UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	CPSC Docket No. 12-2
ZEN MAGNETS, LLC,	)	
Respondent.	)	

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO STAY AND MOTION TO DISQUALIFY THE COMMISSION OR SOME OF ITS MEMBERS

On May 6, 2016, Respondent filed Motions to Disqualify the Commission or four Commissioners, and to Stay the Appeal pending a Commission ruling on the Motion. For the reasons set forth below, Respondent's motions have no merit and should be denied.[1]

I. The Motion to Stay Should Be Denied

A. The Rules Do Not Support a Stay

Complaint Counsel filed an administrative complaint in this matter on August 6, 2012, and a hearing was held in December 2014. The parties filed post-hearing briefs on March 16, 2015. Although Commission rules require an Administrative Law Judge ("ALJ") to endeavor to file an Initial Decision with the Commission within 60 days after the filing of post-hearing briefs, 16 C.F.R. § 1025.51(a), the ALJ in this matter issued an Initial Decision and Order more than one year later, on March 25, 2016. Complaint Counsel filed a timely appeal on March 29, 2016. Nearly four years after this case began, Respondent now seeks a stay, that, if granted, would further unjustly delay resolution of this matter. The Commission should not permit additional delays.

[1] Respondent asks the Commission to enter an order under 16 C.F.R. §1025.70. Complaint Counsel submits that Respondent is not entitled to such relief. 16 C.F.R. 1025.70(e); *Pierce v. Underwood*, 487 U.S. 552 (1988).

Although the Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 1025 ("rules") do not provide specific procedures to disqualify Commissioners, section 1025.42(e)(2), which sets forth the process for motions to disqualify a Presiding Officer, provides relevant guidance for the instant motion. Under that provision, such motions "shall *not* stay the proceedings" unless ordered by the Presiding Officer or the Commission. (emphasis added). Thus, the rules evidence a presumption against an issuance of a stay in such circumstances. This presumption stands in contrast to other circumstances in which the rules affirmatively provide for a stay. *See, e.g.*, 16 C.F.R. § 1025.26(e) (proceedings shall be stayed when offer of settlement agreed to by the parties). Additionally, Respondent has not shown why the presumption against a stay should be overcome in the instant matter. In fact, the evidence against a stay is to the contrary: the matter has already lingered for almost a year since the filing of post hearing briefs. Further delay will continue to expose children to the millions of Subject Products in circulation, putting them at risk of serious injury or death.

B. Children Have Been Seriously Injured Since This Litigation Began

Not only do the rules not support a stay in this circumstance, the continued risk of serious injury posed by the Subject Products warrants a denial of Respondent's request. In the four years since Complaint Counsel initiated this proceeding–during which Zen has steadfastly refused to stop selling or recall the Subject Products–Zen Magnets have severely injured children. In November 2013, for example, 14-year-old Christin Rivas was seriously injured after ingesting two Zen Magnets she received from a friend whose family bought them online. CC-19A at 14; Joint Notice Regarding Witness Stipulations, Exh. J at ¶ 14; CC-16 at entry 32482. Christin was rushed to the hospital within hours of ingesting Zen Magnets, but the magnets had already traveled too far into her gastrointestinal tract to be removed by endoscope. Joint Notice

Exh. J at ¶ 8. By the time doctors were able to remove the Zen Magnets, Christin had suffered severe damage to her colon and intestines, and she needed surgery to remove the destroyed portions of her gastrointestinal tract. *Id.* at ¶ 11.

Christin was not the only child to suffer injuries from Zen Magnets after Complaint Counsel initiated these proceedings. In March 2014, fifteen-month-old Patient M swallowed two Zen Magnets that had been displayed on the refrigerator at her home. CC-18.35, IDI at 2. Patient M endured flu-like symptoms and vomiting for days due to ingestion of Zen Magnets that had attached to two button batteries. *Id.* Her injuries initially went untreated because the tiny magnets and batteries did not appear in a hospital X-ray. CC-27A at 11; CC-30A at 6. By the time doctors discovered the cause of Patient M's symptoms, portions of her bowel had been destroyed and had to be removed. *Id.* Patient M is at an increased risk of intestinal adhesions and bowel-related problems as a consequence of her ingestion of Zen magnets. *Id.* Millions of such products remain in circulation, posing a continuing risk of serious injury or death to children who find them. Initial Decision at 23; CC-10A at 24; Tr. 349:20-350:13.

