

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

**COMPLAINT COUNSEL’S RESPONSE TO LEACHCO’S OBJECTIONS TO NOTICES
OF DEPOSITION (Dkt. 16)**

Pursuant to 16 C.F.R. § 1025.35(b)(3), Complaint Counsel respectfully requests that the Presiding Officer overrule Respondent Leachco, Inc. (“Leachco”)’s objections to the five deposition notices Complaint Counsel served on Leachco’s employees (Dkt. 16) and permit the depositions to proceed.¹ Good cause exists to permit the taking of the depositions, and Leachco’s objections are without merit.

I. INTRODUCTION

On August 4, 2022, after months of struggling to obtain documents from Leachco,² Complaint Counsel noticed the depositions of five Leachco employees. Two virtual depositions were noticed for the week of September 12 “or on a date and at a location mutually agreeable to

¹ Complaint Counsel recognizes that Leachco filed on August 17, 2022 a Motion to Disqualify the Presiding Officer and Stay the Proceeding or, in the Alternative, Motion to Stay Discovery. Complaint Counsel nevertheless is filing this Response because such a motion “shall not stay the proceedings unless otherwise ordered by the Presiding Officer or the Commission.” 16 C.F.R. § 1025.42(e)(2).

² See Complaint Counsel’s Motion to Compel at Dkt. 14.

the parties,” and three virtual depositions were noticed for the week of September 19 “or on a date and at a location mutually agreeable to the parties.”³

On the following day, Leachco explained that it had “many conflicts for the dates” in the notices, asked Complaint Counsel to “withdraw or table those notices until we have completed the written discovery process,” and requested an extension until September 5—nine calendar days before the first deposition—to file an opposition to the deposition notices.⁴

Complaint Counsel responded:

We are not willing to push back the depositions at this time. It is not clear why Leachco’s belief that it has not received full responses to discovery should delay the depositions of Leachco employees. If anything, CPSC would be prejudiced by not yet having any of Leachco’s communications.

That written, we are willing to work with Leachco to identify mutually agreeable dates on which to hold the depositions within a few weeks of the currently noticed dates. Please provide a few dates that are workable for each deponent, and we can try to find an agreeable date. We hope that the virtual nature of the depositions will make them a bit easier to schedule.

Recognizing that it may take a few days to arrive at mutually agreeable dates, we are willing to agree to continue the deadline for oppositions to our deposition notices until next Monday, August 15. The September 5 date listed in the draft motion is too far down the road and only nine calendar days before the date of the first deposition.⁵

Leachco did not provide available dates or otherwise discuss rescheduling the depositions. Instead, Leachco filed its objections and requested that the deposition notices be stricken in their entirety.

³ See Leachco’s Objections to Notices of Deposition (“Obj.”) at Ex. A.

⁴ See Dkt. 15, Ex. 5 at p. 6.

⁵ *Id.* at p. 7.

II. LEGAL STANDARD

Once a party has filed an opposition to a notice of deposition, “[t]he Presiding Officer shall rule on the notice and any opposition and may order the taking of all noticed depositions upon a showing of good cause.” 16 C.F.R. § 1025.35(b)(3).

Although “good cause” is not defined in the Rules of Practice,⁶ federal courts have opined that “[g]ood cause is a flexible standard heavily dependent on the facts of the particular case as found and weighed by the district court in its equitable discretion.” *United States v. Walden*, 625 F.3d 961, 965 (6th Cir. 2010); *PPEX, LLC v. Buttonwood, Inc.*, 21-cv-053-F, 2021 WL 7210385, at *1 (D. Wyo. Sept. 23, 2021) (“The good cause standard is highly flexible, having been designed to accommodate all relevant interests as they arise.” (citation omitted)).⁷

Federal precedent also establishes that deposition notices only rarely should be stricken. “[A]n order to vacate a notice of taking [a deposition] is generally regarded as both unusual and unfavorable.” *Investment Props. Int’l, Ltd. v. IOS, Ltd.*, 459 F.2d 705, 708 (2d Cir. 1972) (reversing trial court order that vacated notices of deposition). Indeed, “[a] request to deny a deposition altogether is extraordinary and is usually denied.” *NuCal Foods, Inc. v. Quality Egg LLC*, No. 10-cv-3105-KJM-CKD, 2012 WL 6629573, at *2 (N.D. Cal. Dec. 19, 2012); *accord Kelley v. Microsoft Corp.*, No. C07-0475MJP, 2008 WL 5000278, at *1 (W.D. Wash. Nov. 21, 2008) (“Courts should not bar a relevant deposition absent extraordinary circumstances as such a prohibition would likely be in error.” (citation and internal quotation marks omitted)).

⁶ 16 C.F.R. § 1025.1 *et seq.*

⁷ Administrative proceedings can look to federal courts for guidance in applying administrative rules of practice. *See, e.g., In re Healthway Shopping Network*, Exch. Act Rel. No. 89374, 2020 WL 4207666, at *2 (Jul. 22, 2020).

III. ARGUMENT

A. Good Cause Exists to Permit the Depositions.

The right to discovery in civil litigation matters “includes the right to take the opposing party’s deposition, so long as that deposition is properly noticed.” *Pulliam v. Lozano*, No. 1:07-cv-964-MJS (PC), 2011 WL 335866, at *3 (E.D. Cal. Jan. 31, 2011); accord *Bertrand v. Yellow Trans., Inc.*, No. 3:08-cv-1123, 2010 WL 2196584, at *2 (M.D. Tenn. May 28, 2010) (“Clearly Defendants are entitled to take the deposition of Plaintiff, an opposing party, and to use that deposition for any purpose at trial.”).

