UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

RESPONSE TO MOTION FOR RECONSIDERATION OF MOTION TO COMPEL CORRECTION
AND RETRACTION AND FOR SANCTIONS

On January 22, 2013, this Court entered an order denying Respondent's Motion To Compel Correction and Retraction and for Sanction. The Court denied the Motion on the grounds that the applicable provisions of 15 U.S.C. §2064(c) and (d) and pertinent regulations, 16 CFR §§1101.51 and 1101.52 contained no delegation of authority to the Court to provide Respondent with the relief it requested, and because Respondent failed to follow applicable procedures set forth in 16 C.F.R. §1101.52(b) and (c). Notwithstanding the Court's ruling, on January 25, 2013, the Respondent challenged the court's reasoning and sought reconsideration of the ruling.

This Court should deny Respondent's Motion for Reconsideration as it represents one more attempt by Respondent to ignore prescribed rules and procedures in an effort to distract attention from the only issue properly before this Court: whether Respondent's product constitutes a substantial product hazard within the meaning of Section 15 of the Consumer Product Safety Act (CPSA), as amended, 15 U.S.C. § 2064, and Section 15 of the Federal Hazardous Substances Act (FHSA), as amended, 15 U.S.C. § 1274. Respondent's refusal to

avail itself of the appropriate venue in which to pursue relief under Section 6(b) should not be used as a vehicle to expand improperly the scope of these proceedings.

Commission regulations at 16 C.F.R. § 1101.52 set forth clearly defined procedures through which Respondent may seek a retraction, yet Respondent disregarded those rules in attempting to proceed instead before this Court. In chastising this Court for failing to provide Respondent "the benefit of a reply brief . . . to rebut the points raised by the staff of the Consumer Product Safety Commission's [sic]," Respondent seeks yet again to re-write the rules as it sees fit, using this new Motion to circumvent the clear prohibition that, absent permission from the Presiding Officer or the Commission, "there shall be no reply to the response expressing opposition to [a] motion." 16 C.F.R. § 1025.23(c). Yet, that is precisely what Respondent seeks to do with its latest Motion which amounts to a sur-reply, a motion specifically not authorized under the rules where, as here, specific permission has not been sought.

In doing so, Respondent displays a consistent disregard for proper procedure that this Court should not countenance. Indeed, after setting forth a brief legal argument, Respondent devotes the bulk of its Memorandum in Support of its Motion to a factual argument on the merits of the retraction and rebuttal of Complaint Counsel's Opposition. As Complaint Counsel contends that this is not the appropriate forum in which to argue these points, we refrain in this Opposition from a fulsome refutation of Respondent's contentions. Should this Court reverse its earlier ruling such that the Court will review the merits of whether a retraction is warranted, Complaint Counsel hereby requests an opportunity to brief the merits of the issue separately.

1. This Court Lacks Jurisdiction to Hear Respondent's Motion to Compel Correction and Retraction and for Sanctions

As detailed in Complaint Counsel's Opposition to Respondent's Motion to Compel Correction and Retraction and for Sanctions, (attached hereto as Exhibit A) this Court lacks jurisdiction to hear Respondent's Motion and is limited in its authority to determine "that a product distributed in commerce presents a substantial product hazard" and order appropriate action, such as requiring notice to the public, cessation of distribution of the product, and refunds to consumers. 15 U.S.C. §§ 2064(c) and (d). See Complaint Counsel Opp. At. 4-6 . *See also* 16 C.F.R. § 1025.1 (defining limited scope of this Court with respect to the CPSA to adjudicative proceedings relating to sections 15 (c), (d), and (f), 17(b), and 20(a)). The scope of the rules governing this proceeding do not include Section 6 disputes.

Despite sweeping assertions that this Court has the "full authority . . . to condition the continuation of these proceedings on the Commission taking corrective action with regard to the December 27, 2012 press release," Respondent's latest Motion cites no new or additional authority to support that proposition. Respondent cites no authority because there is none. Respondent seems to abandon its earlier contention that this Court retains inherent authority to order the Commission to act pursuant to 16 C.F.R. § 1025.42(a), *see* Resp. Memo. at 6, a contention that was patently without basis. Instead, Respondent now relies merely on a vague assertion of authority untethered to any particular statutory or regulatory foundation.

