

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

APR 11 10 50 AM '08

_____)
 In the matter of)
)
 DAISY MANUFACTURING COMPANY,)
 Inc., doing business as Daisy Outdoor)
 Products)
 400 West Stribling Drive)
 Rogers, Arkansas 72756)
)
 Respondent.)
 _____)

CPSC Docket No.: 02-2

**COMPLAINT COUNSEL'S OPPOSITION
TO RESPONDENT'S MOTION TO DISMISS**

TO THE PRESIDING OFFICER:

I. Preliminary Statement

Complaint Counsel opposes Respondent's Motion to Dismiss this entire adjudicative proceeding. On its face, based upon a review of the facts alone, Respondents' Motion must fail.

Daisy's Motion amounts to little more than an expansion upon the affirmative defenses alleged in its Answer filed in this matter. Respondent has the burden of proof to carry its Motion. As discussed below, Respondent's Motion is without basis and Respondent has not met its burden of proof. Respondent blithely makes some very serious allegations without tendering a shred of credible evidence in support.

Daisy's Motion has nothing to do with the merits of the case filed against its defective and hazardous Powerline Airguns. Respondent has tried to concoct procedural grounds for dismissal out of a series of fantasies not facts. Like the extensive media and lobbying attack on

the Commission that preceded the filing of this Complaint, Respondent's continued attempt to manufacture issues that have little connection to the substance of the staff's case suggests it has nothing to say about the merits of this case, or that it wishes to delay or derail the presentation of our case. Respondent's Motion amounts to an *ad hominem* attack on the integrity of the Commission staff and two Commissioners of the United States Consumer Product Safety Commission (hereinafter, "Commission," or "CPSC"). As will become evident, these attacks are as baseless as they are reckless.

II. Factual Background

Respondents have hurled so many red herrings against the wall, hoping some might stick (please forgive the mixed metaphor), that it is difficult to craft a responsive reply. Complaint Counsel will start by setting forth the relevant fact including those Respondent conveniently ignored.

As Respondent well knows, the Compliance staff had been investigating the subject Daisy Airguns for many months prior to October 30, 2001. Daisy provided a great deal of information and the staff reviewed it diligently along with information from other sources. The legal staff was in regular contact with Daisy, discussing the investigation, and met and negotiated with Daisy. Although Daisy had made recent improvements and design changes to the Airguns, it declined to conduct a recall of the uncorrected Airguns that were still in consumers' hands.

As Respondent knows, (Counsel Aaron Locker having represented clients before the Commission since it was formed in 1972), throughout the investigation, the staff kept the entire Commission advised of its efforts. The Commission's Compliance and legal staff conduct status briefings before the full (three person) Commission every month. Each month the Office of Compliance (which includes the legal division) explains the status of every investigation,

voluntary recall, case report and matter in litigation to the full Commission. The Daisy case was no exception. The Commission was briefed on the status of the Daisy investigation every month for several months before October 30, 2001. The Commissioners were free to ask any questions about the case and often did so.

After a last attempt at negotiating a settlement failed to elicit any substantive proposals from Daisy, the staff informed Daisy of its intention to recommend that the Commission refer the matter to an ALJ for a hearing under section 15 of the Consumer Product Safety Act, 15 U.S.C. § 2064.

The legal staff prepared a comprehensive briefing memorandum for the Commission. This memorandum recommended that the Daisy Airgun case be referred to an Administrative Law Judge for a hearing on the merits. The staff provided a briefing package to each Commissioner on October 4, 2001. The staff later provided a copy of the proposed Complaint to Daisy's counsel..

The staff briefed the full Commission on October 23, 2001 and answered its questions. A Commission meeting to vote on the staff recommendation was held on October 30, 2001.

Although one would not know it from reading Respondent's account of the facts, DAISY MET WITH EACH OF THE COMMISSIONERS OFFICES IN OCTOBER 2001 to present its views of our case. After its meetings with the Commissioners, Daisy communicated with Commissioners and their staff by phone and letter prior to the October 30 vote. It even tried to directly influence the outcome of the vote by asking Commissioner Moore to postpone the vote date until after the departure of Chairman Brown. Daisy also asked Chairman Brown to recuse herself. (See Respondent's Exhibits B and C to its Motion.) Neither agreed to Respondent's extraordinary attempts to manipulate the Commission agenda or vote.

Further, Daisy availed itself of other avenues to influence the Commission. It initiated a congressional lobbying effort, solicited intervention by trade associations, and mobilized gun enthusiast groups to pressure and lobby the Commissioners before the Commission October 30th vote. An NRA website revealed the vote date a week before it made *The New York Times* and *USA Today* articles and solicited further lobbying of the Commission.

Daisy's counsel talked to reporters about the upcoming vote and characterized--and repeatedly mischaracterized--the Commission staff's proposed action as did other industry group sources. The Commission and staff did not. On October 23rd, the day the staff was due to brief the Commission on the complaint, *The Washington Times* editorialized against any Commission action. After hearing everything Daisy had to say on the facts and law and weathering the intense pressure Daisy's PR and lobbying effort generated, the Commission voted to issue the Complaint.

Regardless of the outcome of the vote, the outgoing Commission Chairman scheduled a press conference to express her views on the matter. She was departing the agency on October 31, 2001 and this would be her last opportunity to address the public as Chairman.

Respondent correctly asserts that the Commission staff prepared for a press conference and for the issuance of a Complaint. It would have been foolish, and completely without precedent, not to do so.

Within the bounds of the applicable law, every press conference and every Commissioner's written statement explaining his or her vote requires advance preparation. One must inform the media in advance of the timing of the conference; one must prepare, and the Commissioners do prepare, statements for public dissemination, in advance of the vote. The media is advised that a press conference, typically of "an important safety matter," will follow

the Commission vote, period. Neither the name of the company nor the product involved is disclosed. And that is exactly what was done in the Daisy case.

The staff worked on possible questions and answers, public statements, fact sheets and other materials. Several drafts and versions of the materials were prepared and the press release was drafted. The staff did not know, however, how the Commission would vote until the meeting of October 30, but prepared for the possibility that its recommendation would be followed.

III. Argument

Respondent claims it has been deprived of due process of law because of three unsubstantiated allegations: A. Two Commissioners conducted a secret “improper meeting”¹ in violation of the Government in the Sunshine Act; B. The Chairman of the Consumer Product Safety Commission decided how she was going to vote in advance of the final Commission decision meeting; C. Someone at the Commission “leaked” the administrative Complaint before the Commission voted to file the Complaint. Even if Respondent’s rendition of the facts were correct, it has set forth no basis for relief. Since its statement of the so-called facts is unsupported and unsupportable, it fails to even provide a basis for consideration of its legal arguments.

Respondent’s Motion primarily consists of innuendo, supposition, false statements, baldly unsubstantiated, and misleading statements, and one self-serving affidavit by Mr. Jeffrey Locker in support, notarized by his father and co-counsel. That affidavit not only contains no

¹ An “improper meeting” alleged by Respondent is also the type of “irregularity” which, under the Government in the Sunshine Act, 5 U.S.C. § 552b (h) (1), United States District Courts may review within sixty (60) days after the aggrieved action, (*to wit*, within 60 days of the alleged “improper” meeting).

hard evidence, it completely ignores and avoids information that Respondent's counsel **knows** fails to support his statements of "fact".

