

 New Civil Liberties Alliance

June 1, 2023

VIA First Class Mail

The Honorable Alexander Hoehn-Saric
Chair
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814

The Honorable Richard Trumka
Commissioner
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814

The Honorable Mary T. Boyle
Commissioner
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814

Mr. Austin Schlick
General Counsel
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814

The Honorable Peter A. Feldman
Commissioner
U.S. Consumer Product Safety Commission
4330 East-West Highway
Bethesda, MD 20814

Re: Wildchild Stockholm, Inc.'s Notice of the Commission's Violation of Its Constitutional and Statutory Rights and Formal Appeal of the Commission's November 2022 Notice of Violation

Dear Chair Hoehn-Saric, Commissioners Boyle, Feldman, Trumka, and Mr. Schlick,

Our firm, the New Civil Liberties Alliance (“NCLA”),¹ represents Wildchild Stockholm, Inc. (“Wildchild”) which, among other products, designs and imports the DockATot® Deluxe+ dock, a

¹ NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. We have extensive experience in litigation pursuant to the Administrative Procedure Act and regulatory enforcement defense. Most recently, we secured a 9-0 win in the U.S. Supreme Court which

multifunctional docking station for infants aged 0-8 months old. We have been retained to address what appear to be severe deprivations of Wildchild's constitutional and statutory rights by the Consumer Product Safety Commission ("CPSC") generally, and Commissioner Trumka specifically.

This letter highlights several areas of disagreement and deprivations of our client's constitutional and statutory rights, including:

- CPSC's November 2022 Notice of Violation regarding Deluxe+ docks manufactured or imported after June 23, 2022 is inconsistent with the law.
- CPSC effectively manufactured Wildchild's alleged import violation.
- Commissioner Trumka has undertaken a series of actions and issued statements in violation of Wildchild's constitutional and statutory rights.
- Commissioner Trumka and CPSC are impermissibly biased and have prejudged Wildchild and its products.

We formally seek the Commission's responses to the same, as explained in detail below.

I. CPSC'S NOTICE OF VIOLATION REGARDING POST-ISP RULE DELUXE+ DOCKS IS INCONSISTENT WITH THE LAW

On June 23, 2021, the Commission promulgated its Safety Standard for Infant Sleep Products final rule ("ISP Rule").² The ISP Rule is sweeping in nature and effectively covers any infant sleep product that is not a bassinet, cradle, full-size baby crib, non-full-size baby crib, play yard, or bedside sleeper.³ An "infant sleep product" is defined as "a product *marketed* or *intended* to provide a sleeping accommodation for an infant up to 5 months of age" that is not already subject to certain "mandatory standards for infant sleep" and is "manufactured or imported on or after" June 23, 2022.⁴ (emphasis added). The plain language and ordinary meaning of a regulation controls.⁵ Thus, under the ISP Rule

established that district courts have jurisdiction to hear suits raising constitutional challenges to administrative proceedings, like those we believe the CPSC has already taken or may be contemplating. *See Axon Enter., Inc. v. FTC*, 143 S. Ct. 890 (2023).

² Consumer Product Safety Comm'n, *Safety Standard for Infant Sleep Products*, 86 Fed. Reg. 33022 (June 23, 2021). The ISP Rule was promulgated pursuant to the CPSC's purported authority under the Consumer Product Safety Improvement Act of 2008 ("CPSIA") and the Consumer Product Safety Act ("CPSA").

³ *See id.* at 33022-23. Per the CPSC, the scope of the ISP Rule is intentionally broad. *Id.* at 33024.

⁴ *Id.* at 33022-23, 33062; *see also id.* at 33046 ("Including a manufacturer's marketing and intent in the definition also assists the Commission to enforce the regulation, because it provides objective criteria for CPSC staff to apply to a product's name, packaging, warnings, labeling, and marketing materials about whether the product falls within the scope of the rule.").

⁵ "The ordinary-meaning canon is the most fundamental semantic rule of interpretation. It governs constitutions, statutes, rules, and private instruments." Antonin Scalia & Bryan A. Garner, *READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS* § 6, at 69 (2012); *see, e.g., United States v. Garvon*, 54 F.4th 1274, 1277 (11th Cir. 2022) (citing same).

a product manufactured after June 23, 2022 that is *not* marketed nor intended to provide a sleeping accommodation for an infant up to 5 months of age falls outside the scope of the regulation. The Deluxe+ docks are multifunctional loungers and our client removed any references to sleep-related intent years before CPSC issued its regulation. Those manufactured after June 23, 2022 also included express warnings against use for sleep. The Deluxe+ docks therefore fall outside the scope of the regulation.

As the Commission is aware, and CPSC leadership and staff were briefed on multiple occasions, our client's Deluxe+ dock was always marketed and intended as a *multifunctional* product including primarily for non-sleep uses like lounging, playing, tummy time, and diaper changing. In 2020, well before CPSC even promulgated the ISP Rule, our client, as well as its global counterparts, ceased any marketing that depicts or promotes sleep for the Deluxe+ dock. This change in marketing included both online messaging and updated product labelling.

CPSC staff were provided samples of the updated labelling that went a step further and specifically warned against use for sleep in October and December of 2021 and again on May 12, 2022. These samples provide significant and repeated messaging for intended use of the product, including specific on-product statements that the product is not intended for infant sleep (and advising parents to move their children to a sleep product if a baby should fall asleep).⁶ In addition to changing messaging and labeling worldwide, since at least late-2020 our client's website has provided safety tips for using their docks that are consistent with prevailing safe sleep guidelines in the United States.⁷ Thus, before the ISP Rule was finalized the Deluxe+ docks, including those manufactured after June 23, 2022, have not been marketed or intended to provide a sleep accommodation for infants and fall outside the scope of the ISP Rule.

⁶ Copies of the labeling, as provided to CPSC, are attached hereto as Attachments 1 (provided to CPSC's Small Business Ombudsman on October 20, 2021), 2 (provided to the Office of the Chair on December 9, 2021), and 3 (provided to CPSC staff on May 12, 2022).

