

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)
)

BABY MATTERS LLC,)
)

Respondent.)
)
)

CPSC DOCKET No. 13-1

**MOTION FOR RECONSIDERATION OF DENIAL OF MOTION TO COMPEL
CORRECTION AND RETRACTION AND FOR SANCTIONS**

COMES NOW Baby Matters LLC (“Respondent” or “Baby Matters”), by counsel, and respectfully moves this Court, pursuant to 16 CFR Part 1025.23, to reconsider its Order dated January 22, 2013 denying Respondent’s Motion to Compel Correction and Retraction and for Sanctions. In support of this Motion for Reconsideration, Respondent 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. On December 27, 2012, the Consumer Product Safety Commission (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 contained the false statement that “[u]nder federal law, it is illegal to attempt to sell or resell this or any other recalled product.”

3. On January 2, 2013, Respondent filed a Motion to Compel Correction and Retraction and for Sanctions and an accompanying Memorandum in Support, setting forth the legal and factual bases in support of the conclusion that (1) the statements in the press release were false, (2) the Commission opportunistically took advantage of this misinformation to encourage the public to stop buying or re-selling Respondent's products, and (3) good cause exists for the Commission to issue a correction and retraction and for this Court to sanction the Commission to prevent it from abusing its perceived authority in the future.

4. On January 14, 2013, Complaint Counsel filed an Opposition Brief in which it (1) admits that the Commission disclosed the false material, (2) does not deny that Scott Wolfson, the Commission's official spokesman, later "re-tweeted" the false material, and (3) fails to address the substance of Respondent's motion. Instead, in its Opposition Brief, the Commission argued that this Court lacks jurisdiction to hear that motion.

5. Without the benefit of a reply brief or oral argument, this Court denied the motion on January 22, 2013.

6. Respondent now seeks reconsideration of the issues presented in its Motion to Compel Correction and Retraction and for Sanctions, including an opportunity to address the jurisdictional points raised by Commission Counsel.

7. First, while Respondent referred to Section 6(b) of the Consumer Product Safety Act, 15 U.S.C. § 2055(b) in its motion, that section of the Act is not relied on for relief in this motion. Rather, this Court has the inherent authority to govern the proceedings before it, including matters involving how the parties conduct themselves with regard to this litigation.

8. Second, pursuant to Section 6(b)(4) of the Act, the public disclosure requirements in Sections 6(b)(1) through (3) do not apply to the public disclosure of "information in the course

of or concerning . . . an adjudicatory proceeding (which shall commence upon the issuance of a complaint) or other administrative or judicial proceeding under this Act.” Thus, the Commission was not required to provide Respondent with notice before it released the Press Release to the public “in the course of or concerning” this suit, and indeed, Respondent received no advance notice before the Commission issued the Press Release. The Section 6(b)(4) exemption extends to Respondent’s requirement to seek redress *exclusively* through the Commission. The exemption suggests that, where a judicial body, such as this Court, already has jurisdiction under the Act, it may also rule on other ancillary matters without the need for either final agency action or the separate filing of a district court action. This is because neither of the concerns raised in *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980) or *Reliable Automatic Sprinkler v. CPSC*, 324 F.3d 726 (D.C. Cir. 2003), such as judicial economy or an available forum to redress wrongs exists.

9. Once the Court has properly exercised jurisdiction over Respondent’s Motion to Compel Correction and Retraction and for Sanctions, it should compel a retraction and sanction the Commission by dismissing this action 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 reconsider the Motion to Compel Correction and Retraction and for Sanctions, grant this Motion to Reconsider and grant the underlying Motion to Compel Correction and Retraction and for Sanctions and order the following:

- (1) The Order entered January 22, 2013 is vacated;
- (2) 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.”;

- (3) This action shall be dismissed, with prejudice; and
- (4) For such other relief as this Court deems just and appropriate.

January 25, 2013

Respectfully submitted,

Baby Matters LLC
By Counsel



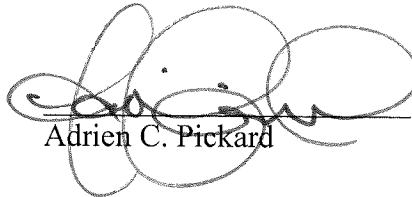
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Motion for Reconsideration of Denial 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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