A. Respondent Provides No Evidence of Any "Improper Meeting and No Basis for Relief

The foundation of Respondent's Motion, as gleaned from its Memorandum in Support of its Motion to Dismiss, is the completely unsupported and reckless allegation of the occurrence of "an improper meeting" between Commissioner Moore and Chairman Brown. The fact is there is no evidence such a meeting ever occurred. Respondents rest an elephant of an accusation on the flimsiest eggshell of supposition. Even Respondent can only proffer (on page 1 of its Memorandum in Support of its Motion) "The decision to issue the Complaint was accompanied by...**an apparent meeting** in violation of the...Sunshine Act." [*sic*] Respondent seems to believe that no two people could come to the same conclusion—to authorize a Complaint in this case--without holding "improper meetings" first.

Clearly, the Commissioners did not need secret, "improper meetings" to make a decision about the CPSC staff recommendation to refer this case to an Administrative Law Judge for a full hearing. And Respondent knows it. Respondent's attempt to infer the existence of such a meeting is based more on "wishing it were true" than anything remotely resembling evidence that it happened.

Daisy asks us to suppose this "apparent meeting" occurred because the Chairman held a press conference soon after the vote and could not have done so unless she knew for a certainty that the Commission would vote to issue an administrative Complaint. A quick review of all the facts and common sense is all that is needed to dismiss this inference. Daisy ignores the obvious: the Commission had been fully briefed as an entire body on October 24th by the staff and set a vote for October 30th. Competent people prepare for the possible outcomes of such an

important decision. Reporters require advance notice to attend a press conference. Whatever decision the Commission made would have been newsworthy, since Daisy and its surrogates had widely publicized the Commission consideration of the Complaint and the date of the vote. Daisy's inference of an improper meeting is not the most logical inference to be drawn from this chain of events.

Without **any** proof of any secret, improper "apparent" meeting, Respondent's claim that two Commissioners must have violated The Government in the Sunshine Act is without basis in fact and must fail.

Daisy fails on procedural grounds as well. If Respondent truly believed that Commissioners violated The Government in the Sunshine Act in October 2001, it has failed to act in a timely fashion. The Sunshine Act requires that the alleged violation be raised before a U.S. District Court within 60 days of the "improper meeting." See 5 U.S.C. §552(b)(d)(1). Since Respondent failed to raise this allegation in a timely manner, and before the appropriate forum, it has lost any opportunity to raise such an issue now.

Assuming arguendo, that this "apparent" meeting had occurred, Respondent failed to demonstrate that it's right to due process was violated. Respondent took every opportunity—fair and unfair—to present its position to the Commission and did so. Daisy presents no evidence that the outcome would have been any different—"apparent" meeting or none. Its due process argument is wholly unsupported and without merit.

In summary, Respondent failed to support its accusations of an "apparent" "improper meeting" and further failed to provide any valid grounds for relief.

B. Respondent Has Failed to Show that Prejudgment Occurred

Daisy has tried to stretch the concept of prejudgment well beyond the law. Like a rubber band, Daisy's overstretched argument outreaches its elasticity and snaps when given the slightest scrutiny.

Prejudgment requires proof that a decision maker made a premature but final decision that Daisy violated a law within the Commission's jurisdiction. No Commissioner, including Chairman Brown, was called on to decide, and none did decide, that Daisy violated any law administered by the Commission. The Commission merely decided to authorize this administrative proceeding. Only after the Presiding Officer issues his initial decision will the Commissioners become decision makers on the merits. Since Chairman Brown left the Commission several months ago, and will never be a decision-maker, she could not have prejudged this case under the caselaw.

The many briefings provided by the staff and Daisy to the Commission, supplied the Commission with the information necessary to make an initial finding as to whether a complaint should issue. Of necessity, the Commission must make that initial finding that the staff has presented a case with enough merit to go to a hearing. One cannot prejudge a case merely by saying or deciding that a complaint should issue. Otherwise prejudgment must occur in every case of administrative litigation that ever occurs.

The essence of prejudgment is whether an agency decision-maker made a premature but final decision that a firm violated a law administered by the agency. Respondent infers that Commissioner Brown prejudged the ultimate issue based on a variety of inconclusive inferences it calls "facts." Public statements by Commissioners are an insufficient basis to conclude the

existence of bias and prejudgment. Association of National Advertisers v. F.T.C., 627 F2d 1151, 201 U.S. App. D.C. 165, cert. denied 100 S. Ct. 3011 (1980).

Even if Ann Brown had reached a hardened, implacable position—something Respondent has not shown—its argument is without merit. If the Presiding Officer finds that Daisy Airguns are hazardous under CPSC statutes, Daisy may appeal that Decision to the full Commission. It is at that time that the full Commission will be asked to decide whether Daisy's Airguns t violate any of the laws it administers. At that time, **the person accused of prejudgment, the departed Ex-Chairman Ann Brown, will not even be a decision-maker.**

Under any test or case law cited by Respondents in its Motion and Memorandum in Support thereof, consideration of prejudgment at this time is not ripe--and it never will be. Ann Brown has not and will never be, part of any decision that Daisy violated CPSC law in this matter.

C. Respondent's Allegations That The Commission staff gave the draft Complaint to a Reporter Is Without Merit

The Commission shared its proposed Complaint with only one person in advance of the Commission vote: Respondent. Respondent makes an extremely serious charge in what appears to be a desperate attempt to allege procedural wrongdoing somewhere in the pre-Complaint stage. Respondent alleges that Complaint Counsel or some other Commission employee leaked the draft Complaint to *USA Today*. In Mr. Jeffrey Locker's Affidavit in support of his Motion to Dismiss he states that Ms. Jayne O'Donnell of *USA Today* read him verbatim provisions of the CPSC Complaint and that she said the Complaint was read to her. The affidavit does not directly quote Ms. O'Donnell and certainly does not identify a CPSC staff member as the source of the leak. Mr. Locker just characterizes many months after the conversation some of Ms.

O'Donnell's statements. He then insinuates that Ms. O'Donnell must have learned of the contents of the complaint from the Commission staff.

After reading the Respondent's Answer, the CPSC legal staff conducted an internal investigation to determine whether a leak could have occurred. As part of that effort, we contacted Jayne O'Donnell. Although she declined to identify her source, she "stated unequivocally that the person who read [the Complaint] to her was not employed or previously employed by the Commission." (Exhibit A, p. 2))

Mr. Locker says he was "in a state of shock" that a newspaper was quoting from the proposed Complaint. He should not have been. The facts support the conclusion that Respondent's in their public relations and lobbying effort leaked much, if not all of the allegations of the Complaint². Once the legal staff informed Daisy of its intention to recommend referral of the Airgun hazard case to an administrative Court, but before sharing the proposed Complaint with Daisy, the firm mounted a high powered lobbying effort and publicity campaign to derail any vote on the recommendation. The Commission received letters from Congressional offices, trade associations and gun enthusiasts and their organizations on behalf of Daisy. News stories and editorials appeared in publications quoting Daisy's counsel and industry representatives. Initially, these third parties seemed to believe that the Commission might take some action against Daisy because of the Airguns' high velocity.

² In his denial that Respondents could have inadvertently through their efforts provided the Complaint to someone who leaked it, Mr. Locker repeatedly denied that Respondent had leaked the complaint directly to the "media" or any "media venue." (Letter of December 11, 2001 from Jeffrey Locker to Eric Stone, Exhibit D). Interestingly, Mr. Locker never previously contended that the reporter told him the Commission "was going to issue a complaint." [Exhibits B & D] Her story speculates about whether there were two votes for the complaint and noted the Commission would not comment. If the court wishes to pursue this matter further, the staff wishes to depose Mr Locker about his and Daisy's actions and whether Mr. Locker has provided a complete and accurate account of what he knows about the *USA Today's* sources. We believe he has direct evidence that the reporter did not get information about the complaint from anyone associated with the Commission, but has not disclosed this to this court.