⁷ *Compare* American Academy of Pediatrics, *Safe Sleep* (last visited May 30, 2023), <https://www.aap.org/en/patient-care/safe-sleep/> ("Place infants on their backs for sleep in their own sleep space [...] ... Use a crib bassinet, or portable play yard with a firm, flat mattress") *with* DockATot, *Dock Safety Tips* (last visited May 30, 2023), <https://dockatot.com/pages/safety-guide> ("For naps and overnight sleep, place your baby in a crib/cot, bassinet, or play yard.") *and* DockATot, *At what age should I stop swaddling my baby?* (last visited May 30, 2023), <https://support.dockatot.com/article/331-at-what-age-should-i-stop-swaddling-my-baby> ("If you are placing your baby down to sleep, we recommend that you put them in a bare product subject to a mandatory sleep standard (such as a bassinet, Moses basket, crib/cot, cradle, or play yard), on their back. DockATot docks are not to be used inside of a crib/cot, cradle, bassinet, Moses basket, or play yard.") *and* DockATot, *My baby has unexpectedly fallen asleep in a Deluxe+ dock. What Do I Do?* (last visited May 30, 2023), <https://support.dockatot.com/article/287-my-baby-has-unexpectedly-fallen-asleep-in-a-deluxe-dock-what-do-i-do> ("Your baby should be moved to a safe sleep environment if they fall asleep. We recommend using a product subject to a mandatory standard contemplating infant sleep (such as a bassinet, crib/cot, cradle, or play yard), on their back."). CPSC has also acknowledged that "newborns can and do fall asleep in many products" because they sleep for significant portions of the day. *See* 86 Fed. Reg. 33047.

Despite this, in November of 2022, CPSC issued a Notice of Violation (“NOV”) for Deluxe+ docks manufactured after the ISP Rule’s effective date and imported into the United States.⁸ We believe the Commission is without legal basis to issue this NOV because the Deluxe+ dock does not violate the ISP Rule. Moreover, the Commission has never provided Wildchild a full explanation of its decision to issue the NOV.

We highlight several points regarding the application of the ISP Rule to the Deluxe+ docks for the Commission’s consideration.

First, CPSC has indicated that a company can remarket and relabel their existing products as “not intended for infant sleep” to make the product fall outside the scope of the ISP Rule.⁹ It has also acknowledged that products that were remarketed as loungers or for “tummy time” are only required to comply with the ISP Rule if they are marketed for sleep.¹⁰ While our client’s Deluxe+ dock has always served multifunctional purposes, our client remarketed and relabeled the docks as not for infant sleep *before* the ISP Rule was promulgated. Our client provided those marketing materials and labels to Commission staff for their consideration before the ISP Rule went into effect and requested confirmation that the product was not within the scope of the rule (or even an interpretation to the contrary). But CPSC remained silent. Despite these facts, CPSC has publicly taken the position that the post-ISP Rule Deluxe+ docks fall within the scope of the rule. To date, the CPSC has provided no clear reason for why it took this position.

Second, CPSC makes passing references in its responses to commentators to its view that remarketing may not be available to certain manufacturers whose product’s “physical form ... demonstrates that it is intended for sleep.”¹¹ It is unclear what this means. Which products can be remarketed, and which products cannot? The CPSC’s “know-it-when-I-see-it” theory of violation that some products cannot be relabeled because they are “clearly intended for infant sleep” is insufficient.¹² And in any event, the purpose of promulgating rules is to provide regulated parties with “fair notice” of what is required under the law.¹³

⁸ Press Release, CPSC, CPSC Tells Manufacturers, Importers, Distributors and Retailers They Must Protect Infants by Complying with Infant Sleep Product Rule (Nov. 9, 2022), <https://www.cpsc.gov/Newsroom/News-Releases/2023/CPSC-Tells-Manufacturers-Importers-Distributors-and-Retailers-They-Must-Protect-Infants-by-Complying-with-Infant-Sleep-Product-Rule>.

⁹ 86 Fed. Reg. at 33063 (“Noncompliant products would need to be removed from the U.S. market, modified to meet the mandatory standard as specified in this final rule, remarketed for children older than 5 months, or remarketed as not intended for infant sleep.”).

¹⁰ *Id.* at 33066.

¹¹ *Id.* at 33052, 33063.

¹² *Id.* at 33066.

¹³ *See, e.g., Mexican Gulf Fishing Co. v. United States Dep’t of Com.*, 60 F.4th 956, 974 (5th Cir. 2023).

Notably, CPSC’s initial 2017 notice of proposed rulemaking and 2019 supplemental notice of proposed rulemaking are silent on and insufficient regarding these points as well.¹⁴ This suggests that the first notice of the Commission’s informal view was only made public when the ISP Rule was promulgated as a final rule. This is improper. As such positions were never subjected to notice-and-comment procedures, they cannot form the basis of an enforcement determination.

But it is not clear what legal basis CPSC relied on in issuing its NOV. Wildchild is entirely without information regarding whether the shape of the Deluxe+ dock is the issue with the product that the CPSC believes renders it incapable of being remarketed¹⁵ or if it is due to some other feature or characteristic of the dock. It certainly cannot be because of our client’s marketing, labeling, and intended use of the post-ISP Rule Deluxe+ docks.

This lack of notice, and the method by which “notice” could even be gleaned, underscores that the ISP Rule is littered with the agency’s arbitrary interpretations of the regulation, but those lack the force of law.¹⁶ CPSC interjects its views of how it may enforce the ISP Rule in the future but failed to incorporate those views into the ISP Rule itself. For example, the CPSC noted its “physical form” restriction that suggests that if the form of a product demonstrates that the product is intended for sleep it violates the rule. But nowhere in the regulation’s plain and unambiguous language is that restriction laid bare. The Commission’s expressed views are, at best, non-binding guidance that lacks the force of law and cannot form the basis of enforcement under the ISP Rule.

To this day, the Commission has never provided our client with a coherent theory of why the post-ISP Rule Deluxe+ docks violate the regulation—not through the rulemaking process, Wildchild’s explicit efforts to obtain agency guidance regarding the application of the ISP rule prior to it becoming effective, nor via communications associated with the issuance of the NOV. This is improper and neither constitutes, nor contributes to, sound agency action. Based on the information previously submitted and this letter, Wildchild now formally appeals the agency’s NOV and requests a formal and final determination regarding the application of the ISP Rule to its Deluxe+ dock, including an explanation of why the Commission believes the product violates the ISP Rule.

II. CPSC EFFECTIVELY MANUFACTURED WILDCHILD’S ALLEGED IMPORT VIOLATION

Wildchild spent almost a year trying to ascertain the CPSC’s views regarding whether the agency believed the Deluxe+ docks violated the ISP Rule. These efforts included working with the Commission’s Small Business Ombudsman, communications with the Chair’s office and CPSC’s General Counsel, and a formal meeting with nearly two dozen members of CPSC staff. As early as

¹⁴ Consumer Product Safety Comm’n, Notice of Proposed Rulemaking, *Safety Standard for Infant Inclined Sleep Products*, 82 Fed. Reg. 16963 (Apr. 7, 2017); Consumer Product Safety Comm’n, Supplemental Notice of Proposed Rulemaking, *Safety Standard for Infant Sleep Products*, 84 Fed. Reg. 60949 (Nov. 12, 2019).

