Nuna Baby Essentials Inc
70 Thousand Oaks Boulevard, Morgantown, PA 19543

January 30, 2025

BY EMAIL

Daniel Rabinovitz, Esq.
Office of Chief Counsel
National Highway Traffic Safety Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Information Request ID PE24-026 – Nuna's Request for Confidential Treatment

Dear Mr. Rabinovitz:

Nuna Baby Essentials, Inc. ("Nuna") is submitting its response and documents to the NHTSA Office of Defects Investigation in connection with the above-referenced matter. Because the response and documents include confidential business information, Nuna is requesting confidential treatment pursuant to 49 C.F.R. Part 512 and Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), for portions of the information in this submission and is submitting it, along with this request and the attached Part 512 certificate, through your office.

The information required by NHTSA's Part 512 regulations is set forth below.

A. Description of the Information (49 C.F.R. § 512.S(a))

The confidential business information includes sales volumes, manufacturing information, and consumer service system and consumer interaction information.

We have put confidential business information banners on the pages that have confidential business information. When only a part of a page is confidential, we have indicated the confidential information by highlighting it.

B. Confidentiality Standard (49 C.F.R. § 512.S(b))

Prior to the U.S. Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), this submission would have been subject to the confidentiality standard in 49 C.F.R. § 512.15(b) for information that the submitter is required to submit to NHTSA. The standard for confidential treatment is now set forth in *Food Marketing Institute*, 139 S. Ct. at 2366.

C. Justification for Confidential Treatment (49 C.F.R. § 512.S(c))

In *Food Marketing Institute*, the Supreme Court held that information is "confidential" within the meaning of FOIA Exemption 4 when it is "both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy." 139 S. Ct. at 2366.

Nuna customarily and actually treats the information for which it is requesting confidential treatment as private. The suppliers and carriers with which some of the information has been shared also treat the information as private.

As for an assurance of confidentiality, the Supreme Court expressly declined to hold that an assurance is, in fact, a ***necessary*** condition for confidentiality. Id. at 2363. Nor did the Court describe the nature of the "assurances" to which it referred.

The United States District Court for the District of Columbia has repeatedly stated that an assurance of confidentiality is ***not*** required. *See Naumes v. Dep't of the Army*, Civ. A. No. 21-1670 (JEB), slip op. at 19 (D.D.C. Mar. 1, 2022); *Cause of Action Inst. v. Export-Import Bank of the US*, Civ. A. No. 19-1915 (JEB), slip op. at 38 (D.D.C. Jan. 27, 2022); *Renewable Fuels Ass'n v. EPA*, 519 F. Supp. 3d 1, 12 (D.D.C. 2021)). The district court reached this conclusion because, as a result of the *Food Marketing Institute* decision, *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), governs the application of FOIA Exemption 4 in the D.C. Circuit, and *Critical Mass* does not require a governmental assurance of confidentiality. *Renewable Fuels*, 519 F. Supp. 3d at 12.

In addition, the court noted that requiring assurances would lead to "many fairly arbitrary disputes over whether such an assurance can be implied." *Id*.

Even if an assurance of confidentiality were required, an implied assurance would be sufficient, and such an implied assurance could be inferred from a number of considerations, including an agency's past practice. *See Flyers Rights Educ. Fund, Inc. v. FAA*, 2021 WL 4206594, at *7-*9 (D.D.C. Sept. 16, 2021) (appeal filed*); see also* Department of Justice Office of Information Policy ("OIP"), "Exemption 4 After the Supreme Court's Ruling in *Food Marketing Institute v. Argus Leader Media*," https://www.justice.gov/oip/exemption-4-aftersupreme-courts-ruling-food-marketing-institute-v-argus-leader-media, at 5.

Here, if an assurance of any kind were required, Nuna has an ample basis for an implied assurance of confidentiality, both because the designated confidential information would have been protected from disclosure under the former more-demanding substantial-competitive-harm standard and because of NHTSA's past confidentiality practices. Indeed, under the now-superseded substantial-competitive-harm standard, child restraint manufacturers routinely sought and received confidential treatment for production volumes, inventory information, and sales information because such information could provide competitors with insights into a submitter's market penetration, operational practices and capacities, marketing plans, commercial strategies, and costs. In addition, Congress expressly referred to "sales statistics" and "inventories" in

discussing the material protected by Exemption 4. *See* H.R. Rep. No. 1497, 89th Cong., 2d Sess. IO, *reprinted in* 1966 U.S.C.C.A.N. 2418, 2427.

As for the other kinds of information for which Nuna is seeking confidential treatment, the undersigned is aware that NHTSA has routinely accorded confidential treatment to design and manufacturing change information, as well as to information about quality assurance procedures. In doing so, NHTSA has followed the courts in recognizing that information-such as design information-that would enable a competitor to bring a competitive product to market more quickly and with less effort satisfied the former substantial-competitive-harm standard. *See, e.g.*, *Public Citizen Health Research Grp. v. FDA*, 185 F.3d 898,905 (D.C. Cir. 1999). The D.C. Circuit also underscored the competitive significance of quality assurance information, noting that information that could be used by competitors to "improve their own manufacturing and quality control systems" is competitively valuable and should be withheld from disclosure under FOIA Exemption 4. *United Technologies Corp. v. US. Dep't of Def & Def Contracting Mgmt. Agency*, 601 F.3d 557, 564 (D.C. Cir. 2010).[1]

D. Class Determination (49 C.F.R. § 512.S(d))

None of the information at issue is subject to a class determination.

E. Duration For Which Confidential Treatment Is Sought (49 C.F.R. § 512.8(e))

Because Nuna does not contemplate that it will ever disclose the information, and because the information will retain its competitive value indefinitely, Nuna requests that the information be accorded confidential treatment permanently.

F. Contact Information (49 C.F.R. § 512.S(f))

Please direct all inquiries to the undersigned.

* * *

A certificate in support of confidentiality executed on behalf of Nuna is attached.
If you receive a request for disclosure of the information for which confidential treatment is being sought before you have completed your review of our request, Nuna respectfully requests

[1] The competitive harm that would result from a disclosure of the information also is relevant to the reasonable foreseeability of the harm that would result from a disclosure. *See* 5 U.S.C. § 552(a)(8)(A)(i)(I). In the post-*Food Marketing Institute* context, reasonably foreseeable harms sufficient to justify withholding under FOIA Exemption 4 include impairment of the legitimate commercial, financial, business, or research interests of the submitter. *See Naumes*, slip op. at 22-23.

notification of the request(s) and an opportunity to provide further justification for the confidential treatment of this information, if warranted.

Respectfully,

Daniel Mee

Daniel Mee
Legal Director

Enclosure

cc: Steve Gerhart
Erika Z. Jones