Respondent properly acknowledges that "aggrieved individuals seeking redress for the wrongful disclosure of information under 6(b) should file actions in the district court," Memorandum at 3. However, Respondent subsequently asserts, unencumbered by any supporting authority, that this means of redress somehow vanishes when a separate enforcement

proceeding is pending because "there is no need for any district court to also take jurisdiction of the dispute," as if the mere convenience of Respondent is sufficient to supplant the district court's authority. *Id.* Similarly, Respondent asserts, again without statutory or legal foundation, that Section 6(b)(4) somehow "implies" that this Court can "redress wrongful disclosures under Section 6(b)(4)." Memorandum at 2.

Just as Respondent may not write the rules as it wishes them to be, Respondent cannot read into the statute what it wishes it would say. While Section 6(b)(4) relieves the Commission of its notice responsibilities under Section 6(b)(1)-(3) under certain circumstances, the requirements of Section 6(b)(7), which govern retraction procedures, remain intact. Thus, despite Respondent's claim to the contrary, the two actions can, and must, proceed independently as the statutory authority to seek review under 6(b) falls squarely within the domain of the federal district court once there has been final agency action. See, e.g., *Daisy Mfg. Co., Inc. v. Consumer Products Safety Com'n*, 133 F.3d 1081, 1082 (8th Cir. 1998) (federal court review proceeded on firm's Section 6 public release dispute once the firm finished exhausting the procedures set by the Commission). Nothing in the statute or the Commission's implementing regulations indicate that this path of review changes simply because a separate enforcement proceeding has commenced.

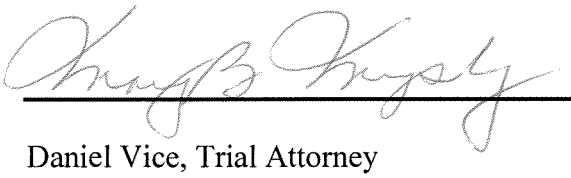
Moreover, Respondent's request for sanctions in the form of dismissal is equally without merit. Not only does Respondent offer no substantive basis that would warrant granting this request, Respondent can point to no provision in the Regulations that empowers this Court to impose such a sanction. To the extent the regulations do permit the imposition of sanctions at all, that penalty exists only for the failure to comply with discovery orders, *See* 16 C.F.R. § 10125.37, and for prohibited ex parte communications, See 16 C.F.R. §1025.68(g). See also, 16

C.F.R. § 1025.66(b) (government exclusion of parties, participants or their representatives). The rules do not permit, nor do the facts justify, sanctions of any kind, let alone the severe penalty Respondent requests.

In properly denying Respondent's Motion, this Court does not deny Respondent the opportunity to obtain the relief it seeks as Respondent may still pursue that relief in the appropriate forum. Rather, in denying this request, this Court will be able to focus attention on the matter appropriately before it: determining whether Respondent's product constitutes a substantial product hazard within the meaning of the CPSA and the FHSA.

CONCLUSION

For the reasons stated above, Respondent's motion should be denied.



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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing on all parties and participants of record in these proceedings by emailing a courtesy copy and by mailing, postage prepaid a copy to each on January 28, 2013.

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EXHIBIT A

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

RESPONSE TO MOTION TO COMPEL CORRECTION
AND RETRACTION AND FOR SANCTIONS

This case is an administrative enforcement proceeding initiated by the staff of the Consumer Product Safety Commission (CPSC or Commission) seeking a determination that Respondent's infant recliners constitute a substantial product hazard within the meaning of Section 15 of the Consumer Product Safety Act (CPSA), as amended, 15 U.S.C. § 2064, and Section 15 of the Federal Hazardous Substances Act (FHSA), as amended, 15 U.S.C. § 1274. *See* Complaint filed by Complaint Counsel on December 4, 2012, hereinafter "Compl.," at ¶ 1. The Complaint alleges that Respondent's products are defective for a number of reasons, including that they allow infants who are placed in them to move into compromised positions so that their heads or bodies become dangerously entrapped, which can result in injury or death. *See id.* ¶¶ 54-58, 78-86, 101-121.

