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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