It was only after the legal staff sent the proposed Complaint to Daisy that the lobbying efforts focused more narrowly on the allegations of the proposed Complaint. For example, on October 27th, the Associated Press ran a wire story on Senator Enzi's opposition to the issuance of a Complaint. Senator Enzi (R-Wyoming) provided information on the very same defects in the proposed Complaint. As noted earlier, *The Washington Times* even delivered an editorial attacking the former Chairman and the proposed staff action the morning the staff planned to brief the Commission.

Respondent has provided several documents showing that the Commission notified the public of a "closed meeting" or a press conference. Those notices did not identify the subject matter. However, as noted above, a week before the October 30th vote, the NRA Institute for Legislative Action website announced when the vote would be held and asked its supporters to lobby the Commissioners. Taken in this light, it is perhaps not so surprising that the October 30th edition of *the New York Times* stated that the Commission was going to vote that day on a proposed Complaint naming Daisy, nor is it surprising that reporters who were not totally brain dead might infer that the closed meeting was about the Daisy Complaint.³

Daisy and the Commission took opposite paths during the weeks preceding the October 30 vote. Daisy aggressively disseminated its view about the merits of the case, including the Complaint. The Commission chose to comply with section 6(b) of the Consumer Product Safety

³ Additional examples of Daisy's political and media lobbying effort appear in two letters written by the Director of the Commission's Legal Division, Eric L. Stone, to Jeffrey Locker. (They are Attachments A and C to this Opposition.) Over and over, the news stories printed before the October 30 vote, including Exhibits E and F to Respondent's Motion to Dismiss, quoted only one party to this litigation, Daisy. Both Mr. Lockers were quoted in news stories. Over and over, the stories noted that the Commission and its staff declined to comment.

Act, 15 U.S.C. § 2055(b), and declined to comment on the merits of the case.⁴ Respondent's allegation that the staff leaked the complaint to Ms. O'Donnell is clearly unsupported by anything that might qualify as evidence. It is even more outrageous since Respondent's counsel has already been informed of Ms. O'Donnell's statement that nobody connected to the Commission read her the complaint.

However, even if Respondent's claim were fact and not fantasy, Respondent alleges nothing that amounts to a due process violation. Respondent and its surrogates widely publicized the Commission investigation and potential legal action. In this context, Respondent cannot make any showing that it was prejudiced in any way if someone read the Complaint to a reporter the day before the Commission vote.

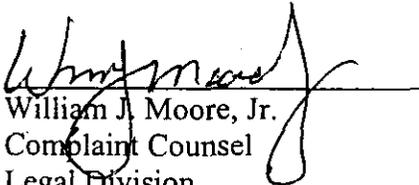
IV. Conclusion

Respondent provided no evidence of a secret, "improper meeting" between Commissioners Moore and Brown. Complaint Counsel has demonstrated there is no evidence to support Respondent's claim that an "apparent" meeting ever occurred. Respondents have failed to demonstrate a cause of action under the Government in the Sunshine Act or on due process grounds. Respondent's claim of prejudgment simply makes no sense. Further, Respondents failed to demonstrate that Chairman Brown prejudged anything. Respondents have also failed to make any case that the Commission leaked its Complaint to anyone beside Daisy. In the public relations war fought before the Daisy complaint issued, Daisy went nuclear, while the Chairman and the Commission staff hunkered down in our bunkers and sought merely to survive. Daisy's due process claims are simply preposterous.

⁴ Despite Mr. Locker's statement to the reporter that "the confidentiality provisions of section 6(b) . . . precluded me from discussing matters. . ." [Locker Affidavit, para. 2] only the Commission is silenced by section 6(b) in the pre-complaint stage.

WHEREFORE, Complaint Counsel respectfully submits that Respondent's Motion to Dismiss should be denied and that the proceedings should not be stayed while the Motion is pending.

Dated this 11th day of April, 2002


William J. Moore, Jr.
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November 21, 2001

Jeffrey M. Locker, Esquire
Locker Greenberg & Brainin, P.C.
Attorneys at Law
420 Fifth Avenue
New York, N.Y. 10018

Re: In the Matter of Daisy Manufacturing Company, Inc.

Dear Mr. Locker:

Thank you for sending me a courtesy copy of your Answer. I have read it carefully and we shall deal with it in due course during the administrative proceeding. However, given our long relationship with you and your firm, I feel it necessary to address some gross mis-statements of fact about the actions of the staff that relate to your groundless "Procedural Irregularities" statement. It is unfortunate, that your client has focused its efforts on ad hominem attacks on the former Chairman and the staff rather than the merits of the case.

In paragraph 41, you state

Prior to voting on the issuance of a complaint, the Commission staff violated the confidentiality provisions of Section 6(b) of the Consumer Product Safety Act and released confidential information and a draft complaint to various media organizations who were also told prior to the vote that the Commission would be holding a press conference on this matter at 2:00 P.M. on the day of the vote and the Complaint was rushed accordingly. {sic}

As a preliminary matter, it appears that your statements merely repeat the mis-statements of others. I assume you are not intentionally attempting to mislead the administrative law judge or the Commission. Nevertheless, this is a very serious charge that we would have thought you would not make without supporting evidence.

We have investigated your allegations. Here is what we have learned. First, the Commission staff provided a copy of the proposed complaint only to one person outside the

Mr. Jeffrey M. Locker

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Commission prior to the Commission vote: your law firm. We have checked with members of our public affairs staff, our compliance staff, and the former Chairman's staff and been told that **none** of those parties released the proposed complaint to anyone outside of the Commission before the Commission voted to issue it. In fact, our office did not even give the Complaint to our public affairs staff until the Complaint had been authorized. We first gave a copy to our Congressional relations staff on the afternoon of October 29th, 2001 to provide to James C. Greenwood, Chairman of the House Subcommittee on Oversight and Investigations after the Commission authorized the Complaint. Further, our public affairs staff announcement of the press conference on the AP system did not even indicate the product involved.

We checked with the reporter who wrote the USA Today story after our Public Affairs staff stated that they had been told that someone on the staff had read her the complaint over the telephone. She confirmed that someone had read her a copy of the Complaint, however, she stated unequivocally that the person who read it to her **was not employed or previously employed by the Commission**. She added that everyone she spoke to at the Commission refused to answer her questions and that her story would have been more accurate had she had a Commission source. Her story specifically notes that nobody from the Commission would comment.

To sum up, we shared the proposed complaint only with one "outsider"-- your law firm. To the extent there were leaks about the forthcoming Commission vote, and the contents of our proposed complaint, the evidence supports the conclusion those leaks came from your law firm, your client, and its agents. Here is the evidence we used to reach that conclusion.

Prior to the Commission vote, Daisy targeted the Commission with an extensive lobbying effort. We received inquiries from congressional offices inquiring on behalf of Daisy, trade organizations, and gun enthusiasts and their organizations. In addition, news stories and editorials appeared in publications starting with the CPSC Monitor September-October 2001 edition. (As you know, that publication is critical of the Commission and former Chairman Ann Brown.) Initially, these parties appeared to believe that the Commission was taking action against the Daisy airguns because of their high velocity. Only after we sent you the Complaint did your lobbying efforts focus more on the allegations of the proposed Complaint. Here are some specific examples for your analysis:

- The October 20, 2001 edition of The Washington Post discussed the upcoming Commission vote and said the Chairman was "aggressively pushing for a recall." It noted "CPSC officials declined to discuss Brown's effort yesterday. But industry sources said the agency's staff is concerned about the gravity-loading features, the lack of any automatic safety mechanism and the silver color of the BB. . . 'The [safety defect] allegations the CPSC is looking at are not unique to the Daisy Product. . . ' said Lawrence Keane, vice president and general counsel for the National Shooting Sports Foundation." Mr. Aaron Locker was quoted in that article as saying that the Commission had previously "'determined these guns were safe.' Keane made the same argument." [Emphasis added.]
- The October 23rd Washington Times ran an editorial "Don't Target BB Guns" attacking the agency and Chairman Brown and detailing some of the allegations of

the Complaint. It repeated the statement that the Commission had previously determined the guns were safe.