On January 2, 2013, Respondent filed a Motion to Compel Correction and Retraction and for Sanctions. Respondent seeks to compel the Commission to issue a correction and retraction of a press release, issued by the Commission on December 27, 2012, advising the public that four retailers have agreed to stop the sale of, and voluntarily recall, Respondent's products. The

motion also requests that this Court impose sanctions on the Commission in the form of a dismissal of what it calls this "sham" administrative proceeding. Resp. Memo. at 1. This motion should be denied because the Court lacks jurisdiction over the motion, because Respondent failed to comply with the rules governing requests for retractions, and because prompt remedial measures that render the request moot have already been taken.

BACKGROUND

On December 4, 2012, staff of the CPSC filed a complaint, authorized by the Commission, after extensive, but ultimately unsuccessful, negotiations with Respondent failed to yield a voluntary recall of its Nap Nanny line of infant recliner products. Separate and apart from this litigation, Commission staff continued to seek voluntary recalls of the infant recliners sold by retailers who are not parties to this litigation. On December 27, 2012, the Commission announced that four retailers agreed to voluntarily recall the Nap Nanny line of products and issue refunds to consumers. The Commission subsequently issued a press release advising the public of the remedy available to members of the public who wish to return the product. *See* 16 C.F.R. § 1115.20(a)(1)(ii) (voluntary recalls "shall include, as appropriate . . . means to be employed to notify the public of the alleged product hazard (e.g., letter, press release, advertising)").

Because this voluntary retailer recall was independent of the proceeding against Respondent, the press release did not mention the instant proceeding. *See* Resp. Memo. at Exh. A. Instead, it correctly stated that the manufacturer had previously agreed to a recall for Nap Nanny Generation One and Two models in 2010, and it advised consumers that they now may contact retailers to return Nap Nanny Generation One and Two and Chill models. *See id.* The release also contained small font boilerplate at the end, describing the Commission's statutory

functions and stating that, "Under federal law, it is illegal to attempt to sell or resell this or any other recalled product." *Id.*

On the afternoon of December 27, 2012, the day the press release was issued,[1] Respondent e-mailed Commission staff to express concerns about the above-referenced boilerplate language in the release. Resp. Memo. at 3. Respondent asserted that the phrase stating that it is illegal to resell "this or any other recalled product," was misleading because federal law only prohibits the resale of products voluntarily recalled by manufacturers. Resp. Memo. at Exh. C. Respondent further demanded that a corrected release "specifically state" that "the Nap Nanny has not been voluntarily recalled by the manufacturer," *id.*, despite the fact that tens of thousands of Respondent's Nap Nanny products in fact had been voluntarily recalled by Respondent in 2010. *See* Compl. ¶¶ 65-66.[2]

Despite Respondent's "demand" that the Commission "specifically state" something that was not in fact accurate, Commission staff nonetheless worked to assuage Respondent's concerns and deleted the sentence stating that is illegal to resell "this or any other recalled product" from the press release on the Commission's cpsc.gov website. This remedial action was taken at 4:43 pm, less than two hours after receiving the initial contact from Respondent about this issue. *See* Commission Log Sheet attached at Exh. 1.[3] Indeed, Respondent does not

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[1] Respondent sent its first e-mail concerning this press release to Commission staff at 2:56 pm on December 27, 2012. *See* Resp. Memo. at 3.

[2] Pursuant to 15 U.S.C. § 2068(a)(2)(B), it is unlawful to "sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States any consumer product, or other product or substance that is . . . subject to voluntary corrective action taken by the manufacturer, in consultation with the Commission, of which action the Commission has notified the public or if the seller, distributor, or manufacturer knew or should have known of such voluntary corrective action. . . ."

[3] The press release containing the deleted sentence was also inadvertently uploaded the following day, December 28, 2012, onto a beta test website, preview.cpsc.gov. It was removed from that site within three hours and replaced with the corrected press release.

cite any statement by any news media referring to the small font boilerplate in the press release about limits on the sale of recalled products. Only after Respondent itself apparently alerted the media the following week to the deleted language did such a report appear.[4] Respondent's late in the day e-mail demanding that the Commission issue a correction, followed by Respondent's apparent media outreach to highlight a sentence that had already been deleted and that Respondent claims it did not want the public to see, suggests that its accusation that the Commission engaged in "blatant manipulation of the news cycle," Resp. Memo. at 5, is misplaced.

