UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | CPSC Docket No. 12-2 |
| ZEN MAGNETS, LLC, | ) | |
| | ) | Hon. Dean C. Metry |
| Respondent. | ) | Administrative Law Judge |
| | ) | |

**COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS**

Respondent has moved to dismiss this proceeding claiming that an alleged violation of due process "might arise" in a potential appeal. Motion at 1. This Court should deny the motion because: 1) it is not ripe for review, 2) this Court lacks jurisdiction to determine the qualification of Commissioners to act as an appellate body, 3) Respondent has been afforded full due process under the Rules of Practice governing this matter; and 4) no prejudgment has occurred.

BACKGROUND

On August 6, 2012, Complaint Counsel initiated this proceeding to determine whether small, high-powered rare earth magnets sold by Respondent as Zen Magnets and Neoballs (Subject Products) are a "substantial product hazard" pursuant to CPSA Section 15. 15 U.S.C. § 2064. Under section 15, a manufacturer, distributor, or retailer of products that are found to present a substantial product hazard may be ordered to stop sale, recall the products, and provide notice of the recall. *See* 15 U.S.C. § 2064(c),(d). Section 15 proceedings provide for numerous layers of due process, including an initial determination by an Administrative Law Judge, an opportunity for appeal to the Commission, and further opportunities to appeal to federal court under the Administrative Procedure Act, 5 U.S.C. §§ 701-06. *See* 15 U.S.C. § 2065(f)(1); 16 C.F.R. §§ 1025.51-58.

Under separate statutory authority, the Commission may promulgate a consumer product safety standard to "prevent or reduce an unreasonable risk of injury" associated with a product. 15 U.S.C. §§ 2056, 2058 (CPSA sections 7 and 9). On September 4, 2012, the Commission, pursuant to CPSA sections 7 and 9, issued a proposed consumer product safety standard that set forth performance requirements designed to address "an unreasonable risk of injury" associated with magnet sets. 77 Fed. Reg. 53781. Following a public comment period, the Commission approved the Final Rule on September 25, 2014. *See* 79 Fed. Reg. 59961 (Final Rule). The Final Rule, which takes effect on April 1, 2015, is prospective in nature, applying only to the sale or distribution of magnets manufactured or imported on or after the effective date. The Final Rule does not order an immediate stop sale of the Subject Products, require their recall, or in any way apply to magnets distributed in commerce before April 1, 2015. Instead, the rule requires that magnet sets, including individual magnets used with magnets sets, which are manufactured or imported on or after April 1, 2015, must comply with the Rule's standards.[1]

Removal of products currently in the stream of commerce and provision of a remedy for consumers may be ordered in a Section 15 proceeding, which is wholly separate and unrelated to the Commission's rulemaking authority under CPSA sections 7 and 9. Among other differences, Sections 7 and 9 require that the Commission consider factors distinct from those in a Section 15 proceeding, including a comparison of costs and benefits and effects of a proposed rule on competition and manufacturing. *Compare* 15 U.S.C. § 2058(c) and (f)(1) (discussing economic analysis in rulemaking) with 15 U.S.C. § 2064(h) (comparison of costs and benefits need not be considered in Section 15 proceedings).

[1] Under the Final Rule, if a magnet set manufactured or imported after April 1, 2015, contains a magnet that fits within a small parts cylinder, each magnet must have a flux index of 50 $kG^2$ $mm^2$ or less. (A small parts cylinder is 2.25 inches long by 1.25 inches wide, about the size of the throat of a child under three years old. *See* 16 C.F.R. § 1501.4).

## ARGUMENT

### I. Respondent's Motion Is Not Ripe for Review

Although Respondent's underlying arguments concerning prejudgment have no merit, this Court need not consider them because Respondent's motion is not ripe for review. For Respondent's claim to be ripe, Respondent must show that it has felt the concrete effects of a formal administrative decision. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). Respondent does not argue that it has suffered a lack of due process in the instant proceeding. Rather, Respondent speculates that due process issues "might arise" in the future *if* a party does not receive a favorable ruling by this Court and *if* that party then decides to appeal. Motion at 1, 10. Because Respondent's argument hinges on hypothetical future actions that have not yet occurred and may never occur, the motion to dismiss is not ripe and should be denied. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed, may not occur at all.'") (*quoting Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)).

Regulations implementing CPSA Section 15 provide that an Administrative Law Judge acts as a trial court, and the Commission acts as an appellate court if a party appeals or if the Commission initiates review of the Court's Initial Decision. *See* 16 C.F.R. §§ 1025.51-54. However, the Administrative Law Judge's Initial Decision automatically becomes the Final Decision and Order of the Commission without review by the Commission if no party appeals and the Commission does not seek to review the Initial Decision. *See* 16 C.F.R. § 1025.52. Thus, this Court's Initial Decision may become final without any review by the Commission. In such a case, Respondent's hypothetical claims concerning Commissioner prejudgment would never materialize, making review of such claims now premature at best. As the court found in

*Boise Cascade Corp. v. Federal Trade Comm'n*, 498 F.Supp. 772, 781 (D.Del. 1980), a case involving a nearly identical claim that a Commissioner's prejudgment of a case would make it impossible to have a fair hearing on appeal, the court ruled that Boise could not raise "hypothetical threats" of a due process violation because of prejudgment on appeal before an appeal had even occurred. Such concerns, the court found, must wait until an "appeal of the final agency ruling…." *Id.* Similarly, review of any harm Respondent claims might result from alleged prejudgment must wait until an actual, rather than speculative, issue exists.

