

In the Matter of)
)
)
BABY MATTERS LLC,)
)
)
)
)
Respondent.)
)
)

CPSC DOCKET No. 13-1

Although the putative intervenors are engaged in litigation with Baby Matters LLC in the United States District Court for the Eastern District of Michigan, Petitioners have no interests that will be affected by this enforcement action. Petitioners have sued Respondent in federal court for the alleged wrongful death of their daughter, which they claim was caused by alleged defects in the Nap Nanny[®]. Respondent is actively defending that suit. It is apparent from the Petition to Intervene (the “Petition”), however, that Petitioners seek to intervene in this enforcement action solely to litigate the facts of their civil suit. *See* Pet. ¶ 4. This does not satisfy the standard for intervention contained in the relevant regulations. Accordingly, the Presiding Officer should deny the Petition.

Before a party may intervene, a petitioner must make a sufficient showing that their participation in the matter is justified and would not unduly burden or delay the proceeding. 16 C.F.R. § 1025.17(d). A Petition to Intervene must “(i) identify the specific aspect or aspects of the proceedings as to which the petitioner wishes to intervene, (ii) set forth the interest of the

petitioner in the proceedings, (iii) state how the petitioner's interest may be affected by the results of the proceedings, and (iv) state any other reasons why the petitioner should be permitted to intervene as a party." 16 C.F.R. § 1025.17(a)(2). In ruling on a petition to intervene, the Presiding Officer must consider the factors set forth in Section 1025.17(d). These are:

- (1) The nature of the petitioner's interest, under the applicable statute governing the proceedings, to be made a party to the proceedings;
- (2) The nature and extent of the petitioner's interest in protecting himself/herself/itself or the public against unreasonable risks of injury associated with consumer products;
- (3) The nature and extent of the petitioner's property, financial or other substantial interest in the proceedings;
- (4) Whether the petitioner would be aggrieved by any final order which may be entered in the proceedings;
- (5) The extent to which the petitioner's intervention may reasonably be expected to assist in developing a sound record;
- (6) The extent to which the petitioner's interest will be represented by existing parties;
- (7) The extent to which the petitioner's intervention may broaden the issues or delay the proceedings; and
- (8) The extent to which the petitioner's interest can be protected by other available means.

The Petition fails to address the factors set forth in Section 1025.17(d). It contains only a single reason why the Petitioners should be permitted to intervene: their purported connection to one of the incidents that purportedly forms the basis for the Consumer Product Safety Commission's (the "Commission") decision to sue Baby Matters to recall the First and Second Generation Nap Nanny[®] products and the Chill[™] (the "Subject Products"). But it lacks any analysis as to why the Petitioners' intervention in this suit is necessary for the adjudication of this matter, or how their involvement would assist the Court in its analysis of the issues before it (*i.e.*, whether the Subject Products are hazardous or defective pursuant to Section 15 the Consumer Product Safety Act, 15 U.S.C. § 2064 and Section 15 of the Federal Hazardous

Substances Act, 15 U.S.C. § 1274, respectively). The Petition should be denied on this basis alone.

II. The Factors Do Not Support Intervention

Even when the factors are applied, they fail to support intervention. Furthermore, intervention serves no practical or statutorily necessary purpose. Petitioner's rights are being protected by their district court action, currently pending in the Eastern District of Michigan. Duplicating those efforts in this Court is needless, and permitting the Petitioners to "babysit" these proceedings – and perhaps influence them to suit their purposes – is fraught with issues.

(1) *The Nature of the Petitioner's Interest to be Made a Party to the Proceedings* – Petitioner's only interest in these proceedings, as conceded in its moving papers, is to "assist[] in developing a sound record" and to share "evidence which could assist in fully developing the record of this matter." Clearly, Petitioners desire only to litigate the facts of their lawsuit in this enforcement action (duplicating their efforts in the U.S. District Court for the Eastern District of Michigan). *See* Pet. ¶ 2-4. This is not a justification to permit intervention in this enforcement action. Indeed, the issue in this enforcement action is not Respondent's liability to Petitioners. It is whether the Subject Products present a substantial product hazard or whether they are defective under the relevant statutes. These issues diverge from those issues presented by Petitioners in their product liability suit. Presentation of Petitioners' personal injury evidence will be nothing more than a distraction to the issues before the Court, and will likely lead to a "mini-trial" regarding the facts of the Thiel/Mako incident. Those issues are being litigated in Michigan, and they make up but a small part of this case. The Commission is fully capable of presenting the facts necessary to support its case for recall based on the information available to it without the intervention of Petitioners.

(2) *The nature and extent of the petitioner's interest in protecting himself/herself/itself or the public against unreasonable risks of injury associated with consumer products* – As they have asserted in their Petition, Mr. Thiel and Ms. Mako are parties to a wrongful death suit against Respondent filed in the United States District Court for the Eastern District of Michigan. Their rights are protected by the filing of that suit, in which they have sought millions of dollars in compensation from Respondent. Furthermore, to the extent that their interests remain implicated by this action, they are in no different a position than the other consumers who purchased one of the Subject Products and there is no need for their intervention.