¹⁵ Wildchild uses the term “remarketed” but notes that the Deluxe+ dock was not remarketed to comply with the ISP Rule—it was remarketed long before CPSC’s interpretation of remarketing was published in the Federal Register (or anywhere).

¹⁶ *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

October 20, 2021, our client formally inquired with the CPSC's Office Small Business Ombudsman regarding the whether the agency believed the ISP Rule applied to the Deluxe+ docks. After receiving no answer, on December 9, 2021, our client emailed the Office of the Chair asking to be routed to the appropriate division to provide answers and stated that a timely response from the Commission was necessary to account for longer-than-usual production and shipping times as well as the ISP Rule's impending effective date in June 2022. Our client also met with nearly two dozen CPSC staff members on May 12, 2022 and, during that meeting, again sought answers from the agency. Throughout this process, our client asked two simple questions: Did the CPSC consider the Deluxe+ dock to fall within the scope of the ISP Rule? And if so, did the Commission believe there was something that could be done to address that determination?

Instead of providing information that our client could have used to guide its future business decisions, including whether to import Deluxe+ docks made after the ISP Rule's implementation, Wildchild's attempts to understand the CPSC's position on the simple question of whether the agency believed the Deluxe+ fell within the scope of the ISP Rule were met with the Commission's deafening silence.¹⁷ That was until August 30, 2022, after the ISP Rule went into effect, when a member of the CPSC Compliance staff sent a form letter that was widely distributed to other manufacturers and sellers but that also asked our client to review several of its products, including the Deluxe+ dock, for compliance with the ISP Rule. Wildchild conducted that review, but the form letter invited no response and still did not provide CPSC's position on whether the agency considered Deluxe+ dock within the scope of the ISP Rule.

Following another brief period of silence, on September 14, 2022, a CPSC attorney contacted our client's product safety counsel and began inquiring about the company's importation of Deluxe+ docks manufactured after June 23, 2022. A week later the staff attorney expressed interest in our client's importation timeline. Over the following weeks, CPSC made additional inquiries to our client and its counsel, often with artificially short timelines. During this time our client offered to provide Commission staff with a product sample that was identical to the Deluxe+ docks manufactured after June 23, 2022, but staff did not accept that offer until October 4, 2022.

Throughout this process, and despite our client's attempt to ascertain the CPSC's views *before* the ISP Rule went into effect, our client was never told that its post-ISP Rule Deluxe+ docks were considered within the scope of the regulation. That position was first communicated on October 3, 2022, nearly one year after Wildchild initially contacted CPSC's Small Business Ombudsman. And importantly, only *after* the products were already inbound to or had landed in the United States. While our client continued to try to resolve differences with the Commission, staff messaged that the actions taken regarding our client's Deluxe+ dock were being driven by top agency leadership and were essentially "non-negotiable."

¹⁷ CPSC's silence may constitute a violation of Section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub.L. 104-121, Title II, § 201 to 224, Mar. 29, 1996, 110 Stat. 857-862.

On November 9, 2022, CPSC issued an NOV and a surprise public statement indicating that our client imported Deluxe+ docks in violation of the ISP Rule.¹⁸ Wildchild had tried to avoid this exact situation. Despite over a year of attempting to ascertain the Commission's views, and to stop such an alleged violation from occurring in the first instance, CPSC issued the NOV with no explanation for why our client's post-ISP Rule Deluxe+ docks violate the regulation and then issued a press release highlighting this enforcement action.

Given the timing and events leading up to the NOV's issuance, it seems that CPSC manufactured Wildchild's alleged import violation by creating a "gotcha" moment. The agency knew it had the opportunity to make a headline and it created one. Had CPSC responded to our client's reasonable inquiries in a timely manner, this could have been resolved in another way. While the Commission may have achieved its goals by garnering splashy headlines against a well-respected product and driving our client to the brink of financial insolvency, this is not how regulation and enforcement are meant to occur under the CPSA.¹⁹

Since the NOV was issued, Wildchild has continued to pay for storage of the allegedly violative products at the port and around the world at great expense. On May 1, 2023, Wildchild formally requested the CPSC grant release of the allegedly violative products for export. Rather than consider the export notice on its merits, the CPSC is once again playing games with respect to Wildchild's statutory rights (and doing so without providing *prompt* notice as required by 16 C.F.R. § 1019.5(b)). Although the original notice was valid, Wildchild resubmitted a new export notice today. The Assistant Executive Director for Compliance has not taken the required steps under 16 C.F.R. § 1019.7 but the notice has not changed. To the extent the agency is prohibiting this export, please confirm so in writing, which will be construed as final agency action with respect to the agency's position that these Deluxe+ docks are subject to the ISP Rule and prohibiting their export. To date, the CPSC's action has been limited to filing the NOV and issuing a statement to the press. The agency has provided no explanation for why these products violate the ISP Rule and Wildchild is left without a discernable path forward with respect to these products.

III.COMMISSIONER TRUMKA HAS VIOLATED WILDCHILD'S CONSTITUTIONAL AND STATUTORY RIGHTS, MAKING CPSC INCAPABLE OF PROVIDING WILDCHILD WITH THE FAIR AND IMPARTIAL PROCESS IT IS ENTITLED TO

During this process it has also come to light that Commissioner Trumka appears to have little interest in or ability to operate within the confines of the Constitution or the law. For the reasons discussed below, Wildchild's constitutional and statutory rights were violated by Commissioner Trumka. Given his actions, CPSC is incapable of providing Wildchild with a fair hearing consistent with its Fifth Amendment right to due process of law.²⁰

¹⁸ See *supra* n.8.

¹⁹ The process as set forth by Congress is generally collaborative.

²⁰ U.S. Const. amend. V ("[n]o person shall ... be deprived of life, liberty, or property, without due process of law.").