Respondent has not shown that a stay is warranted; indeed, the facts demand the opposite as further delay will expose additional children to the risk of serious injury. Accordingly, the Motion to Stay should be denied, and Respondent should be required to proceed in accordance with 16 C.F.R. § 1025.53(c).

II. The Motion to Disqualify Should Be Denied

A. Respondent's Motion Does Not Comply With the Requirements of the Administrative Procedure Act

The Commission's adjudicative proceedings are conducted in accordance with the Administrative Procedure Act ("APA"). 16 C.F.R. § 1025.2, citing 5 U.S.C. § 551 et. seq. The APA requires that a motion to disqualify a decision maker in an administrative adjudication must

be supported by "a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee . . . ." 5 U.S.C. § 556(b). 16 C.F.R. § 1025.23(b). Consistent with that direction, Commission rules on motions to disqualify the Presiding Officer require that such a motion "be supported by affidavit(s) setting forth the alleged grounds for disqualification." 16 C.F.R. § 42(e)(2). *See also* 16 C.F.R. § 4.17 (FTC rule governing disqualification of Commissioners requires "such motion to be supported by affidavits"). Respondent failed to submit an affidavit in support of its motion. Accordingly, on procedural grounds alone, his motion should fail.

Case law also supports such an outcome. As the Ninth Circuit explained in *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995), the court dismissed a party's motion to disqualify the Director of the Office of Thrift Supervision based on the failure to submit an affidavit: "Keating did not submit to the agency an affidavit laying out the basis for his request for recusal or substantiating his allegation of bias, and his failure to do so is fatal to his claim." *Id.* at 326. Similarly, the Fifth Circuit has explained that requiring an affidavit in support of such a claim "is not an empty formality to be cast aside unilaterally by a party to a Commission proceeding." *Gibson v. Federal Trade Comm'n*, 682 F.2d 554, 565 (5th Cir. 1982). The Court explained its reasoning, stating:

> There are many reasons for such a requirement. An affidavit provides an exact, sworn recitation of facts, collected in one place; a disqualification motion must not be made by a party, nor taken by the Commission, lightly . . . . Accordingly, the affidavit requirement serves not only to focus the facts underlying the charge, but to foster an atmosphere of solemnity commensurate with the gravity of the claim. Respondents' failure to submit affidavits is thus an independently sufficient basis to deny their petitions in this respect.

Id. (quoting decision of Federal Trade Commission).

Pursuant to the APA, Commission rules, and clear case precedent, Respondent's allegations that personal bias renders Commissioners incapable of making an impartial decision

must be supported by an affidavit. His failure to do so is "fatal to [his] claim" and the Commission should deny the motion.

B. Commission Action Under CPSA Section 9 Does Not Preclude Adjudication Under CPSA Section 15

Even if Respondent's motion did not suffer from patent procedural deficiencies, the Commission should deny the request. Respondent argues (1) that the entire Commission is precluded from adjudicating this matter because rulemaking under section 9 of the Consumer Product Safety Act (CPSA) necessarily biases the Commission in adjudications concerning related products, and (2) in the alternative, four Commissioners should be disqualified because their statements indicate bias against Respondent and the Subject Products. As demonstrated below, neither the statutory framework nor the case law supports these arguments.

1. The CPSA Does Not Preclude Simultaneous Actions Under Sections 9 and 15

Respondent argues that participation in rulemaking under CPSA Section 9 by definition creates a personal bias against any firm that manufactures products subject to such a standard, thereby precluding Commissioners from participating in Section 15 adjudications on any related products. In other words, Respondent posits that Congress gave the Commissioners a choice: *either* protect consumers by using its Section 15 authority to recall substantial product hazards already sold *or* protect consumers from unreasonable risks issuing prospective safety standards under Section 9 (or commence such rulemaking only after the conclusion–possibly years or decades later–of all section 15 actions on a product or class of products). Such a view fundamentally misapprehends the dual nature of the agency's function, a function that, by Congressional design, permits rulemaking and adjudication to proceed simultaneously. The CPSA contains no restriction such that a choice to proceed under one authority forbids exercise

of another authority. To the contrary, Congress carefully separated rulemaking and adjudicatory functions in two separate and distinct sections of the CPSA, just as Congress separated those functions for all agencies in the Administrative Procedure Act ("APA"). 5 U.S.C. §§ 553 (rulemaking), 554 (adjudications).

