UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF MOTION FOR RECONSIDERATION OF DENIAL OF MOTION TO COMPEL CORRECTION AND RETRACTION AND FOR SANCTIONS

Without the benefit of a reply brief or any oral argument from Baby Matters LLC ("Respondent") to rebut the points raised by the staff of the Consumer Product Safety Commission's ("CPSC" or "Commission") in its Opposition brief, this Court denied Respondent's Motion to Compel Correction and Retraction and for Sanctions. This Court, however, has mistaken the breadth of its jurisdictional reach in this case and has placed weight on inapposite authorities cited by the Commission that raise concerns not present in this case. Respectfully, this Court should reconsider its January 22, 2013 Order in which it concluded that it lacked jurisdiction to hear Respondent's Motion to Compel Correction and Retraction and for Sanctions.

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

In conclusory fashion, the Commission states that its December 27, 2012, press release did not relate to this proceeding because it failed to mention the proceeding. Opp. Br. at 2.

Based on this predicate, the Commission argues that this Court lacks jurisdiction to rule on Respondent's underlying motion.

Yet, if that were the case, then the Commission violated its own procedures in disclosing false information about Respondent's products, including the Nap Nanny® Chill™ (the "Chill™"), which it knew was not subject to a recall, but was only subject to this pending suit. Section 6(b) of the Consumer Product Safety Act, 15 U.S.C. § 2055(b) (the "Act"), requires that the Commission give any manufacturer, including Respondent, at least fifteen (15) days notice before it discloses any information about it publicly.

Respondent was provided no advance notice of the issuance press release. This is because the Commission, fully aware of the Act and its implementing regulations, is also aware of the exemptions to the notice requirement found at 15 U.S.C. § 2055(b)(4), which provides that no notice is required where "an adjudicatory proceeding (which shall commence upon the issuance of a complaint) or other administrative or judicial proceeding under this Act" has been initiated. The filing of this enforcement action satisfies the Section 6(b)(4) exemption. The Commission provided no notice to Respondent of the press release ***because*** of the release's relation to this pending action. This relationship relieved the Commission of its notice obligation under Section 6(b).

Section 6(b) of the Act, generally, regulates the disclosure of information by the Commission, and includes procedures to redress wrongful disclosure of incorrect information by the Commission. The Section 6(b)(4) exemption provision, by its reference to existing adjudicatory proceedings, implies that, under certain circumstances, where a judicial body already has jurisdiction to hear certain matters, those bodies (including administrative or judicial proceedings) can redress the wrongful disclosures under Section 6(b). In *CPSC v. GTE Sylvania,*

Inc., 447 U.S. 102 (1980), a case principally relied on by the Commission, the Court held that Section 6(b) of the Act regulated public disclosure of information by the Commission. It noted that aggrieved individuals seeking redress for the wrongful disclosure of information under Section 6(b) should file actions in the district court. In that case, however, no separate enforcement action was pending, so the district court was the only court available to redress the wrongful public disclosure of information under Section 6(b). In this case, because this enforcement action is already pending, there is no need for any district court to also take jurisdiction of the dispute to rule in this discreet issue. Requiring Respondent to file a separate action in the district court, while this adjudicative proceeding is simultaneously pending in this Court, is unnecessarily duplicative, is inefficient, and is a waste of judicial resources.

Indeed, one of the principal concerns in *Reliable Automatic Sprinkler v. CPSC*, 324 F.3d 726, 732 (D.C. Cir. 2003), the other case relied on by the Commission, was the issue of judicial economy. That issue was framed in terms of final agency action, and the court was concerned with short-circuiting the agency's decision-making process. That issue has no bearing on this motion. This forum already exists to redress the wrongs of which Respondent complains. This Court is already marshalling these proceedings. It has the full authority to govern the behavior of the parties before it and to condition the continuation of these proceedings on the Commission taking corrective action with regard to the December 27, 2012 press release. It is this sanction, primarily, that this motion seeks and which this Court has the authority to impose.