This rule is both practical and efficient, as “[t]he use of oral depositions is often crucial to an attorney’s assessment of the opposing party’s case and to preparation for a trial.” *Sadowski v. Tech. Career Insts., Inc.*, No. 93-Civ-455 (PKL), 1994 WL 240546, at *1 (S.D.N.Y. May 27, 1994). Here, the noticed depositions are essential to Complaint Counsel’s case and its preparation for the hearing in this case, particularly given the paucity of documents Leachco has produced. Barring these depositions effectively would foreclose Complaint Counsel’s right to depose the opposing party in this matter.

Complaint Counsel noticed the depositions of five Leachco employees: Jamie Leach, Leachco’s Vice President and Chief of Product Development; Clyde Leach, Leachco’s President and CEO; Alex Leach, Leachco’s Chief of Operations and Chief Marketing Strategist; Mabry Ballard, Leachco’s Customer Service Supervisor and Executive Assistant to the Vice President; and Tonya Barrett, Leachco’s Compliance Coordinator and Office Manager. Each of these individuals has a unique perspective on the inner workings of Leachco and its products, and each can provide testimony “relevant to the subject matter involved in the proceedings.” 16 C.F.R. § 1025.31(c)(1) (articulating the scope of discovery in CPSC adjudicative proceedings). That is,

they can provide testimony about Leachco’s Podster infant lounger products, their design, their intended and foreseeable uses, their potential defects, and other information relevant to the question whether the Podsters pose a substantial product hazard.

For example, in its responses to Complaint Counsel’s Interrogatories, Leachco admits “that the Podster was designed in 2008 by founder and Leachco Vice President, Jamie Leach, with consultation only in connection with the Patent process.”⁸ Leachco also concedes that “Jamie Leach was primarily responsible for the creation and design of the warnings for the Podster, with assistance from Tonya Barrett and Leah Barnes.”⁹ Leachco further admits that “the marketing and promotion for the Podster—primarily through Amazon, trade shows and brochures—was overseen by Jamie Leach, with assistance from Leah Barnes (with staff assistance).”¹⁰ Leachco also explained that “over the years, Jamie Leach has reviewed industry and other materials concerning suffocation risks and other risks related to infants, but does not have specific identifying information about those materials.”¹¹ In addition, Leachco admitted that Ms. Leach was one of the individuals responsible for developing and implementing Leachco’s policies for responding to customer inquiries, including inquiries related to the Podsters:

Leachco states that its customer service department responds to consumer claims and inquiries by e-mail and/or by phone, gathers information as necessary and documents all complaints, inquiries, and injuries, including all information available. At all relevant times, Jamie Leach, Alex Leach, and Mabry Ballard

⁸ Ex. 1 at Response to Interrogatory No. 7 on p. 4.

⁹ *Id.* at Response to Interrogatory No. 8 on p. 4. Complaint Counsel had been informed by counsel for Leachco that Leah Barnes no longer is employed by Leachco. Complaint Counsel intends to seek a subpoena for the deposition of Ms. Barnes.

¹⁰ *Id.* at Response to Interrogatory No. 9 on p. 5.

¹¹ *Id.* at Response to Interrogatory No. 10 on p. 5.

were responsible for the development and implementation of these policies and procedures.¹²

In light of Leachco's own admissions, it is clear that Ms. Leach will be able to testify at her deposition about the development of the Podsters, the creation of their warnings, their marketing and promotion, and how Leachco addressed customers' inquiries and concerns about the Podsters. Complaint Counsel also will be able to inquire further about the "materials concerning suffocation risks and other risks related to infants" that Ms. Leach reviewed but about which Leachco was unable to offer additional details. All these topics fall squarely within the subject matter of this litigation and are appropriate topics for deposition. Such a deposition would be far from the sort of "abuse and harassment" that Leachco expresses concern about in its brief.¹³

Nor are the other depositions for "abuse and harassment"; they are designed to elicit information within the scope of discovery and are particularly important given Leachco's unwillingness to produce responsive materials in this case. For example, by virtue of her role as Leachco's Customer Service Supervisor and Leachco's admission that she is responsible for developing and implementing Leachco's customer service policy and procedures, Mabry Ballard will be able to testify to Leachco's interactions and communications with consumers with respect to the Podster, and she will be able to discuss its foreseeable uses.

Similarly, Alex Leach—who also admittedly was responsible for the development and implementation of customer service policies—is in a position to provide testimony about Leachco's interactions with consumers regarding the Podsters. And, in his role as Chief Marketing Strategist, Mr. Leach can testify about the marketing strategy behind the Podster and

¹² *Id.* at Response to Interrogatory No. 15 on p. 8.

¹³ *Obj.* at p. 4.

any interactions Mr. Leach and Leachco may have had with retailers regarding how best to market and use the product.

Tonya Barrett, Leachco’s Compliance Coordinator, who admittedly assisted Jamie Leach in “the creation and design of the warnings for the Podster” is in a position to testify about those warnings and the reasons for them. In addition, Ms. Barrett is poised to provide testimony about any compliance due diligence, testing, or evaluations Leachco conducted with respect to the Podster, whether during its development or after the two instances in which infants died while using the product.

