

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
)	
BABY MATTERS LLC,)	
)	CPSC DOCKET No. 13-1
)	
Respondent.)	
)	
)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO
COMPEL CORRECTION AND RETRACTION AND FOR SANCTIONS**

COMES NOW Baby Matters LLC (“Respondent” or “Baby Matters”), by counsel, and submits this Memorandum of Points and Authorities in Support of its Motion to Compel Correction and Retraction and for Sanctions.

I. Introduction

The Consumer Product Safety Commission (the “Commission”), through its Office of Communications, is no stranger to the art of controlling the news cycle, including the timing of news releases to maximize their reach and impact. The Commission also understands that when it issues a recall press release announcing that selling or reselling a recalled consumer product is a violation of federal law, its message will have a powerful and, indeed, chilling effect on further distribution of the recalled product. There is nothing improper about these practices when carried out on the basis of truthful information. Here, however, the Commission has not been truthful, has attempted to manipulate the news cycle to maximize the impact of its falsehoods, and has, through its conduct, demonstrated that this administrative enforcement proceeding is a sham and that the Complaint should be dismissed.

II. Argument

Complaint Counsel initiated this proceeding on December 4, 2012, following months of protracted negotiations with Respondent, in which the Commission attempted to secure Respondent's agreement to enter into various Corrective Action Plans ("CAPs"). Every CAP proffered by the Commission put the future existence of the company into jeopardy. Over time, each proposed CAP became increasingly onerous in their threats to warn the public of the non-existent risks of harm involving the Nap Nanny[®] Chill[™] ("the Chill"), until, finally, the Commission demanded that the Respondent stop selling the entire Nap Nanny[®] line of products, including the Chill, the only product currently sold by Respondent. The Commission insisted on these CAPs using the same specious reasoning and questionable evidence cited in the Complaint.

Respondent refused the Commission's demands, offering several less restrictive remedies. These included a voluntary recall of the Generation One ("Gen1") and Generation Two ("Gen2") products, pursuant to which consumers owning such products could trade them in for a Chill at a steeply discounted price. Notwithstanding the fact that more than 100,000 Chill products had been sold and there had been not been a single incident involving injury to children when the Chill had been used according to warnings and instructions—labeling the Commission itself had previously approved—the Commission rejected Respondent's proposal. It threatened on three separate occasions to issue press releases warning the public to stop using the Nap Nanny[®] line of infant recliners (the "Subject Products") unless Respondent capitulated to its demands. Respondent refused to do so, and although the Commission never followed through on its threat to issue a recall press release, this administrative enforcement proceeding followed.

On December 27, 2012, the Commission issued a press release in which it trumpeted the voluntary cooperation of four retailers that had agreed to cease the sales of the Subject Products

while this suit is pending (the “Press Release”). A true and accurate copy of the Press Release is attached hereto at Exhibit A. The Press Release was issued at the beginning of the December 27 news cycle and distributed to news outlets with sufficient priority notice so that, when the public woke up on December 27, the news was one of the lead stories on many radio, television, newspaper and internet outlets. Indeed, throughout the day, the story continued to garner attention, and was the subject of continual blogging, internet commentary, and radio and television coverage.

The Press Release, however, contained language that was materially inaccurate in violation of Section 19 of the CPSA, 15 U.S.C.A. § 2068. At the bottom of the Press Release, the Commission affirmatively stated: “Under federal law, it is illegal to attempt to sell or resell this or any other recalled product.” *See* Ex. A. This statement was false.¹ As the Commission well knows, it is perfectly *legal* for retailers, resellers and consumers to sell, resell and purchase the Subject Products until such time as this Court enters an order recalling these products. Section 19 of the CPSA only makes it unlawful to sell or resell a product that is “subject to a voluntary corrective action taken *by the manufacturer* ...; subject to an order issued under section 12 or 15 of this Act or; a banned hazardous substance within the meaning of section 2(q)(1) of the Federal Hazardous Substances Act (15 U.S.C. 1261(q)(1).” 15 U.S. C.A. § 2068 (emphasis added). None of the conditions precedent in this section had been satisfied so as to

