UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

IN THE MATTER OF **LEACHCO, INC.,** **Respondent.**	**CPSC DOCKET NO. 22-1**

LEACHCO, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SANCTIONS AND ORDER THAT RFAS BE DEEMED ADMITTED

The Commission filed a Motion for Protective Order to avoid responding to many of Leachco's Requests for Admission. The Court denied this Motion (except with respect to three RFAs). In doing so, the Court put everyone on notice: "The parties are well advised to amend their conduct and should consider that matters within their grasp, if not their perfect knowledge, may not be accepted as evidence or may be deemed admitted at trial, even if no pretrial motion for sanctions has been made." Order Granting in Part and Denying in Part Complaint Counsel's Mtn. for Protective Order [Dkt. No. 76] (RFA Order) at 6 n.3.

Nonetheless, in supplemental responses, the Commission failed to cleanly admit or deny Leachco's RFAs. Instead, the Commission improperly answered questions that were not asked; failed to meet the substance of the requests that were asked; recited baseless boilerplate objections; or merely cited documents and declared that they "speak for themselves." Accordingly, the Court should order that Leachco's RFAs be deemed admitted.

BACKGROUND

This case involves the Commission's claim that Leachco's Podster presents a "substantial product hazard" under the Consumer Product Safety Act. Leachco propounded Requests for Admission to clarify the Commission's theory of the case (*e.g.*, whether the claim included an allegation that the Podster was defectively manufactured); to apply laws to the facts (*e.g.*, whether the Podster complies with consumer product safety rules); to resolve potential factual disputes (*e.g.*, whether the Podster is safe when used consistent with Leachco's warnings and instructions); and generally to narrow the issues for trial.

The Commission filed a motion for a protective order, arguing that Leachco's RFAs "(1) relate to a purely legal question; (2) seek information related to Respondent's own business; (3) relate to or seek expert opinion or testimony; (4) pose improper hypotheticals; and (5) seek privileged information or information not yet required under the scheduling order." RFA Order at 1. In response to the Commission's motion, and immediately following this Court's February 24 discovery conference, Leachco emailed the Commission and offered to submit a revised set of RFAs. *See* Leachco Opp. to Mtn. for Protective Order [Dkt. No. 65] at 1. The Commission rejected Leachco's offer. Nonetheless, in its Opposition, Leachco attempted to resolve the dispute by offering to streamline and combine various requests. *Id.*; *see also id.*, Ex. A (proposed revisions to RFAs).[1]

[1] In its Opposition [Dkt. No. 65], Leachco noted that it had "submitted an admittedly lengthy set of RFAs" but did so for at least two reasons: (1) because the Commission had largely refused to respond to other forms of discovery, and (2) because short and simple RFAs, often in alternative language, would hopefully prevent the Commission from avoiding the substance of requests by parsing and objecting to wordy RFAs. *Id.* 5, 10 n.6.

Ultimately, the Court ordered the Commission to answer almost all of the disputed RFAs. *See* RFA Order at 12 (denying CPSC's Motion for Protective Order with respect to RFA Nos. 3, 8–99, 102–23, 130–84, 212, 232–33, 236–45, 249–78, 285–91, 293–96, 305, 307–21, 325–63, and (in part) No. 302; granting Motion only for Nos. 246–48 and (in part) No. 302).

In its Order, the Court explained that the discovery "process must ensure, as much as possible, that every piece of evidence necessary to the full and fair trial of this case is made mutually available to the parties." RFA Order at 5. This Order was consistent with the Court's previous admonitions. For example, in an Order concerning Leachco's responses to the Commission's RFAs, the Court warned against "add[ing] non-existing facets—*e.g.*, intent or accuracy—to . . . factual inquiries." Mar. 2, 2023 Order Denying in Part and Granting in Part CPSC's Mtn. to Compel [Dkt. No. 66] at 5. The Court further stated that "[e]vasive or incomplete answers not addressing the subject of the query may be deemed admitted, or adequate answers may be compelled." *Id.*; *see also* Dec. 16, 2022 Order Denying Leachco's Mtn. for Protective Order & Granting CPSC's Mtn. to Compel [Dkt. No. 51] at 7 (noting that lack of "relevance and purported need" are not valid grounds for a protective order).

