

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 13, 2023

In the Matter of

LEACHCO, INC.,

CPSC Docket No. 22-1

Respondent.

**ORDER GRANTING COMPLAINT COUNSEL'S OPPOSITION TO LEACHCO, INC.'S  
NOTICES OF DEPOSITION OF CELESTINE KISH AND CONSUMER PRODUCT  
SAFETY COMMISSION**

Respondent served depositions for five individuals and the Commission on February 27, 2023. Opp'n to Leachco, Inc.'s Notices of Depo. of Celestine Kish & Consumer Prod. Safety Comm'n, at 1 (Mar. 3, 2023). The noticed dates were March 7, 2023, for Ms. Kish, *id.* Ex. E, at 1, and March 16, 2023, for the Commission, *id.* Ex. F, at 1. Complaint Counsel opposes the notice to Ms. Kish for inadequate notice and for seeking improper fact deposition of an expert witness. *Id.* at 2. It also opposes the notice to the Commission for failure to comply with Commission procedural rules or meet the requirements of Rule 30(b)(6) of the Federal Rules of Civil Procedure ("FRCP"), if applicable. *Id.*

This Court granted Complaint Counsel's opposition in part—finding that Respondent failed the notice requirement for Ms. Kish—and deferred ruling on the remaining issues, ordering a conference for March 10, 2023. Order Granting in Part Compl. Counsel's Opp'n to Leachco, Inc.'s Notices of Depo. of Celestine Kish & Consumer Prod. Safety Comm'n & Order Scheduling Conference, at 1 (March 6, 2023). Respondent immediately filed an amended deposition notice for Ms. Kish, scheduled for March 17, 2023—meeting the notice requirement. Leachco, Inc.'s Am. Notice of Fact Depo. of Celestine Kish, at 1 (March 6, 2023).<sup>1</sup>

The Court convened a prehearing conference to address Complaint Counsel's motion. For the reasons set forth below, Complaint Counsel's opposition is **GRANTED**.

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<sup>1</sup> "Leachco submits this Amended Notice only to satisfy the 10-day-notice requirement. But Leachco does not intend that the Amended Notice avoids or otherwise "cures" the Commission's objections to the scope of Ms. Kish's testimony. Accordingly, Leachco stipulates that the Commission's Objections apply to this Amended Notice, and Leachco understands that the Amended Notice will be subject to the Court's final resolution of the Commission's Objections." Email from Oliver J. Dunford, Senior Attorney, Pacific Legal Foundation, to Alberta E. Mills, Commission Secretary, U.S. Consumer Product Safety Commission (Mar. 6, 2023; 2:13 p.m. ET).

**I. Celestine Kish May Be Deposed Once—Either as a Percipient Witness, or as an Expert Witness Upon a Showing of Substantial Cause.**

Complaint Counsel informed Respondent of its intent to designate Ms. Kish as an expert witness. *See* Leachco, Inc.’s Resp. to the Comm’n’s Objs. to Certain Depos. and Req. for an Immediate Hr’g, Ex. C (Mar. 6, 2023). Respondent has now sought to depose her as a percipient witness. It maintains that her deposition will concern:

[A]ll 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 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.

Am. Notice at 2.

Nothing in the Commission’s Rules designates a process for identification of experts, but the parties have agreed to an April 28, 2023, deadline for the provision of expert witness testimony in accordance with the CPSC’s rules. *See* 16 C.F.R. §1025.31(c)(4); Joint Proposed Revised Prehr’g Schedule, at 1 (Sept. 14, 2022). Respondent is therefore entitled to, by the established deadline, a response to interrogatories that identify the witness, state the subject matter, state the substance of facts and opinions, and summarize the grounds for each opinion. 16 C.F.R. § 1025.31(c)(4)(i)(A). This Court may order further discovery by other means—e.g., deposition—“upon a showing of substantial cause.” *Id.* § 1025.31(c)(4)(i)(B).

