

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

IN THE MATTER OF

LEACHCO, INC.

CPSC Docket No. 22-1

HON. MICHAEL G. YOUNG
PRESIDING OFFICER

**IMMEDIATE
HEARING REQUESTED**

**LEACHCO, INC.'S RESPONSE TO THE COMMISSION'S OBJECTIONS TO
CERTAIN DEPOSITIONS AND REQUEST FOR AN IMMEDIATE HEARING**

The Commission's Objections to Leachco's depositions are baseless and contrary to the Commission's own Rules of Procedure. First, the Commission admits that Leachco may conduct a fact deposition of Celestine Kish, who was identified by the Commission as a percipient witness. But instead of scheduling a mutually agreeable date, the Commission filed its Objections. Second, the Commission's own Rules of Procedure allow parties to depose "any other party," including a "federal . . . governmental entity." 16 C.F.R. §§ 1025.3(f), (g); 1025.35(a). The Court should therefore overrule the Commission's Objections and order these depositions to take place during the weeks of March 6 and March 13, as originally noticed. If the Court's resolution of this matter would be assisted by a hearing, Leachco respectfully asks that the Court schedule a hearing as soon as practicable due to the looming March 20 fact-discovery deadline.

ARGUMENT

I. THE COMMISSION IDENTIFIED MS. KISH AS A PERCIPIENT FACT WITNESS AND ADMITS THAT LEACHCO MAY CONDUCT A FACT DEPOSITION

This latest discovery dispute involves a common tactic by the Commission: using the future disclosure of expert testimony to block Leachco’s right to obtain relevant factual evidence.¹ Here, the Commission objects to Leachco’s proposed *fact* deposition of CPSC employee Celestine Kish on the ground that she will later testify as an expert witness. *See* Obj. at 2. But the Commission knows this argument lacks merit because (1) Leachco expressly noticed Ms. Kish for a “Fact Deposition” *see* Ex. E to CPSC Obj. (“Leachco, Inc.’s Notice of Fact Deposition of Celestine Kish.”), and (2) the Commission, after refusing Leachco’s requests, now offers a date for Ms. Kish’s deposition.

Further, the Commission’s procedural complaint—that Leachco failed to provide the proper 10-day notice (Obj. at 2–4, 6)—is at best disingenuous. More than a month ago, Leachco advised the Commission of that it may depose Ms. Kish, Zachary Foster, Hope Nesteruk, Chris Nguyen, and Suad Wanna-Nakamura—all of whom were identified by the Commission as percipient witnesses. *See* Ex. A (O. Dunford Jan. 25, 2023 Email).² More recently, on February 22, Leachco confirmed that it would depose Ms. Kish and the others during the weeks of March 6 and 13 and *asked*

¹ *See, e.g.*, Leachco Opp. to CPSC Mtn. for Protective Order (Dkt. 65) at 2–3 & fn.1 (providing some examples of CPSC’s “expert-testimony” excuse to withhold relevant factual information).

² Leachco’s Interrogatory No. 2 asked the Commission to “[i]dentify any Person who was a witness to or has knowledge of the facts, circumstances and events that are related to the relief requested in the Complaint, or who otherwise has knowledge relevant to the issues in this case... .” In response, the Commission identified Ms. Kish, Mr. Foster, Ms. Nesteruk, Mr. Nguyen, and Ms. Wanna-Nakamura. *See* Ex. B (CPSC Resp. to Leachco ROG 2).

the Commission to provide “dates [that] are best for these depositions.” *See* Ex. A (O. Dunford Feb. 22, 2023 Email). Two days later, the Commission—for the first time—objected to Leachco’s deposition of Ms. Kish, on the ground that she will *also* provide expert testimony, and it refused to provide an available date for her deposition. *See* Ex. C (G. Reyes Feb. 24, 2023 Email). Leachco reminded the Commission that not only does Ms. Kish’s name appear on key documents,³ but also that the Commission identified her as a percipient witness. *See* Ex. E (O. Dunford Feb. 27, 2023 Email). In response to Leachco’s email, the Commission stated that it could allow her deposition if Leachco agreed not to explore privileged or expert-testimony related areas, but again did not provide available dates for deposition. *See* Ex. B (G. Reyes Feb. 27, 2023).

Leachco then noticed Ms. Kish’s “Fact Deposition” for March 7 but, in the email to Complaint Counsel, Leachco wrote, “we can reschedule if Ms. Kish is unavailable that day.” *See* Ex E (O. Dunford Feb. 27, 2023 Email and Kish Notice). Instead of offering an available date for Ms. Kish’s “Fact Deposition,” the Commission filed its Objections.⁴ But, as just shown, the Commission’s contentions that Leachco failed to properly schedule Ms. Kish’s deposition and that Leachco didn’t agree to limit its deposition to facts (Obj. at 7) are both false. Therefore, the Commission’s

³ According to the Commission’s own Product Safety Assessment Reports (PSAs) and In-Depth Investigation Reports (IDIs), Ms. Kish was involved in investigating all three incidents that the Commission claims are associated with the (mis-)use of a Podster. *See* Ex. D (excerpts from relevant PSAs and IDIs) (submitted for *in camera* review only).

⁴ Nor did the Commission give Leachco’s counsel any forewarning of its Objections. Leachco’s counsel had reserved an airline ticket for Saturday, March 4, to travel to the DC area, where the depositions of CPSC personnel will take place. The Commission did not file and serve its Objections until 4:33 pm Friday, March 3. Had the Commission at least notified Leachco’s counsel earlier in the week, Leachco’s counsel could have changed his flight and saved a day’s travel, hotel, and meal expenses.

request for an order limiting Ms. Kish’s deposition to facts (Obj. 2, 7–8) and its belated offering of an available deposition date are merely delaying tactics. The Commission’s Objections have simply wasted everyone’s time and resources.⁵

Therefore, the Court should order Ms. Kish to appear for her fact deposition on March 7, 10, 14, or 17 (the available days over the next two weeks before the end of fact discovery). The Commission’s offer to reschedule Ms. Kish’s deposition to March 23 (Obj. 6) should be rejected. Leachco’s counsel will be in the DC area through March 17, and discovery closes March 20. There is no need to delay Ms. Kish’s deposition past March 17.⁶

II. THE COMMISSION IGNORES ITS OWN RULES OF PRACTICE TO OBJECT TO A PROPER AGENCY DEPOSITION

A. The Commission’s own rules expressly authorize Leachco to depose the Commission

The Commission’s Rules allow Leachco to depose the Commission in its agency capacity. Thus, “any party may take the deposition of any *other party, including* the

⁵ Because the Commission admits that Leachco may depose Ms. Kish about the facts of this case, Leachco need not belabor the point. But, briefly, the Commission has no support to argue that a witness cannot be deposed in two different capacities. Such “hybrid witnesses” are not uncommon. *See, e.g.,* The New Wigmore: Expert Evidence § 4.2.2 – Hybrid Expert Witnesses (3d ed. 2023). Indeed, if anything, *Leachco* would have a stronger objection to Ms. Kish’s proposed dual role here than does the Commission to her being deposed in her role as percipient witness. *See, e.g., id.* (“Courts frequently express concern about the use of dual-role experts and exhort litigants and judges to take safeguards to alleviate jury confusion and clearly delineate between fact and expert testimony.”); *United States v. Vera*, 770 F.3d 1232, 1242 (9th Cir. 2014) (“Such dual capacity testimony raises additional concerns, however: [a law enforcement officer’s] status as an expert could lend him unmerited credibility when testifying as a percipient witness, cross-examination might be inhibited, jurors could be confused and the agent might be more likely to stray from reliable methodology and rely on hearsay.”); *id.* at 1243 (finding “plain error not to instruct the jury on how to appropriately evaluate [the officer’s] opinions and to fail to require an adequately specific foundation for those opinions”). In short, the Commission has no basis whatsoever to resist Leachco’s fact deposition of Ms. Kish.

⁶ Leachco advises the Court that counsel is currently scheduled to leave the DC area on the morning of March 17. Accordingly, Leachco respectfully asks that, if the Court orders Ms. Kish to be deposed on March 17, it enter the order as soon as possible so that Leachco’s counsel can change travel plans.

agents, employees, consultants, or prospective witnesses of that party.” 16 C.F.R. § 1025.35(a) (emphasis added). A “party” is “any named person . . . in any proceedings governed by these Rules,” and a “person” includes “any . . . federal . . . governmental entity.” *Id.* § 1025.3(f), (g). The Commission is, of course, a “party” to this proceeding. Indeed, the Commission named itself as a party in its Complaint. *See* Compl. ¶4. The Commission’s Rules further provide that a deposition may be used against “anyone who at the time of the taking of the deposition was an officer, director, managing agent, or person otherwise designated to testify on behalf of a . . . governmental entity which is a party to the proceedings... .” *Id.* § 1025.35(i)(2). The Rules thus contemplate that the Commission “designate[]” a witness to “testify on [its] behalf.”

Demonstrating the weakness of its argument, the Commission’s primary argument is that Leachco did not notice the “name . . . of each person to be deposed.” Obj. at 8 (quoting 16 C.F.R. § 1025.31(b)(1)(ii)). To the contrary, Leachco noticed the Consumer Product Safety Commission—*i.e.*, the “person to be deposed.” *See* Ex. E.