The Commission has flouted the Court's clear and consistent instructions and submitted deficient supplemental responses to Leachco's RFAs. Because this Court repeatedly put the parties on notice about improper discovery responses, the Court should deem Leachco's RFAs admitted.

ARGUMENT

Responses to RFAs "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). An "evasive or incomplete response is to be treated as a failure to respond." *Id*. 1025.36. In such a case, this Court may "order that the matter be deemed admitted or that an amended answer must be served." *Id*. 1025.34(b). When a party fails to comply with a discovery order, the Commission's rules permit the Presiding officer to "take such action as is just," including sanctions that the RFA be deemed admitted. *Id*. 1025.37. The Presiding Officer "may issue any just and appropriate order for the purpose of ensuring . . . timely completion" of discovery procedures. *Id*. 1025.31(i).

"In evaluating the sufficiency of the answers, the court should consider: (1) whether the denial fairly meets the substance of the request; (2) whether good faith requires that the denial be qualified; and (3) whether any 'qualification' which has been supplied is a good faith qualification." *State Farm Mut. Auto. Ins. Co. v. Cordua*, No. 07-518, 2010 WL 1223588, at *2 (E.D. Pa. Mar. 29, 2010) (citation omitted). "[A]n answer will be deemed insufficient if it appears 'to be non-specific, evasive, ambiguous and . . . go to the accuracy of the requested admissions rather than the "essential truth" contained therein.'" *Id.* (quoting *United States v. Lorenzo*, No. 89–6933, 1990 WL 83388, at *1 (E.D. Pa. 1990)); *see also Pugh v. Comm. Health Sys. Inc.*, No. 5:20-cv-00630, 2021 WL 2853268, at *1 (E.D. Pa. July 7, 2021); *Havenfield Corp. v. H & R Block, Inc.*, 67 F.R.D. 93, 97 (W.D. Mo. 1973).

A party must answer "straightforward" requests that "do not convey unfair inferences out of context." *Anthony v. Cabot Corp.*, No. 06-CV-4419, 2008 WL 2645152, at *3 (E.D. Pa. July 3, 2008). And a party cannot issue "bad faith qualifications" that "avoid the essential truth of the statements" in the requests. *Id.*

Therefore, "a reviewing court should not permit a responding party to undermine the efficacy of the rule by crediting disingenuous, hair-splitting distinctions whose unarticulated goal is unfairly to burden an opposing party." *Thalheim v. Eberheim*, 124 F.R.D. 34, 35 (D. Conn. 1988); *see also State Farm Mut. Auto. Ins. Co.*, 2010 WL 1223588, at *2 (Courts should not "allow the responding party to make hair-splitting distinctions that frustrate the purpose of the Request.") (citation omitted). "Nor should a reviewing court permit a responding party to frustrate the rule by initially providing inadequate responses, forcing the requesting party to file a motion and costly memoranda, and only then coming forward with 'amended answers' that easily could have been supplied in the first instance." *Thalheim*, 124 F.R.D. at 35–36.

The Commission's responses here frustrate the purpose of RFAs, make hair-splitting distinctions, and do not fairly meet the substance of Leachco's requests.

I. RFA Nos. 136–42, 147–48, 149–56, 249–50, 252, 265, and 362–63 should be deemed admitted

In its Order denying the Commission's motion for a protective order, this Court ordered the Commission to answer RFA Nos. 136–42, 147–48, 149–56, 249–50, 252, 265, and 362–63. The Commission's supplemental responses are deficient.

Start with RFA No. 136:

> *136. You contend that Leachco is liable under the CPSA regardless of whether Leachco Tested the Podster before it first sold the Podster.*

RESPONSE:

[redacted]

SUPPLEMENTAL RESPONSE:

[redacted]

First, the Commission's Supplemental Response fails to meet the substance of this RFA. Leachco asked specifically whether, in the Commission's view, Leachco would be liable regardless of whether Leachco had tested the Podster. As the Court recognized, this and related RFAs are straightforward: "RFA numbers . . . 136–42 . . . simply request Complaint Counsel's knowledge of its burden of proof and *its own contentions*." RFA Order at 3 (emphasis added). The Commission's responses are deficient.