Since November of 2022, Commissioner Trumka has taken a series of deliberate actions and made specific statements regarding Wildchild and the Deluxe+ dock that violate our client's constitutional right to a fair and impartial tribunal. "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases."²¹ The necessity of a fair tribunal "applies to administrative agencies which adjudicate as well as to courts."²² Bias can take many forms, including "prejudgment" or the appearance of such by commissioners.²³ And when, as here, a commissioner "unnecessarily makes prejudicial remarks outside an authorized proceeding" the courts are "more likely to find a violation of due process."²⁴ But even statements within "the course of an authorized proceeding ... may still reflect prejudgment or its appearance."²⁵ As a leading administrative law treatise has observed, "[i]t is conceivable that a decisionmaker can form an opinion of a party so extreme that it renders the decisionmaker impermissibly biased."²⁶

It is obvious that Commissioner Trumka has formed an opinion of Wildchild and its products that renders him impermissibly biased. As the Tenth Circuit has noted, the test for impermissible bias—bias that violates a regulated party's constitutional right to due process of law—is a question of both "context" and "content."²⁷ That test is easily satisfied here.

For example, Commissioner Trumka's statements and tweets discussing the NOV go beyond the content of the Commission's statement in a manner we believe was meant to raise his views over those of the Commission and to drive negative media attention at our client. The Commission's statement specifically discussing the Deluxe+ dock NOV states:

CPSC recently issued a violation notice to one firm, Dock-a-tot, for importing an infant sleep product manufactured after June 23, 2022 that fails to comply with the mandatory requirements of the ISP rule. The product in question, DockATot® Deluxe Plus Dock (all models manufactured on or after June 23, 2022) is pictured below.²⁸

In comparison to the CPSC's formal language, Commissioner Trumka's statement goes far beyond the scope of the NOV, oozing with subjective and inflammatory rhetoric regarding *all* Deluxe+ docks, irrespective of their date of manufacture. His statement encourages the public "to read the reports of

²¹ *In re Murchison*, 349 U.S. 133, 136 (1955).

²² *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *see also Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018) (holding that agency adjudication proceedings must provide "neutral and respectful consideration" of a litigant's views free from hostility or bias); *id.* at 1734 (Kagan, J., concurring) (agreeing that the Constitution forbids agency or judicial proceedings that are "infected by ... bias").

²³ *Zen Magnets, LLC v. CPSC*, 968 F.3d 1156, 1168 (10th Cir. 2020).

²⁴ *Id.* at 1171.

²⁵ *Id.*

²⁶ Kristin E. Hickman & Richard J. Pierce, Jr., *Administrative Law Treatise* § 7.7, at 868 (6th ed. 2019); *see Zen Magnets*, 968 F.3d at 1171 (quoting same).

²⁷ *Zen Magnets*, 968 F.3d at 1171.

²⁸ *See supra* n.8.

infants' deaths associated with DockATot products, as reported by members of the public. To access them, visit www.saferproducts.gov and type DockATot into the search bar, and you can read caregivers' stories of their worst nightmares becoming reality using this product."^{29, 30} The statement includes a screen grab of the SaferProducts.gov website with "dockatot" entered in the search bar.³¹ It also hyperbolically states that the Commissioner "want[s] to ensure that products sold for babies will not kill babies[.]"³² Commissioner Trumka's statement clearly, and impermissibly, implies (if not outright states) that Wildchild's product kills babies. We can think of few, if any, accusations more damning than that.

Equally importantly, as we believe Commissioner Trumka intended, the media ran with his message.³³ His tweets regarding the NOV fare no better.³⁴ On November 9, 2022, Commissioner Trumka tweeted a thread highlighting his statement and the CPSC's NOV which impermissibly implied that CPSC's NOV was as to all Deluxe+ docks and implored consumers to "[toss] them immediately." But the NOV, as the Commission's statement indicates, only applies to Deluxe+ docks manufactured after June 23, 2022. As the agency knows, *none of these products are in consumers' hands*. There is no need to "toss" them. Again, Commissioner Trumka's comments extend beyond the

²⁹ Press Release, CPSC Comm'r Rich Trumka Jr., Dockatot Deluxe+ is Unsafe for Sleep; CPSC Issues Notice of Violation (Nov. 9, 2022), <https://www.cpsc.gov/About-CPSC/Commissioner/Richard-Trumka/Statement/Dockatot-Deluxe-is-Unsafe-for-Sleep-CPSC-Issues-Notice-of-Violation>.

³⁰ As required by law, the "CPSC does not guarantee the accuracy, completeness, or adequacy of the contents of the Publicly Available Consumer Product Safety Information Database on SaferProducts.gov, particularly with respect to information submitted by people outside of CPSC." U.S. Consumer Prod. Safety Comm'n, *Home Page*, SaferProducts.gov (last visited May 30, 2023), <http://www.saferproducts.gov/Default.aspx>; *see also* 15 U.S.C. § 2055a(b)(5).

³¹ *See supra* n.29.

³² *Id.*

³³ *See, e.g., Leah Rocketto, CPSC Calls Attention to DockATot for Violating the Infant Sleep Product Rule, Citing Infant Deaths, What to Expect* (Nov. 11, 2022), <https://www.whattoexpect.com/news/baby-products/sleep/dockatot-violates-safe-infant-sleep-product-rule> (quoting Commissioner Trumka's statement telling the public to search for DockATot in the Safer Products database).

³⁴ In a November 9, 2022 Twitter thread, Commissioner Trumka tweeted, "[i]t is unsafe for your baby to sleep in a DockATot Deluxe+! Toss them immediately. @USCPSC issued @dockatot a notice that this product violates the Infant Sleep Rule." @TrumkaCPSC, TWITTER (Nov. 10, 2022, 9:10 AM), <https://twitter.com/TrumkaCPSC/status/1590708354342690818?s=20> (linking to his statement). He then tweeted "I encourage you to read reports of infant deaths associated with this product. Type 'dockatot' into the search bar on <http://saferproducts.gov>[" @TrumkaCPSC, TWITTER (Nov. 10, 2022, 9:19 AM), <https://twitter.com/TrumkaCPSC/status/1590710730223136768?s=20>. Finally, he tweeted "[r]ead the @USCPSC press release here[" @TrumkaCPSC, TWITTER (Nov. 10, 2022, 9:19 AM), <https://twitter.com/TrumkaCPSC/status/1590710849517518849?s=20> (linking to CPSC's statement).

Commission's NOV determination and statement, and his statements were meant to leave the impression that the CPSC's action was broader than it was.