- The NRA Institute for Legislative Action web site carried detailed information about the proposed Commission vote, requested a lobbying effort by its members aimed at the Commission and told them to point out that the Commission had investigated several times “over the past 20 years and each time . . . found these product is nondefective.”[sic]
- On October 27th, the AP ran a wire story on Senator Mike Enzi, R-Wyoming’s opposition to a Commission complaint. Senator Enzi provided information on the defects in the proposed complaint and stated that the Commission had “for the past 20 years. . . found [the gun] to be nondefective.”[sic]
- On October 29th, Chairman Brown received a letter from William S. Dworzan, Chairman of the ASTM F15.06 Committee, addressing the “possible CPSC action.” Mr. Dworzan advocated letting the industry deal with some of the alleged “defects” which he claimed were industry wide through the voluntary standards process. These statements paralleled the statements made by Aaron Locker at our last meeting.
- The October 30, 2001 New York Times reported that the Commission was going to vote that day on a proposed complaint and detailed the staff allegations. The article does not quote any Commission sources but cited “supporters and opponents of Daisy.” The article also reported “Lawyers for Daisy asked Ms. Brown yesterday to abstain from voting. They accused her of leaking information about the recall.”
- The same day, USAToday detailed the allegations of the complaint and noted “CPSC would not comment before today’s vote.” The article does quote you at length on the steps necessary to fire the gun. You also stated the Commission had investigated “air guns for 20 years and on three separate occasions and determined they are not defective.”
- The next day, USA Today further quoted you as saying “In cases involving BBs nine times out of 10, the shooter always says “I didn’t know it was loaded. . . I assume they were reckless.”

From reading this information, it is evident that Daisy and its proxies engaged in a systematic effort to intimidate the Commission into not issuing the proposed complaint. The content of some of those communications appear to have come from your firm and/or your client and people contacted by you or your client. Most of the quotes suggest the use of the same prepared statement or talking points.

It is ludicrous to suggest that we would generate a lobbying and media assault on our own proposed action. The only person who potentially could benefit from this systematic pattern of leaks, personalized attacks, and exaggerated claims that the entire BB gun industry would be affected by the Complaint was your client. It is evident from the published articles that the Commission repeatedly refused to respond to Daisy’s characterizations until the Complaint was issued. We chose to comply with section 6(b) and not to respond to your client’s public statements until the Commission voted to issue the Complaint.

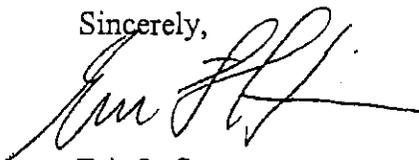
Mr. Jeffrey M. Locker

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If you have any evidence to back the allegations you made in your answer and in The New York Times story of October 30th that the staff leaked the Complaint and violated section 6(b) of the CPSA, please provide that information to me. If you have no such evidence, we expect you to stop making such inflammatory, inaccurate accusations. We think this is not only the proper thing, but it is the wise thing to do. All of the evidence we have obtained suggests that your law firm, your client, and/or its agents leaked the Complaint and its contents to others as part of its effort to intimidate the Commission into not issuing the Complaint.

We trust that you will either provide evidence to support your statements or discontinue making such allegations immediately.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric L. Stone", with a long horizontal flourish extending to the right.

Eric L. Stone

LOCKER GREENBERG & BRAININ, P.C.
ATTORNEYS AT LAW

EXHIBIT B

AARON LOCKER
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DAVID N. BRAININ
OF COUNSEL

November 27, 2001

Via Fax (301)504-0359

Eric L. Stone
Director Legal Division
Office of Compliance
U.S. Consumer Product Safety Commission
Washington, D.C. 20207

Re: In the Matter of Daisy Manufacturing Company, Inc.

Dear Mr. Stone:

Thank you for your letter dated November 21, 2001. I appreciate the long relationship that our firm has had with the CPSC but take issue with your statement that the Procedural Irregularities referenced in our Answer are "groundless."

In reference to the release of confidential information and a draft complaint prior to the October 30, 2001, vote of the Commission, please note as follows:

1. Neither this firm nor Daisy Manufacturing Company released the draft Complaint to anyone prior to the Commission vote. To do so would waive confidentiality and would be against the best interests of the Company who until October 30, 2001, did not know the outcome of the Commission vote. Your conclusion that this firm leaked the complaint to the media is unfounded and outrageous.

2. It was Ann Brown as Chairman who either scheduled or directed the Office of Public Affairs to schedule a press conference at 2:00 p.m. on October 30, 2001, to coincide with the vote on the Daisy matter. The scheduling of that press conference and the notice given to USA Today, The Washington Post and The New York Times occurred on October 29, 2001, before the Commission vote. The reporters called our offices in response to the information released to them by the CPSC. We did not release any information since we hoped that the Commission would not authorize a Complaint and the matter would continue to be confidential under the provisions of Section 6 (b) of the Consumer Product Safety Act. Moreover, we understand that, prior to the vote, Ann Brown was fully briefed on October 29th with questions and answers on the press conference and had arranged on or before that date for attendance by John Tucker Mahoney, his family and/or his attorneys.

LOCKER GREENBERG & BRAININ, P.C.
ATTORNEYS AT LAW

November 27, 2001
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3. It is clear that a member of the CPSC Public Affairs staff, the Compliance staff or the Chairman's staff, or an agent thereof, released or read the proposed Complaint to members of the media before the Commission voted to issue it. In support of this statement, please note the following:

- i. The CPSC Public Affairs Department announced a major press conference on this action on October 29, 2001 prior to the Commission vote.
- ii. In response to and in coordination with the CPSC announcement, this firm was contacted by USA Today, the Washington Post and The New York Times on October 29, 2001. Each of these organization specifically referenced Commission action on Daisy 856 and 880 Airguns. In response to such inquiry this firm and its members would not comment on the alleged CPSC action.
- iii. In response to the October 29, 2001, USA Today inquiry, I stated that I "could not comment on CPSC's action." What I did comment on was publicly known information regarding past review of the products by the Agency and the function of the Daisy Airgun. This is different from the actions taken by the Commission, or its agents in discussing the specific CPSC Section 15 investigation and the specific allegations of the proposed complaint on the Daisy 856 and 880 Airguns. I was surprised and outraged when the USA Today reporter quoted specific sections of the proposed CPSC complaint. I specifically denied that such complaint existed and ask her whether she had a copy of the Complaint. In response, she stated that she did not have a copy of the Complaint but that it was "read to her over the phone." It is obvious that the release of the Complaint information was made to coincide with the press conference called for by the CPSC on the following day and to insure that the USA Today article coincided with Commission action on this matter.

4. The October 30, 2001, dissenting statement of Commissioner Gall in opposition to the issuance of an administrative Complaint against Daisy specifically states:

"The timing of the filing of this Complaint is one in a chain of procedural irregularities that have characterized the handling of the entire Daisy matter. Yesterday some Commission staff furnished the confidential draft Complaint to a reporter and other news organizations before the Commission voted on the issue. News organizations were also informed that the Commission would be holding a press conference at 2:00 P.M. today to announce a matter concerning a consumer product that would involve the mother of a victim."