The final deponent, Clyde Leach, was not deposed in the wrongful death lawsuit. Leachco has not yet admitted that Mr. Leach—the President and CEO of what Leachco itself characterizes as a “small family company”¹⁴—has personal knowledge related to the Podsters, though Leachco tacitly concedes in its objections that Clyde Leach has had at least some involvement with the Podsters.¹⁵ Complaint Counsel is entitled to inquire into that involvement, and it also is entitled to inquire into why the head of a small family company would have “nearly no involvement with the Podster” even after learning of the death of an infant in the product in 2015 and battling a wrongful death lawsuit arising from that death. Did the head of the company request an investigation into the safety of the product? Was any evaluation of the product conducted at his direction? Why did Leachco not report the 2015 death of an infant in a Podster to CPSC upon learning of it? These sorts of questions go directly to the subject matter of the litigation, and Complaint Counsel is entitled to ask them. “[H]ighly-placed executives are not immune from discovery, and the fact that an executive has a busy schedule cannot shield that

¹⁴ Obj. at p. 4.

¹⁵ *Id.* (“Clyde Leach . . . has had *nearly no involvement* with the Podster[.]”) (emphasis added).

witness from being deposed.” *Six West Retail Acquisition v. Sony Theatre Mgt. Corp.*, 203 F.R.D. 98, 102 (S.D.N.Y. 2001) (citation omitted). “Even where, as in this case, a high-ranking corporate officer denies personal knowledge of the issues at hand, this claim is subject to testing by the examining party.” *Id.* (citation omitted); *accord Carnegie Mellon University v. Marvell Tech. Grp., Ltd.*, 09-cv-290, 2010 WL 4338388, at *1 (W.D. Pa. Oct. 27, 2010) (“Moreover, where, as in this case, high ranking corporate officers deny personal knowledge of the issues at hand, these claims are subject to testing by the requesting party.” (citation omitted)).

In sum, Complaint Counsel seeks to depose five Leachco employees about topics directly relevant to the subject matter of this lawsuit: whether the Podsters pose a substantial product hazard. Far from being taken for the purposes of “abuse and harassment,” these depositions will be taken to help advance this administrative lawsuit and protect American consumers. Moreover, due to the ongoing issues with COVID-19, Complaint Counsel has proposed that the depositions take place virtually, which should minimize any burden placed on Leachco’s employees. The parties also have agreed to follow the Federal Rules’ presumptive deposition limit of seven hours, and Complaint Counsel intends to work cooperatively and flexibly with Leachco’s counsel and witnesses to ensure that the timing of the depositions is not unnecessarily burdensome.

B. Leachco’s Arguments Do Not Warrant Striking the Deposition Notices.

Not only is there good cause to proceed with the noticed depositions, Leachco’s objections to the deposition notices do not supply the sort of “extraordinary” or “unusual” circumstances required to bar the taking of a deposition. *See Investment Props.*, 459 F.2d at 708; *Kelley*, 2008 WL 5000278, at *1.

1. The Prior Depositions of Leachco Employees in a Wrongful Death Suit Do Not Foreclose the Need for Depositions in this Matter.

Leachco objects to the deposition notices as “unnecessary and harassing” because “Complaint counsel already possesses deposition transcripts of four of these five witnesses.”¹⁶ The deposition transcripts Leachco is referencing are the deposition transcripts of each of the noticed Leachco employees, except for Clyde Leach, from an Alabama state court wrongful death lawsuit arising from the 2015 death of an infant while in a Podster. Complaint Counsel strongly disagrees with Leachco’s contention that those deposition transcripts obviate the need for depositions in this case. When Complaint Counsel requested that Leachco produce those depositions in this matter, Leachco refused to do so, objected to Complaint Counsel’s discovery request, and contended that “the majority of these documents *are unrelated to this proceeding*, and would be inadmissible in this proceeding.”¹⁷ (emphasis added). Leachco’s refusal to produce the deposition transcripts required Complaint Counsel to obtain them by other means.

a. This Case Involves Different Causes of Action.

Now that Complaint Counsel has the transcripts, and faced with depositions of its employees, Leachco has reversed course and advances that the deposition do in fact bear squarely on the issue in this proceeding—so much so that they obviate the need for any further deposition testimony. Respectfully, Compliant Counsel urges this court to reject this inconsistent reasoning and allow discovery to proceed with this handful of witnesses.

¹⁶ Obj. at p. 4.

¹⁷ See Dkt. 15, Ex. 1 at pp. 10–11. As Complaint Counsel previously has noted, this objection is in contravention of 16 CFR § 1025.31(c)(1), which states that: “It is not ground for objection that the information sought will be inadmissible at the hearing if [it] appears reasonably calculated to lead to the discovery of admissible evidence.”

Moreover, the fact that the parties may have been deposed in a previous matter does not undermine the need for depositions in this matter. The prior depositions were taken in the context of entirely different causes of action than those at issue here. Specifically, the previous depositions were taken in a case brought by private litigants alleging claims such as negligence/wantonness and wrongful death against Leachco under Alabama law. Counsel in the prior depositions sought to establish, for example, that Leachco had a duty of care to the decedent and breached that duty.¹⁸ Such elements of proof are distinct from those in this matter, where Complaint Counsel seeks an Initial Decision and Order that the Podsters present a “substantial product hazard” under 15 U.S.C. § 2064(a)(2), a finding that requires establishing a “defect” that poses a “substantial risk of injury to the public” under federal law.¹⁹ This is a different legal analysis and finding than that which is required to establish the breach of a duty of care under state law.