ARGUMENT

This Court should reject Respondent's motion because it has no jurisdiction to hear the motion, because Respondent failed to comply with the rules governing requests for Commission retractions, and because the issue was rendered moot by prompt action taken by CPSC staff in response to Respondent's request.

1. Respondent's Motion is Properly Brought Before the Commission

This Court has limited jurisdiction pursuant to Section 15 of the Consumer Product Safety Act, 15 U.S.C. § 2064(f), to determine "that a product distributed in commerce presents a substantial product hazard" and order appropriate action, such as requiring notice to the public, cessation of distribution of the product, and refunds to consumers. 15 U.S.C. §§ 2064(c) and (d). Here, however, Respondent relies on Section 6(b)(7) of the CPSA, 15 U.S.C. § 2055(b)(7), governing public disclosure of information, to argue that this Court must order the Commission to issue a retraction. *See* Resp. Memo. at 4. Respondent erroneously contends that this Court

[4] *See* Diane Mastrull, *Maker of Nap Nanny fights agency's recall effort*, Philadelphia Inquirer, Jan. 3, 2013, available at http://articles.philly.com/2013-01-03/business/36132815_1_baby-matters-llc-cpsc-raymond-g-mullady.

has sweeping authority to order the Commission to act pursuant to 16 C.F.R. § 1025.42(a), *see* Resp. Memo. at 6; however, the rules concerning the Court's powers within this proceeding cannot expand its jurisdiction beyond the scope of the Court's clearly defined role set forth in the regulations. *See* 16 C.F.R. § 1025.1 (defining limited scope of this Court with respect to the CPSA to adjudicative proceedings relating to sections 15 (c), (d), and (f), 17(b), and 20(a)). The scope of the rules governing this proceeding do not include Section 6 disputes.

The rules exclude Section 6 disputes from the jurisdiction of this Court for good reason. The Commission is not a party to this proceeding. Indeed, the Commission is this Court's appellate body. *See* 16 C.F.R. § 1025.53. The actions of this Court are not final until adopted by the Commission itself; moreover, this Court's decision is appealable to the Commission and subject to final review by the Commission. *See* 16 C.F.R. §§ 1025.52-53. Because the Commission is not a party at this stage, this Court has no power to order the Commission to take any action whatsoever, including issuing a retraction. Indeed, Section 6 of the CPSA is governed by a regulatory scheme that is entirely separate from Section 15, and Commission actions under Section 6 are subject to review in federal district court, not this Court. *See, e.g., Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 105-06 (1980) ("Section 6 of the CPSA . . . regulates the 'public disclosure' of information by the Commission," and noting review of Commission actions under this section in the district court).

II. Respondent Failed to Comply with Commission Regulations in Seeking a Retraction

In proceeding before this Court, Respondent chose not to avail itself of the clearly defined procedure, set forth at 16 C.F.R. § 1101.52, by which firms can seek such a retraction. Among other requirements, the regulations implementing section 6(b)(7) require that a retraction request "must be in writing and addressed to the Secretary. . . ." 16 C.F.R. § 1101.52(b).

Respondent made no such submission. *See* Declaration of Todd Stevenson at Exh. 2. The request must be submitted to the Secretary so that the Commission may determine whether there has been "public disclosure of inaccurate or misleading information that reflects adversely either on the safety of the firm's product or the practices of the firm. . . ." 16 C.F.R. § 1101.52(d). The Commission must act "expeditiously on any request for retraction within 30 working days" unless the Commission demonstrates good cause for additional time. Here, having purported to invoke Section 6(b)(7) of the CPSA, Respondent failed to comply with the rule's requirements on multiple fronts.

Once the Commission has issued a final decision on a request for a retraction, a firm requesting such a retraction may dispute the Commission's final action by seeking review in federal court. *See, e.g., Reliable Automatic Sprinkler Co., Inc. v. Consumer Product Safety Com'n*, 324 F.3d 726, 731 (D.C. Cir. 2003), quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997) ("Final agency action" is reviewable in federal district court and it "'mark[s] the consummation of the agency's decisionmaking process' and is 'one by which rights or obligations have been determined, or from which legal consequences will flow.'"); *Daisy Mfg. Co., Inc. v. Consumer Products Safety Com'n*, 133 F.3d 1081, 1082 (8th Cir. 1998) (federal court review proceeded on firm's Section 6 public release dispute once the firm finished exhausting the procedures set by the Commission). However, having failed to comply with the rules governing retraction requests, Respondent cannot seek such review at this time because it has not exhausted its administrative remedies. As the D.C. Circuit has explained, review of an agency's action cannot commence before the agency has finished its process as "[i]t conserves both judicial and administrative resources to allow the required agency deliberative process to take place before judicial review is undertaken." *Reliable*, 324 F.3d at 733.

