

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

Respondent.)
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_____)

**MEMORANDUM IN SUPPORT OF RESPONDENT'S
MOTION FOR LEAVE TO TAKE DEPOSITIONS**

COMES NOW Respondent Baby Matters LLC, by counsel, and seeks leave pursuant to 16 C.F.R. § 1035.35 to take the depositions upon oral examination of (1) a designee from the Consumer Product Safety Commission (the "Commission") most knowledgeable to testify on the various matters set forth in Respondent's Motion for Leave, (2) Scott Wolfson, (3) all Commission staff with knowledge of the facts alleged in the Complaint, as amended, or who intend to testify at trial in this matter, and (4) those experts to be identified by Complaint Counsel in discovery.

The rules require that Respondent seek leave before deposing any party, including that party's agents, employees, consultants, or prospective witnesses. 16 C.F.R. § 1025.35(a). Leave to take depositions is to be freely granted when good cause is shown, and should only be denied to "prevent dilatory tactics, as well as harassment or abuse." 45 Fed. Reg. 29206, 29212-13 (May 1, 1980). Good cause exists to depose the individuals requested by Respondent.

1. A Knowledgeable Designee from the Consumer Product Safety Commission

Respondent seeks to depose a representative, or those representatives, from the Commission with knowledge of the Commission's bases for bringing this action. The areas for which Respondent seeks discovery include the facts supporting the Commission's claim that the Generation One Nap Nanny[®], the Generation Two Nap Nanny[®], and the Chill[™] (the "Subject Products") pose a risk of substantial harm to consumers or that they are defective. Respondent also seeks to discover the Commission's knowledge regarding the alleged injuries or deaths that occurred while using the Subject Products. These areas of inquiry go to the heart of this case. Respondent also seeks discovery on the Commission's deliberations, its methods and methodologies for determining that the Subject Products created a substantial product hazard or contained defects. These, too, are central questions in this case.

Respondent seeks discovery concerning the Commission's decision to include the Chill in this enforcement action, which includes an examination of the Commission's attempts to engage Respondent in a voluntary corrective action plan in 2012, which culminated in a series of Press Releases, only the last of which included mention of the Chill as a substantially hazardous product. Discovery of the Commission's reasons for this change-of-course are critical to Respondent's defense of this action.

Respondent also seeks discovery of the Commission's efforts to test, examine or otherwise assess the risk of the Subject Products, either through scientific or other means. While Respondent has not yet received any responses to discovery, it understands that the Commission employs mechanical engineers, "human factors" specialists and other individuals who are tasked with assessing, through various means, the safety of products and providing reports of their findings on which the Commission may rely.

Respondent also seeks discovery of other deaths or injuries involving products similar to the Subject Products. Discovery of the Commission's treatment of these incidents is relevant to understanding the criteria that CPSC employs in determining whether a juvenile product contains a substantial product hazard.

2. Scott Wolfson

Mr. Wolfson is the Director of the Office of Communications at the U.S. Consumer Product Safety Commission. His office is responsible for the publications of the Commission's public statements about the Subject Products, including the press releases sent to Respondent on August 31, 2012 ("Release #12-DRAFT 8/29/12"), October 4, 2012 ("Release #12-DRAFT10/3/12") and October 5, 2012 ("Release-DRAFT10/5/12") (collectively, the "Press Releases"). Mr. Wolfson is likely to have knowledge or information regarding the Press Releases, their content and the Commission's decision to include the Chill in Release-DRAFT10/5/12. Mr. Wolfson's office is also responsible for placing information about the voluntary recall of the Subject Products and this enforcement action in the public sphere. For example, Mr. Wolfson is likely to have personal knowledge regarding the information posted to the Commission's official Twitter account, as well as official statements made by the Commission at trade events relating to the Subject Products. These facts are relevant to understanding the Commission's decision to include the Chill as part of this enforcement action and are relevant to understanding the Commission's efforts to procure voluntary recall cooperation from Respondent's major retailers. This information is relevant to Respondent's demand that the Commission undertake parallel efforts to ensure that these retailers reverse their decision to voluntarily recall Respondent's products, and agree to again sell the Subject Products, if they prevail in this action.

Mr. Wolfson may also have relevant information relating to the Commission's efforts, *vel non*, to alert consumers about the need to follow warnings and instructions on all baby products, including the Subject Products, and to develop consumer awareness regarding the risks associated with careless disregard for on-product warnings. Mr. Wolfson may have relevant information regarding the manner in which the Commission uses its significant presence in the public sphere to increase public awareness of the various risks and dangers that exist in using particular products or products in general. These facts are relevant to the Commission's claims of reasonable foreseeability of misuse by consumers of the Subject Products.

3. All Commission staff with knowledge of the facts alleged in the Complaint, as amended, or who intend to testify at trial in this matter

It is believed that these Commission staff – none of whom have been identified by Complaint Counsel yet – will have relevant knowledge of (a) the injuries and/or deaths alleged in the Complaint, as amended, (b) the bases and methodologies used by the Commission to determine that the Subject Products present a substantial product hazard or contain defects, or (c) relevant knowledge regarding studies, tests or analyses of the Subject Products that relate to their safety. Indeed, any future identification of these witnesses in response to discovery as having knowledge of the facts alleged in the Complaint, or Complaint Counsel's intent to use these witnesses at trial, renders these witnesses relevant to these proceedings.

4. Those experts to be identified by Complaint Counsel in discovery.

While Complaint Counsel has yet to identify any experts in this case, any such experts will be relevant to the claims and defenses in this case.

WHEREFORE, for the foregoing reasons, Respondent respectfully requests that this Commission grant Respondent leave to take the depositions listed in the attached Motion for Leave.

February 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 in Support of Respondent's Motion for Leave to Take Depositions upon the following parties and participants of record in these proceedings by electronic mail and by first-class mail, postage prepaid, on this 25th day of February, 2013.

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