¹ The CPSC’s press releases are carefully crafted pieces of public advocacy intended to sway public opinion. For example, the Press Release states that “[s]ince the 2010 recall, CPSC has received an additional 70 reports of children nearly falling out of the product,” misleading consumers to believe that each of these incidents has occurred in a Chill model – the only model actively marketed by Respondent. Not only does Respondent vigorously deny the characterization of these reports as involving children “nearly falling out” of Nap Nanny products when in fact most of the reports involved infants merely turning sideways when improperly secured in the product’s harness, but these reports rarely involved the Chill, grossly exaggerating the perceived risk of harm in continuing the use of or purchasing the Chill. Yet, based on its contextual placement in the Press Release, consumers are given the false impression that most, if not all, of these incidents occurred while using the Chill.

make it unlawful to sell or resell Respondent's products at the time that the Commission issued its Press Release.²

Respondent timely informed Complaint Counsel of the existence of this misinformation and the violation of Section 19 of the CPSA, as well as the need to correct the error, by e-mail correspondence on December 27, 2012 at 2:56 p.m. A true and accurate copy of the e-mail correspondence sent from Raymond G. Mullady Jr. to Kelly Moore at 2:56 on December 27, 2012, is attached hereto as Exhibit C. Respondent demanded that the Commission "immediately issue a corrected press release informing consumers and the media that its earlier release was in error." *See* Ex. C. Respondent further demanded that the corrected release "specifically state that because the Nap Nanny has not been voluntarily recalled by the manufacturer, it is not illegal for the Nap Nanny to be resold." *Id.*

15 U.S.C. § 2055(7) requires that when the Commission makes a disclosure of fact that is "inaccurate or misleading ... which reflects adversely upon the safety of any consumer product or class of consumer products ... it shall, in a manner equivalent to that in which such disclosure was made, take reasonable steps to publish a retraction of such inaccurate or misleading information."

² This is not the first time that the CPSC's Office of Communications has issued false statements relating to the recall of the Subject Products. On December 5, 2012, Scott Wolfson, CPSC spokesman was quoted in the USA Today News Online as stating, "Parents are placing (the Nap Nannies) inside cribs and there have been tragic situations when *they tipped over*." (Parenthetical in original, emphasis added). *See*, Ex. B, Dec. 5, 2012 USA Today Article, a true and accurate copy of which is attached. Mr. Wolfson elaborated that the harness inadequately secured infants from falling out of the product if it tipped over. *Id.* Yet, there is no evidence in the record or alleged in the Complaint that any of the Subject Products have ever tipped over or that any of the alleged incidents involving death or injury involved tipping over. This was a blatant misrepresentation of the nature of the alleged risks involved in using the Subject Products. Whether ignorant of the true facts, or perhaps intending to distort them, Mr. Wolfson, it seems, cannot let his objectives—to influence public opinion of the Subject Products—be derailed by such trivial things as the facts.

Counsel for Respondent did not receive a response to his e-mail correspondence for the remainder of that business day. At 6:01 p.m., more than three hours later, the Commission sent out a “tweet” using the social media site Twitter, that contained a link to the still-uncorrected Press Release that falsely informed consumers that they could neither sell nor resell Respondent’s products. A true and accurate copy of the “tweet” is attached hereto as Exhibit D.

It was not until 6:23 p.m., when the daily news cycle had ended, that Kelly Moore, Trial Attorney and Complaint Counsel, sent Respondent a private email that contained a link to a corrected Press Release (the “Corrected Press Release”). A true and accurate copy of the electronic mail from Kelly Moore to Raymond G. Mullady Jr. at 6:23 p.m. on December 27, 2012, is attached hereto as Exhibit E. Nothing in the Corrected Press Release notes the correction. A true and correct copy of the Corrected Press Release is attached hereto as Exhibit F. Further, the Commission made no news of its retraction and correction in the Corrected Press Release or otherwise. Nor did the Commission make any efforts to alert consumers or retailers who had read the news earlier in the day, or been alerted by the “tweet” just minutes before, that the Press Release that they had read was incorrect and contained false information about what they could and could not do with Respondent’s products. Indeed, two days later, December 29, Scott Wolfson sent out an additional “tweet” linking to a Press Release that contained the same offending language. A true and accurate copy of the Wolfson “tweet” of December 28, 2012 is attached hereto as Exhibit G.