Moreover, the Commission's numerous objections flout this Court's instructions that parties not "add non-existing facets—e.g., intent or accuracy—to factual inquiries." Mar. 2, 2023 Order [Dkt. No. 66] at 5; *see also Pugh*, 2021 WL 2853268, at *1 (holding party should not respond with answer that goes "to the accuracy of the requested admis-

sion[] rather than the essential truth contained therein"). The Commission claimed that RFA No. 136 [redacted] But that is beside the point. All that matters is narrowing the issues for trial, which requires a clean admission or denial.

In addition to the improper objection, the Commission answered an entirely different question than the one raised by RFA No. 136. [redacted] Supp. Resp. to RFA No. 136. But Leachco didn't seek an admission on that issue. Thus, the Commission did not even attempt to "meet the substance of the requested admission." 16 C.F.R. 1025.34(b). Because this response is "[e]vasive [and] incomplete" and does "not address[] the subject of the query," it should "be deemed admit[ted]." Mar. 2, 2023 Order [Dkt. No. 66] at 5.

The same problems plague the Commission's supplemental responses to RFA Nos. 137–142 and 147–148. The supplemental responses to RFA Nos. 147 and 148 are particularly egregious. In these Requests, Leachco asked the Commission to admit (or deny) the utility of the Podster—an issue the Commission itself claims is directly relevant to whether a "defect" exists under the CPSA. *See In the Matter of Zen Magnets*, CPSC Dkt. No. 12-2, 2017 WL 11672449, at *9 (C.P.S.C. 2017) (ruling that even before declaring a product "defective," the Commission must "determine whether the risk of injury outweighs the usefulness of the product"). [redacted]

147. The Podster is useful.

RESPONSE:

[redacted]

SUPPLEMENTAL RESPONSE:

[redacted]

148. The Podster is useful for Caregivers.

RESPONSE:

[redacted]

SUPPLEMENTAL RESPONSE:

[redacted]

In short, [redacted] This response has no connection to the questions asked, and the Commission is not permitted "to undermine the efficacy of the rule by crediting disingenuous, hair-splitting distinctions." *Thalheim*, 124 F.R.D. at 35. These requests should be deemed admitted.

So, too, with RFA Nos. 149–56. In this group of RFAs, Leachco asked whether the Podster failed to comply with any product safety rule under certain provisions, such as Chapter 47 of Title 15 of the U.S. Code. This Court ordered the Commission to answer (*see* RFA Order at 12) but, once again, the Commission refused:

> *149. The Podster does not fail to comply with any applicable consumer product safety rule under Chapter 47 of Title 15 of the U.S. Code.*
>
> **RESPONSE:**
>
> [redacted]
>
> **SUPPLEMENTAL RESPONSE**:
>
> [redacted]

Again the Commission answered a question that Leachco did not ask. [redacted] But the Commission cannot respond to the Court's Order by denying that RFAs are relevant, nor can it pick and choose which parts of an RFA it wishes to respond to. Rather, the Commission must answer the RFAs by fairly meeting the substance of the request. An "incomplete response"—as here—"is to be treated as a

failure to respond." 16 C.F.R. 1025.36. Thus, RFA No. 149—and RFA Nos. 150–56, which present the same defects—should be deemed admitted.

Next, RFA Nos. 249, 250, 252, and 265 should be deemed admitted because the Commission purports to admit its own allegations rather than admitting (or denying) the bases for those allegations. RFA No. 249 provides an example:

> *249. The Podster is not an "infant sleep product" as defined in Safety Standard for Infant Sleep Products, 86 Fed. Reg. 33022 (June 23, 2021).*
>
> **RESPONSE:**
>
> [redacted]
>
> **SUPPLEMENTAL RESPONSE**:
>
> [redacted]

Leachco asked a straightforward question: Is the Podster an infant sleep product? The Commission evaded answering, instead stating [redacted]

[redacted] But that was not even remotely part of Leachco's RFA. Whether the Podster is—or is not—an infant sleep product is directly relevant in this matter because the Commission tries to conflate the Podster with infant sleep products, even though the latter products (unlike the Podster) were banned by legislation. *See* 15 U.S.C. § 2057d. Therefore, Leachco wants to establish a basic fact—that the Podster is a different product. Nor did Leachco ask what the Commission is—or is not—*alleging*; Leachco asked the Commission to admit (or deny) relevant *facts*. As this Court explained, because a "statement in the Complaint is not taken as an admission," Leachco "is requesting Complaint Counsel acknowledge its allegation as an admission as well." RFA Order at 4 n.1. Therefore, the Commission's refusal to admit (or deny) facts is improper, and RFA Nos. 249, 250, 252, and 265 should be deemed admitted.