Commissioner Trumka has also sought to interfere with Wildchild's international counterparts, and their marketing and contractual relationships with other international businesses. On September 26, 2022, DockATot UK, which has no presence in the United States, announced its partnership agreement with Brown's Hotel in London³⁵ to provide guests with a selection of DockATot UK's products.³⁶ Despite having no connection to the United States, on November 18, 2022, Commissioner Trumka sent a letter—on his official CPSC letterhead—to the chairperson for the hotel group which owns Brown's Hotel. We have attached a copy of that letter in full as provided to DockATot UK by its hotel partner.³⁷

In that letter, Commissioner Trumka states that the hotel partnered with Wildchild, which is inaccurate, and that the Deluxe+ dock was among the products provided.³⁸ He then informs the chairperson of CPSC's NOV. He proceeds to parrot the same inaccurate statement noted in his tweet above that CPSC has “informed U.S. consumers to immediately discontinue [the Deluxe+ dock's] use” without clarifying that the CPSC's NOV only related to products manufactured after June 23, 2022.³⁹ Commissioner Trumka also states that “[t]here are publicly available reports of infant deaths associated with the product” and provides instructions on how to view such in a footnote.⁴⁰ Ignoring the fact that product safety standards vary by country, he ends the letter with a tacit acknowledgement that he is “aware” that the hotel “is not in the United States, where [his] agency regulates” but nonetheless “felt compelled to share the information” to inform the chairperson's “decision-making” regarding its partnership with DockATot UK.⁴¹ As with Commissioner Trumka's tweets and statements, the implied message is obvious. Commissioner Trumka's interference with partnerships between international businesses operating outside our nation's borders is beyond the pale.

Commissioner Trumka, or his staff acting at his direction, likely have also contacted other third parties, including national news media outlets and/or reporters, and provided them or attempted to provide them with nonpublic information about Wildchild and/or its products. If such actions have occurred, they are in direct violation of the law.

³⁵ Brown's London is owned and operated by Rocco Forte Hotels, a British hotel group with no operations in the United States.

³⁶ Press Release, Rocco Forte Hotels, A Snug Life at Browns (last visited May 30, 2023), <https://www.roccofortehotels.com/hotels-and-resorts/brown-s-hotel/families/dreaming-in-colour-with-dockatot/>; Ashley Nakos, A Snug Life at Brown's, DockATot Blog (Sept. 26, 2022), <https://dockatot.com/blogs/news/a-snug-life-at-browns>.

³⁷ Letter from Comm'r Trumka to Sir Rocco Forte (Nov. 18, 2022), attached hereto as Attachment 4.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* Again he fails to note that information in that database is not guaranteed by CPSC as accurate, complete, or adequate. *See supra* n.30.

⁴¹ *Id.*

Commissioner Trumka's statements and actions go beyond making prejudicial remarks, they show a distinct disdain for Wildchild and evidence his impermissible prejudgment on any matter related to Wildchild or its products, including the Deluxe+ dock. As a sitting Commissioner, he has great influence over the CPSC's compliance staff and his views have likely colored the actions of agency leadership with respect to the Deluxe+ docks. Based on Commissioner Trumka's actions and statements—that Wildchild is aware of—he and CPSC are incapable of providing the company with the fair or impartial judgments it is entitled to.

We are also of the view that the nature and content of these statements and actions, even if the agency has reasonable cause to believe a regulatory violation occurred, violate the CPSA's disclosure provisions. Section 6(b) of the CPSA, 15 U.S.C. § 2055(b), and its implementing regulations, 16 C.F.R. § 1101 et seq., which "establish[] procedures for and restrictions on the Commission's public disclosure of information."⁴² As the Commission is aware, these provisions encourage transparency between manufacturers and CPSC by protecting certain confidential disclosures while additional factual inquiries are conducted. Moreover, these provisions were explicitly adopted by Congress to address "several embarrassing incidents in which the CPSC identified allegedly unsafe products but released inaccurate information, costing the manufacturers significant amounts of money."⁴³

Commissioner Trumka's actions and statements violate Section 6(b) of the CPSA. While he may disagree with the CPSA's disclosure provisions, and he is free to advocate for their amendment,⁴⁴ Commissioner Trumka cannot ignore the law, much less violate it. Doing so is a clear dereliction of his duty and of his oath.

In light of this, we have contemporaneously served you with a litigation hold letter to inform the CPSC, its Commissioners, and their staffs that if necessary, and when appropriate, we will be seeking discovery of any and all communications regarding Wildchild and its products.

IV. ANY FUTURE CPSC ACTIONS WOULD DEPRIVE WILDCHILD OF ITS CONSTITUTIONAL RIGHTS

It is evident from recent inquiries by Commission staff that CPSC is considering further action against our client. If the Commission proceeds in such fashion, we will be left with no recourse but to seek immediate emergency relief. While this remains speculative at this juncture, we briefly highlight some of the constitutional deficiencies that we will raise in an appropriate judicial forum, if necessary.

⁴² CPSC, *CPSA Section 6(b) FACT SHEET* (last visited May 30, 2023), https://www.cpsc.gov/s3fs-public/pdfs/blk_pdf_CPSA6bFactSheet.pdf.

⁴³ Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 B.Y.U. L. Rev. 1371, 1421 (2011); see also James O'Reilly, *Libels on Government Websites: Exploring Remedies for Federal Internet Defamation*, 55 Admin. L. Rev. 507, 542-43 (2003).

⁴⁴@TrumkaCPSC, TWITTER (Nov. 7, 2022, 10:15 AM), <https://twitter.com/TrumkaCPSC/status/1589637726370136065?s=20> ("Sadly, I know about product hazards that I'm blocked from telling you about. A Gag Rule forces @USCPSC to first run public warnings by the company selling the dangerous products, and lets them delay. Pass the Sunshine in Product Safety Act NOW.").

The CPSC is unconstitutionally structured. Under the Constitution, the executive power “shall be vested” in the President, which includes the authority to remove subordinates, and this removal authority is essential if executive power is to be accountable.⁴⁵ However, under the CPSA, the President may remove the Commissioners only for cause. Such a restriction on the President’s ability to terminate principal executive officers at will violates the “take Care” clause of Article II of the Constitution.⁴⁶ CPSC Commissioners are not inferior officers with narrowly defined duties. Instead, they are members of an expert agency who wield substantial executive power. The CPSA vests them with immense power over the nation’s economy. They can, upon proper findings, shut down businesses and even entire industries. Because Commissioners exercise significant executive power, they “must be removable by the President at will[.]”⁴⁷ Given that they are not so removable, the Commission is unconstitutionally structured and lacks legal authority to act now or in the future.

