UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	CPSC DOCKET NO. 13-1 FOI
BABY MATTERS, LLC	)	
	)	HON. WALTER J. BRUDZINSKI
Respondent.	)	Administrative Law Judge

COMPLAINT COUNSEL'S RESPONSE TO PETITION TO INTERVENE ON BEHALF OF BRIAN THIEL AND KRISTINE MAKO

Petitioners Brian Thiel and Kristine Mako have sought to intervene or, in the alternative, to participate in the above captioned matter brought by Complaint Counsel seeking a determination that Respondent's infant recliners constitute a substantial product hazard within the meaning of Section 15 of the Consumer Product Safety Act (CPSA), as amended, 15 U.S.C. § 2064, and Section 15 of the Federal Hazardous Substances Act (FHSA), as amended, 15 U.S.C. § 1274.

The request to intervene should be denied because the Petitioners have not demonstrated the necessary factors required to be granted intervenor status. Complaint Counsel takes no position, however, on Petitioners' request to participate as a non-party participant.

ARGUMENT

The Petitioners Do Not Qualify as Intervenors

Under 16 C.F.R. § 1025.17, intervention is limited to petitioners who can "make a sufficient showing" that their full participation as a party – including a right to engage in discovery, depositions, motions, briefing, witness examination and cross examination as a party at a hearing – is justified and does not unduly burden or delay the proceeding. 16 C.F.R.

§ 1025.17(d). To intervene as a party, a petition must state: (i) "the specific aspect or aspects of the proceedings as to which the petitioner wishes to intervene," (ii) "the interest of the petitioner in the proceedings," (iii) "how the petitioner's interest may be affected by the results of the proceedings," and (iv) "any other reasons why the petitioner should be permitted to intervene as a party, with particular reference to the factors set forth in paragraph (d) of this section." 16 C.F.R. § 1025.17(a)(2).[1] Section 1025.17(d), in turn, lists eight factors that the Presiding Officer should consider in deciding whether to grant intervention:

> (1) The nature of the petitioner's interest, under the applicable statute governing the proceedings, to be made a party to the proceedings;
>
> (2) The nature and extent of the petitioner's interest in protecting himself/herself/itself or the public against unreasonable risks of injury associated with consumer products;
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> (3) The nature and extent of the petitioner's property, financial or other substantial interest in the proceedings;
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> (4) Whether the petitioner would be aggrieved by any final order which may be entered in the proceedings;
>
> (5) The extent to which the petitioner's intervention may reasonably be expected to assist in developing a sound record;
>
> (6) The extent to which the petitioner's interest will be represented by existing parties;
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> (7) The extent to which the petitioner's intervention may broaden the issues or delay the proceedings; and
>
> (8) The extent to which the petitioner's interest can be protected by other available means.

Under the rule, a proposed intervenor must state "the specific aspect or aspects of the proceedings as to which the petitioner wishes to intervene." 16 C.F.R. § 1025.17(a)(2)(i). Here,

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[1] The rules also require that anyone "who desires to participate as a party in any proceedings subject to these rules shall file a written petition for leave to intervene with the Secretary," 16 C.F.R. § 1025.17(a), and likewise that "any person who desires to participate in the proceedings as a non-party shall file with the Secretary a request to participate in the proceedings...." 16 C.F.R. § 1025.17(b). Although Petitioners have not filed any petition with the Secretary, *see* Declaration of Todd Stevenson at Exh. 1, a petition may be filed with the Secretary to participate as a non-party up until "commencement of the hearing." 16 C.F.R. § 1025.17(b)(1).

although Petitioners state that they have been affected directly by the Subject Products, they have not explained which "specific aspect or aspects of the proceeding" requires their participation as an intervenor. For example, Petitioners have not explained any need to engage in discovery or depositions as a party to the proceeding, or any need to call witnesses or cross examine witnesses at a hearing. Rather, they state that they have already gathered their own evidence and would offer general assistance "in developing a sound record" by providing the evidence gathered during their independent litigation. Petition at ¶ 4.[2] The Petitioners need not be granted intervenor status in order to assist in this regard. Petitioners are free to provide this information even if this Court declines to grant them full intervenor status. For example, non-party participants may provide a "written or oral statement of position" and "proposed findings of fact" without also participating in discovery and depositions, which could unduly complicate and delay the proceeding. 16 C.F.R. § 1025.17(b)(3).

The rules also require that a proposed intervenor state its interest in the proceedings and how its "interest may be affected by the results of the proceedings." 16 C.F.R. §§ 1025.17(a)(2)(ii) and (iii). Petitioners have stated an interest in seeing that Respondent does not continue to "refuse[] to make appropriate changes in the product (or recall it) in order to prevent additional deaths." Petition at ¶ 2. As Complaint Counsel is seeking an order that, among other things, Baby Matters stop sale of the Subject Products, offer consumers a full refund, and provide public notice of the hazard presented by the Subject Products – elements of a corrective action program that usually accompany a recall – no separate need requires Petitioner's intervention. Courts interpreting similar federal intervention rules have examined

[2] *See Thiel v. Baby Matters, LLC*, 2:11-cv-15112-AC-PJK (E.D. Mich.) (wrongful death action, discovery set to end in July 2013).