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Page Three

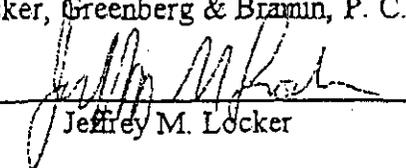
The actions of the CPSC have been enormously detrimental to Daisy which is a small company. Contrary to your assertions, the only one to benefit from the coordinated media release of confidential information prior to the Commission vote on the matter would be the CPSC. To quote the CPSC's own record on this matter:

"The best explanation for these procedural irregularities can be found in Chairman Ann Brown's August 8, 2001, statement announcing her departure. In that statement she announced both the result of this investigation ("a lawsuit regarding a very dangerous product [which everyone at the Commission knew to be Daisy BB guns] that kills and maims children") and its time table ("before I leave.")

Obviously the staff has willingly complied with the Chairman's pre-determined agenda.

We would be interested to know the outcome of your internal investigations into the leak of the Complaint by the Commission or any agent thereof.

Very truly yours,
Locker, Greenberg & Brainin, P. C.

By: 
Jeffrey M. Locker

JML:dd

EXHIBIT C



FILE COPY

U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

Eric L. Stone
Director
Legal Division
Office of Compliance

Tel: 301-504-0608, Ext. 1350
Fax: 301-504-0359
email: estone@cpsc.gov

November 29, 2001

Jeffrey M. Locker, Esquire
Locker Greenberg & Brainin, P.C.
Attorneys at Law
420 Fifth Avenue
New York, N.Y. 10018

Re: In the Matter of Daisy Manufacturing Company, Inc.

Dear Mr. Locker:

Thank you for your letter of November 27, 2001. It confirms what we already thought-- that you have no evidence to support the charges you made in your Answer to the Complaint that "the Commission staff violated the confidentiality provisions of Section 6(b). . .and released confidential information and a draft complaint to various media organizations. . ." In your efforts to cobble together an argument, you ignore Daisy's efforts to mount a lobbying and public relations effort to derail the Complaint before it was issued and Daisy's release of the substance of our proposed Complaint to members of Congress, the NRA, trade association representatives, and others.

Since this whole question is more side-show than main event, I do not wish to spend too much time rearguing our points. In the course of the administrative proceeding, Daisy will be forced to defend the substance of our allegations of defect and hazard and your "due process" arguments will be dismissed as groundless. However, there are a few final points that emerge from your letter.

Your letter attempts to support your allegations by ignoring key facts and contorting logic to reach the desired conclusion. In a nutshell, you rely on the following: that the Commission announced a press conference, members of the press guessed what the press conference was about, a reporter told you someone had read her the complaint, and Commissioner Gall stated the staff had leaked. Let's look at all of the relevant facts.

You do not deny that Daisy mounted a sophisticated lobbying and PR effort to discourage the Commission from issuing the Complaint. This meant that *Daisy* put into the public domain a

Mr. Jeffrey M. Locker

Page 2

lot of information about the proposed complaint and when the Commission would vote. We identified some of the evidence of this campaign in our previous letter.

While you say that neither your firm nor Daisy "released" the draft complaint, the evidence suggests that you or your client did disseminate the allegations of that complaint long before the vote. For example, the October 20th, 2001 Washington Post story quoted industry sources about the upcoming Daisy vote. It provided very specific information about the defects in the proposed Complaint. It quoted Mr. Lawrence Keane, identified as vice president and general counsel for the National Shooting Sports Foundation on the matter, at length. The Post also quoted Aaron Locker as saying—erroneously—that the Commission had previously "determined these guns were safe." The Post story specifically stated that CPSC officials had refused to discuss the matter.

The NRA, members of Congress inquiring on behalf of Daisy, and other industry supporters of Daisy, repeatedly raised our allegations and Daisy's contrary arguments in the two weeks before the press conference advisory and Commission vote. To reiterate the obvious, it was against the Commission staff's interest to leak these details to these parties and to generate a lobbying campaign against a complaint, and we did not do so.

You argue that the evidence of staff leaks is that the Chairman prepared for a potential press conference, the Commission issued a press conference advisory (you apparently concede this did not mention the product), and reporters called you to ask about Daisy. However, your conclusion of something sinister is not the logical explanation. Given Daisy's lobbying effort about the upcoming vote it is not surprising that members of the press inferred that the Daisy Complaint was the subject matter of the press conference. For example, a week before the vote, the NRA Institute for Legislative Action web site asked people to contact the agency before the vote to express their opposition to the Complaint. That site announced the vote was scheduled for Tuesday, October 30th.

In your letter, you also rely upon a statement to you by the USA Today reporter who wrote their October 30, 2001 article. You say she told you that the Complaint was "read to her over the phone". We have been told that your law firm immediately conveyed this statement to a member of Commissioner Gall's staff. In turn, Commissioner Gall's statement, which you now cite as "evidence" of staff leaks in your letter of November 27th, appears to have been based on the information your firm provided to her staff about a supposed leak by the Commission staff.

Unfortunately, this argument collapses of its own weight. Once again, you have chosen to ignore critical evidence. First, the USA Today article specifically stated that nobody from the Commission would comment. Second, as we said in our letter of November 21st, the USA Today reporter told us the proposed Complaint was read to her by someone who was not, and had not been, a Commission employee. (For whatever reason, you did not ask her that question but reached your own conclusion about the source.) We find it ironic that you have based a serious allegation of staff misconduct on your misinterpretation of the reporter's comment to you and now attempt to support your position with the statement of Commissioner Gall which is based on the same misinterpretation which you fed to her staff.

Mr. Jeffrey M. Locker
Page 3

In sum, you have provided absolutely no evidence to support your allegation that the staff violated 6(b) and leaked the Complaint. Rather, the evidence suggests that Daisy's lobbying effort put into the public domain a great deal of information about the Complaint and the Commission's plans. The Commission staff demonstrated tremendous restraint in not responding to arguments by Daisy and its surrogates and complied fully with section 6(b).

We hope that we have set the record straight regarding what the staff did and did not do and will not hear this clearly unsubstantiated allegation again.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric L. Stone", with a long horizontal flourish extending to the right.

Eric L. Stone

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-CPSC COMPLIANCE

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**Office of Compliance
Legal Division**

Eric L. Stone
Director
Phone: 301-504-0828 X1350
Fax: 301-504-0359



**U.S. CONSUMER
PRODUCT
SAFETY COMMISSION
WASHINGTON, D.C. 20207**

Fax

To: Jeffrey M. Locker, Esq.	From: Eric L. Stone
Fax: (212) 391-2035	Pages: 4
Phone:	Date: 11/30/01
Re: Daisy Manufacturing Company, Inc.	CC:

Facsimile Transmission Only

X Confirmation by U.S. Mail

• **Comments:**

Note: If all pages are not received, or if you have any problems with this transmittal, please contact the person listed above.

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EXHIBIT D

LOCKER GREENBERG & BRAININ, P.C.
ATTORNEYS AT LAW

AARON LOCKER
THEODORE M. GREENBERG
FREDERICK B. LOCKER
JEFFREY M. LOCKER

DAVID N. BRAININ
OF COUNSEL

420 FIFTH AVENUE, NEW YORK, N.Y. 10018

(212) 391-5200
TELECOPIER (212) 391-2035

December 11, 2001

Via FAX - (301) 504-0359 & Mail

Eric Stone, Esq.
Director, Legal Division
Office of Compliance
U.S. Consumer Product Safety Commission
Washington, D.C. 20207

RECEIVED
CPSC
OFFICE OF COMPLIANCE
2002 JAN 28 AM 9:22

Re: In the Matter of Daisy Manufacturing Company, Inc.

Dear Mr. Stone:

Thank you for your letter dated November 29, 2001.