The deposition testimony in the Alabama action also predates this action by over four years, meaning that the testimony in that matter necessarily fails to capture any matters pertaining to the Podster that arose in the intervening years. *See Kucera v. Jefferson Cnty. Bd. of School Comm'rs*, No. 3:03-cv-593, 2013 WL 1363499, at *2 (E.D. Tenn. Apr. 3, 2013) (permitting newly noticed depositions to proceed to allow discovery of new facts where the prior depositions occurred seven to eight years earlier).

¹⁸ Under Alabama law, a claim for wrongful death under a negligence theory requires the plaintiff to establish “that the defendant owed her decedent a duty and that it breached that duty, proximately causing the death of her decedent.” *Plant v. R.L. Reid, Inc.*, 365 So.2d 305, 305 (Ala. 1978).

¹⁹ A “substantial product hazard” is “a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.” 15 U.S.C. § 2064(a)(2).

b. This Case Involves Different Parties.

This action was brought by the Government, not a private litigant. The Supreme Court has recognized that the Government and private litigants are not in the same position because, among other things, the claims at issue for Government litigation necessarily involve matters of substantial public importance. *See United States v. Mendoza*, 464 U.S. 154, 162–63 (1984) (holding the doctrine of nonmutual offensive collateral estoppel did not operate against the Government, noting “[t]he conduct of government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the government”).

Leachco essentially is seeking to collaterally estop Complaint Counsel from taking testimony. But Government actions brought in the public interest cannot be limited in the same way that private litigants are constrained by the law of preclusion. *See id.*; *see also Securities and Exchange Commission v. Seahawk Deep Ocean Tech.*, 166 F.R.D. 268, 271 (D. Conn. 1996) (denying motion to quash in SEC enforcement action, noting “the testimony is highly relevant to the underlying case and there is a strong public interest in favor of the litigation of such claims. The SEC brings securities enforcement actions in the public interest of preventing widespread securities fraud and, on the facts of this case, that interest outweighs any interest the movant might have in not disclosing the verification testimony at issue.”). In the same manner, Complaint Counsel is bringing this action in the public interest, seeking to protect infants, a vulnerable population, from a risk of suffocation. The deposition notices should not be stricken.

Even if some of Complaint Counsel’s inquiries were to overlap with those asked by *other* parties in *other* cases, that is not enough to make the deposition notices “unnecessary and

harassing.” See *Cuviello v. Feld Entm't, Inc.*, No. 5:13-CV-03135-LHK, 2014 WL 12607811, at *2 (N.D. Cal. Nov. 14, 2014) (holding that there was “no merit” to the contention that subpoenas for deposition “are unduly burdensome simply because they may solicit testimony that overlaps with previous testimony”); see also *Willis v. Big Lots, Inc.*, Civ. Action. 2:12-cv-604, 2017 WL 2608960, *5 (S.D. Ohio June 6, 2017) (denying motion to quash deposition subpoena even though “other discovery may exist on these topics” and observing that limiting the deposition would mean that “no litigant could ever revisit a topic in discovery.”). Complaint Counsel should be permitted to move forward with the depositions and develop testimony relevant to the question whether the Podsters pose a substantial product hazard.

2. The Depositions Are Not Premature.

Leachco contends that the deposition notices are premature because, in Leachco’s view, it has not received complete discovery responses.²⁰ Leachco’s contention is inaccurate. Complaint Counsel provided Leachco with ample and sufficient discovery both before and during the formal discovery period, including the Product Safety Assessments prepared by CPSC’s technical officers and substantive responses to those of Leachco’s interrogatories that properly were posed. And Leachco’s argument fails regardless. As an initial matter, Leachco has not explained how its belief that Complaint Counsel has not provided all necessary discovery somehow renders Leachco’s own fact witnesses unable to provide testimony based on their own personal knowledge. These are analytically separate issues, and purported grievances about Complaint Counsel’s discovery responses are not relevant to the question whether these

²⁰ Obj. at p. 3.

deposition notices should be stricken. If anything, Complaint Counsel is prejudiced by proceeding with depositions despite having received only limited productions from Leachco.²¹

Moreover, the Rules of Practice, like the Federal Rules, “do not provide for a priority or for a sequencing of discovery.” *Resource Assocs. Grant Writing and Eval. Servs., LLC. v. Maberry*, 08-cv-0552 JB/LAM, 2008 WL 6045496, at *1 (D.N.M. Oct. 22, 2008) (denying the defendant’s request for a protective order that would have shielded the defendant from deposition until after the plaintiff responded to defendant’s interrogatories.).

To the contrary, the Rules of Practice expressly state that: “Unless otherwise provided in these Rules or by order of the Presiding Officer, *methods of discovery may be used in any sequence* and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party’s discovery.” 16 C.F.R. § 1025.31(e) (emphasis added). Depositions therefore may proceed even if written discovery still is ongoing or pending. Complaint Counsel respectfully requests that the Presiding Officer reach the same result as the court in *Maberry* and reject Leachco’s contention that the depositions are premature because written discovery is ongoing.