This blatant manipulation of the news cycle by the Commission, including the opportunistic advantage it took of the false information it published earlier in the day to create confusion among the retailers who refused to pull the Subject Products from their shelves, was an abuse of its perceived authority. The Commission, it seems, believes it has the power to be

judge, jury and executioner—to decide Respondent’s fate in the court of public opinion—without the need for a judicial determination whether the Subject Products are indeed hazardous. After all, if retailers not participating in the recall and the general public believe that it is a violation of federal law to sell or resell the Subject Products, they are going to stop selling and reselling them immediately. Once that occurs, this proceeding is effectively mooted.

Blinded by its zeal, the Commission appears more eager to try this case in the media than before the Presiding Officer, playing by whatever rules it chooses. 16 CFR 1025.42(a) gives the Presiding Officer the authority to “maintain order,” and endows him all the powers necessary to that end, including the power to “regulate the course of the proceedings and the conduct of the parties and their representatives” and “issue ... orders, as appropriate,” or “take any action authorized by these Rules or the provisions of title 5” The Presiding Officer has the inherent authority to both compel the Commission to issue a correction and retraction and to sanction the Commission for its willful manipulation of the information disseminated to the public.

The appropriate sanction is the dismissal of this administrative enforcement proceeding with prejudice. The Commission, by its flagrant violation of its own rules, has demonstrated that this case was not brought in good faith. Rather, the filing of this case now appears to have been simply a vehicle to give the Commission leverage to strong-arm a complete recall without having to prove its case. The Complaint apparently gave the Commission the leverage it needed to negotiate a voluntary recall with Respondent’s major retailers—an agreement the Commission was not able to achieve until it initiated this proceeding. The Commission then used the announcement of the limited, voluntary recall by some retailers to falsely intimidate non-participating retailers and the public into not selling the Subject Products.

The Presiding Officer should not countenance such utter disregard for the integrity of the administrative enforcement proceeding process and the Commission's own rules.

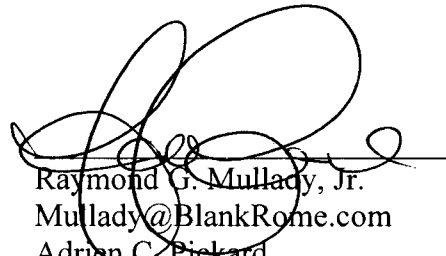
III. Conclusion

For the foregoing reasons, Respondent respectfully requests that this Court enter an order that (1) requires the Commission to issue a retraction, in every news outlet that it issued the original Press Release, expressly identifying the error in the first Press Release and clarifying that non-participating retailers and the public are free to continue purchasing, selling and reselling the Subject Products while this proceeding is pending; and (2) sanctions the Commission by dismissing this case in its entirety, with prejudice.

January 2, 2013

Respectfully submitted,

Baby Matters LLC
By Counsel



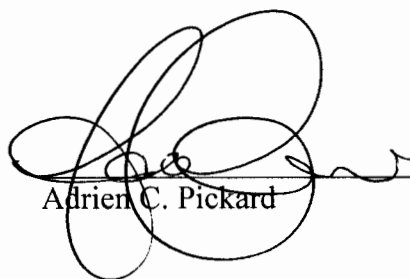
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Tel: (202) 772-5828
Fax: (202) 572-8414
Counsel for Respondent Baby Matters LLC

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Memorandum of Points and Authorities in Support of Motion to Compel Correction and Retraction and for Sanctions upon the following parties and participants of record in these proceedings by mailing, postage prepaid and by email a copy to each on this 2nd day of January, 2013.