CPSC’s adjudicatory apparatus violates Article III of the Constitution. The Constitution vests “[t]he judicial Power of the United States . . . in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”⁴⁸ Judicial power is “the right to determine actual controversies arising between diverse litigants, duly instituted in courts of proper jurisdiction.”⁴⁹ The CPSC, its Commissioners, hearing officers, and administrative law judges cannot exercise Article III power. Nor can judicial power be delegated by Congress. Any future proceedings before the Commission would violate this fundamental structural limitation placed on it by the Constitution. Indeed, the Supreme Court recently noted that challenges arguing that an agency has violated separation-of-powers principles are “fundamental, even existential.”⁵⁰

CPSC’s adjudicatory apparatus deprives parties of their right to due process of law. As discussed above, *see* section III, the Commission’s impermissible bias deprives Wildchild of any opportunity for a fair and impartial hearing, which is a fundamental guarantee of due process of law. But agency adjudications, such as those the Commission may currently be considering, are generally infected with bias as well. That is because “[e]very procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice, clear, and true between the State and the

⁴⁵ *See, e.g., Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020) (“In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead”); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483 (2010) (“Since 1789, the Constitution has been understood to empower the President to keep . . . officers accountable—by removing them from office, if necessary.”); *Fleming v. USDA*, 987 F.3d 1093, 1114 (D.C. Cir. 2021) (Rao, J., concurring-in part and dissenting-in-part) (“Article II executive power necessarily includes the power to remove subordinate officers, because anything traditionally considered to be part of the executive power ‘remained with the President’ unless ‘expressly taken away’ by the Constitution.”) (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789)).

⁴⁶ *See generally Seila Law*, 140 S. Ct. 2183.

⁴⁷ *Id.* at 2192.

⁴⁸ U.S. Const. art. III, § 1.

⁴⁹ *Muskrat v. United States*, 219 U.S. 346, 361 (1911).

⁵⁰ *Axon*, 143 S. Ct. at 897.

accused denies the latter due process of law.”⁵¹ And when, as here, the Commissioners issue the regulations, determine violations thereof, prosecute those violations, and then hear appeals of CPSC’s in-house proceedings, there is no impartiality to be found. A more draconian, and (for enforcement targets) futile procedure is hard to imagine.⁵²

CPSC’s adjudicatory apparatus deprives parties of their right to a jury trial. A trial by jury is a “fundamental” component of our system, “and remains one of our most vital barriers to governmental arbitrariness.”⁵³ Understandably then, “[t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.”⁵⁴ The “right of trial by jury” is preserved in “Suits at common law.”⁵⁵ Absent congressional intent to grant the right of trial by jury, courts “determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty” by “exam[ining] both the nature of the action and of the remedy sought.”⁵⁶ Under *Tull*’s two-part analysis, courts first “compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity” and then, second, “examine the remedy sought and determine whether it is legal or equitable in nature.”⁵⁷ The second inquiry into the nature of the remedy sought “is more important than the first.”⁵⁸ Civil penalty suits are akin to action in debt that were “within the jurisdiction of English courts of law.”⁵⁹ Given the nature of the Commission’s actions to date, and remedies available to it under the law, any future proceedings the Commission may take in its in-house process would violate our client’s right to a trial by jury.

To be sure, our client is not alone in these concerns. And if necessary, we will join the chorus of other manufacturers, importers, and trade associations who are currently raising similar challenges to the Commission’s structure and authority in courts across the country.

V. CONCLUSION

We look forward to the Commission’s responses to our concerns. But, please know that while we believe a resolution between our client and the Commission is still possible, we stand ready and willing to seek judicial resolution of our differences if necessary.

⁵¹ *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927).

⁵² See *Axon*, 143 S. Ct. at 918 (Gorsuch, J., concurring) (noting that “few can outlast or outspend the federal government”).

⁵³ *Reid v. Covert*, 354 U.S. 1, 9-10 (1957).

⁵⁴ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

⁵⁵ U.S. Const. amend. VII.

⁵⁶ *Tull v. United States*, 481 U.S. 412, 417 (1987) (finding a constitutional right to a jury trial to determine liability in an action to enforce civil penalties under the Clean Water Act).

⁵⁷ *Id.* at 417-18; see also *Jarkesy v. SEC*, 34 F.4th 446, 454-55 (5th Cir. 2022).

⁵⁸ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

⁵⁹ *Tull*, 481 U.S. at 418.

Very truly yours,



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Mary Murphy, via email

Caitlin O'Donnell, via email

Attachment 1

Deluxe+

Sleep Warnings

Current Production



WARNING

- Dock is not intended for infant sleep. Never use in the parent's bed. If baby falls asleep, move them to a sleep product (e.g. crib/cot or bassinet).