In short, the Commission’s own rules expressly allow Leachco to depose “any other party” to this proceeding, including a “federal . . . governmental entity.” 16 C.F.R. §§ 1025.3(f), (g); 1025.35(a).

B. The Federal Rules of Civil Procedure—if relevant—support Leachco

The Commission claims that Leachco seeks an “improper” Federal Rule-30(b)(6) deposition (Obj. 8), but Leachco has never cited Federal Rule 30 and has always relied on the Commission’s own Rules of Procedure. But, regardless, the Commission’s argument fails here, too. When the Commission adopted its Rules of

Procedure, it explained that those rules were “patterned on” the Federal Rules of Civil Procedure, and the Commission “expect[ed] that interpretations of these Rules by the Presiding Officer will be guided by principles stated and developed in case law interpreting the Federal Rules of Civil Procedure.” *See* 45 Fed. Reg. 29205, 29026–27, 29209, 29012 (May 1, 1980).⁷ Further, while the Commission explained that it placed the noticing and taking of depositions under the Presiding Officer’s control,⁸ (*id.* 45 Fed. Reg. at 29213 (emphasis added)), the Commission did not identify any *substantive* differences between depositions under the Federal Rules and those under the Commission’s Rules. *Id.* And as explained in the previous section, the Commission’s Rules—patterned on the Federal Civil Rules of Procedure—expressly allow one party to take the deposition of the other party. Therefore, to the extent discussion of Federal Rule 30 is relevant, it supports Leachco’s deposition of the Commission as a party.

C. Leachco’s topics relate to this proceeding

Finally, the Commission’s objections to the topics Leachco noticed have no merit. First, the Commission’s Rules of Procedure require *all* deposition notices to include the “subject matter of the expected testimony.” 16 C.F.R. § 1025.35(b)(iii). And all of Leachco’s notices here—to individuals and to the Commission—include topics of expected testimony. *See* Ex. E (Kish Notice; CPSC Notice).

⁷ *See* <https://www.govinfo.gov/content/pkg/FR-1980-05-01/pdf/FR-1980-05-01.pdf>, last visited Mar. 5, 2023. The pages cited are attached as Exhibit F.

⁸ Here, the Presiding Officer and the parties agreed that each party may take up to ten depositions without leave.

Further, the noticed topics are properly focused on the Commission's allegations against Leachco, the facts supporting those allegations, and the Commission's treatment of products similar to the Podster. The Commission's arguments that the topics are (1) overly broad, (2) duplicative, (3) would require the testimony of attorneys, and (4) would invade privileged information (Obj. 12–19), are without merit.

1. The Commission argues that the following topics are overly broad: (1) the facts and allegations in this proceeding, (2) Leachco and the Podster, (7) the nature and scope of the CPSC's allegations against Leachco, and (8) evidence supporting the allegations in CPSC's Complaint. Obj. 15–16. But the Commission fails to explain how these topics could be properly narrowed. The Commission's claim here involves Leachco and the Podster, and Leachco properly seeks factual information about the nature, scope, and evidence (allegedly) supporting the Commission's claim. Further, these topics will allow Leachco to explore whether the Commission had a viable basis to bring its claim against Leachco. As this Court admonished Complaint Counsel, "if there is not a factual basis for the complaint having being filed and that is challenged and you need to show your cards, I'm going to make you show your cards, or I'm going to dismiss the complaint." *See* Ex. G (Tr., Sept. 7, 2022 Hearing, 14:14–18). Topics 1, 2, 7, and 8 are properly focused on this case. The Court should therefore reject the Commission's objection.

2. The Commission complains that topics 1, 2, 6–8, 10, and 11 are duplicative of other testimony Leachco seeks. Obj. 16. But the Commission misunderstands the nature of an agency deposition. Thus, even assuming the topics would seek nothing

but cumulative evidence, there is a difference between the testimony of CPSC employees and the testimony of the agency itself. The latter testimony would bind the agency. Therefore, while the topics covered could be similar, the effect of the testimony is significantly different. Further, the information sought would not be duplicative. For example, while Leachco may properly ask individuals about their own training and education, Leachco may ask the Commission about the training and education *requirements* to work at the Commission. The Court should reject the Commission's objection.

3. The Commission's claim that only CPSC attorneys could testify about Topics 9–12 (Obj. at 14, 17–18) is false. Topic 9 addresses the relief requested in this proceeding, and the main relief sought in the complaint is the recall of Leachco's Podster. *See* Compl. pp. 9–10. But CPSC non-attorney employees are at no disadvantage in talking about recalls. *See, e.g.*, CPSC Recall Effectiveness Workshop (facilitated by, among others, deponents Celestine Kish and Christopher Nguyen).⁹ Similarly, topics 10 and 11 concern studies and tests about infant products—hardly a topic known only to attorneys. And topic 12 addresses CPSC communications with third parties (including members of Congress). The Commission's claim that these communications exclusively involve attorneys is erroneous. Here, the Commission produced an email string related to a request for information from a member of Congress. *See* Ex. H (CPSC0004807) (submitted for *in camera* review). Among the senders and recipients are two non-attorneys: Kiara Beverly (Former Compliance Officer,

⁹ *See* https://www.cpsc.gov/s3fs-public/Recall_Effectiveness_Workshop-Consolidated%20Notes_2018.pdf?YO6tPh4HWNruwHSdi2nSVrz3DpbrGEG2, last visited Mar. 4, 2023.

Office of Compliance and Field Operations, Division of Enforcement and Litigation, CPSC), and Duane Boniface (the Assistant Executive Director of the CPSC Office of Hazard Identification and Reduction). *See* Ex. I (Glossary to Complaint Counsel’s Amended Privilege Log). Therefore, the Court should reject the Commission’s objection.

4. Finally, the Commission erroneously claims that topics 3, 4, and 5—concerning the processes by which the Commission takes action—are “entirely” within the confines of privilege. But the Commission’s website discusses these topics. For example, the Commission publishes a Recall Handbook.¹⁰ Further, and more generally, the Commission is a public agency that says it values transparency because “[g]overnment should provide citizens with information about what their government is doing so that government can be held accountable.”¹¹ The Commission thus has an obligation to the public and to Leachco to discuss matters related to its recall action against the Podster. To the extent the Commission has viable privilege objections, it may raise those objections during the deposition and instruct the witness not to discuss. But the Commission cannot refuse to testify at all based on its prediction that the deposition will necessarily involve only privileged information. This objection, too, lacks merit.

¹⁰ *See* <https://www.cpsc.gov/s3fs-public/CPSCRecallHandbookSeptember2021.pdf>, last visited Mar. 5, 2023.

¹¹ *See* <https://www.cpsc.gov/Business--Manufacturing/open-gov>, last visited Mar. 5, 2023.

CONCLUSION

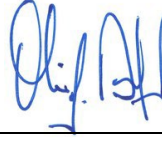
The Commission's objections to Ms. Kish's deposition are not only baseless, but the Commission knows they are baseless, as Leachco served a Notice of "Fact Discovery" and gave the Commission several opportunities to schedule her deposition. Further, the Commission's own Rules of Practice authorize the deposition of the Commission in its agency capacity. While it can assert privilege and other objections during that deposition, the Commission may not avoid the deposition altogether. The Court should overrule the Commission's Objections, order Ms. Kish to appear for her deposition on March 7, 10, 14, or 17, and order the Commission to designate a witness (or witnesses) to testify on March 16, as noticed.

If a hearing would assist the Court in resolving this matter, Leachco respectfully asks that a hearing be held as soon as possible because of the looming March 20 fact-discovery deadline.

* * *

DATED: March 6, 2023.

Respectfully submitted,



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Counsel for Respondent Leachco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2023, I served, by electronic mail, the foregoing upon all parties of record in these proceedings:

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

 Oliver J. Dunford
Counsel for Respondent Leachco, Inc.

**LEACHCO, INC.'S RESPONSE TO THE COMMISSION'S OBJECTIONS TO
CERTAIN DEPOSITIONS AND REQUEST FOR AN IMMEDIATE HEARING**

EXHIBIT A

From: [Oliver J. Dunford](#)
To: [Ruff, Brett](#); [Thomas, Rosalee](#); [ODonnell, Caitlin](#); [Rogal, Michael](#); [Millett, Frederick](#); [Reyes, Gregory](#)
Cc: [John F. Kerkhoff](#); [Frank Garrison](#)
Bcc: [Jessica Thompson](#); [Katherine Turnbull](#)
Subject: RE: In the Matter of Leachco, Inc., CPSC Docket No. 22-1
Date: Wednesday, February 22, 2023 5:21:00 PM
Attachments: [image001.png](#)

Brett,

We will depose Zachary Foster, Celestine Kish, Hope Nesteruk, Christopher Nguyen, and Suad Wanna Nakamura during the weeks of March 6 and 13. We will also depose the CPSC in its agency capacity, and we will serve a notice with topics.

The depositions will be conducted at our office in Arlington, Virginia.