Respondent has not shown substantial cause for this Court to order a deposition at this time. It claims the Commission is using future disclosure of expert testimony to block Respondent’s right to obtain evidence. Resp. at 2. Otherwise, it only asserts that it complied with the notice requirement via its January 2023 notification of intent to depose certain individuals, *id.* at 2–3, an argument this Court has rejected. Order at 1.

The parties agreed at conference that Ms. Kish could be called as a percipient witness, that Respondent had not intent to ask questions regarding her expert testimony, and that any such question could properly be objected to during deposition. This Court clarified that she will not be deposed twice—once as a fact witness, and once as an expert witness following disclosure of the required information on or by the deadline. Respondent may wait until after the expert testimony deadline and move to demonstrate substantial cause to depose Ms. Kish as an expert witness. Alternatively, Ms. Kish can be deposed later as a percipient witness in the normal course of discovery.

## **II. Topics Proposed by Respondent for Deposition of the Commission Would Require Provision of Privileged Information, and Such Discovery is also Improper Before Complaint Counsel Responds to Requests for Admission.**

### **A. The Commission is within the class of “persons” who may be deposed.**

Complaint Counsel asserted that Respondent has disguised a deposition notice that is impermissible under Commission Rules as one under Rule 30(b)(6) of the FRCP. Opp’n at 2. Respondent responded that such a deposition is allowed by Commission Rules. *See* Resp. at 4–5 (citing 16 C.F.R. § 1025.3(f),(g), .35(a),(i)(2)).<sup>2</sup> Sections .3(f) and (g) enable deposing a named person, including a government entity; the Commission is a named party. *See* Resp. at 5 (citing Compl. ¶ 4). This necessarily means that a person would be designated to testify for the Commission if it were called.

Respondent therefore need not rely on FRCP 30(b)(6). This Court, however, agrees that Commission Rules were patterned on the FRCP, and interpretations should be guided by case law interpreting the FRCP. *See* Resp. at 6; *Rules of Practice for Adjudicatory Proceedings*, 45 Fed. Reg. 29,205, 29,207, 29,209 (May 1, 1980). Per one of Complaint Counsel’s cited cases, “[A] Rule 30(b)(6) deposition of [an agency] is not intrinsically improper.” *EEOC v. Sources One Staffing, Inc.*, No. 11 C 6754, 2013 WL 25033, at \*4 (N.D. Ill. Jan. 2, 2013). By either standard, Respondent’s notice to depose the Commission is not immediately improper, though the proposed topics may cause it to be.

### **B. The proposed topics are inappropriate either because they necessarily seek privileged information, or because the information can be obtained in a more efficient manner.**

The Federal Rules require a notice to “describe with reasonable particularity the matters for examination.” Fed. R. Civ. P. 30(b)(6) (2020). There is no analogous provision in the Commission Rules. The described purpose, however, demonstrates that such notice is pragmatically necessary if an agency is to be deposed. The Federal Rule was amended to respond to problems with ambiguously worded matters:

Candid exchanges about the purposes of the deposition and the organization’s information structure may clarify and focus the matters for examination, and *enable the organization to designate and to prepare an appropriate witness or witnesses*, thereby avoiding later disagreements.

*Id.*, advisory committee’s note to 2020 amendment (emphasis added). Similarly, if the Commission is to be deposed, the proposed matters must be adequately described to enable the designation and preparation of a witness on the Commission’s behalf.

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<sup>2</sup> It is unnecessary to determine whether section .35(i)(2), governing the *use of* deposition of a person designated to testify on behalf of a governmental entity, necessarily contemplates allowing the Commission to be deposed. It is sufficient that the Commission is a party to the action under the plain language of section .3.