The prospective consumer product safety rules issued pursuant to Section 9 are distinct from, and in addition to, the retrospective recall and notice authority provided to the Commission under Section 15. Sections 9 and 15 thus contain different methods of protecting the public (safety rules vs. substantial product hazard orders), and apply different legal standards (preventing an "unreasonable risk of injury" from future products vs. avoiding a "substantial risk of injury" from products in the marketplace.). Simply put, Respondent points to nothing, nor can he, in the CPSA or the APA that restricts agencies from conducting simultaneous rulemaking and adjudication because the very statutory framework authorizes a dual approach.

Yet Respondent seeks to undermine clear statutory authority by insisting the Commission must choose among equally valid, and complementary, means to protect the public both from the risk of injury posed by future products and the risk of injury posed by products already in the marketplace. This is a false choice. The statute expressly allows the Commission to look forward through rulemaking and backward through recall authority and that is precisely what the Commission did in the instant matter. Nothing in the statute instructs the Commission to make an "either/or" choice or to proceed serially so that Section 9 authority can only be exercised *after* Section 15 actions have concluded. There is simply no basis in the statute for that position. Moreover, such a restriction would paralyze the CPSC, allowing a single intransigent firm to either delay product safety rules through years of litigation or potentially avoid a recall of already-sold products. *See, e.g., Fed. Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 701 (1948)

(refusing to disqualify the Commission because it would "completely immunize[] the practices investigated even though they [do not comport with the law]," which would frustrate the purpose of the Commission's enabling act).[2]

2. Participation in the Rulemaking Does Not Warrant the Commission's Disqualification in CPSC 12-2

Case law also demonstrates that participation in agency rulemaking does not establish bias and prejudgment requiring disqualification. Rather than establishing that the Commissioners merely exercised their statutory authority through rulemaking, Respondent must prove that the Commissioners have irrevocably prejudged the adjudicatory record. *See City of Charlottesville v. Federal Energy Reg. Comm'n*, 774 F.2d 1205, 1212 (D.C. Cir. 1985) (Commission's policymaking concerning tax policy that would apply to a particular company did not disqualify it from later determining the taxes owed by that company). Here, the Commission will be considering many facts in the adjudicative record that were not part of the rulemaking record. Respondent fails to explain how Commissioners could have prejudged facts in the rulemaking that were only presented in the adjudicatory record.

Indeed, the unique evidence in CPSC 12-2 includes three weeks of trial testimony consisting of numerous physical exhibits of the Subject Products; 2,772 pages of trial transcripts; the stipulated testimony of Complaint Counsel's 11 witnesses; extensive written direct testimony

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[2] Respondent's suggestion that the Commissioners could simply allow the Initial Decision to become final notwithstanding Complaint Counsel's appeal is without merit. The Commissioners were nominated by the President and confirmed by the Senate because of "their background and expertise in areas related to consumer products and protection of the public from risks to safety" and are accountable for the actions of the Commission. 15 U.S.C. § 2053(a). It would be an abdication of responsibility and a violation of the adjudicatory rules to allow an unaccountable ALJ to determine the actions of the Commission with no review by the Commissioners. 16 C.F.R. § 1025.55(b) (the Commission "shall consider the record as a whole" and "shall issue an order reflecting its Final Decision" following an appeal). This is particularly true here, where the ALJ fundamentally misconstrued, misapplied, and misunderstood the CPSA and its implementing regulations. *See* Complaint Counsel's Appeal Brief. A Final Decision and Order is subject to review by the Commissioners precisely because of cases such as this, where a deeply flawed Initial Decision must be corrected so that the Final Decision protects consumers from the substantial product hazard presented by the Subject Products.

and reports by Complaint Counsel's experts; consumer e-mail correspondence with Respondent; Respondent's sales records; testimony regarding the Respondent's websites; and evidence of undercover purchases of the Subject Products. By contrast, in the rulemaking, the Commission considered a distinct body of evidence, such as a regulatory analysis setting forth the costs and benefits of the rule, alternatives to the rule, and economic data bearing on the impact of the rule on market competition. *See* 79 Fed. Reg. 59961, 59987-88. None of those regulatory factors is a consideration in a Section 15 proceeding. *See* 15 U.S.C. § 2064; 16 C.F.R. § 1115.4.[3]