See underside for additional important warnings



Other Warnings – Deluxe+

Current Production

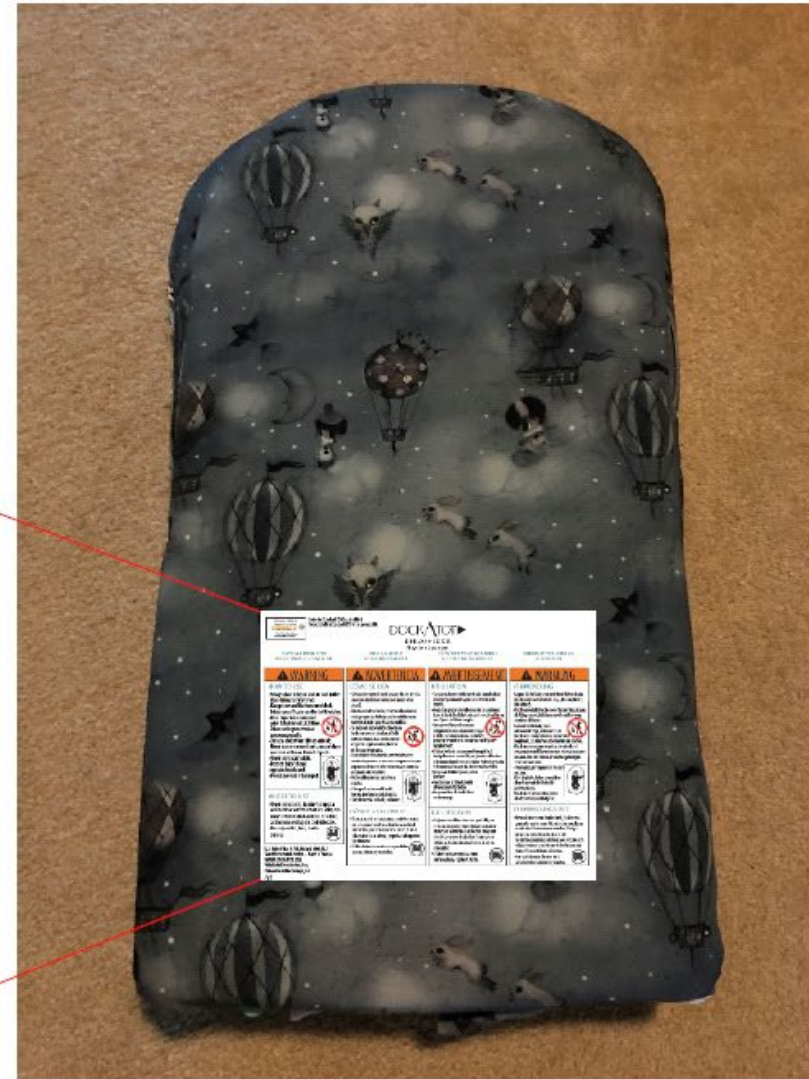
⚠ WARNING

HOW TO USE

- Always place baby on back in dock (other than during tummy time).
- Keep pillows and blankets out of dock, babies can suffocate on added soft bedding.
- Direct supervision is required when baby is in dock at all times. Babies can begin to crawl or scoot unexpectedly. 
- Only use dock when fully assembled; Never use component parts separately or use dock with non-DockATot parts.
- Never use to carry child. 
- Position baby's head opposite buckle end.
- Do not use dock if damaged.

WHERE TO USE

- Never use in a crib, bassinet, or near a wall or other vertical structure. Baby can move between dock and side structure, and become entrapped and suffocate.
- Use only on flat, firm, stable surface. 



Deluxe+ Packaging

Current Production



NOT FOR USE IN CRIB

Never use in a crib/cot, bassinet, carry cot, pram/stroller or playpen.

Nunca usar en una cuna, moisés, capazo, carrito/silla de bebé o parque de juegos.

Ne jamais utiliser dans un petit lit, un berceau, un lit portable, un landau, une poussette ou un parc bébé.

Niemals in einem Kinderbett, Stubenwagen, einer Babytragetasche, einem Kinderwagen oder Laufstälchen verwenden.

**Dock is not intended for infant sleep.
Never use in the parent's bed.**

**El nido no está destinado al descanso infantil.
Nunca usar en la cama de los padres.**



Attachment 2

Deluxe+

Sleep Warnings

Current Production



WARNING

- Dock is not intended for infant sleep. Never use in the parent's bed. If baby falls asleep, move them to a sleep product (e.g. crib/cot or bassinet).

See underside for additional important warnings



Other Warnings – Deluxe+

Current Production

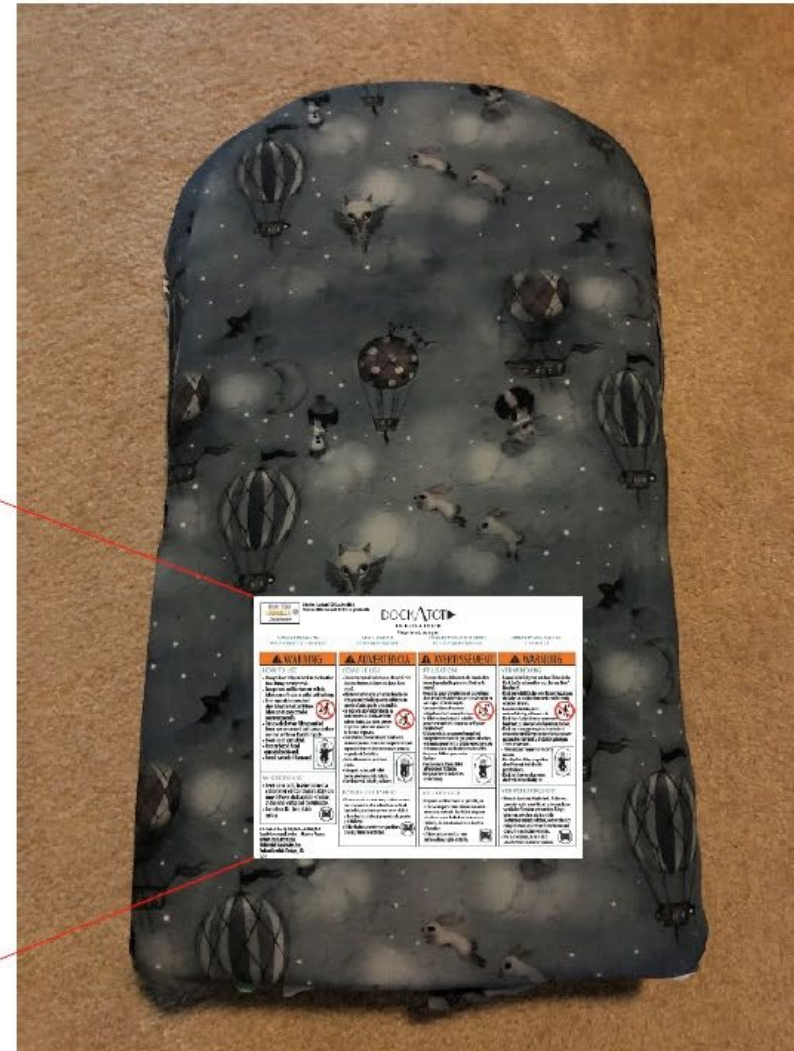
⚠ WARNING

HOW TO USE

- Always place baby on back in dock (other than during tummy time).
- Keep pillows and blankets out of dock, babies can suffocate on added soft bedding.
- Direct supervision is required when baby is in dock at all times. Babies can begin to crawl or scoot unexpectedly. 
- Only use dock when fully assembled; Never use component parts separately or use dock with non-DockATot parts.
- Never use to carry child. 
- Position baby's head opposite buckle end.
- Do not use dock if damaged.

WHERE TO USE

- Never use in a crib, bassinet, or near a wall or other vertical structure. Baby can move between dock and side structure, and become entrapped and suffocate.
- Use only on flat, firm, stable surface. 