Mary B. Murphy, Esquire
Assistant General Counsel
Division of Compliance
Office of the General Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Kelly Moore, Trial Attorney
Complaint Counsel for
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814



Adrien C. Pickard

PUT CPSC RECALLS
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NEWS from CPSC

SHARE

U.S. Consumer Product Safety Commission

Office of Communications

Washington, D.C.

FOR IMMEDIATE RELEASE
December 27, 2012
Release #13-083

CPSC Hotline: (800) 638-2772
CPSC Media Contact: (301) 504-7908

Four Retailers Agree to Stop Sale and Voluntarily Recall Nap Nanny Recliners Due to Five Infant Deaths

WASHINGTON, D.C. - The U.S. Consumer Product Safety Commission (CPSC) and four major retailers are announcing a voluntary recall to consumers who own Nap Nanny® recliners made by Baby Matters, LLC of Berwyn, Pa.

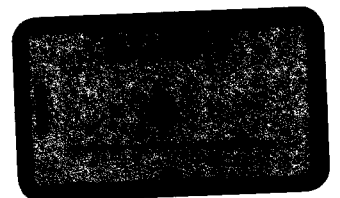
Retailers currently participating include Amazon.com, Buy Buy Baby, Diapers.com and Toys R Us/Babies R Us. At the request of the CPSC, these retailers have agreed to voluntarily participate because the manufacturer is unable or unwilling to participate in the recall.

CPSC is warning parents and caregivers that these baby recliners contain defects in the design, warnings and instructions, which pose a substantial risk of injury and death to infants. This recall includes the Nap Nanny Generations One and Two, and the Chill™ model infant recliners.

In July 2010, CPSC and Baby Matters, LLC issued a joint [recall news release](#) that offered a discount coupon to Generation One owners toward the purchase of a newer model Nap Nanny, and improved instructions and warnings to consumers who owned the Generation Two model of Nap Nanny



Nap Nanny Generation Two model



recliners.

At the time of the 2010 recall, CPSC was aware of one death that had occurred in a Nap Nanny recliner and 22 reports of infants hanging or falling out over the side of the Nap Nanny, even though most of the infants had been placed in the harness. Subsequently, despite the improvements to the warnings and instructions, additional deaths using the Nap Nanny recliners were reported, including one in a Chill model. Since the 2010 recall, CPSC has received an additional 70 reports of children nearly falling out of the product.

The Nap Nanny is a portable infant recliner designed for sleeping, resting and playing. The recliner includes a bucket seat shaped foam base and a fitted fabric cover with a three point harness. Five thousand Nap Nanny Generation One and 50,000 Generation Two models were sold between 2009 and early 2012 and have been discontinued. One hundred thousand Chill Models have been sold since January 2011. The recalled Nap Nanny recliners were sold at toy and children's retail stores nationwide and online, including at www.napnanny.com. All models were priced around \$130.

For more information, consumers should review the return policy of the individual retailer from which they purchased a Nap Nanny recliner. If the product was purchased at one of the retailers below, see the link or call for instructions on returns:

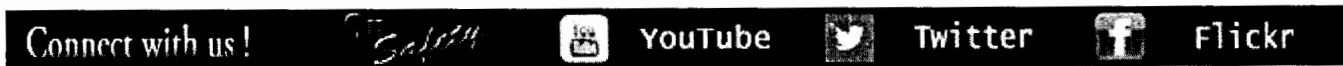
- Amazon.com: <http://www.amazon.com>
- Buy Buy Baby: Toll-free at (877) 328-9222, <http://www.buybuybaby.com/productRecalls.asp>
- Diapers.com: (800) 342-7377, <http://www.diapers.com>
- Toys R Us/Babies R Us: (800) 869-7787, <http://www.toysrusinc.com/safety/recalls>