3. Leachco Is on Sufficient Notice of the Nature of the Depositions.

Leachco also objects to the deposition notices because it believes they do not list the subject matter of the expected testimony as required by Section 1025.35(b)(iii). Leachco is incorrect. Each deposition notice expressly states that the depositions will be “concerning all matters related to CPSC Docket No. 22-1, as well as all matters related to the Complaint, the Answer, and any responses by Respondent Leachco, Inc. to any of Complaint Counsel’s

²¹ See Complaint Counsel’s Motion to Compel, Dkt. 14.

discovery requests.”²² That is, the depositions will be limited to the subject matter of this administrative proceeding. This description of the scope of the depositions is consistent with the scope described by Complaint Counsel and at least one Respondent in deposition notices in other CPSC administrative proceedings.²³

Although Leachco appears to want a more tailored description of the scope of each employee’s deposition, the current description is particularly appropriate given that Leachco is a small family company where the employees work collaboratively and hold a variety of positions. For example, Leachco describes Tonya Barrett as having three roles as its “Office Manager/New Accounts/Compliance Coordinator” and Mabry Ballard as both “Executive Assistant to the Vice President” and “Customer Service Supervisor,” while the Vice President herself also is described as the “Chief of Product Development.”²⁴ Given the various hats worn by Leachco’s employees, it is impossible for an outside observer to determine precisely what knowledge each employee may have with respect to the subject matter of this litigation. The deposition notices as framed permit Complaint Counsel to inquire into the full scope of the knowledge that Leachco’s employees may have related to the Podsters and substantial product hazard they are alleged to pose.

Nor is it burdensome for Leachco to apprehend the nature of the depositions from the Complaint and its own Answer and discovery responses. The Complaint is only eleven pages long, including the signature page, and Leachco prepared the discovery responses and its own

²² Obj. at Ex. A.

²³ See, e.g., Dkts. 36 (Notice of Deposition by Complaint Counsel) & 37–39 (Notices of Deposition by Respondent) in CPSC Docket 21-1, as well as the June 8, 2014 “Complaint Counsel’s Notice of Deposition of Shihan Qu” in CPSC Docket No. 13-2.

²⁴ Obj. at p. 1.

eight-page Answer. Leachco also has been provided with sufficient documents as to the scope of this matter during both the investigative stage and this litigation, so its assertions that it lacks sufficient information on how to respond to the notices rings hollow.

4. Leachco's Remaining Arguments Do Not Warrant Striking the Depositions.

Leachco also contends that the deposition notices pose an undue burden on, and are oppressive to, its employees and its business, and that by filing its objections Leachco somehow mooted Complaint Counsel's notices of deposition and Complaint Counsel now must seek leave of the Presiding Officer to reissue them. Not only would such an argument undermine the Court's discovery schedule and the Rules of Practice that advance the need for a timely resolution of issues, neither argument warrants striking the deposition notices.

The deposition notices are not an undue burden to the noticed individuals. "Depositions usually involve some burden to all participants." *Clayton v. Velociti, Inc.*, No. 08-2298-CM/GLR, 2009 WL 1033738, at *3 (D. Kan. Apr. 17, 2009). Here, that burden will be lessened by the virtual nature of the depositions and the fact that the parties have agreed to limit each deposition to seven hours. Leachco has not pointed to any facts or law demonstrating that the burden is so undue or unusual as to warrant striking the notices. As explained above, Complaint Counsel seeks to depose these Leachco employees in an effort to continue building evidence about the substantial product hazard posed by the Podsters and intends to present that evidence to the Presiding Officer during the June 2023 hearing in this matter. This is proper discovery, and the depositions should be permitted to proceed.

Leachco also advances an unsupportable argument that, by virtue of the Presiding Officer's approval of Complaint Counsel's request that each party be permitted to proceed with ten depositions without leave of the Court unless a party objects, Leachco's filing of objections

somehow invalidated the deposition notices and now requires Complaint Counsel to seek approval of the Court before re-serving the notices.²⁵ That is a tortured and inefficient approach to resolving Leachco’s concerns, particularly given that Section 1025.35(b)(3) already contemplates that a party may file an opposition to deposition notices—as Leachco has done here—and “[t]he Presiding Officer shall rule on the notice and any opposition and may order the taking of all noticed depositions upon a showing of good cause.” Regardless, Leachco’s proposed approach is a distinction without a difference. Leachco’s objections to the deposition notices have invoked 16 CFR § 1025.35(b)(3), with the practical effect being that the Presiding Officer must review the deposition notices and rule on whether the depositions may proceed. Although we believe it to be an unnecessary and an unreasonable burden on the Court, Complaint Counsel does not intend to proceed with the depositions until the Presiding Officer has made such a ruling.

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²⁵ Obj. at p. 2.

IV. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that (a) Leachco's objections to Complaint Counsel's deposition notices be overruled and (b) Complaint Counsel be permitted to proceed with the five depositions. Complaint Counsel remains available to discuss with Leachco mutually agreeable dates for those depositions and expects that they may have to be pushed to late September or early October 2022 due to the timing of the hearing on this matter.

Dated this 22nd day of August, 2022

Respectfully submitted,

/s/ Brett Ruff

Mary B. Murphy, Director
Leah Ippolito, Supervisory Attorney
Brett Ruff, Trial Attorney
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Complaint Counsel for
U.S. Consumer Product Safety Commission

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2022, I served Complaint Counsel's Response to Leachco's Objections to Notices of Deposition on all parties and participants of record in these proceedings as follows:

By email to the Secretary:

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U.S. Consumer Product Safety Commission

EXHIBIT 1

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

In the Matter of

LEACHCO, INC.

Respondent.