Finally, RFA Nos. 362 and 363 must too be deemed admitted.

362. Caregivers of Infant C did not follow Leachco's warnings.

RESPONSE:

[redacted]

SUPPLEMENTAL RESPONSE:

[redacted]

[redacted]

363. Caregivers of Infant C did not follow Leachco's instructions.

RESPONSE:

[redacted]

SUPPLEMENTAL RESPONSE:

[redacted]

The Commission's responses are improper. First, the Commission objected [redacted] But again the Commission may not "add non-existing facets—e.g., intent or accuracy—to . . . factual inquiries" in an RFA. Mar. 2, 2023 Order [Dkt. No. 66] at 5; *see State Farm Mut. Auto. Ins. Co.*, 2010 WL 1223588, at *2 ("[A]n answer will be deemed insufficient if it appears to be non-specific, evasive, ambiguous and . . . go to the accuracy of the requested admissions rather than the essential truth contained therein.") (cleaned up).

Second, the Commission [redacted] Supp. Resp. to RFA Nos. 362 and 363. But a party may not refuse to answer an RFA by relying on documents. As the court in

House v. Giant of Maryland LLC stated, a "favorite excuse for not answering requests for admission . . . is that 'the document speaks for itself,'" a "folklore within the bar" that is "wrong." 232 F.R.D. 257, 262 (E.D. Va. 2005); *see also* RFA Order at 6 (examining and relying on *House*); *Miller v. Holzmann*, 240 F.R.D. 1, 4 (D.D.C. 2006) (analyzing the "tautology" that "the document speaks for itself," which "does not move the ball an inch down the field and defeats the narrowing of issues in dispute that is the purpose of the rule permitting requests for admission"). Thus, RFA Nos. 362 and 363 must be deemed admitted.

* * *

The Commission's supplemental responses utterly fail to comply with this Court's Orders. Instead, the Commission has engaged in "[g]amesmanship in the form of non-responsive answers," *House*, 232 F.R.D. at 262—just what this Court warned against when it alerted the parties that "matters within their grasp, if not their perfect knowledge, . . . may be deemed admitted at trial, even if no pretrial motion for sanctions has been made." RFA Order at 6 n.3. Accordingly, RFAs 136–42, 147–48, 149–56, 249–50, 252, 265, and 362–63 should be deemed admitted.

II. RFAs 4–6, 128–29, 185–94, 195–211, 213–14, 218–25, 227–31, 234, 292, 297–300, and 322–24 should be deemed admitted

The Commission's responses to the remaining RFAs at issue largely mirror the problems discussed above. The Commission did not seek a protective order for these RFAS, and so they are not directly subject to the Court's RFA Order.[2] But the same

[2] In its Opposition to the Commission's Motion for Protective Order (filed Feb. 27, 2023; Dkt. No. 65), Leachco preserved its objections to the responses that the Commission had initially provided. *See id*. at

principles apply. And under the Commission's rules, any "evasive or incomplete response is to be treated as a failure to respond." 16 C.F.R. 1025.36. In such a case, this Court may "order that the matter be deemed admitted or that an amended answer must be served." *Id.* 1025.34(b). This Court should enter such an order.

Start with RFAs 4–6.

> *4. The Podster is not intended to be used for sleep.*
>
> **RESPONSE:**
>
> [redacted]
>
> *5. The Podster was never intended to be used for sleep.*
>
> **RESPONSE:**
>
> [redacted]

32 (arguing that the Commission's responses to RFAs 185–92, 193–211, 213–14, 218–25, 227–31, 279–84, 292, 297–300, 322–24 were deficient).

[redacted]

6. The Podster is not designed for sleep.

RESPONSE:

[redacted]

These responses should be deemed admitted for the same reasons as RFAs 249, 250, 252, and 265 above—namely, because the Commission attempts to admit what it is "alleging" rather than what the facts are. The design of the Podster—and what it is used for—is directly relevant to the Commission's claims. Responses to RFAs on these topics would narrow the scope of the issues for trial. The Commission's attempt to discuss its complaint instead of answering the RFAs is evasive and fails to meet the substance of the RFAs. *See State Farm Mut. Auto. Ins. Co.*, 2010 WL 1223588, at *2.