Because Respondent has failed to comply with the requirements of Section 6(b)(7) of the CPSA and its implementing regulations and has improperly sought relief in the wrong forum, its motion should be denied.

III. Respondent's Request is Moot

Even if the motion had been brought in the proper forum and Respondent had complied with Commission regulations governing retractions, the request is moot because the relief sought has already been granted. Via an informal email request to Commission staff, Respondent demanded: 1) that the Commission "immediately issue a corrected press release," and 2) that this release "inform[] consumers and the media that its earlier release was in error" by "specifically stat[ing] that because the Nap Nanny has not been voluntarily recalled by the manufacturer, it is not illegal for the Nap Nanny to be resold." Resp. Memo. at Exh. C.

Within less than two hours of Respondent's request, Commission staff issued a corrected press release by deleting the sentence that Respondent asked to be removed, resolving the first part of Respondent's request. *See* Exh. 1. As to Respondent's second request, Commission staff did not "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," because such a statement would be false. Thousands of Generation One and Two Nap Nanny products were in fact recalled by the manufacturer in 2010, *see* Compl. ¶ 66, and thus it is illegal to sell or resell those products. *See* 15 U.S.C. § 2068(a)(2)(B). Therefore, to the extent Respondent's request could be granted, it was granted, and granted promptly, rendering any further proceeding on this question moot, regardless of the forum. *See, e.g., Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1114 (10th Cir. 2010), citing *National Min. Ass'n v. U.S. Dept. of Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001) (agency's "revisions mooted appellant's challenge").

CONCLUSION

For the reasons stated above, Respondent's motion should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing on all parties and participants of record in these proceedings by emailing a courtesy copy and by mailing, postage prepaid a copy to each on January 14, 2013.

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EXHIBIT 1

Call Logging - Web Team

File Edit View Group Customer Solution Accessory Report AutoTask ITSM Window Help

Web_Team - 23 of 23 | Web Team - Closed and Subset.CustID/Wolfson, Scott - 396 of 396

Call ID: 00169041 | Stopwatch: 0:01:25 | Count: 1 | Status: Closed

Employee Information

CPSC

Wolfson, Scott | Scott | Wolfson

swolfson@cpsc.gov | (301) 504-7051 | 7051 | EXPA | 519-07

Call Log | Detail (0) | Assignment (1) | Journal (0) | Web (0) | Attachments (0)

Incident Log

Closed | 1 | Urgent | EMail

Change to Rel. #13-083

Please strike the line, "Under federal law, it is illegal to attempt to sell or resell this or any other recalled product," in the footer of Release #13-083. This template change should only be made to the above referenced press release.

change made in English and Spanish versions - since this is in the boilerplate, I hard-coded it for this release, and deleted the line

User Services | Web Posting

CPSC Web Site | Information Addition/Change/Update

Current status of the call ticket (field name = CallS | heat

EXHIBIT 2

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

DECLARATION OF TODD STEVENSON

1. My name is Todd Stevenson, Director, The Secretariat (Office of the Secretary), Office of the General Counsel of the U.S. Consumer Product Safety Commission (Commission).

2. Commission regulations at 16 C.F.R. § 1101.52 state that, "Any manufacturer, private labeler, distributor or retailer of a consumer product or any other person may request a retraction if he/she believes the Commission or an individual member, employee, agent, contractor or representative of the Commission has made public disclosure of inaccurate or misleading information, which reflects adversely either on the safety of a product with which the firm deals or on the practices of the firm. The request must be in writing and addressed to the Secretary, CPSC."

3. The Office of the Secretary has not received any requests in writing addressed to the Secretary seeking a retraction concerning a press release issued by the Commission on December 27, 2012, relating to Nap Nanny products.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 11, 2013.

Todd Stevenson