Would you please let me know which dates are best for these depositions.

Thank you,
Oliver

Oliver J. Dunford | Senior Attorney
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4440 PGA Blvd., Suite 307 | Palm Beach Gardens, FL 33410
916.503.9060 (Direct) | 216.702.7027 (Cell)



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FOUNDATION**

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From: Ruff, Brett <BRuff@cpsc.gov>
Sent: Wednesday, January 25, 2023 5:38 PM
To: Oliver J. Dunford <ODunford@pacificlegal.org>; Thomas, Rosalee <RBThomas@cpsc.gov>; ODonnell, Caitlin <CODonnell@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>
Cc: John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>
Subject: RE: In the Matter of Leachco, Inc., CPSC Docket No. 22-1

Oliver,

Please be advised that Ms. Rauchschalbe no longer works for the CPSC. When you have decided which CPSC employees to depose and the timeframe during which you would like to do so, let us know and we can discuss scheduling the depositions.

Brett Ruff
Trial Attorney
[U.S. Consumer Product Safety Commission](#)

Division of Enforcement and Litigation | Office of Compliance and Field Operations
4330 East West Highway | Bethesda, MD 20814

From: Oliver J. Dunford <ODunford@pacificlegal.org>

Sent: Wednesday, January 25, 2023 1:46 PM

To: Ruff, Brett <BRuff@cpsc.gov>; Thomas, Rosalee <RBThomas@cpsc.gov>; O'Donnell, Caitlin <CODonnell@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>; Millett, Frederick <FMillett@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Ippolito, Leah <Lippolito@cpsc.gov>; Murphy, Mary <MMurphy@cpsc.gov>; Kaye, Robert <RKaye@cpsc.gov>

Cc: John F. Kerkhoff <JKerkhoff@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>

Subject: In the Matter of Leachco, Inc., CPSC Docket No. 22-1

Counsel,

I've attached Leachco's First Set of Requests for Admission, Second Set of Requests for the Production of Documents, and Second Set of Interrogatories.

Also, in light of the Commission's January 20, 2023 production, I remind Counsel of the obligation to supplement, as necessary, the Commission's responses to Leachco's earlier interrogatories and document requests.

Finally, while we have not made any final decisions, we intend to depose one or more of the following individuals: Zachary Foster, Celestine Kish, Hope Nesteruk, Christopher Nguyen, Renae Rauchschalbe, and Suad Wanna Nakamura. We can discuss mutually convenient dates and times.

Thank you,
Oliver

Oliver J. Dunford | Senior Attorney

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<http://www.cpsc.gov/en/Newsroom/Subscribe> ****!!

**LEACHCO, INC.'S RESPONSE TO THE COMMISSION'S OBJECTIONS TO
CERTAIN DEPOSITIONS AND REQUEST FOR AN IMMEDIATE HEARING**

EXHIBIT B

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

**COMPLAINT COUNSEL’S SECOND SUPPLEMENTAL RESPONSES
TO RESPONDENT’S FIRST SET OF INTERROGATORIES TO
CONSUMER PRODUCT SAFETY COMMISSION**

Pursuant to 16 C.F.R. § 1025.32, Complaint Counsel respectfully submits its second supplemental responses (“Responses”) to Respondent Leachco, Inc.’s (“Respondent”), First Set of Interrogatories to Consumer Product Safety Commission (“Interrogatories”).

PRELIMINARY STATEMENT

Complaint Counsel hereby incorporates by reference its Preliminary Statement set forth in Complaint Counsel’s Objections and Responses to Respondent’s First Set of Interrogatories to Consumer Product Safety Commission, dated May 13, 2022.

GENERAL OBJECTIONS

Complaint Counsel hereby incorporates by reference its General Objections set forth in Complaint Counsel’s Objections and Responses to Respondent’s First Set of Interrogatories to Consumer Product Safety Commission, dated May 13, 2022.

Subject to and without waiving those objections, Complaint Counsel provides the following Responses:

FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 1:

Subject to and without waiver of the foregoing general and specific objections, Complaint Counsel states that the following individual also assisted in responding to these Interrogatories: Frank Robert Perilla, Paralegal Specialist, Office of Compliance and Field Operations, Division of Enforcement and Litigation; Assisted in collecting documents and information potentially responsive to the Discovery.

Complaint Counsel reiterates its objection that this Interrogatory seeks premature expert discovery. Complaint Counsel will identify the expert witnesses it expects to call at the hearing in this matter in accordance with the Court’s September 16, 2022 Order on Prehearing Schedule and will amend these responses in accordance with 16 C.F.R. § 1025.31(f), as appropriate.

INTERROGATORY NO. 2: Identify any Person who was a witness to or has knowledge of the facts, circumstances and events that are related to the relief requested in the Complaint, or who otherwise has knowledge relevant to the issues in this case and identify any Documents concerning, involving or in any way related to your response.

RESPONSE TO INTERROGATORY NO. 2:

Complaint Counsel objects to this Interrogatory and states it is overly broad, vague, and ambiguous in its use of the phrases “concerning, involving or in any way related to your response” and “any Person who was a witness to or has knowledge of the facts, circumstances and events that are related to the relief requested in the Complaint, or who otherwise has knowledge relevant to the issues in this case.” Complaint Counsel interprets the latter phrase to mean individuals with knowledge of the facts alleged within the Complaint, including CPSC staff members who were the principal participants concerning CPSC File Nos. PI210002 and CA220007. Complaint Counsel also objects to this Interrogatory on the grounds it constitutes premature expert discovery. Complaint Counsel will identify the expert witnesses it expects to

call at the hearing in this matter pursuant to the Court's oral April 22, 2022 Scheduling Order and will amend these Responses in accordance with 16 C.F.R. § 1025.31(f), as appropriate.

Subject to and without waiver of the foregoing general and specific objections, Complaint Counsel states that information of the type sought by this Interrogatory is contained within, or can be derived from, the various documents produced by Complaint Counsel in this matter, including the In-Depth Investigation Reports ("IDIs") and other incident data Complaint Counsel has produced or will produce to Respondent, or from information that is already within Respondent's own files, and the burden of deriving or ascertaining the information is substantially the same for Respondent as it is for Complaint Counsel. Further responding, Complaint Counsel states that, other than Complaint Counsel and attorneys within the Division of Enforcement and Litigation, and staff who will be designated as experts, the following members of CPSC staff were the principal participants concerning CPSC File Nos. PI210002 and CA220007 and may have information of the type sought by this Interrogatory:

- a) Rana Balci-Sinha, Director, Engineering Sciences Division of Human Factors, CPSC.
- b) Kiara Beverly, former Compliance Officer, Office of Compliance and Field Operations, CPSC.
- c) Michelle Donofrio, Internet Investigative Analyst; Office of Compliance and Field Operations, eCommerce, Surveillance, Analysis & Field Enforcement ("eSAFE"), CPSC
- d) Zachary Foster, Industrial Engineer, Engineering Sciences Division of Human Factors, CPSC.
- e) Craig Genievich; Internet Investigative Analyst, Office of Compliance and Field Operations, eSAFE, CPSC.

- f) Celestine Kish, Engineering Psychologist, Engineering Sciences Division of Human Factors, CPSC.
- g) Mark Kumagai, Assistant Executive Director for Engineering Sciences, Office of Hazard Identification and Reduction, CPSC.
- h) Stefanie Marques, Director, Division of Pharmacology and Physiology Assessment, Health Sciences Directorate, CPSC.
- i) Hope Nesteruk, Program Area Risk Manager, Risk Management Group, Office of Hazard Identification and Reduction, CPSC; former Engineer, Engineering Sciences Mechanical and Combustion Division, CPSC.
- j) Chris Nguyen, Program Specialist, Small Business Ombudsman Office, CPSC; former Compliance Officer, Office of Compliance and Field Operations, CPSC.
- k) Caroleene Paul, Director, Engineering Sciences Mechanical and Combustion Division, CPSC.
- l) Adam Suchy, Mathematical Statistician, Directorate of Epidemiology, CPSC.
- m) Suad Wanna-Nakamura, Physiologist, Health Sciences Directorate, CPSC.

FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 2:

Subject to and without waiver of the foregoing general and specific objections, Complaint Counsel reiterates its objection that this Interrogatory seeks premature expert discovery. Complaint Counsel will identify the expert witnesses it expects to call at the hearing in this matter in accordance with the Court's September 16, 2022 Order on Prehearing Schedule and will amend these responses in accordance with 16 C.F.R. § 1025.31(f), as appropriate.

For the Responses:

I, Brett Ruff, affirm that the foregoing First Amended Responses to Respondent's First Set of Interrogatories to Consumer Product Safety Commission are true and correct to the best of my knowledge, information, and belief.