Although several thousand pages of evidence are unique to this adjudication, it is unremarkable that there are likely to be similar facts relevant to both the rulemaking and this proceeding. With respect to those similar facts, courts have repeatedly recognized that Commissioners routinely analyze facts within their area of expertise; prior consideration of these facts cannot serve to disqualify a Commissioner. In *Cement Institute*, the U.S. Supreme Court explained that because Commissioners are experts in their fields, they will necessarily conduct investigations and form legal opinions about products subject to Commission regulations. 333 U.S. at 701. Such "investigations did not necessarily mean that the minds of its members were irrevocably closed" requiring disqualification. *Id.* Indeed, because CPSC Commissioners are experts overseeing the agency charged with protecting consumers from dangerous products, they necessarily will be exposed to facts, and may even form opinions, concerning these products before any adjudication. As the Court in *Cement Institute* instructed, this activity does not preclude their participation in adjudication.

[3] Respondent incorrectly asserts that the rulemaking and adjudication relate "to the same exact products" and that "the rule really is a ban." Motion at 5. The rulemaking established a safety standard for products manufactured or imported after the rule took effect, but did not relate to products made and imported before the rule took effect. 16 C.F.R. § 1240.1. Indeed, Zen has continued selling the Subject Products despite the rule. *See* zenmagnets.com, accessed May 10, 2016 (stating that Zen is still selling "1 Mandala & 1 Gift set released per month"). Furthermore, the rule did not "ban" SREMs; it established a standard for SREMs, and Zen in fact is selling "Compliance Magnets" that it asserts comply with the rule. *See* micromagnets.com.

Commissioners are not prohibited from deciding multiple issues that may pertain to the same set of facts, just as "judges frequently try the same case more than once and decide identical issues each time" without raising any claim of a violation of due process. *Id.* at 703. To hold otherwise would make the "experience acquired from their work as commissioners ... a handicap instead of an advantage." *Id.* at 702. Despite any previous consideration of facts related to the adjudication, Respondent is afforded its full due process rights through the adjudication, and is "free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments," why it should prevail. *Id.* at 701. Thus, an adjudication may involve new evidence–indeed, as in *Cement Institute*, there are "volumes of it," *id.*–which the Commissioners will examine to reach a fair decision in the adjudication.

In *NEC Corp. v. United States*, 151 F.3d 1361 (Fed. Cir. 1998), the court recognized that agency officials may have "previous knowledge of the facts" of a particular case simply because their supervising role at the agency exposed them to such facts. *Id.* at 1372. Such prior knowledge of facts, and formulation of opinions based on those facts, did not disqualify Commissioners, the court reasoned:

> We would be blinding ourselves to the reality of the administrative process that Congress has created were we to hold that the mere fact that a decision maker has been involved in the development of the case, either through a field investigation or a public hearing, or indeed has taken, preliminarily, a public position on the case, is enough to place the entire process under a constitutional cloud from which it cannot be shielded.

Id. at 1372-73. *See also Pangburn v. Civil Aeronautics Bd.*, 311 F.2d 349, 358 (1st Cir. 1962) (fact that decision maker considered particular facts in a prior hearing or "has taken a public position on the facts" should not inhibit that tribunal from passing upon the facts in a subsequent hearing).

As these cases make clear, the fact that all of the Commissioners participated in the rulemaking process does not establish bias requiring disqualification from their participation in CPSC 12-2.

3. Respondent Had Not Presented Evidence Warranting the Disqualification of Four Commissioners

As an alternative to the argument that the entire Commission should be disqualified from hearing the appeal of 12-2, Respondent asserts that four of the five Commissioners should be disqualified. As with Respondent's other positions, this argument lacks merit and does not warrant relief.

A party seeking disqualification based on the comments or actions of a commissioner "can prevail on its claim of prejudgment only if it can establish that the decision maker is not capable of judging a particular controversy fairly on the basis of its own circumstances." *NEC Corp. v. United States*, 151 F.3d 1361, 1373 (Fed. Cir. 1998), quoting *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) and *United States v. Morgan*, 313 U.S. 409, 421 (1941) (internal quotations omitted). Thus, Commissioners should be disqualified only if evidence shows that a decision maker's mind was "irrevocably closed." *NEC* at 1373, 1375.