In response to your letter, please note the following facts:

1. Neither Locker Greenberg & Brainin, P.C., Friday Eldredge & Clark, nor anyone associated with them released any provisions of a draft Complaint in this matter to any media venue.
2. While Daisy felt the CPSC was being unreasonable in dealing with this matter and did make its feelings known to outside parties, neither Daisy nor any of its agents or associates released any provisions of the draft Complaint or the substance thereof to any media venue. Your letter erroneously suggests that Mr. Lawrence Keane or Mr. Aaron Locker "disseminated allegations of that Complaint long before the vote." When contacted by the media, not the other way around, past actions of the CPSC were referenced, but not specific pleadings of the proposed Complaint in this matter.
3. You confuse lobbying efforts by Daisy with a direct leak of the Complaint to the media prior to a supposedly impartial vote by the Commission to issue the Complaint in this matter. The only parties in possession of the draft Complaint

December 11, 2001
Page Two

were Locker Greenberg & Brainin, P.C., Friday Eldredge & Clark, Daisy Manufacturing Co. and the CPSC. Our allegations were based on the fact that Daisy, its counsel Locker Greenberg & Brainin, P.C., and Friday Eldredge & Clark did not leak the Complaint to the media and that the media had verbatim language from the Complaint immediately after the Commission called its press conference prior to the vote in this matter.

We trust that the record is clear on the above three points.

Sincerely,

LOCKER GREENBERG & BRAININ, P.C.

By: 
Jeffrey M. Locker

JML:jv

UNITED STATES OF AMERICA

CONSUMER PRODUCT SAFETY COMMISSION

CPSC OFFICE OF THE SECRETARY

7/17/02 11 P 5 03

In the matter of)
DAISY MANUFACTURING COMPANY,)
Inc., doing business as Daisy Outdoor)
Products)
400 West Stribling Drive)
Rogers, Arkansas 72756)
Respondent.)

CPSC Docket No.: 02-2

**MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT COUNSEL'S
OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THESE
PROCEEDINGS**

TO THE PRESIDING OFFICER:

In the clear, clean light of day,
In the Sunshine, one might say,
Respondent's Motion fades away
Into nothing

Complaint Counsel opposes Respondent's Motion to Dismiss these proceedings and the attendant request to Stay the administrative hearing. The facts set forth in Complaint Counsel's Opposition to the Motion, attached hereto, are very important. We submit that, in and of themselves, they are dispositive and provide a strong basis for denial.

Complaint Counsel avers that the only applicable and relevant law guiding a decision on this Motion can be found on page 13 of Daisy's Memorandum of Law: "As a

general rule, the **exhaustion of remedies doctrine** provides that challenges to an agency action should not be heard until relevant administrative proceedings have been concluded.” (Grucon Corporation v. Consumer Product Safety Commission, No. 01-C-157, slip op. (E.D. Wis. Sept. 19, 2001; Reliable Automatic Sprinkler Co., Inc. v. Consumer Product Safety Commission, 173 F. Supp.2d 41 (D.D.C. 2001) In Grucon, a federal magistrate judge held that CPSC’s action – which included the filing of an administrative Complaint – were insufficiently final to warrant review under the Administrative Procedure Act. Grucon at 12. In FTC v. Standard Oil of California, 449 U.S. 232 (1980) the Court held that the agency’s preliminary determination that it had “reason to believe” was not final agency action or otherwise reviewable under the APA. Reliable at 44. In the Daisy case the Commission voted that it had “reason to believe” the subject airguns contained defects which present a hazard and referred the case for this administrative hearing. The FTC’s averment of a “reason to believe” was not a “definitive statement of position;” rather it “represent[ed] a threshold determination that further inquiry is warranted and that a Complaint should initiate proceedings, Reliable at 44 quoting Standard Oil 241.

Pursuant to the controlling Rules of Practice for Adjudicative Proceeding, once the Presiding Officer renders his Initial Decision in this Matter, a party may elect to appeal that decision to the full Consumer Product Safety Commission (hereinafter, “Commission”). 16 C.F.R. § 1025.53

Within twenty (20) days after issuance of a Final Decision and Order by the Commission, a party may file for reconsideration of the Final Decision and Order. 16 C.F.R. § 1025.56

Any appeal on the merits of a Final Commission Order is to Federal District Court as prescribed in the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*

We believe Respondent's Motion must fail on the facts alone because Daisy, as proponent, fails meet its burden of proof. **All written motions shall state with particularity the order, rulings, or action desired and the reasons why the action should be granted.** 16 C.F.R. § 1025.23(b) It fails to provide the evidence necessary to sustain its factual allegations. In addition, although Complaint Counsel has shown that Respondent's Motion is both too late (to assert the Sunshine Act allegation) and premature, the (prejudgment argument), we will address Daisy's view of "the applicable law."

ARGUMENT:

Requirements of Fairness and Alleged Denial of Due Process

Under the Rules of Practice for Adjudicative Proceedings governing Consumer Product Safety Commission (hereinafter, "Commission" or "CPSC") actions under Section 15 of the Consumer Product Safety Act and Section 15 of the Federal Hazardous Substances Act, adjudicative proceedings "shall be commenced by the issuance of a Complaint, authorized by the Commission, and signed by the Associate Executive Director for Compliance and Enforcement." 16 C.F.R § 1025.11.

On October 30, 2001, the Commission authorized CPSC staff to file an administrative Complaint against Respondent Daisy Manufacturing Company, Inc. (hereinafter, "Daisy") that seeks a determination that Daisy's Powerline airgun models

880 and 856 have specific defects that present a substantial product hazard or substantial risk of injury to the public and children.

In Daisy's Memorandum of Law in Support of Respondent's Motion to Dismiss the Complaint (hereinafter, "Memorandum"), Respondent cites Amos Treat and Co. v. SEC for the proposition that administrative hearings require fairness at every element of the adjudicative phase, including whether to file a Complaint and that a fair trial is a basic requirement of due process. 113 U.S. App. D.C. 100, 107, 306 F.2d 260, 267 (D.C. Cir.1962); see also, In Re Murchison et al., 349 U.S. 133, 136-37 (1955) (Held: Due process was denied when a **trial judge** who served as a "one man grand jury" for purposes of indictment, cited the defendants for contempt, presided over the defendants' contempt trial, convicted them and sentenced them.).

In Amos, the court held that to allow a Commission staff member to investigate the complaint against a company, weigh the results and possibly recommend the filing of charges, and after becoming a Commissioner of that agency, participate directly in an adjudicatory hearing, involving the same company and join in agency rulings concerning that company, was "tantamount to that denial of administrative due process against which both the Congress and the courts have inveighed." 306 F.2d 260 at 267.

These cases are inapposite. The Commissioners who authorized issuance of the Complaint against Daisy were not staff investigators who gathered evidence supporting the CPSC staff recommendation that a Complaint issue against Daisy.

In this case Daisy was afforded every consideration possible, every opportunity to be heard, directly and through political supporters (please see Exhibits 1 and 2 to Complaint Counsel's Opposition) during the period before a Commission vote was taken.

As pointed out in greater detail in our Opposition, Daisy met with staff level decision makers from the Commission's Office of Compliance. The staff Legal Division was in regular contact with Daisy regarding its investigation. In October 2001 alone Daisy met with Compliance staff and all three Commissioners or members of their staff.

Further, and of very great significance, in Amos, the SEC issued an **order** setting forth charges that the company willfully violated an Act administered by the SEC. Amos, 306 F.2d 260 at 262. When the CPSC authorized the issuance of a Complaint, the Commission did not make a final determination of any kind. Rather, the Commission decided to refer the matter for a full administrative hearing before an Administrative Law Judge. The Commission acted as it is empowered to act pursuant to the Consumer Product Safety Act, 15 U.S.C. § 2064(c) and the Federal Hazardous Substances Act, 15 U.S.C. § 1274(c)(1).