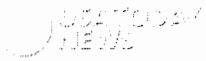

The U.S. Consumer Product Safety Commission (CPSC) is still interested in receiving incident or injury reports that are either directly related to this product recall or involve a different hazard with the same product. Please tell us about your experience with the product on SaferProducts.gov

CPSC is charged with protecting the public from unreasonable risks of injury or death associated with the use of the thousands of consumer products under the agency's jurisdiction. Deaths, injuries, and property damage from consumer product incidents cost the nation more than \$900 billion annually. CPSC is committed to protecting consumers and families from products that pose a fire, electrical, chemical, or mechanical hazard. CPSC's work to ensure the safety of consumer products - such as toys, cribs, power tools, cigarette lighters, and household chemicals - contributed to a decline in the rate of deaths and injuries associated with consumer products over the past 30 years.

Under federal law, it is illegal to attempt to sell or resell this or any other recalled product.

To report a dangerous product or a product-related injury, go online to: SaferProducts.gov, call CPSC's Hotline at (800) 638-2772 or teletypewriter at (301) 595-7054 for the hearing and speech impaired. Consumers can obtain this news release and product safety information at www.cpsc.gov. To join a free e-mail subscription list, please go to www.cpsc.gov/cpscslst.aspx.



The Day in
Pictures 

Feds file lawsuit against Nap Nanny maker



CPSC

The Consumer Product Safety Commission has filed suit against the maker of the Nap Nanny, which it alleges killed 5 infants.

by Jayne O'Donnell, USA TODAY

Published: 12/05/2012 05:21pm

Federal regulators Wednesday sued the maker of Nap Nanny infant recliners because the company wouldn't agree to a recall.

The Consumer Product Safety Commission had demanded a recall because it says five infants died while in a Nap Nanny.



The CPSC's lawsuit alleges that Baby Matters, the maker of Nap Nanny, should notify the public about the risks and refund the cost of the product to any customers who bought it.

"We did what we could," founder and owner Leslie Kemm Gudel told USA TODAY in March. She said that included testing the product with babies and making product changes.

The company shut down in November, says Gudel. However, its website remains up with product information and a statement released Wednesday.

In that statement, Gudel said, "The ongoing battle with the CPSC cost us so much money that it forced us out of business a month ago."

In July 2010, CPSC and Baby Matters agreed to a settlement in which the company offered an \$80 coupon to owners of the Generation One Nap Nanny toward the purchase of a new model. Those models came with more understandable instructions and warnings.

The CPSC's complaint alleges that the Nap Nanny Generation One and Two and Chill infant recliners have defects in the design, warnings and instructions, which "pose a substantial risk of injury and death to infants."

CPSC says it knows of four infant deaths in earlier Nap Nanny models. A fifth death involved the Chill model. The agency also says it has received more than 70 additional incident reports of children nearly falling out of the product.

But CPSC charges that Gudel's company declined to address the potentially fatal hazards that occur when the product is used in a crib without the harness straps securely fastened.

"Parents are placing (the Nap Nannies) inside cribs and there have been tragic situations when they tipped over," says CPSC spokesman Scott Wolfson.

Risks include infants falling out of the product and becoming wedged between the sides of the crib and the mattress. In some cases, the harness failed to keep babies from falling out if the product tipped over, Wolfson said.

Nancy Cowles, executive director of the Kids in Danger advocacy group, says, "If you design products for the most sleep-deprived and stressed among us – parents of fussy babies – safety has to be more than a catchphrase."

Gudel says the company did everything it could to ensure safety.

"I set out to make a product that comforted babies and improved infant sleep," Gudel's statement Wednesday said. "I know we accomplished this mission. I'm sorry we won't be around to carry it on any longer."

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 Single Page

Pickard, Adrien C.