CPSC DOCKET NO. 22-1

**RESPONDENT LEACHCO, INC.'S OBJECTIONS AND RESPONSES TO COMPLAINT
COUNSEL'S FIRST SET OF INTERROGATORIES TO RESPONDENT**

Pursuant to 16 C.F.R. § 1025.32, Respondent Leachco, Inc. ("Leachco") hereby submits the following objections and responses to Complaint Counsel's First Set of Interrogatories to Leachco.

**RESPONSES AND OBJECTIONS TO COMPLAINT COUNSEL'S
INTERROGATORIES**

INTERROGATORY NO. 1

Identify all Persons who assisted in the preparation of, or who provided information or Documents used in the preparation of, the responses to written discovery served by Complaint Counsel in this matter.

RESPONSE:

Objection, this interrogatory calls for information protected by the attorney-client and attorney work product privileges. Subject to and without waiving this objection, Leachco states that these responses were drafted by counsel from information obtained from multiple sources.

INTERROGATORY NO. 2

Identify each Person who possesses, or who you believe possesses, any knowledge relating to the infant suffocation risk or other risks to infants posed by the Podsters, and describe with specificity the knowledge of each Person identified.

RESPONSE:

Objection, this interrogatory is vague, overbroad, argumentative, and assumes facts not established.

Subject to and without waiving these objections, Leachco states that the product has always had warnings on the product, its label, and packaging about the potential risk of suffocation if not properly used, and thus all consumers, the company's officers and employees would be aware of this risk. The number of people potentially called for by this interrogatory makes it unanswerable in its current form.

INTERROGATORY NO. 3

Identify the complete corporate organization of Respondent from founding to the present, including, but not limited to, a detailed listing of its places of incorporation and principal places of business, its officers and directors, and its internal corporate structure. This request includes, but is not limited to, related entities, such as former and current parents and subsidiaries, as well as any entities acquired by or merged with Respondent.

RESPONSE:

Leachco states that it is incorporated in Oklahoma and has its principal place of business is in Ada, Oklahoma. Leachco was founded in 1988 by Clyde and Jamie Leach. Clyde Leach is the President and CEO; Jamie Leach is the Vice President; Stephen Ballard is the Chief Financial Officer, and Alex Leach is the Chief Operating Officer. The company has fewer than 50 full-time employees, including six members of the Leach family, and all of its operations are run out of Ada, Oklahoma.

INTERROGATORY NO. 4

Separately identify all Podsters by: model numbers, names, or the like; total number sold organized by year; dates of manufacture, distribution, and sale; and retail price. Indicate all differences between the different models and whether any model was changed in any way.

RESPONSE:

Leachco will create and produce a spreadsheet for sales of the Podster products. *See also* Leachco's Amended Full Report dated December 11, 2020.

INTERROGATORY NO. 5

Describe in detail the process by which you collected documents and information in response to requests by CPSC staff in CPSC matter nos. PI210002 and CA220007, including, but not limited to, what sources, libraries, or repositories you searched or accessed; whether hard-copy or electronic; whether immediately accessible or in storage; and the results of those searches. If any potential sources, libraries, or repositories of documents or information which may contain responsive information were not searched, provide a detailed explanation of why it was not searched.

RESPONSE:

Objection, this interrogatory seeks information that is not relevant to any claim or defense in this case and is therefore outside the scope of permissible discovery under 16 CFR § 1025.31(c)(1). The request is also overbroad and unduly burdensome, and seeks information protected by the attorney-client and work product privileges.

Subject to and without waiving this objection, Leachco states that with the assistance of counsel, it searched for and produced documents from all known files of the company including its design and patent files, its marketing files, its sales/distribution files, its testing and quality control files, and its customer service files, including all claims by consumers, whether by claim or litigation.

INTERROGATORY NO. 6

Identify each Person whom you expect to call as a witness, whether as an expert or a percipient witness, at the trial or Hearing of this matter, and for each witness, state or provide the following information:

- a) The subject matter on which the witness is expected to testify;
- b) Whether you intend to designate the witness as an expert;
- c) The substance of the opinions, if any, and facts to which the witness is expected to testify; and
- d) A summary of the grounds for each opinion, if any.

RESPONSE:

At this early state of the case, Leachco has not yet identified the witnesses it intends to call at the trial or Hearing of this matter. Leachco will supplement its response to this interrogatory, in accordance with 16 CFR § 1025.31.

INTERROGATORY NO. 7

Identify each Person who participated in the design, development, and manufacture of the Podsters, including any outside parties that Leachco consulted with when designing and developing the Podster. For each Person, indicate the time period of the work and describe the Person's responsibilities, role, and contributions.

RESPONSE:

Objection, overbroad, vague, compound and unduly burdensome. Leachco further objects to requests for information concerning manufacturing, which is not at issue in this case. Subject to and without waiver of these objections, Leachco states that the Podster was designed in 2008 by founder and Leachco Vice President, Jamie Leach, with consultation only in connection with the Patent process.

INTERROGATORY NO. 8

Identify each Person involved in creating, designing, and manufacturing any and all versions or iterations of the packaging, labels, warnings, and instructions that accompanied the Podsters, including any Person with knowledge of changes made at any time to the packaging, labels, warnings, and instructions that accompanied the Podsters. For each Person, indicate the time period of the work, and describe the person's responsibilities, role, and contributions.