**1. To properly respond to many of the proposed topics, any person designated for deposition on behalf of the Commission to respond to the proposed topics would be an attorney or be prepared by one, implicating the work product or attorney-client privileges.**

The available case law overwhelmingly supports the assertion that deposition of an organization should be denied where the deponent would necessarily have to provide legal theories, what facts attorneys believe apply to the issues, and how counsel intends to marshal facts to support its position. *United States ex rel. Baklid-Kuns v. Halifax Hosp. Med. Ctr.*, No. 6:09-cv-1002-Orl-31TBS, 2012 WL 3537070, at \*4 (M.D. Fla. Aug. 14, 2012); see *Sources One Staffing, Inc.*, 2013 WL 25003, at \*4; *FTC v. U.S. Grant. Res., LLC*, No. Civ.A.04-596, 2004 WL 1444951, at \*10–11 (E.D. La. June 25, 2004) (citing *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991); *Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 721 (5th Cir. 1985)) (denying discovery of facts relevant to the defense to claims because “[o]pposing counsel may rarely, if ever, use discovery mechanisms to obtain the research, analysis of legal theories, mental impressions, and notes of an attorney acting on behalf of his client in anticipation of litigation”).

It is inappropriate for representative witnesses to explain why facts support or rebut allegations as it requires interpretation of facts and legal decisions. See *EEOC v. Tex. Roadhouse, Inc.*, No. 11-11732-DJC, 2014 WL 4471521, at \*3 (D. Mass. Sept. 9, 2014) (citing *EEOC v. Am. Int’l Grp., Inc.*, No. 93 CIV. 6390 (PKL) RLE, 1994 WL 376052, at \*2–3 (S.D.N.Y. July 18, 1994) (“Rule 30(b)(6) witness does not have to answer questions relating to allegations in the complaint and possible defenses the defendant may have.”)). It is also inappropriate to delve into the sufficiency of an agency’s pre-suit investigation. *Sources One Staffing, Inc.*, 2013 WL 25003, at \*5 (citing *EEOC v. Caterpillar Inc.*, 409 F.3d 831 (7th Cir. 2005)).

Requests for Admission (“RFA”) Nos. 1 and 2 are fairly vague, but likely intend to elicit testimony regarding the nature of allegations and supporting evidence, like RFA Nos. 7 and 8, which are impermissible. RFA Nos. 3, 4, and 5 contemplate the processes by which the Commission investigates and necessarily involves privileged information regarding decisions and strategies.

**2. The appropriate information intended to be elicited by the proposed topics is available through requests for production or admission, or by other witnesses already deposed or scheduled to be deposed.**

Deposition of the Commission may be premature where the same information can be obtained from other witnesses or interrogatories or RFAs. See *EEOC v. Tex. Roadhouse, Inc.*, 2014 WL 4471521, at \*5 (finding that deposition is premature until completion of expert discovery); *Sources One Staffing, Inc.*, 2013 WL 25033 (quoting *Smithkline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 WL 116082, at \*9 (N.D. Ill. 2000)) (“[S]imilar information could readily have been obtained by the defendant ‘in a more efficient manner by propounding ‘standard’ interrogatories upon its opponent.’”).

To the extent that appropriate facts may be elicited from those RFAs noted above, or any of those not previously addressed, such information is available through more efficient means—depositions of technical personnel already scheduled or conducted, and requests for production (“RFP”) or admission. RFA No. 12 requests communications between the Commission and third parties. Any non-privileged communications may be obtained through RFP. This Court has not yet ruled on the Commission’s protective order motion regarding Respondent’s RFAs, but some of the topics are similar to that information requested there. It is therefore premature to permit deposition of the Commission before such information may be obtained otherwise.

### III. Conclusion

I **GRANT** Complaint Counsel’s opposition to the notice of deposition of Celestine Kish unless limited to prevent inquiry into areas of her expert testimony. Respondent may move to depose Ms. Kish as an expert witness with a showing of substantial cause.

I also **GRANT** Complaint Counsel’s opposition to the notice of deposition of the Commission.



Michael G. Young  
Administrative Law Judge

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