From: Mullady Jr., Raymond G.
Sent: Thursday, December 27, 2012 2:56 PM
To: 'Moore, Kelly'
Cc: Schoem, Marc
Subject: Four Retailers Agree to Stop Sale and Voluntarily Recall Nap Nanny Recliners Due to Five Infant Deaths

Importance: High

<http://www.cpsc.gov/cpsc/pub/prerel/prhtml13/13083.html>

Kelly,

As you are well aware, Baby Matters LLC, the manufacturer of the Nap Nanny, has not voluntarily recalled the Nap Nanny in cooperation with the CPSC such that it would be a prohibited act under CPSA Section 19 to resell the product. Yet today's Commission press release--a link to which is provided above-- falsely states that it is a violation of federal law to resell "this or any other recalled product." We find it breathtaking that the Commission would insert this language in a press release announcing a voluntary recall involving retailers but not the manufacturer, especially in the present circumstances, where the Commission has had to sue the manufacturer in an attempt to force an unwanted recall.

Whether this error was intentional or not, Baby Matters demands that the CPSC immediately issue a corrected press release informing consumers and the media that its earlier release was in error. We demand that the corrected release specifically state that because the Nap Nanny has not been voluntarily recalled by the manufacturer, it is not illegal for the Nap Nanny to be resold.

We will withhold bringing this matter to the attention of the administrative law judge until we have your response to this request.

Please call me on my mobile phone (202-262-3687) if there is anything unclear about this request. Thank you.

Regards,

Raymond G. Mullady, Jr | Blank Rome LLP
Watergate 600 New Hampshire Avenue, NW | Washington, DC 20037
Phone: 202.772.5828 | Mobile: 202.262.3687 | Fax: 202.572.8414 | Email:
Mullady@BlankRome.com

Tweets

Tweet



U.S. CPSC

@OnSafety

Get refunds or store credits for
Nap Nanny bought from:

@Amazon Buy, Buy, Baby

@diapersdotcom @ToysRUs

@BabiesRUs 1.usa.gov/VE6gtX

12/27/12 6:01 PM

3 RETWEETS



Home



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Me

From: Moore, Kelly [mailto:KMoore@cpsc.gov]
Sent: Thursday, December 27, 2012 6:23 PM
To: Mullady Jr., Raymond G.
Cc: Murphy, Mary; Boyle, Mary; Schoem, Marc
Subject: RE: Four Retailers Agree to Stop Sale and Voluntarily Recall Nap Nanny Recliners Due to Five Infant Deaths

Ray,

Please see the link below:

<http://www.cpsc.gov/cpsc/pub/prerel/prhtml13/13083.html>

Regards,
Kelly

Kelly M. Moore
Trial Attorney
Acting Team Lead, Children's Safe Sleep Team
Office of the General Counsel, Division of Compliance
U.S. Consumer Product Safety Commission
4330 East West Hwy, Room 703H
Bethesda, MD 20814
(301) 504-7447

-----Original Message-----

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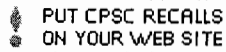
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NEWS from CPSC



U.S. Consumer Product Safety Commission

Office of Communications

Washington, D.C.

FOR IMMEDIATE RELEASE
December 27, 2012
Release #13-083

CPSC Hotline: (800) 638-2772
CPSC Media Contact: (301) 504-7908

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Nap Nanny Generation Two model



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- Buy Buy Baby: Toll-free at (877) 328-9222, <http://www.buybuybaby.com/productRecalls.asp>
- Diapers.com: (800) 342-7377, <http://www.diapers.com>
- Toys R Us/Babies R Us: (800) 869-7787, <http://www.toysrusinc.com/safety/recalls>

The U.S. Consumer Product Safety Commission (CPSC) is still interested in receiving incident or injury reports that are either directly related to this product recall or involve a different hazard with the same product. Please tell us about your experience with the product on SaferProducts.gov

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Scott Wolfson

@Scott_Wolfson

#CPSC: Get refunds or store credits for Nap Nanny bought from @Amazon Buy, Buy, Baby @diapersdotcom @ToysRUs @BabiesRUs 1.usa.gov/VE6gtX

12/29/12 1:04 PM

1 RETWEET