RESPONSE:

Objection, overbroad, vague, compound and unduly burdensome and unlimited in time and scope. Leachco further objects to requests for information concerning manufacturing, which is not at issue in this case. Subject to and without waiver of this objection, Leachco states that at all relevant times, Jamie Leach was primarily responsible for the creation and design of the warnings for the Podster, with assistance from Tonya Barrett and Leah Barnes. In addition, the Podster packaging was submitted to independent third-party testing laboratories for their evaluation and approval. See Leachco's testing documents, which were previously produced to the CPSC in connection with its full report request.

INTERROGATORY NO. 9

Identify each Person who participated in the marketing, advertising, and/or promotion of the Podsters, in any form or through any media. For each Person, indicate the time period of the work, and describe the Person's responsibilities, role, and contribution.

RESPONSE:

Objection, this interrogatory is vague, overbroad and unlimited in time and scope. It also seeks irrelevant information, which is outside the scope of 16 CFR § 1025.31.

Subject to and without waiving these objections, Leachco states that the marketing and promotion for the Podster—primarily through Amazon, trade shows and brochures—was overseen by Jamie Leach, with assistance from Leah Barnes (with staff assistance). Leachco did not conduct any print, radio, or television advertising of the Podster.

INTERROGATORY NO. 10

Identify any studies, reports, publications, written evaluations, or materials of any kind that discuss or refer to the infant suffocation risk or other risks to infants posed by the Podsters.

RESPONSE:

Objection, this request is vague as to the type of materials sought and duplicative of Interrogatory No. 2. Subject to and without waiving these objections, Leachco refers to and incorporates by reference its response to Interrogatory No. 2. Further responding, Leachco states that over the years, Jamie Leach has reviewed industry and other materials concerning suffocation risks and other risks related to infants, but does not have specific identifying information about those materials. Further responding, Leachco submitted the Podster to independent third-party testing laboratories, which evaluated the Product and its warnings. See Leachco's testing documents, which were previously produced to the CPSC in connection with its full report request. In addition, Leachco has produced the expert evaluations of the Podster by Dr. Emily Skow, Ph.D. and Dr. Michael Prange, Ph.D., P.E.

INTERROGATORY NO. 11

Identify any studies, reports, publications, written evaluations, or materials of any kind that evaluated the risks, hazards, or safety of the design of the Podsters that Respondent relied on to

develop or revise the Podster's design, materials, finishing, instructions, warnings, packaging materials, or marketing materials, or that Respondent relied on to refrain from making any changes, and explain why the Respondent refrained from relying on those studies, reports, publications, written evaluations, or materials.

RESPONSE:

Objection, this request is vague, overbroad, and unclear or unlimited in time and scope. It also calls for a narrative, which is improper and which is outside the scope of 16 CFR § 1025.31. Further it is duplicative of other requests. Subject to and without waiving these objections, see Leachco's testing documents, which were previously produced to the CPSC in connection with its full report request and refers to and incorporates herein its response to Interrogatory No. 2 and Interrogatory 10.

INTERROGATORY NO. 12

Identify any third-party experts, consultants, or any other person who evaluated the risks, hazards, or safety of the design of the Podsters that Respondent relied on to develop or revise the Podster's design, materials, finishing, instructions, warnings, packaging materials, or marketing materials, and/or that Respondent relied on to refrain from making any changes, and explain why the Respondent refrained from relying on the evaluations of those third party experts, consultants or any other person.

RESPONSE:

Objection, this request is vague, overbroad, and unlimited in time and scope and repetitive of several prior interrogatories. Subject to and without waiving these objections, Leachco refers to and incorporates herein its response to Interrogatories 2 and 10 as well as Leachco's testing documents.

INTERROGATORY NO. 13

Identify by brand name and model any other products examined or considered by any person in relation to the design, development, revision, or manufacture of the Podsters or the packaging, instructions, warnings, or marketing materials for the Podsters.

RESPONSE:

Objection, this request is vague, overbroad, and unlimited in time and scope. It also seeks information not relevant to any claim or defense in this case, which is improper and outside the scope of permissible discovery under 16 CFR § 1025.31. Further, the request seeks information protected by the attorney-client and work product privileges. Subject to these objections, Leachco states that the Podster is patented and was a unique design at the time it was developed. After development, at various times Leachco has reviewed competitor products in the marketplace and considered their design and warnings. No records document or detail the specifics of those reviews.

INTERROGATORY NO. 14

Identify all Tests performed at any time on the Podsters related to the infant suffocation risk, any other potential safety risk, or any safety standard. As part of your response for each Test:

- a) Identify the specific product or products tested;
- b) Describe each Test including the date of the Test and the standard or protocols used;
- c) Identify all Persons who participated in setting up and conducting the Test;
- d) Describe all information, directions, and requests that you or any other Leachco employee provided to the Person conducting the Test;
- e) Describe and explain the results of the Test, including all observations and conclusions;
- f) Identify all Persons who participated in evaluating the test results; and
- g) Describe any changes to the Podsters following each Test.

RESPONSE:

Objection, this request is vague, overbroad, und unlimited in time and scope, and repetitive of many other requests. Subject to and without waiving these objections, *see* Leachco's testing documents, which were previously produced to the CPSC in connection with its full report request. *See also* Expert Evaluations of the Podster by Emily Skow, Ph.D. and Dr. Michael Prange, Ph.D., P.E., previously produced with Leachco's full report.

INTERROGATORY NO. 15

Describe all past and present policies and procedures for Leachco's response to claims, complaints, inquiries, and reports of incidents, injuries, or fatalities, and identify all persons responsible for the development and implementation of such policies and procedures.