Executed on this 24th day of February, 2023

/s/ Brett Ruff
Brett Ruff
Trial Attorney
Division of Enforcement and Litigation
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission

For the Objections:

Dated this 24th day of February, 2023

/s/ Brett Ruff
Gregory Reyes, Supervisory Attorney
Brett Ruff, Trial Attorney
Caitlin O'Donnell, Trial Attorney
Michael J. Rogal, Trial Attorney

Division of Enforcement and Litigation
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7809

Complaint Counsel for
U.S. Consumer Product Safety Commission

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2023, I served the foregoing COMPLAINT COUNSEL'S SECOND SUPPLEMENTAL RESPONSES TO RESPONDENT'S FIRST SET OF INTERROGATORIES upon Respondent as follows:

By email to Counsel for Respondent:

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

John F. Kerkhoff
Frank D. Garrison
Pacific Legal Foundation
3100 Clarendon Boulevard, Suite 610
Arlington, VA 22201
Email: JKerkhoff@pacificlegal.org
FGarrison@pacificlegal.org

/s/ Brett Ruff
Brett Ruff
Complaint Counsel for
U.S. Consumer Product Safety Commission

**LEACHCO, INC.'S RESPONSE TO THE COMMISSION'S OBJECTIONS TO
CERTAIN DEPOSITIONS AND REQUEST FOR AN IMMEDIATE HEARING**

EXHIBIT C

From: [Reyes, Gregory](#)
To: [Oliver J. Dunford](#); [Frank Garrison](#); [John F. Kerkhoff](#)
Cc: [Ruff, Brett](#); [Rogal, Michael](#)
Subject: RE: In the Matter of Leachco, Inc., CPSC Docket No. 22-1
Date: Monday, February 27, 2023 10:12:20 AM
Attachments: [image001.png](#)

Counsel:

We disagree with your reading of the schedule. The Order on Prehearing Schedule states that February 2, 2023 was the last day to serve written discovery. You do not get to revise otherwise improper requests after the deadline for filing written discovery. There is no motion to compel pending on these RFAs, so we do not think the parties are “effectively” at this stage.

Regarding depositions, you still have not provided a list of topics for your proposed “agency deposition.” Again, and as noted in my email below, we cannot even begin to consider such a request, much less identify a person and track down availability, without a potential list of topics. If you would like us to consider that request, we again request a potential list of topics. We believe that your unilateral notice of such a deposition would be improper without additional information on your proposed topics.

For Ms. Kish, we can agree to her deposition, ***provided that***, you agree to ask only questions regarding “facts related to this case” not acquired or developed in anticipation of litigation or for trial. If you delve into areas of her expert testimony we will object and advise her not to answer, based on her designation as an expert that will be providing written testimony in accordance with the Order on Prehearing Schedule. If you agree to this, let us know and we can ask Ms. Kish for her availability.

Regards,
Greg

Gregory M. Reyes

Supervisory Attorney, Division of Enforcement and Litigation

[U.S. Consumer Product Safety Commission](#) | Office of Compliance and Field Operations

4330 East West Highway | Bethesda, MD 20814

Office: (301) 504-7220 | **Mobile:** (301) 787-1751

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From: Oliver J. Dunford <ODunford@pacifical.org>

Sent: Monday, February 27, 2023 8:07 AM

To: Reyes, Gregory <GReyes@cpsc.gov>; Ruff, Brett <BRuff@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>

Cc: Frank Garrison <FGarrison@pacifical.org>; John F. Kerkhoff <JKerkhoff@pacifical.org>

Subject: RE: In the Matter of Leachco, Inc., CPSC Docket No. 22-1

Counsel,

With respect to the RFAs, we were following Judge Young's advice to reduce and/or revise our requests. And we disagree that the deadline for serving written requests prevents the parties from considering revisions, particularly as the fact discovery deadline is still three weeks away. Further, that deadline pursuant to the Court's schedule is expressly subject to the resolution of any motions to compel, which is effectively where the parties are here. In any event, we will file our response to your Motion for Protective Order.

Thank you for identifying potential deposition dates. We will be issue notices. Your objections to Ms. Kish and an agency deposition are improper, however. First, Ms. Kish's name appears on relevant documents and, regardless, you identified her as a percipient witness in responses to Leachco's interrogatories. That she may also testify as an expert does not relieve your obligation to present her for a deposition regarding her knowledge of facts related to this case. We will, therefore, serve a notice for her deposition.

Similarly, your assertion that there is "no support" for an agency deposition is mistaken. Under 16 C.F.R. § 1025.35(b) parties may "take a deposition of another party." And Section 1025.35(i)(2) expressly contemplates depositions of "anyone who at the time of the taking of the deposition was an officer, director, managing agent, or person otherwise *designated to testify on behalf of a . . . governmental entity which is a party to the proceedings.*" The Commission is, of course, "another party" (§1025.35(b)) and a "party to the proceeding" (§1025.35(i)(2)), and we are entitled to depose "an officer, director, managing agent, or person otherwise designated to testify on behalf of" the Commission. We will, therefore, serve a notice for this deposition.

Thank you,
Oliver

Oliver J. Dunford | Senior Attorney
Pacific Legal Foundation
4440 PGA Blvd., Suite 307 | Palm Beach Gardens, FL 33410
916.503.9060 (Direct) | 216.702.7027 (Cell)



**PACIFIC LEGAL
FOUNDATION**

Defending Liberty and Justice for All.

From: Reyes, Gregory <GReyes@cpsc.gov>

Sent: Friday, February 24, 2023 3:03 PM

To: Oliver J. Dunford <ODunford@pacificlegal.org>; Frank Garrison <FGarrison@pacificlegal.org>; John F. Kerkhoff <JKerkhoff@pacificlegal.org>
Cc: Ruff, Brett <BRuff@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>
Subject: RE: In the Matter of Leachco, Inc., CPSC Docket No. 22-1

Counsel:

Regarding the RFAs, we plan on serving our responses today as noted in our motion. If you plan on withdrawing certain RFAs, you can alert the judge that you are doing so in your Monday filing. As you know, the deadline for serving written discovery has passed, so we will not agree to the serving of additional or revised RFAs.

Regarding depositions, we have been tracking down the availability of CPSC staff you identified in your email sent late Wednesday.

Here is the availability for the following CPSC staff members:

Zachary Foster – March 8
Christopher Nguyen – March 9
Suad Wanna-Nakamura – March 13
Hope Nesteruk – March 15

For Celestine Kish, we plan on designating her as an expert and thus object to her deposition. As you know, the Rules of Practice limit discovery for experts and depositions are not a permitted type. See 16 C.F.R. § 1025.31(c)(4). We will provide Ms. Kish's expert testimony in accordance with the Judge's schedule and you will have an opportunity to conduct cross examination during the hearing.

We also do not think an "agency deposition" is appropriate, as there is no support in the Rules of Practice for such a deposition. In any event, without additional information on the types of topics you are considering, we are unable to even properly consider such a request.

Regards,
Greg

Gregory M. Reyes
Supervisory Attorney, Division of Enforcement and Litigation
[U.S. Consumer Product Safety Commission](#) | Office of Compliance and Field Operations
4330 East West Highway | Bethesda, MD 20814
Office: (301) 504-7220 | **Mobile:** (301) 787-1751

Follow Us: [Facebook](#), [Twitter](#), [Instagram](#), [YouTube](#)

From: Oliver J. Dunford <ODunford@pacificlegal.org>

Sent: Friday, February 24, 2023 11:17 AM

To: Ruff, Brett <BRuff@cpsc.gov>; Reyes, Gregory <GReyes@cpsc.gov>; Rogal, Michael <MRogal@cpsc.gov>

Cc: John F. Kerkhoff <JKerkhoff@pacifical.org>; Frank Garrison <FGarrison@pacifical.org>

Subject: In the Matter of Leachco, Inc., CPSC Docket No. 22-1

Counsel,

Two things. First, in light of Judge Young's comments about Leachco's RFAs, we will withdraw our pending set of RFAs and serve (no later than March 3) a revised set of RFAs. Would you agree to file a Joint Notice to that effect? I don't know whether you'd prefer to withdraw your motion, ask the judge to withhold consideration, note that you may amend the motion after reviewing our revised RFAs or something else. In any event, because our response is otherwise due Monday, we'd like to get the Notice on file today or Monday.

Second, just a reminder to let us know available dates to depose CPSC personnel during the weeks of March 6 and March 13. We intend to conduct the agency deposition last (March 16 or 17) but, otherwise, we are willing to accommodate schedules. We intend to serve notices Monday.

If you'd like to talk about any of this, I'm available all day today.

Thank you,
Oliver

Oliver J. Dunford | Senior Attorney

Pacific Legal Foundation

4440 PGA Blvd., Suite 307 | Palm Beach Gardens, FL 33410

916.503.9060 (Direct) | 216.702.7027 (Cell)



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*****!!! Unless otherwise stated, any views or opinions expressed in this e-mail (and any attachments) are solely those of the author and do not necessarily represent those of the U.S. Consumer Product Safety Commission. Copies of product recall and product safety information can be sent to you automatically via Internet e-mail, as they are released by CPSC. To subscribe or unsubscribe to this service go to the following web page:

<http://www.cpsc.gov/en/Newsroom/Subscribe> *****!!!

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*****!!! Unless otherwise stated, any views or opinions expressed in this e-mail (and any attachments) are solely those of the author and do not necessarily represent those of the U.S. Consumer Product Safety Commission. Copies of product recall and product safety information can be sent to you automatically via Internet e-mail, as they are released by CPSC. To subscribe or unsubscribe to this service go to the following web page:
<http://www.cpsc.gov/en/Newsroom/Subscribe> *****!!!