Respondent must also overcome the presumption that the Commissioners "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *U.S. v. Morgan*, 313 U.S. 409 (1941). As the Supreme Court explained in *Morgan*, agency officials "charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are," and are entitled to have opinions about the matters before them while also keeping an open mind in evaluating the adjudicatory record. *Id.* at 421. Thus, even where an official not only "held but

expressed strong views on matters believed by him to have been in issue" and published those opinions in a letter to the *New York Times*, he was "not unfit . . . for exercising his duty in subsequent proceedings . . . ." *Id.*

In advancing the argument that four Commissioners must be disqualified, Respondent relies heavily on *Cinderella Career and Finishing Schools, Inc. v. Fed. Trade Comm.*, 425 F.2d 583 (D.C. Cir. 1970). This 46-year-old case involved unusual facts evidencing extreme bias, and has repeatedly been distinguished by courts in rejecting motions to disqualify commissioners. In *Cinderella*, although the court noted that commissioners are free to make factual public statements about a party, the court expressed exasperation at a Commissioner's public statements about a matter that were made while an appeal in that matter was pending. In evaluating the propriety of the Commissioner's actions, the Court gave significant weight to the Commissioner's "flagrant disregard of prior decisions" in which the Court had specifically warned him about his personal bias. *Id.* at 589, 591. In the face of such repeated, "appalling" demonstrations of bias, the court ruled that the Commissioner should have been disqualified. *Id.* In contrast, the Commission here has not and could not have prejudged the thousands of pages of unique evidence in the adjudicative record that were not part of the rulemaking record. The facts in *Cinderella* are a far cry from those presented here, and Respondent has failed to shoehorn the holding of *Cinderella* into this matter.

Since the 1970 decision in *Cinderella*, courts have distinguished that case and recognized the heavy burden that must be met to prove bias mandating disqualification. Thus, even proof that a decision maker conducted "ex parte investigations" or "publicly stated views contrary to the [party's] position" was found to be insufficient to find prejudgment. *NEC Corp.*, 151 F.3d at 1372, citing *Cement Inst.* at 701. Likewise, in *Nuclear Information & Research Serv. v. Nuclear*

Reg. Comm'n, 509 F.3d 562, 571 (D.C. Cir. 2007), the D.C. Circuit distinguished *Cinderella*, finding that a Commissioner who publicly disparaged the petitioner as the "Nuclear Disinformation Resource Service" need not be disqualified, recognizing that "agency officials must play in the give-and-take of sometimes rough-and-tumble policy debates . . . ." *Id.* at 571. The court acknowledged that the Commissioner at issue had a "personal style" to "speak vigorously, sometimes colorfully," to "spark debate," but that his comments "made in an entirely separate proceeding" did not support a finding of bias in a future proceeding. *Id.* The court also recognized that Commissioners are entitled to a presumption of fairness, and "[a] party cannot overcome this presumption with a mere showing that an official 'has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute.'" *Id.*, quoting *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980), in turn citing *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976) and *Morgan*, 313 U.S. at 421. Similarly, in the case of *In the Matter of The Stuart-James Co., Inc.*, 50 S.E.C. 468, 470 (1991), the Securities and Exchange Commission rejected a prejudgment claim even though Commissioners had reviewed the settlement of co-defendants alleging the same facts.

Respondent has failed to meet its heavy burden to show that four Commissioners have "irrevocably closed" minds concerning this adjudication. The motion should be denied.

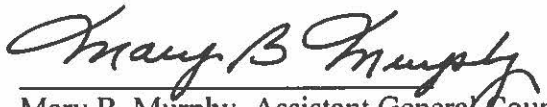
III. Conclusion

Respondent's Motion to Stay the Proceedings should be denied because the rules do not support a stay, and further delay will place additional children at risk. In addition, Complaint Counsel submits that the Motion to Disqualify the Commissioners should be denied because

Respondent failed to comply with the procedural requirements of the APA, and because the arguments underlying the basis for motion are factually and legally devoid of merit.

For the foregoing reasons, Complaint Counsel requests that the Commission enter an order denying the instant Motions.

Respectfully submitted,



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May 13, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have provided on this date, May 13, 2016, Complaint Counsel's Response to Respondent's Motion to Stay and Motion to Disqualify the Commission or Some of Its Members, in the following manner:

Original and five copies by hand delivery to the Secretary of the U.S. Consumer Product Safety Commission: Todd A. Stevenson.

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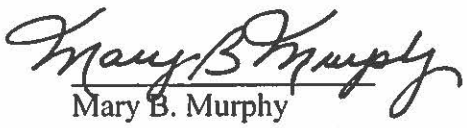

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