RESPONSE:

Objection, this request is vague, overbroad, and unlimited in time and scope. It also calls for a narrative, which is improper and outside the scope of permissible discovery under 16 CFR § 1025.31(c)(1). Additionally, this request calls for information that is protected by the attorney-client and work product privileges.

Subject to and without waiving these objections, Leachco states that its customer service department responds to consumer claims and inquiries by e-mail and/or by phone, gathers information as necessary and documents all complaints, inquiries, and injuries, including all information available. At all relevant times, Jamie Leach, Alex Leach, and Mabry Ballard were responsible for the development and implementation of these policies and procedures.

INTERROGATORY NO. 16

Identify each claim, warranty claim, complaint, inquiry, or report of incidents, injuries, or fatalities involving the Podsters. For each claim, warranty claim, complaint, inquiry, or report of incidents, injuries, or fatalities:

- a) Provide the name, address, telephone number, email address, and any other identifying information of the claimant;
- b) Identify the date Respondent first received verbal or written information concerning the claim, warranty claim, complaint, inquiry, or report;
- c) State the information Respondent received in the claim, warranty claim, complaint, inquiry, or report and how you received it;
- d) State whether you or any other Person acting on behalf of Respondent investigated or took other responsive steps after the initial claim, warranty claim, complaint, inquiry, or report, and if so, identify each person involved in the response and state the date and

description of each investigation or other step, including refunds, replacements, or other remedies;

e) State whether medical attention was sought or received by any Person involved in any claim, warranty claim, complaint, inquiry, or reports;

f) State the age of any Person involved in the incident;

g) Provide all information on the Podster involved, including but not limited to, model, year of manufacture, type of packaging, and warnings; and

h) State the date and location of purchase of the involved product and the identity of the purchaser.

RESPONSE:

Objection, this interrogatory is vague, overbroad, and unlimited in time and scope. Additionally, this request calls for information protected by the attorney-client and work product privileges.

Subject to and without waiving these objections, Leachco previously provided information regarding all “incidents resulting in injuries, near-death occurrences, or fatalities known to the Firm related to the Subject Products,” (as requested by the letter from Kiara Beverly dated November 19, 2020) in its full report to the CPSC. See Dec. 11, 2020 Amended Podster Full Report. Given that all known injuries involving the Podster were the subject of CPSC Epidemiologic Investigation Reports, the consumer information on these incidents is already known by the CPSC and the CPSC has the underlying reports, including any coroner’s reports, police reports and related contemporaneous documentation of the claims related to the incidents.

Further responding, while Leachco provides a limited, 30-day warranty and return policy to the retailers and distributors that sell Podsters to consumers, Leachco does not provide warranties directly to end-users.

INTERROGATORY NO. 17

Identify each Person with knowledge of any claims, lawsuits, or alternative dispute resolution proceedings related to the Podsters.

RESPONSE:

Objection, this interrogatory is vague, overbroad, and unlimited in time and scope. The interrogatory also requests information protected by the attorney-client and work product privileges. Subject to and without waiving these objections, Leachco states that all officers of the company are aware of the one lawsuit involving the Podster, which has been identified in numerous materials provided to the CPSC. As the materials provided reflect, many people were involved in and knowledgeable about these proceedings. See Interrogatory No. 19. There have been no other injury claims or proceedings concerning the Podster.

INTERROGATORY NO. 18

Identify any changes or modifications to the Podsters, including changes to their design, materials, finishing, instructions, warnings, packaging, or marketing materials, that were implemented whether or not in response to or as a result of any claims, complaints, inquiries, reports or incidents, injuries, or fatalities related to the Podsters.

RESPONSE:

Objection, this interrogatory is repetitive and duplicative of other requests, is overbroad, vague, unlimited in time and scope, compound in subject matter and calls for a narrative that would be impossible to provide over a more than 12-year period. Subject to and without waiving these objections, See Leachco's Amended Full Report, Dated December 11, 2020 as well as responses to Interrogatories 4 and 8.

INTERROGATORY NO. 19

Identify each Person who has been deposed or has otherwise given testimony in any legal proceeding regarding the Podsters and provide the date of the testimony and caption of the matter.

RESPONSE:

There has been only one legal proceeding involving the Podster, *Konica McMullen and Theodore McMullen, III v. Leachco, Inc., et al.*, Case No. CV-2015-904869 (Circuit Court of Jefferson County, Alabama, Birmingham Division). Deponents were: Mabry Ballard, Tonya Barrett, Vivian Baulding, David Blackwell, Dr. Boris Datnow, David Everson, Lakesha Glass, Beverly Goodman, Ashley Green, Matthew Green, Tyesha Hill, Evelyn Inestroza, Tracey Johnson, Priscilla Kimball, Grant Kline, Lila Laux, Alex Leach, Jamie Leach, Konica McMullen, Theodore McMullen, III, Matthew Murphree, Keith Peterson, Stuart Statler, Michael Taylor, Shakira Trice, Jessica Vice, Ebony Whitby.

Dated: May 13, 2022

CROWELL & MORING LLP

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Attorneys for Leachco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 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:

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/s/ Cheryl A. Falvey
Cheryl A. Falvey

VERIFICATION

I, JAMIE LEACH, Vice President of Leachco, Inc. ("Leachco"), state that I have read Leachco's answers to The Consumer Product Safety Commission's First Set of Interrogatories and the answers are true to the best of my knowledge, information, and belief.



Jamie Leach