Scope of Review

Respondent requests that CPSC conduct be reviewed under standards outlined under 5 U.S.C. § § 706 and 704 of the Administrative Procedure Act . Of course Complaint counsel believes no review is proper until Respondent has exhausted its administrated remedies. Respondents try to use Section 706 and the Forrester case to support its request, Forrester v. Consumer Product Safety Commission, 182 U.S. App. D.C. 153, 559 F.2d 774 (D.C Cir.1977). Clearly neither source applies to the case before you. Section 706 addresses final agency action in a rule making proceeding. Forrester involves **final agency action**, bicycle **regulations**, promulgated by the Commission. (Petitioners challenged final bicycle regulations issued by the CPSC. The court rejected

nearly all of the petitioner's contentions, and held that most of the findings of the Commission regarding hazards of bicycles and the issued regulations to be valid).

Respondent also alleges that under Section 704 of the APA, final agency action is reviewable. Section 704 involves final agency action on adjudicated matter. There has been no final agency action in this case. That is why we are going through this hearing process, to create a record of facts and admissible evidence relating to the alleged hazards posed by certain Daisy Powerline Airguns so that the Presiding Officer, Judge Moran may make an Initial Decision. 16 C.F.R. § 1025.51

Respondents Alleged violations of the Government in the Sunshine Act

The Government in the Sunshine Act (hereinafter, "Sunshine Act") defines which agency meetings and information shall be available to the public and the rules that apply to certain closed meetings and non-public documents. 5 U.S.C § 552. It does not require "that every portion of every meeting of an agency shall be open to public observation." as Respondent contends, unless you ignore the ten exceptions and agency discretion listed in 5 U.S.C. §§ 552b (c)(1) to (c)(10). Respondent makes a bald allegation, with no evidence or basis in fact, that Commissioners Moore and Brown "obviously met," or "apparent[ly]" met, (take your pick from page two of Respondent's Motion) in an "improper meeting" under the Sunshine Act and CPSC.

Respondent refers to a Supreme Court case that provides guidance for defining meeting under the Sunshine Act. In Federal Communications Commission v. ITT World Communications, Inc., [466 U.S. 463, 471 (1984)] the Supreme Court defined a meeting as discussions 'sufficiently focused on discrete proposals or issues as to cause or be likely

to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency.’ (The court held that a “Consultative Process”--a conference attended by the FCC and its European counterparts to exchange information aimed at facilitating joint planning of telecommunications facilities--where a quorum of members from the FCC attended was **not** a meeting under the Sunshine Act.). The case is interesting but not helpful to Respondent’s claims.

Respondent failed to provide any evidence that any meeting even occurred let alone a preponderance of evidence that the meeting, involved discussions “sufficiently focussed on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before an agency.” Id. Instead, Respondent claims that preparations for a press conference, a press release and an interview mean a secret meeting must have occurred. Complaint Counsel explained why that supposition is false at length in its Opposition.

If Respondent believed an improper meeting occurred prior to the vote to authorize the issuance of the Complaint against Daisy, Respondent had 60 days from the date of the “improper meeting” to file for U.S. District Court review. 5 U.S.C. § 552B(H)(1) Respondent’s request for review in this matter is not supported by the facts, is in the wrong forum and is not timely. Respondent’s reasons for failing to seek its remedy in a timely manner under the Sunshine Act are not known to Complaint Counsel. We can only speculate and speculation has no place in an evidentiary forum.

We do know that Respondents have seized upon the Sunshine Act at this time in a desperate attempt to link its due process claims to said act and hope for premature Judicial Review.

Respondent cites other largely irrelevant cases in its attempt to use a procedural violation of the Sunshine Act as a vehicle through which to pull through its groundless “5th Amendment due process” claim. **In fact, constitutional challenges to the manner in which an agency acts remain outside the [Federal] Courts jurisdiction until final agency action has been taken** Time Warner Entertainment v. FCC, 93 F3d. 957 (D.C. Cir. 1996) The facts in National Association of Broadcasters v. Copyright Royalty Tribunal 218 U.S. App D.C. 348, 675 F.2d 367 (1982) cited by Respondents are not at all similar to the facts in the instant matter. (The court concluded that an **award** to one party was flawed by the failure of the Tribunal to explain why it had chosen to reject the reasoning of its initial decision and that action should be remanded for allocation in accordance with procedural requirements of the Sunshine Act. Petitioner NPR alleged that there was a “meeting” where there was no record maintained, no notice provided, and no specific reasons given as to why the Tribunal chose to reverse its initial decision to award monies earmarked for NPR).

Respondent spends a lot of time trying to distinguish the facts of Pan American v. Civil Aeronautics Board, 221 U.S. App. D.C. 257, 684 F.2d 31 (1982) from the Daisy case. In Pan Am, the court did not invalidate the CAB **award** of a flight route, even though the Cab had committed a Sunshine Act meeting violation. The Court reasoned that the violation of the Sunshine Act was remedied by the subsequent release of transcripts from the closed meeting by the Board, that the violation was unintentional,

that invalidation would cause harm to blameless third parties (the airlines who received the flight route **awards** would be harmed by the invalidation), and that the decision to award these flight routes to the airlines was reasonable.

Respondent claims its case is different. It believes that because it assumes no transcripts probably exist from the alleged “improper meeting”, the alleged meeting was intentional, that a dismissal would cause no harm to blameless third parties and that the CPSC decision to refer this hazard case for a hearing was unreasonable.

Again we are presented with an argument that has no predicate: a secret, improper meeting. Presumably, any secret meeting would be intentional. For argument purposes only we may just as well assume that a secret record was kept of the secret meeting and release of that record would be Respondent’s remedy. Complaint Counsel strongly contends that **there are large numbers of blameless third party consumers, potential victims of the Airgun defects** who would be harmed by a dismissal. Are they not entitled to due process too?

Most importantly, it is not up to Respondent’s counsel to decide that the Commission’s decision to vote to authorize the issuance of a Complaint is unreasonable when Courts across the land routinely defer to the agency expertise in matters of consumer safety.

Alleged claims of Prejudgment by Chairman

Respondent alleges that Chairman Brown should have disqualified herself from the decision to vote to authorize the issuance of the Complaint against Daisy and if she failed to do so, the Commission was obligated to rule on the matter. Respondent

incorrectly reads and applies rules governing the CPSC. Chairman Brown is not considered a Presiding Officer for purposes of 16 C.F.R. § 1025.42.

The standards for disqualification of a Commissioner or decision maker of an agency differs depending upon the type of the proceedings involved. Respondent cites Federal Trade Commission cases for consideration in hopes that the cases apply to the instant matter. These cases do not apply because the Commission's referral to an ALJ does not find that Daisy violated any CPSC law. The referral process in question is neither final adjudicatory nor rulemaking action.

Respondent cites Texaco, Inc. v. Federal Trade Commission, 118 U.S. App. D.C. 366, 336 F.2d 754 (1964) (vacated on other grounds) (adjudicative proceeding); Cinderella Career and Finishing Schools, Inc. et al. v. Federal Trade Commission, 138 U.S. App. D.C. 152, 425 F.2d 583 (1970) (adjudicative proceeding); Association of National Advertisers, Inc. et al. v. Federal Trade Commission, 201 U.S. App. D.C. 165, 627 F.2d 1151 (1979) (rulemaking proceeding).

The (same) FTC Chairman's conduct in these cited cases is especially egregious. In the instant matter, Respondent points to one line in Chairman Brown's resignation remarks issued on August 8, 2001 and preparation for public announcements as evidence that she is guilty of prejudgment. In the remarks the Chairman referred to a matter involving an unnamed product made by an unnamed.