2. The Commission Admits That It Disclosed False Information

In its Opposition brief, the Commission recounts the facts, which do not deviate in any material respect from the facts as recited by Respondent in its moving papers. Indeed, the Commission admits that it included "small font boilerplate" language in its December 27, 2012

press release indicating that "Under federal law, it is illegal to attempt to sell or resell this or any other recalled product." Opp. Br. at 2-3. It further acknowledges that it took the Commission several hours to correct the false information in the press release, and that when the correction was made, no retraction was included in any future press releases.[1] In a post-hoc attempt to justify the inclusion of this language, the Commission argues that the 2010 Corrective Action Plan ("CAP") and voluntary recall of first and second generation Nap Nanny® models rendered this statement true:

> 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." Opp. Br. at 7.

To the extent this statement can be read to imply that the first and second generation Nap Nanny® products that remained on the marked after the 2010 recall could not be legally sold or resold, it is false, misleading, and constitutes yet another attempt by CPSC to falsely communicate to the public that the Nap Nanny® products have been recalled by the manufacturer. Indeed, this statement is no less offensive than the press release, and provides further grounds for the Commission staff to be sanctioned.

As the Commission well knows, the 2010 CAP and voluntary recall were in the nature of a ***warnings*** recall that required Respondent, among other things, to alert existing users of the dangers of using the product incorrectly. The CAP resulted in enhanced warnings placed on more conspicuous portions of product packaging—warnings the Commission itself approved. At no time did the CAP or the voluntary warnings recall require that consumers stop using, selling

[1] The Opposition concedes, in its silence, Scott Wolfson's later "re-tweeting" of the offending language, even after it claims to have made the correction to the press release. It offers no explanation or justification for this continued publication of false information, despite actual knowledge that the press release contained this false information.

or reselling first and second generation Nap Nanny® the product. Therefore, the "small font boilerplate" statement would have been false, even if it related only to the first and second generation Nap Nanny® models.

The press release language, however, related to more than just the first and second generation Nap Nanny® models. The press release told consumers and retailers to stop buying and selling the Chill™ (the only product currently manufactured and sold by Respondent), and the product that is the primary target of this enforcement action. The Chill™ has ***never*** been subject to a CAP or recall of any kind. There is simply no justification for including this statement in relation to the Chill™. And the after-the-fact rationalization that the "truth" stood in the way of a correction is risible to the point of absurdity.

3. The Commission Acknowledges Its Refusal to Issue a Retraction

Respondent originally asked the Commission to remove the offending language and clarify for consumers that the Nap Nanny® had never been recalled. Admittedly, the initial communication to Complaint Counsel should have discriminated between the first and second generation Nap Nanny® models and the Chill™ when asking the Commission to correct the press release and acknowledge that the Chill™ had never been recalled. This patent ambiguity aside, the Commission, in its Opposition, takes the hyper-technical position that it could not comply with Respondent's request that it make a correction because, in doing so, it would be required to "specifically state" something that was not true (*i.e.*, that the Nap Nanny® has not been recalled). This, of course, ignored the entire thrust of Respondent's request, which was to inform the public about the nature of the pending lawsuit and to clarify for consumers that the Chill™ had not been recalled. Apparently unwilling to adapt to Respondent's reasonable request, and unable to recognize the obvious benefit of clarifying the legal status of the Chill™ for the public, instead of

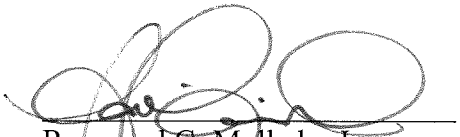
issuing a simple clarifying retraction, the Commission did nothing. The Commission thought the better course of action was to wait until the end of the news day to make a quiet and private correction, with no notice given to the public.

WHEREFORE, for the foregoing reasons, Respondent Baby Matters LLC respectfully request that this Court reconsider its January 22, 2013, Order denying the Motion to Compel Correction and Retraction and for Sanctions.

January 25, 2013

Respectfully submitted,

Baby Matters LLC
By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Memorandum of Points and Authorities in Support of Motion to Compel Correction and Retraction and for Sanctions upon the following parties and participants of record in these proceedings by mailing, postage prepaid and by email a copy to each on this 25th day of January, 2013.

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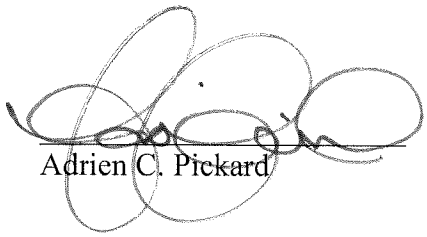

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