**LEACHCO, INC.'S RESPONSE TO THE COMMISSION'S OBJECTIONS TO
CERTAIN DEPOSITIONS AND REQUEST FOR AN IMMEDIATE HEARING**

EXHIBIT D

Submitted for *in camera* review.

**LEACHCO, INC.'S RESPONSE TO THE COMMISSION'S OBJECTIONS TO
CERTAIN DEPOSITIONS AND REQUEST FOR AN IMMEDIATE HEARING**

EXHIBIT E

From: [Oliver J. Dunford](mailto:Oliver.J.Dunford)
To: mmurphy@cpsc.gov; rkaye@cpsc.gov; lippolito@cpsc.gov; bruff@cpsc.gov; rbthomas@cpsc.gov; codonnell@cpsc.gov; mrogal@cpsc.gov; fmillett@cpsc.gov; greyes@cpsc.gov
Cc: [Frank Garrison](#); [John F. Kerkhoff](#); [Oliver J. Dunford](#)
Bcc: [Jessica Thompson](#); [Incoming Lit](#)
Subject: In the Matter of Leachco, Inc., CPSC Docket No. 22-1
Date: Monday, February 27, 2023 7:02:00 PM
Attachments: [Leachco Notice of Deposition - CPSC.pdf](#)
[image001.png](#)
[Leachco Notice of Deposition - Nesteruk.pdf](#)
[Leachco Notice of Deposition - Nguyen.pdf](#)
[Leachco Notice of Deposition - Foster.pdf](#)
[Leachco Notice of Deposition - Kish.pdf](#)
[Leachco Notice of Deposition - Wanna-Nakamura.pdf](#)

Counsel,

Here are Leachco's Deposition Notices. We have noticed Ms. Kish's deposition for March 7, but we can reschedule if Ms. Kish is unavailable that day.

Thank you,
Oliver

Oliver J. Dunford | Senior Attorney
Pacific Legal Foundation
4440 PGA Blvd., Suite 307 | Palm Beach Gardens, FL 33410
916.503.9060 (Direct) | 216.702.7027 (Cell)



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FOUNDATION**

Defending Liberty and Justice for All.

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

IN THE MATTER OF

LEACHCO, INC.

CPSC Docket No. 22-1

HON. MICHAEL G. YOUNG
PRESIDING OFFICER

**LEACHCO, INC.'S NOTICE OF FACT DEPOSITION
OF CELESTINE KISH**

Respondent Leachco, Inc., pursuant to 16 C.F.R. § 1025.35, notices the fact deposition of Celestine Kish, c/o Brett Ruff, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, concerning all matters related to CPSC Docket No. 22-1.

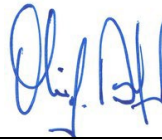
The deposition shall take place at 3100 Clarendon Blvd., Arlington, VA 22201, on March 7, 2023, beginning at 10:00 a.m. Eastern, or on a date and location mutually agreeable to the parties, before a person authorized to administer oaths, for the purposes of discovery and/or as evidence at the hearing of this matter, or for such other purposes as are permitted under the Commission's Rules of Practice for Adjudicative Proceedings. As stipulated by the parties, Federal Rule of Civil Procedure 30(d)(1) will govern the duration of the deposition. The taking of this deposition may be adjourned from day to day until completed and may occur over several days, if necessary, to provide the information requested.

This deposition will be transcribed, and the transcript of the deposition may be used at the hearing of this matter or for such other purposes as are permitted under the Commission's Rules of Practice for Adjudicative Proceedings.

The deposition will concern all matters related to CPSC Docket No. 22-1, as well as all matters related to the Complaint, the Answer, and any responses by Complaint Counsel to any of Leachco's discovery requests. These matters include, but are not limited to, Ms. Kish's educational and professional background; Ms. Kish's role at the CPSC; Ms. Kish's involvement concerning the Podster and/or Leachco; any communications or discussions Ms. Kish has had regarding the Podster and/or Leachco; any documents in Ms. Kish's custody or control related to the Podster and/or Leachco; Ms. Kish's knowledge and experience concerning infant consumer products.

Dated: February 27, 2023.

Respectfully submitted,



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

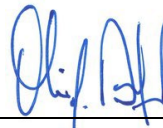
OLIVER J. DUNFORD
Florida Bar No. 1017791
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
Telephone: 916.503.9060
Fax: 916.419.7747
ODunford@pacificlegal.org

Counsel for Respondent Leachco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2023, I served, by electronic mail, the foregoing upon all parties of record in these proceedings:

| | |
|---|--|
| <p>Leah Ippolito, Supervisory Attorney Brett Ruff, Trial Attorney Rosalee Thomas, Trial Attorney Caitlin O'Donnell, Trial Attorney Michael Rogal, Trial Attorney Frederick C. Millett, Trial Attorney Gregory M. Reyes, Supervisory Attorney Complaint Counsel Office of Compliance and Field Operations U.S. Consumer Product Safety Comm'n Bethesda, MD 20814 lippolito@cpsc.gov bruff@cpsc.gov rbthomas@cpsc.gov codonnell@cpsc.gov mrogal@cpsc.gov fmillett@cpsc.gov greyes@cpsc.gov</p> | <p>Mary B. Murphy Director, Div. of Enforcement & Litigation U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 mmurphy@cpsc.gov</p> <p>Robert Kaye Assistant Executive Director Office of Compliance and Field Operations U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 rkaye@cpsc.gov</p> |
|---|--|



Oliver J. Dunford
Counsel for Respondent Leachco, Inc.

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

IN THE MATTER OF

LEACHCO, INC.

CPSC Docket No. 22-1

HON. MICHAEL G. YOUNG
PRESIDING OFFICER

**LEACHCO, INC.'S NOTICE OF DEPOSITION
OF CONSUMER PRODUCT SAFETY COMMISSION**

Respondent Leachco, Inc., pursuant to 16 C.F.R. § 1025.35, notices the deposition of Consumer Product Safety Commission, c/o Brett Ruff, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, concerning all matters related to CPSC Docket No. 22-1.


The deposition shall take place at 3100 Clarendon Blvd., Arlington, VA 22201, on March 16, 2023, beginning at 9:00 a.m. Eastern, or on a date and location mutually agreeable to the parties, before a person authorized to administer oaths, for the purposes of discovery and/or as evidence at the hearing of this matter, or for such other purposes as are permitted under the Commission's Rules of Practice for Adjudicative Proceedings. As stipulated by the parties, Federal Rule of Civil Procedure 30(d)(1) will govern the duration of the deposition. The taking of this deposition may be adjourned from day to day until completed and may occur over several days, if necessary, to provide the information requested.

This deposition will be transcribed, and the transcript of the deposition may be used at the hearing of this matter or for such other purposes as are permitted under the Commission's Rules of Practice for Adjudicative Proceedings.

The Consumer Product Safety Commission is requested to designate one or more persons to testify for the Commission concerning the subject matters described in Attachment A. Such person or persons are requested to bring with them to the deposition all documents relied on or referred to in preparing for the deposition unless such documents have previously been produced pursuant to other requests.

Dated: February 27, 2023.

Respectfully submitted,



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

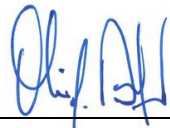
OLIVER J. DUNFORD
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Telephone: 916.503.9060
Fax: 916.419.7747
ODunford@pacificlegal.org

Counsel for Respondent Leachco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2023, I served, by electronic mail, the foregoing upon all parties of record in these proceedings:

| | |
|---|--|
| <p>Leah Ippolito, Supervisory Attorney Brett Ruff, Trial Attorney Rosalee Thomas, Trial Attorney Caitlin O'Donnell, Trial Attorney Michael Rogal, Trial Attorney Frederick C. Millett, Trial Attorney Gregory M. Reyes, Supervisory Attorney Complaint Counsel Office of Compliance and Field Operations U.S. Consumer Product Safety Comm'n Bethesda, MD 20814 lippolito@cpsc.gov bruff@cpsc.gov rbthomas@cpsc.gov codonnell@cpsc.gov mrogal@cpsc.gov fmillett@cpsc.gov greyes@cpsc.gov</p> | <p>Mary B. Murphy Director, Div. of Enforcement & Litigation U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 mmurphy@cpsc.gov</p> <p>Robert Kaye Assistant Executive Director Office of Compliance and Field Operations U.S. Consumer Product Safety Comm'n 4330 East West Highway Bethesda, MD 20814 rkaye@cpsc.gov</p> |
|---|--|



Oliver J. Dunford
Counsel for Respondent Leachco, Inc.