(3) *The nature and extent of the petitioner's property, financial or other substantial interest in the proceedings* – Petitioners have alleged no financial interest in this enforcement action. Indeed, they are not unique in their relation to this enforcement action simply because they are in litigation with the Respondent over the product that is the subject of this enforcement action. There is nothing in the CPSC Complaint or its claim for relief that would compensate Petitioners or give them any special remedy as a result of their claimed injuries. They have no special or substantial financial interest to protect through intervention.

(4) *Whether the petitioner would be aggrieved by any final order which may be entered in the proceedings* – As stated above, Petitioners' rights are protected by the district court action they filed against Respondent. They do not allege that they would be aggrieved by any final order. This factor does not weigh in Petitioners' favor.

(5) *The extent to which the petitioner's intervention may reasonably be expected to assist in developing a sound record* – Petitioners claim this to be their main purpose in intervening in this action. Yet, the Commission based its recall on a pre-existing record that it already possesses. It is clear that Petitioners seek nothing more than to try their civil case in this

enforcement action. Petitioners' involvement in this case would draw out these proceedings, taking attention away from the other relevant evidence in this matter, resulting in a mini-trial of the Michigan case. Petitioners are able to submit their evidence as non-party participants, if they truly desire nothing more than to ensure completeness of the record. *See* 16 C.F.R. § 1025.17(b).

(6) *The extent to which the petitioner's interest will be represented by existing parties* -- The Commission is able to represent consumers' interests, including those interests of the Petitioners, in this matter. It is unnecessary for individual consumers to intervene in this action to litigate individual fact patterns allegedly experienced by them.

(7) *The extent to which the petitioner's intervention may broaden the issues or delay the proceedings* -- Petitioners' intervention would redirect the focus of this case disproportionately on the details of their product liability action in Michigan, to the exclusion of other evidence relating to other incidents. This will have the same effect as broadening the proceedings, as additional time and effort will be spent addressing the matters raised by Petitioners. Petitioners' intervention will divert attention in this matter away from other relevant evidence, obscuring the Presiding Officer's ability to efficiently analyze the breadth of existing relevant evidence before it.

(8) *The extent to which the petitioner's interest can be protected by other available means* -- Petitioners' interests are being protected in their district court action. In addition, the Commission is capable of representing Petitioners, along with other consumers, in this matter. Alternatively, to the extent that Petitioners must play a role in this matter, their role should be limited to that of Participant pursuant to Section 1025.17(b).

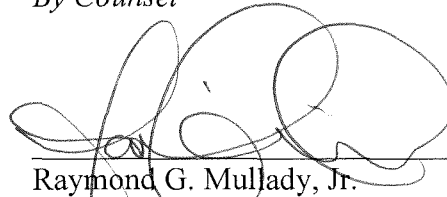
On balance, these factors weigh against permitting Petitioners to intervene in this matter. Instead, this Court should permit Petitioners to participate, if at all, as non-party participants, as alternatively requested in their Petition.

WHEREFORE, for the foregoing reasons, Respondent Baby Matters LLC respectfully requests that this Court deny the Petition to Intervene on Behalf of Brian Thiel and Kristine Mako, and for such other relief as the Court deems necessary.

February 4, 2013

Respectfully submitted,

Baby Matters LLC
By Counsel

A handwritten signature in black ink, appearing to read 'Raymond G. Mullady, Jr.', is written over a horizontal line.

Raymond G. Mullady, Jr.
Mullady@BlankRome.com

Adrien C. Pickard
APickard@BlankRome.com

BLANK ROME LLP

Watergate

600 New Hampshire Ave, N.W.

Washington, D.C. 20037

Tel: (202) 772-5828

Fax: (202) 572-8414

Counsel for Respondent Baby Matters LLC

CERTIFICATE OF SERVICE

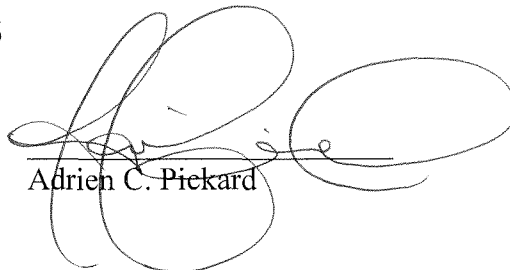
I hereby certify that I served the foregoing Respondent's Response to Petition to Intervene on Behalf of Brian Thiel and Kristine Mako upon the following parties and participants of record in these proceedings by mailing, postage prepaid, and by emailing a copy to each on this 4th day of February, 2013.

Mary B. Murphy, Esquire
(MMurphy@cpsc.gov)
Assistant General Counsel
Division of Compliance
Office of the General Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Kelly Moore, Trial Attorney
(KMoore@cpsc.gov)
Complaint Counsel for
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Larry W. Bennett
(LBennett@gmhlaw.com)
Geoffrey S. Wagner
101 West Big Beaver Road, 10th Floor
Troy, MI 48084

The Honorable Walter J. Brudzinski
c/o Timothy O'Connell
(Timothy.A.O'Connell@uscg.mil)
c/o Regina V. Maye
(Regina.V.Maye@uscg.mil)
1 South Street, Battery Park Building
Room 216
New York, NY 10004-1466



Adrien C. Pickard