In Texaco, the Chairman of the FTC made comments in a public speech, before he took over as Chairman, about the companies the FTC charged with violating a section of the Federal Trade Commission Act. In his speech, the Chairman named companies, issues, items of interest specific to the industry, procedural postures of cases pending

before the Commission and on appeal, and an agenda he hoped to carry out as Chairman of the agency. In Cinderella, the FTC Chairman made a public statement that indicated he had already reached a decision in a case by making specific references to the company that amounted to condemnation of the company's business practices.

Review of Prejudgment Claim and Denial of Due Process is Premature

Respondent cites Association of National Advertisers to support its contention that a review of a prejudgment claim before the completion of the instant case is proper. Again, Respondent incorrectly applies the law in its Memorandum. The Daisy matter involves a pre-adjudicative matter. The proceeding in Association of National Advertisers is a rulemaking proceeding. The Court found the Chairman did not engage in prejudgment nor should he be excluded from remaining FTC activities involving a company about which the Chairman had recently delivered a rather pointed speech. The Court was mindful of the exhaustion of administrative remedies doctrine and stated that its case was one of first impression and will not necessarily allow future piecemeal attacks on administrative processes.

Respondent further alleges that Daisy's due process rights were violated and that such violations require immediate review. Respondent alleges this violation occurred as a result of the Chairman's prejudgment and other procedural irregularity before the Commission voted to authorize the issuance of the Complaint. Respondent offers Withrow v. Larkin and Hercules, Inc. v. EPA as cases of its Due Process contentions. The decisionmakers in Withrow and Hercules were deemed not to have acted in a way that violated the due process clause. See, Withrow et al. v. Larkin, 421 U.S. 35 (1975)

(holding that the Board's conduct did not result in a procedural due process violation where a state medical examining board that made a determination of probable cause and then was also the ultimate adjudicator in a subsequent proceeding; Hercules, Inc. v. Environmental Protection Agency, 194 U.S. App. D.C. 172, 598 F.2d 91 (1978) held that 5 U.S.C. § 554(d) was inapplicable to *ex parte* staff contacts with the EPA administrator, and its chief judicial officer who drafted the order under the administrator's supervision).

Exhaustion of Administrative Remedies

This adjudicative proceeding is not completed. The Presiding Officer is in the process of conducting a hearing and an Initial Decision will be made on the basis of the record. If the decision is adverse to Daisy, Daisy has the right to appeal to the full Commission.

Ann Brown is no longer a Commissioner and Respondent hasn't called for the recusal of Commissioner Moore. A review of a prejudgment claim at this juncture would be premature because Daisy has not exhausted all agency remedies available to it. In fact, the parties are still in the discovery phase of the proceedings. Respondent cites McKart v. United States, 395 U.S. 185 (1969) to support its claim that Daisy has a right to have its procedural irregularity claim reviewed and decided right now. The reference to McKart v. United States is unsupportable in this context because McKart involved a criminal proceeding. (holding that the exhaustion of administrative remedies doctrine does not bar judicial review in a criminal case, that petitioner's failure to appeal his classification in an administrative forum could not foreclose judicial review in his criminal case because the interest underlying the exhaustion rule did not outweigh the severe burden of imprisonment imposed if judicial review was denied).

Complaint Should Not be Invalidated

Respondent has not provided credible evidence of any impropriety in the process leading to the vote to authorize the issuance of the subject Complaint. And of course, it did not demonstrate any final agency action. The statutory and case law Respondent cites do not withstand close scrutiny and do not support Respondents claims and do not act as a surrogate for crucial facts missing from the motion.

Respondent failed to meet its burden of proof and its Motion to Dismiss this entire proceeding and to stay proceedings pending a ruling on said motion should be denied.

Respondents Request for a Stay

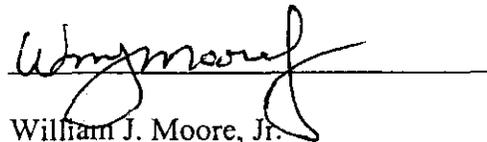
Respondents offer no facts or law in support of its motion to stay these proceedings. As the proponent, its request must be denied.

The Supreme Court repeatedly has held that the usual time and effort required to pursue an administrative remedy does not constitute irreparable injury. Renegotiations Board v. Bannercroft Clothing Co., 415 U.S. 1 (1974)

Conclusion

Upon a review of the applicable law and the purposes for which the cases used by Respondent have been cited, Complaint Counsel respectfully concludes that the Motion to Dismiss and Motion to Stay these adjudicative proceeding must be denied.

Respectfully submitted

A handwritten signature in black ink, appearing to read "W. Moore, Jr.", is written over a horizontal line.

William J. Moore, Jr.
Quynh Nguyen
Candace Blydenburgh
Complaint Counsel
4330 East West Highway
Bethesda, Maryland 20814
301-504-0626 x1348

April 11, 2002

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of)	
)	
DAISY MANUFACTURING COMPANY,)	CPSC Docket No.: 02-2
Inc., doing business as Daisy Outdoor)	
Products)	
400 West Stribling Drive)	
Rogers, Arkansas 72756)	
)	
Respondent.)	
)	

ORDER

Having carefully read and considered Respondent's Motion to Dismiss the Complaint for Procedural Irregularity, Violation of the Law, Action without Observation of Procedures Required by Law and a Denial of Due Process under the Fifth Amendment to the United States Constitution and its Memorandum of Law in Support of the Motion to Dismiss as well as Complaint Counsel's Opposition to Respondent's Motion to Dismiss and Memorandum of Law in Support, I, William B. Moran, the Presiding Officer in the above-captioned Matter,

IT IS HEREBY, ORDERED:

That Respondent's Motion to Dismiss the Complaint in this Matter be, and is hereby, denied.

William B. Moran
United States Administrative Law Judge
and Presiding Officer

Dated:

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

_____)	
In the matter of)	
)	
DAISY MANUFACTURING COMPANY,)	CPSC Docket No.: 02-2
Inc., doing business as Daisy Outdoor)	
Products)	
400 West Stribling Drive)	
Rogers, Arkansas 72756)	
)	
Respondent.)	
_____)	

ORDER

Having carefully read and considered Respondent's Motion to Dismiss the Complaint for Procedural Irregularity, Violation of the Law, Action without Observation of Procedures Required by Law and a Denial of Due Process under the Fifth Amendment to the United States Constitution and its Memorandum of Law in Support of the Motion to Dismiss as well as Complaint Counsel's Opposition to Respondent's Motion to Dismiss and Memorandum of Law in Support, I, William B. Moran, the Presiding Officer in the above-captioned Matter,

IT IS HEREBY, ORDERED:

That Respondent's request that this proceeding be stayed pending a ruling on this motion be, and is hereby, denied.

William B. Moran
United States Administrative Law Judge
and Presiding Officer

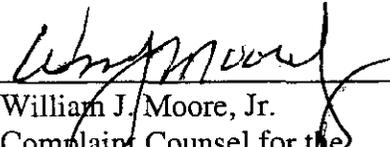
Dated:

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2002, I served the attached **Complaint Counsel's Opposition to Respondent's Motion to Dismiss, Memorandum of Law in Support of Complaint Counsel's Opposition to Respondent's Motion to Dismiss These Proceedings, and 2 proposed Orders** upon all parties of record in these proceedings by mailing, postage pre-paid, a copy of each document to:

Aaron Locker and
Jeffrey M. Locker, Esq.
LOCKER, GREENBERG & BRAININ
420 Fifth Avenue, 26th Floor
New York, NY 10018

Office of the Secretary (via hand delivery)
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814-4408



William J. Moore, Jr.
Complaint Counsel for the
U.S. Consumer Product Safety Commission