non-existing facets—e.g., intent or accuracy—to Complaint Counsel's factual inquiries.

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[5] *See Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 615 (5th Cir. 1977) (answering that it had no knowledge of accidents *prior to* the complaint incident where the request was for *any* knowledge of accidents, and the responding party had knowledge of *subsequent* accidents) (emphasis added); *Obesity Rsch. Inst., LLC v. Fiber Rsch. Int'l, LLC*, No. 15-cv-0595-BAS-MDD, 2016 WL 2757289, at *2 (S.D. Cal. May 12, 2016) (ignoring a portion of the request about claims of clinical proof by simply admitting that it made statements about the effects in advertising); *Roby v. CWI, Inc.*, No. 07 C 4520, 2008 WL 4211689, at *4 (N.D. Ill. Sept. 11, 2008) ("Roby's evasive answer that she was not told that she was scheduled to work and was listed as 'off' does not offer a bssis to contest CWI's assertion that Roby was listed on the work schedules and the facts in § 67 are therefore deemed to be undisputed.").

[6] This Court has not reached an ultimate conclusion on this. It has been recognized as advanced by the CPSC and accepted as a basis for reasonable inquiry at this stage of discovery. *See* Order at 8 n.2.

Respondent's supplemental response to RFA No. 3 objects to the term "allowing" based on supposed ignorance of what consumers "did or intended to do." Memo. at 9. But Respondent has admitted to receiving communications concerning the Podster and sleep prior to the Complaint. *Id.*

The definition of "allow" includes, "[T]o tolerate <she allowed the neighbor's children to play on her lawn>." *Allow*, BLACK'S LAW DICTIONARY (11th ed. 2019). The injured subjects and those for whom the product was designed are infants. Their presence on the subject product requires placement by a caretaker. The RFA might be stated differently, but the attendant circumstances require, at a minimum, an adult's "*toleration*" of an infant's presence on the product.

This Court does not see a need to parse words to infuse Respondent's knowledge of a caretaker's intent regarding "allowing." It is sufficient to have knowledge that infants have been placed on the product, and that any infant who fell asleep while on the product was "allowed" to do so by the adult responsible for the infant's care at that time. The response does not fairly meet the substance of the request and is therefore evasive and incomplete. The response must necessarily include Respondent's knowledge of infants sleeping on the Podster.

Respondent's supplemental response to RFA No. 4 objected to the term "advertised," claiming an inability to confirm how or whether a retailer advertised the Podster. Memo. at 9. But Respondent has admitted it knew Amazon had included the Podster in a "Sleep Positioners" category and denied ever approving the description or marketing. *Id.* at 9–10.

This Court recognizes a possible ambiguity. While Amazon is a retail website that categorizes and displays products for purchase, such categorization may not be contemplated as an "advertisement."

Respondent's response, however, again adds information not contemplated by the request. The request does not ask about the *correctness* of the Podster's inclusion in the "Sleep Positioners" category; nor does it ask whether Respondent approved of such designation. Given Respondent has acknowledged the Podster's display in the category, its response should be limited to its knowledge of that display.

Respondent's supplemental response to RFA No. 5 admitted to knowledge of purported reviews on Amazon.com referencing infants sleeping on Podsters. Memo. at 10. It objected, and denied remaining parts, based on inability to confirm whether the reviews were either accurate or made by actual consumers. *Id.*

Once again, the RFA did not inquire about the accuracy of the reviews or the genuine existence of the reviewer. Respondent's addition of these facets is similar to *Obesity Rsch. Inst., LLC* or *Roby*, because it denies information that was not part of the request. The response should

be limited to that which was requested without ambiguity—knowledge of reviews referencing infants sleeping on Podsters.[7]

This Court's prior Order did not evaluate the adequacy of Respondent's responses. The RFAs were found to be relevant to the claim of defect. Order at 11. This did not give notice that responses were inadequate. Because this order serves as first notice that the supplemental responses are evasive or incomplete, and because this Court has not found bad faith in Respondent's prior discovery disputes, this Court compels an amended response. Failure to provide an adequate response within a designated time will result in the RFAs being deemed admitted.

III. Conclusion

I **DENY** Complaint Counsel's motion to compel discovery and for sanctions regarding its RFP and Interrogatories 29 and 30. As noted, this decision is subject to reconsideration upon Complaint Counsel's review of Leachco's privilege log and further progress in discovery.

I **GRANT** Complaint Counsel's motion to compel regarding RFAs 3, 4, and 5. They are **DEEMED ADMITTED UNLESS** Respondent provides non-evasive supplemental responses no later than **March 13, 2023**.

Michael G. Young
Administrative Law Judge

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[7] I understand Respondent's concern about admitting too broadly facts that may later become damaging to its case, but the proper safeguard against that is a carefully-crafted response to the question actually posed.

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