UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

MOTION TO COMPEL CORRECTION AND RETRACTION AND FOR SANCTIONS

COMES NOW Baby Matters LLC ("Respondent" or "Baby Matters"), by counsel, and moves, pursuant to 16 CFR Part 1025.23, for (1) an order compelling the Consumer Product Safety Commission (the "Commission") to publish a correction and retraction relating to the Press Release issued by the Commission on December 27, 2012, (the "Press Release") and (2) an order imposing sanctions against the Commission relating to its manipulation and improper use of certain false information contained in the Press Release. In support of this Motion, Baby Matters incorporates by reference the accompanying Memorandum of Points and Authorities in Support and states as follows:

1. This administrative enforcement proceeding was initiated by the Office of the General Counsel's Division of Compliance ("Complaint Counsel") with the filing of a Complaint on December 4, 2012. Respondent timely answered the Complaint on December 26, 2012.

2. The Complaint requests that the Commission determine that Respondent's Nap Nanny® portable recliner products ("the Subject Products") present a "substantial product hazard" within the meaning of Section 15 of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064(a)(1) and (2), and that the Subject Products contain a defect, which creates a

substantial risk of injury to children, within the meaning of Section 15 of the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. § 1274(c)(1).

3. On December 27, 2012, the Commission issued a Press Release relating to this lawsuit announcing that four of Respondent's major retailers have decided to stop selling the Subject Products as part of a voluntary recall in cooperation with the Commission. The Press Release noted that "these retailers have agreed to voluntarily participate because the manufacturer is unable or unwilling to participate in the recall."

4. Retailers who have not agreed to voluntarily recall the Subject Products are legally free to sell, and in fact continue to sell, the Subject Products while this litigation is pending.

5. The Press Release, however, incorrectly informed the public, including retailers not participating in the recall, that "[u]nder federal law, it is illegal to attempt to sell or resell this or any other recalled product."

6. This statement was materially false, misleading and deceptive because, as the Commission is well aware, Section 19 of the CPSA, 15 U.S.C.A. § 2068 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)." (Emphasis added).

7. When it issued the Press Release, the Commission knew that "the manufacturer" (Respondent) had not undertaken a voluntary corrective action, that the Subject Products were not subject to any orders issued under Sections 12 or 15 of the CPSA, and that the Subject Products had not been determined to be banned hazardous substances under Section 2(a)(1) of

the FHSA. The Commission thus was aware that it was false, misleading and deceptive to put the public on notice that selling or reselling the Subject Products was a violation of federal law.

8. The false and misleading information in the Press Release created mass confusion in the marketplace, leading a number of retailers who had not agreed to stop selling the Subject Products to contact Respondent, inquiring about the legality of continuing to sell the products.

9. This false and misleading information in the Press Release was made known to the Commission by Respondent's counsel in time for it to be corrected before the end of the December 27, 2012 news day.

10. Instead of making a retraction or correction, however, the Commission continued to re-publish the incorrect Press Release throughout the entire December 27, 2012, news day, with full knowledge of the damage that it was causing to Respondent, and in disregard for the significant confusion that it was causing to the retailers who were not participating in the recall.

11. In an apparent intentional act to manipulate the news cycle, the Commission waited until approximately 6:30 p.m. to correct its on-line version of the Press Release—after the news of the Press Release had achieved maximum impact.

12. Although it ultimately corrected the Press Release, the Commission did not publish a retraction in accordance with 15 U.S.C. 2055(7), which requires that the Commission, in correcting an inaccurate or misleading disclosure of fact, "*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." (Emphasis added).

13. The Commission, through its Office of Communications, is adept at using the news cycle to maximize the impact and reach of its public announcements. It does nothing that is unintentional or without purpose or design. While the Commission may have unintentionally

included the false and misleading language in the Press Release, its response after learning of this error—letting the incorrect Press Release linger in the media "echo chamber" until after the close of the news day on the eve of what it knew would be a "dead" news day on Friday, December 28—was undoubtedly a calculated act. The Commission's apparent objective was to ensure that as many retailers acted to remove Respondent's products from their shelves as possible, regardless of the fact that only some retailers had voluntarily elected to do so, and the manufacturer was "unwilling to participate in the recall." *See* Press Release.

14. 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 … ."

15. This Court and its Presiding Officer have 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.

16. This Court should enter an Order that (1) requires that the Commission issue a retraction and correction in every news outlet that it issued the original Press Release, expressly identifying the error in the first Press Release and clarifying that retailers not participating in the recall and consumers are free to continue purchasing, selling and reselling the Subject Products while this proceeding is pending; and (2) sanctions the Commission by dismissing this action in its entirety, with prejudice.

WHEREFORE, for the foregoing reasons, and those stated in the Memorandum of Points and Authorities filed simultaneously herewith, Respondent Baby Matters LLC respectfully requests that this Court grant this motion and order the following:

(1) The Commission shall, within twenty-four (24) hours of entry of any order relating to this motion, publish a retraction and correction that identifies the error contained in the December 27, 2012 Press Release and directs consumers to the correct information, including the following language, which shall be appended to the top of the corrected Press Release:

"CORRECTION: The following Press Release contains revisions and corrections to the Press Release previously issued on December 27, 2012, which contained false or misleading statements relating to the sale and resale of Baby Matters' Nap Nanny® products pursuant to federal law. The CPSC clarifies for consumers that, until the litigation involving the Nap Nanny® and the Chill™ products is resolved, it is permissible under federal law for retailers not participating in the recall and consumers to purchase, sell and resell Nap Nanny® and Chill™ products.";

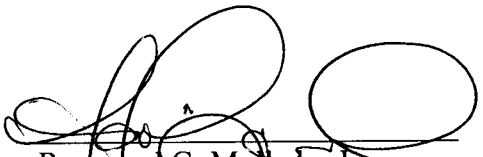
(2) This action shall be dismissed, with prejudice; and

(3) For such other relief as this Court deems just and appropriate.

January 2, 2013

Respectfully submitted,

Baby Matters LLC
By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing 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.

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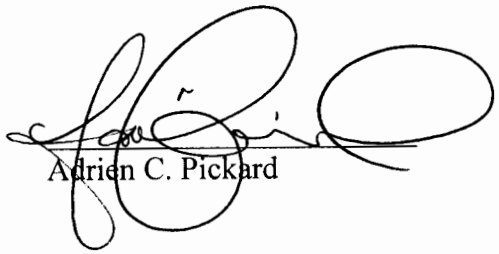

Adrien C. Pickard

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ORDER

UPON CONSIDERATION of Respondent Baby Matters LLC's Motion to Compel Correction and Retraction and for Sanctions, the Opposition thereto and the argument of counsel, for good cause shown, it is hereby

ORDERED that the United States of America Consumer Product Safety Commission shall, within twenty four (24) hours of entry of this Order, publish a retraction and correction to the Press Release issued on December 27, 2012 containing the following language:

CORRECTION:
The following Press Release contains revisions and corrections to the Press Release previously issued on December 27, 2012, which contained false or misleading statements relating to the sale and resale of Baby Matters' Nap Nanny® products pursuant to federal law. The CPSC clarifies for consumers that, until the litigation involving the Nap Nanny® and the Chill™ products is resolved, it is permissible under federal law for retailers not participating in the recall and consumers to purchase, sell and resell Nap Nanny® and Chill™ products.

and it is further

ORDERED that, as a sanction, this action is DISMISSED with prejudice.

DATE: _____

_____
Judge Walter J. Brudzinski
Administrative Law Judge

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