Deluxe+ Packaging

| | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ! WARNING | ! AVERTISSEMENT |
| <p>• Dock is not intended for infant sleep. Never use in the parent's bed. If baby falls asleep, move them to a sleep product (e.g. crib/cot or bassinet).</p> | <p>• Le dock n'est pas destiné à être utilisé comme un lit de bébé. Ne jamais utiliser dans le lit des parents. Si le bébé s'endort, il doit être transféré dans un équipement conçu pour dormir (comme un petit lit ou un berceau).</p> |
| ! ADVERTENCIA | ! WARNUNG |
| <p>• El nido no está destinado al descanso infantil. Nunca usen en la cama de los padres. Si el bebé se duerme, es necesario colocarlo en otro lugar adecuado (p. ej. una cuna o moisés).</p> | <p>• Keine Kleinkinder im Dock schlafen lassen. Nie im Bett der Eltern verwenden. Wenn Baby einschläft, bringen Sie es in ein anderes Schlafprodukt (Krippe oder Kinderbett).</p> |

0-8
Multi-functional baby essential

how we're different

- 100% 11" headroom for baby's head and shoulders
- 100% 100% headroom for baby's head and shoulders
- 100% 100% headroom for baby's head and shoulders
- 100% 100% headroom for baby's head and shoulders



DOCK A TOT ▶

Begin the World of
DOCK A TOT ▶

DOCK A TOT.COM

DOCK A TOT

Deluxe+ Dock

THE SCANDINAVIAN
Multi-Functional Baby Cradle

0-8

Attachment 3

Deluxe+

Sleep Warnings

Current Production



WARNING

- Dock is not intended for infant sleep. Never use in the parent's bed. If baby falls asleep, move them to a sleep product (e.g. crib/cot or bassinet).

See underside for additional important warnings



Other Warnings – Deluxe+

Current Production

 **WARNING**

HOW TO USE

- Always place baby on back in dock (other than during tummy time).
- Keep pillows and blankets out of dock, babies can suffocate on added soft bedding.
- Direct supervision is required when baby is in dock at all times. Babies can begin to crawl or scoot unexpectedly. 
- Only use dock when fully assembled; Never use component parts separately or use dock with non-DockATot parts.
- Never use to carry child.
- Position baby's head opposite buckle end.
- Do not use dock if damaged. 

WHERE TO USE

- Never use in a crib, bassinet, or near a wall or other vertical structure. Baby can move between dock and side structure, and become entrapped and suffocate.
- Use only on flat, firm, stable surface. 



Deluxe+

Packaging

Current Production

| | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ! WARNING | ! AVERTISSEMENT |
| <ul style="list-style-type: none"> • Dock is not intended for infant sleep. Never use in the parent's bed. If baby falls asleep, move them to a sleep product (e.g. crib/cot or bassinet). | <ul style="list-style-type: none"> • Le dock n'est pas destiné à être utilisé comme un lit de bébé. Ne jamais utiliser dans le lit des parents. Si le bébé s'endort, il doit être transféré dans un équipement conçu pour dormir (comme un petit lit ou un berceau). |
| ! ADVERTENCIA | ! WARNUNG |
| <ul style="list-style-type: none"> • El nido no está destinado al descanso infantil. Nunca usar en la cama de los padres. Si el bebé se duerme, es necesario colocarlo en otro lugar adecuado (p. ej. una cuna o molsés). | <ul style="list-style-type: none"> • Keine Kleinkinder im Dock schlafen lassen. Nie im Bett der Eltern verwenden. Wenn Baby einschläft, bringen Sie es in ein anderes Schlafprodukt (Krippe oder Kinderbett). |

Explore the World of DOCKATOT
 DOCKATOT.COM
 #DOCKATOT

DOCKATOT
 Multi-functional baby essential

0-8

how we're different

- 100% cotton, soft as the hood of your favorite fuzzy robe
- Machine washable, 100% polyester mesh, 100% polyester
- It can be folded flat and tucked away with the hood
- It's made in the USA
- It's designed to hold up to 20 lbs
- It's designed to hold up to 20 lbs

DOCKATOT.COM

WARNING: Avertissement: Advertencia: Warnung

DOCKATOT

DOCKATOT

Deluxe+ Dock

THE SCANDINAVIAN Multi-Functional Baby Cradle

0-8

DOCKATOT.COM

Attachment 4



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

COMMISSIONER RICH TRUMKA JR.

November 18, 2022

Sir Rocco Forte
Rocco Forte Hotels
70 Jermyn Street
London, England
SW1Y 6NY

Dear Sir Forte,

It has recently come to my attention that Brown's Hotel, owned by your hotel group, has partnered with a company called Wildchild Stockholm, Inc. to provide its DockATot products to your hotel's guests traveling with young children.¹ I understand that among the DockATot products that your hotel will offer is the DockATot Deluxe+.²

I write to inform you that, in the United States, no new DockATot Deluxe+ products may be imported, distributed, or sold.³ The U.S. Consumer Product Safety Commission informed Wildchild Stockholm, Inc. of this decision last week, sending the company notice that continued sales of the Deluxe+ violate our Infant Sleep Products Rule.⁴ That rule is designed to eliminate unsafe infant sleep products from the U.S. market. Wildchild Stockholm, Inc. has confirmed that it will no longer import, distribute, or sell the Deluxe+ in the U.S.

If guests at Brown's Hotel are provided with a DockATot Deluxe+, it is foreseeable that they will put their infants to sleep in those products. To be clear, the Deluxe+ is unsafe for infant

¹ *Brown's Hotel Partners with Family Brand DockATot*, TTG (Sept. 13, 2022) (online at <https://www.ttgmedia.com/luxury/browns-hotel-partners-with-family-brand-dockatot-36196>).

² *Id.*

³ *DockATot Deluxe+ is Unsafe for Sleep; CPSC Issues Notice of Violation*, Statement of Commissioner Richard Trumka Jr. (Nov. 9, 2022) (online at <https://www.cpsc.gov/About-CPSC/Commissioner/Richard-Trumka/Statement/Dockatot-Deluxe-is-Unsafe-for-Sleep-CPSC-Issues-Notice-of-Violation>).

⁴ *CPSC Tells Manufacturers, Importers, Distributors and Retailers They Must Protect Infants by Complying with Infant Sleep Product Rule* (Nov. 9, 2022) (online at <https://www.cpsc.gov/Newsroom/News-Releases/2023/CPSC-Tells-Manufacturers-Importers-Distributors-and-Retailers-They-Must-Protect-Infants-by-Complying-with-Infant-Sleep-Product-Rule>).

sleep; we have informed U.S. consumers to immediately discontinue its use. There are publicly available reports of infant deaths associated with the product.⁵

I am, of course, aware that your hotel is not in the United States, where my agency regulates. However, I felt compelled to share the information, particularly because Brown's Hotel's partnership with this company predates our agency's announcement, meaning that you could not have known of this issue at that time. I hope that you find this information useful in your decision-making.

Should you have any questions, I am available to discuss.

Sincerely,

Richard L. Trumka Jr.
Commissioner
U.S. Consumer Product Safety Commission

⁵ To access the public reports of infant death associated with the product, visit www.saferproducts.gov and type DockATot into the search bar.