Attachment A

1. The facts and allegations in this proceeding.
2. Leachco, Inc. and the Podster.
3. The process(es) by which the Consumer Product Safety Commission (CPSC) examines and evaluates potential consumer-product defects, including but not limited to all laws, regulations, policies, practices, guidelines, and procedures considered or relied upon therefor.
4. The process(es) by which the CPSC determines which consumer products to pursue for recall and which ones it does not pursue, including but not limited to all laws, regulations, policies, practices, guidelines, and procedures considered or relied upon therefor.
5. The process(es) by which the CPSC determines that a “substantial product hazard” under 15 U.S.C. § 2064(a) exists, including but not limited to all laws, regulations, policies, practices, guidelines, and procedures considered or relied upon therefor.
6. Training and education requirements for technical staff.
7. The nature and scope of the CPSC’s allegations against Leachco.
8. Evidence supporting the allegations in CPSC’s Complaint.
9. CPSC’s requested relief in this proceeding and the basis(-es) therefor.
10. CPSC studies, tests, analyses, examinations, inspections, or other assessments, and the results thereof—including but not limited to In-Depth Investigation Reports, Product Safety Assessments, the CPSC’s annual Injuries and

Deaths Associated with Nursery Products Among Children Younger than Age Five—
concerning infant consumer products.

11. Aside from the work of expert witnesses retained by the Commission for this proceeding non-CPSC studies, tests, analyses, examinations, inspections, or other assessments, and the results thereof, concerning infant consumer products.

12. Communications concerning Leachco, the Podster, and infant-lounger products between or among any agent of the CPSC and third parties, including but not limited to, Members of Congress and/or their staff; other state or federal governmental agencies, including the President's administration; outside experts, specialists, or consultants, *e.g.*, Erin D. Mannen; lawyers, including Michael Comer; and any other individual.

**LEACHCO, INC.'S RESPONSE TO THE COMMISSION'S OBJECTIONS TO
CERTAIN DEPOSITIONS AND REQUEST FOR AN IMMEDIATE HEARING**

EXHIBIT F

Federal Register

Thursday
May 1, 1980

Part IV

Consumer Product Safety Commission

**Rules of Practice for Adjudicative
Proceedings**

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1025

Rules of Practice for Adjudicative Proceedings

AGENCY: Consumer Product Safety Commission.

ACTION: Final rules.

SUMMARY: In this document, the Consumer Product Safety Commission sets forth its final Rules of Practice for Adjudicative Proceedings, which shall govern the procedure in adjudicative proceedings arising under the Consumer Product Safety Act, the Flammable Fabrics Act, and in such other proceedings as the Commission may designate.

EFFECTIVE DATE: May 1, 1980.

FOR FURTHER INFORMATION CONTACT: Winston M. Haythe, Directorate for Compliance and Enforcement, Consumer Product Safety Commission, Washington, D.C. 20207, Telephone No. (301) 492-6633.

SUPPLEMENTARY INFORMATION: On July 23, 1974 the Consumer Product Safety Commission published in the Federal Register (39 FR 26843) proposed and interim rules of practice for adjudicative proceedings and received comments on that proposal. Thereafter, on June 21, 1977 the Commission published in the Federal Register (42 FR 31431) a revised set of proposed and interim rules of practice for adjudicative proceedings, 16 CFR Part 1025. The revisions in the second proposal were made in light of the comments received on the first proposal, as well as the experience gained by the Commission staff in trying cases pursuant to the initially published rules. The proposal of June 21, 1977 invited public comment by July 21, 1977. The comment period was extended until August 22, 1977 at the request of several interested persons who were unable to prepare comments by July 21 (42 FR 29089, August 2, 1977).

A basic intent of the Commission in the development of these final Rules of Practice has been to promulgate a single set of procedural rules which can accommodate both simple matters and complex matters in adjudication. The Commission believes this objective has been accomplished in these Rules. For this reason, the Commission has concluded that it will be unnecessary, and confusing, to have separate rules to govern procedures in adjudications to assess civil penalties. Therefore, the Commission is simultaneously revoking its interim Rules of Practice for

Expedited Proceedings ("Expedited Rules") (16 CFR Part 1026) and withdrawing the proposed rule (45 FR 27923, April 25, 1980).

As discussed in the notice revoking the Expedited Rules, the three public comments on 16 CFR Part 1026 stated that, among other things, procedural rights (e.g., discovery) would be limited in expedited proceedings for the assessment of civil penalties. Since the Commission is revoking the Expedited Rules and will conduct all administrative proceedings for the assessment of civil penalties under these final Rules of Practice, the concerns expressed by the public comments have been rendered moot. Thus, the final Rules of Practice, which are patterned on the Federal Rules of Procedure, will be used in all administrative matters, including civil penalty assessment hearings, except in those instances where the matter of a civil penalty is presented to a United States District Court in conjunction with an action by the Commission for injunctive or other appropriate relief. When the Commission proceeds against a person for injunctive or other appropriate relief in a United States District Court, the Commission may, if it so chooses, combine the assessment of a civil penalty with the injunctive application into a single case to be heard by the Court. However, the Commission retains the right to institute an administrative proceeding for the assessment of a civil penalty separate and distinct from any court action for an injunction against the same party. In either instance every affected party will be afforded the full panoply of procedural due process rights as guaranteed by the Constitution.

Discussion of Major Comments

Identification of Comments

In response to the Commission's proposal of June 21, 1977 comments were received from manufacturers, directly and through trade associations, an association of retailers and a law school-affiliated public interest organization.

In addition to the public comments on the proposed rules, a number of suggestions were made by members of the Commission staff, based upon their individual experiences in using the proposed rules in the course of administrative hearings.

As the "Section-By-Section Analysis of Comments" will show, the Commission has accepted some suggestions contained in the comments, thereby either amending or deleting

portions of the proposed rules, and has rejected others.

Commission Objectives in Development of Rules

The Commission has been guided by certain overall objectives in drafting rules which are to govern matters in adjudication. The primary objective is to achieve a just, speedy and inexpensive determination based upon the evidence, with a uniformity of treatment in all adjudications. Openness is another objective. From its inception in 1973, the Commission has conducted its regulatory activities in full public view and has encouraged, to the maximum extent, meaningful public participation in its regulatory efforts. These final Rules reflect the Commission's openness policy by requiring that matters in litigation be transacted in sessions which are open to the public to the fullest extent possible.

To encourage meaningful public participation in the adjudicative process, the Commission has provided in these Rules for a person to appear as a "participant." A participant shall have the privilege of participating in the proceedings to the extent of making a written or oral statement of position, and may file proposed findings of fact and conclusions of law, as well as a post hearing brief, with the Presiding Officer. See § 1025.17(b). A participant's statements shall be considered but not accorded the status of probative evidence. A participant may also participate in any appeal of a matter by complying with §§ 1025.53-54. In exchange for the limited participation just described, those provisions relieve participants from the necessity of complying with the more stringent legal requirements which are imposed on parties with full litigating rights. Additionally, if a member of the public, who is not a named party to the proceedings, desires to participate in the adjudication with the full range of litigating rights of any other party, one can be an "intervenor" if the requirements for intervenor status set forth in § 1025.17 are met.

Another major objective of the Commission in the development of these rules has been to insure that all matters in adjudication move forward in a timely manner because of the safety issues involved in the Commission's enforcement actions. Thus, while affording adequate protection to the Constitutional due process rights of every affected party, the Commission has imposed certain time restrictions within these Rules. For example, all discovery must be completed within 150 days after issuance of a complaint,

unless otherwise ordered by the Presiding Officer in exceptional circumstances. See § 1025.31(g).

These rules have been designed to accommodate both the simplest and the most complex types of cases. The vehicle for achieving such flexibility within a single set of adjudicative rules is to place broad discretion in the Presiding Officer who hears a matter in controversy. The granting of broad discretion to the Presiding Officer can be seen throughout the provisions of these rules.

Except as otherwise provided, these Rules have been patterned on the Federal Rules of Civil Procedure. Therefore, legal practitioners who are familiar with the United States court system will already be familiar with most, if not all, procedural requirements of the Commission. Additionally, the Federal Rules of Evidence are applicable to proceedings before the Commission, except as they may be relaxed by the Presiding Officer if the ends of justice will be better served in so doing. See § 1025.43(a).

The major overall objective of the Commission in developing these Rules has been to ensure that matters in adjudication be carried out in furtherance of the Commission's Congressional mandate "to protect the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. 2051(b)(1). The Commission believes that these final Rules of Practice for Adjudicative Proceedings achieve the Commission's objectives for matters in administrative litigation.

Section-by-Section Analyses of Comments

Significant changes have been made throughout these Rules as a result of public comments, staff recommendations, and/or upon the Commission's own initiative. The principal issues raised by the comments and the Commission's conclusions are as follows:

1. *Section 1025.3(e)*. Two comments suggested that the definition of the term "motion" be amended to make clear that only those persons with an interest in the subject of the motion would be entitled to respond to it. Section 1025.3(e) limits responses to motions to parties in a proceeding. Section 1025.3(f) defines the term "party" to mean any person named in the proceedings subject to the Rules or any intervenor. Section 1025.17(d) sets forth factors which a Presiding Officer shall consider in ruling on petitions to intervene, e.g., the nature and extent of the property, financial or other substantial interest in the

proceedings of the person seeking to intervene. Section 1025.17(a) provides that once granted intervenor status, such intervenor shall have the full range of litigating rights afforded to any other party. Since § 1025.3(e) already limits responses to parties to the proceedings, the Commission's view is that the commenters' objective has already been achieved and no further clarification within § 1025.3(e) is necessary.