whether a proposed intervenor has shown "that the representation might be inadequate" and, failing that, have rejected proposed intervention where a proposed party "has offered nothing ... that would suggest that the current [party] would fail to represent its interests adequately." *Blount-Hill v. Ohio*, 244 F.R.D. 399, 404 (S.D. Ohio 2005). Here, Petitioners do not suggest that Complaint Counsel will fail to seek a recall of Respondent's products, and indeed that is what the Amended Complaint seeks; accordingly, intervention should be denied. *See, e.g., Martin v. Correction Corp. of America*, 231 F.R.D. 532, 538 (W.D.Tenn. 2005) ("prospective intervenors have the burden of showing that the parties may not adequately represent their interests," and "[i]f an applicant's interests in litigation are the same as the interests of one or more of the existing parties, adequate representation is assured.").

The rules also state that the Presiding Officer "shall consider, in addition to other relevant factors," the eight factors specified in 16 C.F.R. § 1025.17(d). The first two of those factors concern "[t]he nature of the petitioner's interest, under the applicable statute governing the proceedings, to be made a party to the proceedings" and "[t]he nature and extent of the petitioner's interest in protecting himself/herself/itself or the public against unreasonable risks of injury associated with consumer products...." 16 C.F.R. §§ 1025.17(d)(1) and (2). In addition to seeking a recall, Petitioners describe their interest as concerning "Baby Matters ... improperly continu[ing] to blame Petitioners and others for the death of their child" and asserting "that the death of Juliette Thiel was not its fault but rather the fault of Petitioners, among others." Petition ¶¶ 2-3. Although the issue of "blame" may be relevant to Petitioners' wrongful death matter and the determination of causation, "the applicable statute governing the proceedings" here is focused on whether Respondent's products constitute a "substantial product hazard" that "creates a substantial risk of injury to the public." 15 U.S.C. § 2064(a)(2). As such, Petitioners' interests

in establishing that the product caused the death of their infant child may diverge from the issues to be resolved in this proceeding.

The third and fourth factors of 16 C.F.R. §1025.17(d) also do not support granting leave to intervene. Petitioners do not allege a direct "property, financial or other substantial interest in these proceedings;" rather, they are engaged in separate litigation with Respondent to protect their own interests. 16 C.F.R. § 1025.17(d)(3). Petitioners likewise do not suggest that they "would be aggrieved by any final order" in this proceeding, as their interests in demonstrating that the Nap Nanny caused the death of their daughter are adequately protected through their own litigation. 16 C.F.R. § 1025.17(d)(4).

The fifth factor concerns whether "the petitioner's intervention may reasonably be expected to assist in developing a sound record...." 16 C.F.R. § 1025.17(d)(5). Although Petitioners have stated that they have "gathered evidence which could assist in fully developing the record of this matter," they may provide that evidence without being granted intervenor status. As the Commission recognized in promulgating these rules, the public may be granted "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" without having to intervene as a party, by acting as a non-party participant. 45 Fed. Reg. 29215, 29206 (May 1, 1980). The rules thus contemplate that non-parties may provide evidence without bogging down the proceeding with additional parties that would then have to "comply[] with the more stringent legal requirements which are imposed on parties with full litigating rights." *Id.*

The sixth and seventh factors concern "[t]he extent to which the petitioner's interest will be represented by existing parties" and "[t]he extent to which the petitioner's intervention may broaden the issues or delay the proceedings." 16 C.F.R. § 1025.17(d)(6) and (7). As stated

above, to the extent that Petitioners seek a recall of Respondent's products, Complaint Counsel is already seeking that relief. On the other hand, to the extent Petitioners' interests concern the issues of "blame" and "fault" relevant to their wrongful death matter, their intervention could unduly broaden the issues in this proceeding. As courts have recognized, once a petitioner is "allowed to intervene, it is presumed that it will seek discovery, file motions..., and, in the event this case goes to trial, seek to call and question witnesses and to enter evidence into the record. All of this will require the Plaintiffs and the Court to invest a significant amount of time and effort in response." *Blount-Hill* at 404. Moreover, while the rules governing this proceeding are streamlined "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," 45 Fed. Reg. at 29206, Petitioners' litigation is moving forward under a different timeline, with discovery not due to be completed until July 2013, a pretrial conference in November 2013, and no trial date set. *See* Scheduling Order in *Thiel v. Baby Matters, LLC* (Jan. 18, 2013), attached as Exhibit 2. If Petitioners' interest in their litigation is permitted to intersect with this proceeding, it could unnecessarily delay this proceeding. Such broadening of the issues and delay that may result likewise weighs against granting Petitioners intervenor status in this matter. 16 C.F.R. § 1025.14(d)(7).

On balance, weighing all of these factors set forth in 16 C.F.R. § 1025.17(d) demonstrates that Petitioners' interests can be protected with a remedy short of full intervention as a party to this proceeding, *see* 16 C.F.R. § 1025.17(d)(8), such as a request by Petitioners before the hearing to participate as a non-party participant.

CONCLUSION

For the reasons stated above, the Petition to Intervene should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing on all parties and participants of record in these proceedings by emailing a courtesy copy and by mailing, postage prepaid a copy to each on February 4, 2013.

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