



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

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Record of Commission Action
Commissioners Voting by Ballot*

Commissioners Voting: Acting Chairman Thomas H. Moore
 Commissioner Mary Sheila Gall


ITEM:

Subpoenas in the Daisy Manufacturing Company Administrative Case
(Briefing package dated April 1, 2002, OS#5783)

DECISION:

The Commission voted unanimously (2-0) to issue three subpoenas under the Consumer Product Safety Act, as edited according to each of their statements (attached). The subpoenas filed by the Complaint Counsel (Office of Compliance lawyers) seek production of records and depositions from parties that may have information relating to the Daisy "Powerline" airguns that are the subject of the administrative proceeding, In the Matter of Daisy Manufacturing Company (CPSC Docket No. 02-2). The parties to be subpoenaed are Sears, Roebuck and Company, Kmart Corporation, and Wal-Mart Stores, Inc.

Acting Chairman Moore and Commissioner Gall filed separate statements regarding and editing the subpoenas.

For the Commission:

Todd A. Stevenson
Secretary

* Ballot vote due April 5, 2002



ACTING CHAIRMAN

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

**STATEMENT OF THE HONORABLE THOMAS H. MOORE
ON THE ISSUANCE OF CERTAIN NON-PARTY SUBPOENAS IN THE
DAISY MANUFACTURING COMPANY CASE**

MAY 1, 2002

I am voting to approve the issuance of the subpoenas in the Daisy case in accordance with the changes required by Commissioner Gall. I do this, not because I agree with those changes, but to allow Complaint Counsel to obtain at least some of the information he is seeking from each non-party.

I do not believe it is appropriate to second-guess Complaint Counsel in his preparation for trial. The discovery process is intended to be broad and all encompassing because it is impossible at that stage to anticipate every type and piece of information that may be relevant in a case. To limit the information received in a case when we do not know all the theories or lines of inquiry that Complaint Counsel may be pursuing, unnecessarily ties Counsel's hands and could, unwittingly, affect the decision in the case.

The recipient of a subpoena has the ability to object to discovery requests. At this point we do not even know if any of these non-parties would object to any of the requests made of them. However, if they did, those objections would be forwarded to the Commission and the Commissioners would have an opportunity, with the benefit of information that we cannot obtain now, to determine whether those objections had merit.

There are no limitations, other than those the Commission might seek to impose on a case-by-case basis, as to the number of times the same non-party may be subpoenaed. Therefore, at a later time, Complaint Counsel may resubmit additional subpoenas for further Commission consideration if the stricken portions are vital to their case.

**EXPLANATION OF THE HONORABLE MARY SHEILA GALL
OF VOTE ON APPLICATION FOR ISSUANCE OF SUBPOENAS
BY COMPLAINT COUNSEL IN DAISY CASE (OS#5783)**

- a. Sears Roebuck
- i. Approve paragraphs 1 through 4, 8, 9, 11, 12 and 14 through 24, paragraph 7 insofar as it seeks documents pertaining to the Powerline Airguns and/or the Model 9072, and paragraph 10 insofar as it seeks documents pertaining to Powerline Airguns and/or the Model 9072, of the proposed subpoena, with a change in the return date to enable Sears Roebuck to comply within a reasonable time.
 - ii. Do not approve paragraphs 5, 6, and 13, and the portions of paragraphs 7 and 10 not described in i. above of the proposed subpoena.
 - iii. My basis for not approving the portions of the subpoena specified in ii above is a lack of information concerning the following questions:
 - What is the relevance of research conducted on the profitability of Powerline air guns?
 - What is the relevance of the wholesale price, retail price and profitability of Powerline air guns?
 - Why does item seven of the production of documents ask about “high-powered airguns” when the Complaint concerns two specific models of Powerline air guns? Is the term “high-powered airgun” defined or a well recognized term of art in the airgun industry?
 - Item eight is unclear about the relationship between Sears and Daisy reports.

- Why does item ten request documents relating to pre-and post-market testing and/or evaluation done or performed on “high powered airguns,” when the Complaint concerns two specific models of Powerline air guns?
- What is the relevance of the “costs incurred” by Sears in purchasing Powerline Airguns?

b. Kmart

- i. Approve paragraphs 1, 2, 5, 6, 8, and 10-20, and paragraph 7 insofar as it seeks documents pertaining to the Powerline Airguns, of the proposed subpoena, with a change in the return date to enable Kmart to comply within a reasonable time.
- ii. Do not approve paragraphs 3, 4, or 9, and the portion of paragraph 7 not described in i. above, of the proposed subpoena.
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 - Item five is unclear about the relationship between K-Mart and Daisy reports.

- Why does item seven of the production of documents ask about “high-powered airguns” when the Complaint concerns two specific models of Powerline air guns? Is the term “high-powered airgun” defined or a well recognized term of art in the airgun industry?
- What is the relevance of the “costs incurred” by K-Mart in purchasing Powerline Airguns?
- Why is K-Mart asked about indemnification arrangements it may have had with Daisy when Sears isn’t?

c. Wal-Mart Stores, Inc.

- i. Approve paragraphs 1, 2, 5, 6, 8, 10-20, and paragraph 7 insofar as it seeks documents pertaining to the Powerline Airguns, of the proposed subpoena, with a change in the return date to enable Wal-Mart to comply within a reasonable time.
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