2. *Section 1025.3(j)*. One comment requested that the term "Presiding Officer" be redefined to include only a member of the Commission or an administrative law judge. The Commission has decided to revise the definition of the term "Presiding Officer" to exclude Commissioners. Without this change a Commissioner could review on appeal the determinations he/she made during the hearing and the initial decision he/she prepared.

The Commission has decided it is better to exclude a member of the Commission from serving as a Presiding Officer than to exclude the Commissioner who serves as a Presiding Officer from participating as a member of the Commission in an appeal. If a Commissioner presides at an adjudication, prepares the initial decision and is excluded from the appellate process, the other Commissioners might nonetheless be influenced by the fact that a fellow Commissioner rendered the decision. In addition, there may be the public perception that that may happen. Also, by excluding the Commissioner that presided, the possibility of a tie Commission vote is greatly enhanced. To avoid these difficulties the definition has been changed to exclude members of the Commission.

3. *Sections 1025.11 (a) and (b)*. Although no public comment addressed these provisions which concern the commencement of proceedings, the Commission has amended the language in these sections to provide that adjudicative proceedings will be commenced, after the Commission has determined that a *prima facie* case has been established, by the issuance of a complaint bearing the signature of the individual delegated responsibility to sign the Complaint by the Commission. As proposed, §§ 1025.11 (a) and (b) provided that a complaint must be issued "by the Commission" and "signed by the Secretary on the seal of the Commission."

The final provision reflects the fact that the burden of proof in an administrative proceeding is on the Directorate for Compliance and Enforcement and to avoid the appearance that the Commission is both

prosecuting and deciding each adjudication.

4. *Section 1025.11(b)(3)*. As proposed, this section directs that the documents that accompanied the staff's recommendation to the Commission to initiate the proceeding, and that are obtainable under the Freedom of Information Act, 5 U.S.C. 552, be attached to the complaint. Two comments stated that this provision could authorize the attachment of trade secrets and other confidential commercial information to a complaint. The concerns expressed and suggestions raised in those comments are now moot since § 1025.11(c) has been changed in the final section to provide that only a list and summary of the documentary evidence shall be attached to the complaints.

5. *Section 1025.11(c) (§ 1025.11(d) as proposed)*. This section provides for the prompt publication in the Federal Register of the complaint after it is issued. One comment stated that a complaint should not be published in the Federal Register as provided in proposed § 1025.11(d) and two other comments expressed concern that a complaint could conceivably be published before a respondent had knowledge of the complaint. Although it is theoretically possible that a complaint could be published in the Federal Register prior to completion of service, the Commission believes such an occurrence is unlikely because of the necessary delay in publication resulting from the preparation of transmitted documents at the Commission and the time required at the Office of the Federal Register to prepare the complaint for publication. Despite the risk of delayed service upon the respondent, the Commission believes prompt publication is important, especially in view of possible class actions under § 1025.18, as well as to give notice of the complaint to potential participants or intervenors under § 1025.17.

6. *Section 1025.13*. Three comments object to the section authorizing the Presiding Officer to allow appropriate amendments and supplemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay. The commenters expressed concern that amendments to the administrative complaint could (1) alter the charges originally authorized by the Commission, thereby usurping the Commission's function, (2) allow extraneous issues to be introduced into an adjudication, and (3) hamper the respondent's ability to develop an adequate defense or conduct adequate

actions. The Commission intends to exclude respondent class actions under Fed.R.Civ.P. 23(b)(3). To make this clear, § 1025.18(d) has been amended as follows:

"(d) Upon motion of Complaint Counsel and as soon as practicable after the commencement of any proceedings brought as a class action, the Presiding Officer shall determine by order whether the action is a proper class action. It is a proper class action if the prerequisites of paragraph (a) are met and if the Presiding Officer finds that:

"(1) The prosecution of separate actions against individual members of the respondent class might result in (A) inconsistent or varying determinations with respect to individual members of the class which might produce incompatible or conflicting results, or (B) determinations with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members who are not parties to the proceedings or would substantially impair or impede the ability of the absent members to protect their interests; or

"(2) The Commission has acted on grounds generally applicable to the class, thereby making appropriate an order directed to the class as a whole. In reaching a decision, the Presiding Officer shall consider the interests of members of the class in individually controlling the defense of separate actions, the extent and nature of any proceedings concerning the controversy already commenced against members of the class, the desirability or undesirability of concentrating the litigation in one adjudication, and the difficulties likely to be encountered in the management of a class action, as well as the benefits expected to result from the maintenance of a class action."

In addition, one comment expressed concern that the respondent or respondents selected to represent the respondent class would be unable or unwilling to defend adequately the absent class members. This is an objection which should more properly be raised in the context of a particular adjudication and considered by the Presiding Officer on a case-by-case basis when he/she is asked to determine whether or not a class action may be maintained. It is an issue faced and addressed by United States district courts when they are requested to certify a class action. As noted elsewhere in this preamble, the Commission expects that interpretations of these Rules by the Presiding Officer will be guided by principles stated and developed in case law interpreting the Federal Rules of Civil Procedure.

The same comment observed that there is no procedure in these rules comparable to Fed.R.Civ.P. 23(c)(2) whereby a respondent may elect to be excluded from the respondent class and represent himself/herself/itself through counsel or otherwise. The amendment of

§ 1025.18(d) discussed above makes such a provision unnecessary. The procedure in Fed.R.Civ.P. 23(c)(2) allowing a respondent to "opt out" of the class applies only to class actions maintained under Fed.R. Civ.P. 23(b)(3). Since that section has not been incorporated into these rules, the procedure to "opt out" has not been included.

Furthermore, providing an "opt out" procedure from a defendant class would be contrary to the purpose of class actions. Presumably every respondent who could afford to "opt out" would do so, leaving a "shell" respondent class. Since sound reasons exist for not including such a provision, the Commission has accordingly not provided one.

The provisions of §§ 1025.18 (a) and (d) which require the Presiding Officer to consider certain factors when deciding whether to allow the class action to be maintained, together with the interlocutory appeal procedure, guarantee that a respondent class will not be maintained unless the Presiding Officer is satisfied that the representative will adequately represent the interests of the absent class members and that the action is one suitable for class action treatment. Finally, the rights of individual absent members are further protected by the provision which permits subclasses to be used and by the inherent authority of the Presiding Officer to order such notice or other actions as he/she may deem necessary for the orderly and fair progress of the case.

The Commission believes that the section in final form provides the due process envisioned by the Federal Rules of Civil Procedures and required by law.

11. *Section 1025.19.* One comment stated that the section on joinder of proceedings fails to provide a mechanism for a party whose rights would be prejudiced by joinder to prevent joinder or at least to present arguments. Section 1025.19 provides for consolidation upon motion by a party. Section 1025.23(c) provides for the filing of a written response to any written motion by an opposing party. Thus, a party that believes it will be prejudiced by joinder may express its opposition in a response to a motion for joinder. Hence, no change to § 1025.19 is deemed by the Commission to be warranted.

12. *Section 1025.21.* Three comments were received concerning prehearing conferences. One requested clarification as to the meaning of the phrase "except in unusual circumstances" as used in § 1025.21(a). The intent of the Commission is to establish the holding of a prehearing conference reasonably

soon after the commencement of an adjudication under these Rules of Practice as the customary procedure. The qualifying language "except in unusual circumstances" was included to permit the presiding officer discretion to vary the time or dispense with the hearing when unusual circumstances not now anticipated make such a conference impractical or valueless. The language of the qualifying clause has been altered to clarify its meaning.

The other two comments objected to the provision requiring an initial prehearing conference within approximately 50 days after publication of a complaint in the Federal Register. Section 1025.21(a) states that the purpose of the prehearing conference is "to consider" a number of relevant items, including those set forth within the Rule. The comments expressed concern as to whether or not a proper defense could be prepared within the 50-day time limit. The Commission anticipates that for highly complex cases, more than one prehearing conference might be held before a hearing on the merits of the cause. Thus, at an initial prehearing conference it would not be necessary in every case that each of the parties would be fully prepared on each of the items in § 1025.21(a). The initial prehearing conference is the proper forum for establishing schedules and insuring that adjudicated matters proceed in a timely fashion. The Commission therefore will adhere to the 50-day requirement as proposed.

One comment objected to § 1025.21(a)(9) as unreasonable and unnecessary in terms of limiting the number of witnesses. As stated earlier, the initial prehearing conference provides an opportunity to consider all relevant matters, and the number of witnesses is a matter of relevant concern. The purpose is not to control the presentation of a party's case or to limit the number of witnesses needed to prove any point, but rather to avoid unnecessary duplication of testimony and delay. Hence, no substantive change is being made in § 1025.21.

13. *Section 1025.22.* Although no public comment addressed this provision, the Commission has decided to amend the mandatory requirement for the filing by parties of prehearing briefs and to place the matter within the discretion of the Presiding Officer. In final form, § 1025.22 provides that parties may file prehearing briefs not later than 10 days prior to the hearing, unless otherwise ordered by the Presiding Officer. Since pretrial briefs serve as an aid to the Presiding Officer,

1025.31(c)(3) identifies the circumstances when material prepared in anticipation of litigation, other than the work of experts, is subject to discovery. These new sections, taken with the bases for granting protective orders in § 1025.31(d), reasonably protect the interests of the parties.