The same reasoning applies to responses to RFAs 234 and 292. The Commission's response to RFA No. 234 [redacted]

[redacted] But Leachco asked the Commission to admit that the *Podster's warnings* make that statement—not that the Complaint alleges so. In response to RFA No. 292, the Commission [redacted] Leachco's RFA was much different: Admit that the "Commission is aware of no injuries or deaths involving a Podster that was used in conformance with the Podster's warnings and instructions." RFA No. 292. The Commission's response—[redacted] comes nowhere close to meeting the substance of the RFA.

RFAs 128–29 should also be deemed admitted because the Commission did not answer at all:

> *128. After an administrative complaint has been filed by Complaint Counsel, the Commission's General Counsel represents both the Commissioners and Complaint Counsel (and their staff).*
>
> **RESPONSE:**
>
> [redacted]

[redacted]

129. After an administrative complaint has been filed by Complaint Counsel, the Commission's General Counsel advises both the Commissioners and Complaint Counsel (and their staff).

RESPONSE:

[redacted]

Here, the Commission offers nothing but objections; it neither admits nor denies the requests.

And its privilege objections cannot be sustained. Leachco asks the Commission to answer a fact: Whether the General Counsel represents or advises the Commissioners and Complaint Counsel. Leachco does not seek any legal analysis or the content of any advice. And Leachco's request bears directly on its due process and separation-of-functions defenses. Indeed, another federal agency was recently forced to dismiss cases

because agency staff failed to keep a wall of separation among themselves. *See* Thomas Barrabi, *SEC dismisses 42 cases after admitting enforcement breach larger than reported*, N.Y. POST, https://nypost.com/2023/06/02/sec-dismisses-cases-after-admitting-breach-bigger-than-reported/. These RFAs should be deemed admitted.

Finally, in responses to RFAs 185–94 and 297–300 the Commission once more [redacted]. Similarly, in response to RFAs 195–211, 213–14, 218–25, 227–31, and 322–24, the Commission [redacted]. As explained above (*see* re: RFA Nos. 362–63), these are entirely improper answers, and they too should be admitted. *House*, 232 F.R.D. 257 at 262; *Miller*, 240 F.R.D. at 4.

* * *

The Commission's responses do not answer the requests made in RFAs 4–6, 128–29, 185–94, 195–211, 213–14, 218–25, 227–31, 234, 292, 297–300, and 322–24. This Court should not allow "[e]vasive or incomplete answers not addressing the subject of the query." Mar. 2, 2023 Order [Dkt. No. 66] at 5. Such answers—even if not subject to a specific court order—are "to be treated as a failure to respond." 16 C.F.R. 1025.36. And this Court should thus "order that the matter be deemed admitted." *Id*. 1025.34(b).

CONCLUSION

Basic discovery practice requires parties answering RFAs to respond to the substance of each RFA. The Commission therefore may not avoid admitting (or denying) an RFA by challenging the applicability to the complaint, *e.g.*, RFA No. 149; pointing

to documents that purportedly "speak for themselves," *e.g.*, RFA No. 195; or answering questions that were not asked, *e.g.*, RFA Nos. 136, 148. Nor, of course, may the Commission ignore this Court's Orders. The Commission has run afoul of all these basic discovery rules, and despite this Court's warning, the Commission failed to "amend [its] conduct" in discovery. RFA Order at 6 n.3. Sanctions are warranted.

Accordingly, Leachco's Requests for Admission Nos. 4–6, 128–29, 136–42, 147–48, 149–56, 185–94, 195–211, 213–14, 218–25, 227–31, 234, 249–50, 252, 265, 292, 297–300, 322–24, and 362–63 should be deemed admitted.

DATED: June 6, 2023.

Respectfully submitted,

s/ *Oliver J. Dunford*

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2023, the foregoing was served upon all parties and participants of record as follows:

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LEACHCO, INC.
MOTION FOR SANCTIONS AND ORDER
THAT RFAS BE DEEMED ADMITTED

Exhibit 1

Submitted for *in camera* review.