As proposed, § 1025.31(c)(2) excepted from discovery the documents which accompanied the staff's recommendation to the Commission as to whether a complaint should be issued. The purpose was to eliminate unnecessary discovery since under proposed § 1025.11(c) the same documents which were obtainable under the Freedom of Information Act were required to be attached to the complaint. Several comments objected to the exception from discovery. Those comments have been rendered moot by several changes in the final rules. Final § 1025.11(b)(3) (superseding proposed § 1025.11(c)) requires that only "[a] list and summary of documentary evidence supporting the charges" in the complaint (not the documents themselves) be attached to the complaint. Since the reason for the exception no longer exists, the exception in proposed § 1025.31(c)(2) has been deleted from the final rules.

Several comments addressed proposed § 1025.31(c)(3), which concerns discovery of experts. The commenters suggested that the provisions on discovery should be redrafted to prohibit discovery of experts who are not expected to appear at trial, except in extraordinary circumstances, such as those contemplated in Fed.R.Civ.P. 26(b)(4)(B).

As stated earlier in this preamble, these Rules have been patterned on the Federal Rules of Civil Procedure. In view of this fact and after consideration of the comments concerning the discovery of experts, the Commission has decided to substantially revise § 1025.31(c)(3) to bring it into accord with Fed.R.Civ.P. 26(b)(4) (A) and (B).

Section 1025.31(c)(3) as promulgated provides:

(3) Hearing Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (c)(1) of this section and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

(ii) Upon motion, the Presiding Officer may order further discovery by other means upon a showing of substantial cause and may exercise discretion to impose such conditions, if any, as are appropriate in the case.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."

Another comment suggested a revision to § 1025.31 to provide for the tender and payment of fees and expenses to follow the provisions of Fed.R.Civ.P. 26(b)(4)(C). That section provides that a party seeking discovery from an expert shall customarily pay the expert a reasonable fee, and in the case of an expert retained by another party but not expected to be called as a witness, the party seeking discovery shall pay a fair portion of the reasonable fees and expenses paid by the party that retained the expert.

The Commission agrees with the fundamental principle expressed in the comment that a party may be required to bear the cost of conducting discovery of another party's expert. The Commission has therefore added a new § 1025.31(c)(3)(C) to provide for the payment of experts. Rather than following Fed.R.Civ.P. 26(b)(4)(C), the Commission has patterned the new section on the Federal Trade Commission's Rules of Practice, 16 CFR 3.31(b)(4)(B)(iii). Section 1025.31(c)(3)(C) as promulgated reads as follows:

The Presiding Officer may require as a condition of discovery that the party seeking discovery pay the expert a reasonable fee, but not more than the maximum specified in 5 U.S.C. 3109 for the time spent in responding to discovery.

Unlike Fed.R.Civ.P. 26(b)(4)(C), no provision is included in these Rules for reimbursement to an attorney of fees paid to an expert who will not be called to testify. The Commission expects that on the rare occasion when such a circumstance occurs, payment will go directly to the expert based upon the time spent in complying with the discovery. Allocating the original fee would be difficult and cumbersome and the inclusion of a provision adequate to the task is not justified by the number of times such a situation is likely to arise.

Discretion whether to require payment of a fee, and to fix the amount of a reasonable fee is placed in the Presiding Officer. In an adjudication in which each party is seeking discovery of a like number of experts of an opposing party,

it may be reasonable to have each party bear the fees for its own experts. The amount of the expert's fee not only must be reasonable, but it cannot exceed the statutory maximum specified in 5 U.S.C. 3109.

Two comments objected to the provision to supplement responses after discovery is had, pursuant to § 1025.31(f). The Commission has not adopted the suggestion for two reasons. Any extra burden placed upon respondents and Complaint Counsel by the requirement to update responses to discovery is greatly outweighed by the practice that would ultimately evolve of making numerous, periodic and repetitive discovery requests to ascertain if there will be a change from a prior response as a result of information obtained since the last request. In addition, the exchange of all relevant data during the course of any enforcement proceeding helps assure that the result is fair, equitable and proper.

Five comments objected to the 150-day limitation upon discovery provided in § 1025.31(g). Prior to proposing these Rules, the Commission carefully considered the time limitations imposed, being aware of the due process rights of every respondent but at the same time being concerned that every enforcement matter proceed in a timely fashion. The comments have failed to persuade the Commission that the 150-day limitation is unreasonable. The commenters have suggested leaving the time limitation to the discretion of the Presiding Officer. While the suggestion is consistent with one of the basic principles embodied in these Rules, and the Presiding Officer is, in fact, authorized to increase or decrease the time period for discovery based upon the nature of the proceedings and the circumstances, the Commission believes inclusion of a 150-day time limit as a general rule will result in diligent efforts to complete discovery within the time allowed. Therefore the Commission has declined to adopt the suggested change in the final rule.

22. *Section 1025.33.* Although none of the public comments addressed the section on the production of documents, the Commission has decided to amend § 1025.33 to make the language more consistent with the wording of Fed.R.Civ.P. 34. The reason is to insure that judicial interpretations of Fed. R. Civ. P. 34 will be more directly applicable to administrative interpretations of the scope of § 1025.33.

23. *Section 1025.35.* Three comments were directed to the requirements that good cause be shown for the taking of a deposition and that leave of the

**LEACHCO, INC.'S RESPONSE TO THE COMMISSION'S OBJECTIONS TO
CERTAIN DEPOSITIONS AND REQUEST FOR AN IMMEDIATE HEARING**

EXHIBIT G

IN THE MATTER OF LEACHCO, INC.

DOCKET NO. 22-1

U.S. CONSUMER PRODUCT SAFETY COMMISSION

BETHESDA, MARYLAND

Wednesday, September 7, 2022

APPEARANCES:

Presiding Officer:

Michael G. Young, Administrative Law Judge

On behalf of the Complaint:

Brett Ruff, Esq.

Michael Rogal, Esq.

Rosalee Thomas, Esq.

Leah Ippolito, Esq.

U.S. Consumer Product and Safety Commission

Office of Compliance and Enforcement

4330 East West Highway, Suite 400

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On behalf of the Respondent:

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APPEARANCES (cont.):

On behalf of the Respondent (cont.):

John Kerkhoff, Esq.

Oliver Dunford, Esq.

Frank Garrison, Esq.

Pacific Legal Foundation

From the Office of the Secretary, CPSC:

Nina DiPadova, Esq.

Also Present:

Frank Robert Perilla, Paralegal

Christopher Jannace, Law Clerk

1 identify the documents that are allegedly privileged, I
2 don't know how we can do that.

3 JUDGE YOUNG: Well, I know one way that it
4 could be done. And maybe Mr. Ruff -- and I'm hopeful
5 about this -- in providing the 1500 pages, has thought
6 anew about the discovery process. But if not, Mr.
7 Ruff, at some point, if there is not a basis for this
8 complaint and there is a motion to dismiss it because
9 no factual basis has been established and it's
10 arbitrary and capricious, you're going to have to
11 produce an affidavit of supporting documents.

12 So I would suggest that you might anticipate
13 that and save us some steps, some trouble, some time
14 and some energy by avoiding that necessity because if
15 there is not a factual basis for the complaint having
16 being filed and that is challenged and you need to show
17 your cards, I'm going to make you show your cards, or
18 I'm going to dismiss the complaint.

19 MR. RUFF: We understand, Your Honor. And our
20 position is that -- that we have produced documents and
21 materials that support our allegations. I recognize
22 that there might be a difference in opinion on

**LEACHCO, INC.'S RESPONSE TO THE COMMISSION'S OBJECTIONS TO
CERTAIN DEPOSITIONS AND REQUEST FOR AN IMMEDIATE HEARING**

EXHIBIT H

Submitted for *in camera* review.

**LEACHCO, INC.'S RESPONSE TO THE COMMISSION'S OBJECTIONS TO
CERTAIN DEPOSITIONS AND REQUEST FOR AN IMMEDIATE HEARING**

EXHIBIT I

GLOSSARY FOR COMPLAINT COUNSEL'S PRIVILEGE LOG

| | |
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| Babich, Michael | Director, Division of Toxicology & Risk Assessment, CPSC |
| Baiocco, Dana | Commissioner, CPSC |
| Balci-Sinha, Rana | Director, Engineering Sciences Division of Human Factors, CPSC |
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| Boniface, Duane | Assistant Executive Director, Office of Hazard Identification & Reduction, CPSC |
| Boyle, Mary | Commissioner, CPSC; Former Executive Director, CPSC |
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| Cusey, William | Small Business Ombudsman, CPSC |
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| Midgett, Jonathan | Consumer Ombudsman, CPSC |
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GLOSSARY FOR COMPLAINT COUNSEL'S PRIVILEGE LOG

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***Attorney in the Office of General Counsel or Office of Compliance and Field Operations**