Not only are Respondent's claims unripe, the arguments depend on four particular Commissioners hearing any possible future appeal, a conclusion lacking any certainty because the timing of such an appeal, if any, cannot be known at this point. Accordingly, the composition of the Commission also cannot be known as it may change by the time the Final Order of the Court becomes appealable. Indeed one need only look to the change in Commission members since the onset of this proceeding to recognize the mutable nature of this body: only one of the five current Commissioners was a Commissioner at the time this proceeding commenced.[2] Respondent has no way of knowing what the makeup of the Commission will be at the time of any hypothetical future appeal, thus underscoring the speculative foundation upon which this motion lies.

Because Respondent's claims are not ripe and are rooted in speculation, this Court should deny the motion.

II. This Court Lacks Jurisdiction to Decide the Motion

Not only should this Court deny Respondent's motion because the claims are unripe, this Court should deny the motion for lack of jurisdiction. In seeking a dismissal of this proceeding,

[2] *See* Commissioner and Chairman biographies at http://www.cpsc.gov/en/About-CPSC/Commissioners and http://www.cpsc.gov/en/About-CPSC/Chairman/Kaye-Biography.

Respondent asks this Court to decide that "four of the five Commissioners have prejudged … this case" such that they must be "disqualifie[d] from considering any appeal…." Motion at 10-11. The Commission is the appellate body here – it is not a party to this proceeding. *See* 16 C.F.R. §§ 1025.3; 1025.53 (Complaint Counsel represents Commission staff, while Commissioners act as independent appellate body). As such, the Court has no authority to order the Commission to do anything, much less deprive the Commission of its statutorily prescribed role as the appellate body in this proceeding. In short, Respondent's request for dismissal would result in this Court exceeding its authority at the expense of the Commission's proper authority. Just as a federal district court lacks the jurisdiction to decide in advance of a hypothetical future appeal whether particular federal Circuit Court judges must be disqualified from hearing such appeal, the Presiding Officer here lacks jurisdiction to determine the qualifications of the Commissioners. *See, e.g., In re Bernard*, 31 F.3d 842, 843 (9th Cir. 1994) (in analogous motion to disqualify appellate judge, motion must be brought before the judge sought to be disqualified).

This Court has specifically defined jurisdiction pursuant to Section 15 of the Consumer Product Safety Act, 15 U.S.C. § 2064(f), to determine "that a product distributed in commerce presents a substantial product hazard" and order appropriate action, such as requiring notice to the public, cessation of distribution of the product, and refunds to consumers. 15 U.S.C. §§ 2064 (c) and (d). Determinations of the qualification of particular Commissioners to hear a future appeal of the Court's ruling are simply beyond this Court's province. Rather, if and when these claims are ripe, Respondent must as an initial matter bring them to the Commission itself and then, if necessary, to federal court following final agency action.

Because this Court has no jurisdiction to determine the Commissioners' qualifications and the motion is not properly before this Court, the motion should be denied.

III. Respondent Has Been Afforded Full Due Process in This Proceeding

Other than speculating about some possible future abridgment of its rights, Respondent makes no claim, nor can it, that its due process rights have been in any way infringed during this proceeding. Over the course of more than two years, Respondent has been afforded every opportunity to exercise its rights, proffer a vigorous defense, depose potential witnesses, and respond in full to Complaint Counsel's allegations. The record substantiates amply the full panoply of due process rights available to, and exercised by, Respondent, and this Court has ensured that the statutory and regulatory rules governing this proceeding have been observed strictly and faithfully. Respondent can point to nothing in the record to demonstrate a violation of its Fifth Amendment or any other rights, and its motion must therefore fail.

IV. The Commissioners Have Not Prejudged This Proceeding

Even if the motion were ripe for review and properly before this Court, the motion should be denied because the Commissioners have not prejudged this proceeding and therefore dismissal is unwarranted.

To establish prejudgment mandating disqualification, Respondent must show that the Commissioners have prejudged both the facts as well as the law in advance of a hearing. *See City of Charlottesville v. Federal Energy Reg. Comm'n*, 774 F.2d 1205, 1212 (D.C. Cir. 1985). Respondent "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). Even proof that a decision maker conducted "ex parte investigations" or "publicly stated views contrary to the [party's] position" may be

insufficient to find prejudgment. *NEC Corp.*, 151 F.3d at 1372, *citing FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948). *See also Morgan*, 313 U.S. at 421 (officials, such as the Commissioners here, "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."); *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).

Respondent has not met its burden of demonstrating that the Commissioners have prejudged the facts raised in this proceeding. Respondent insists that "the facts involved" in both the rulemaking and this proceeding "are precisely the same," and therefore "the Commission in the instant case has clearly made up its mind" in advance of any hearing. Motion at 8-9. Respondent's assertions are incorrect. In support of its claim that the Subject Products present a substantial product hazard, Complaint Counsel has presented significant evidence in this proceeding that was not part of the record in the rulemaking and has not yet been presented to the Commission. This evidence includes dozens of exhibits filed under seal as attachments to Complaint Counsel's Motion for Summary Decision, including witness declarations, medical records, expert reports, deposition transcripts, consumer e-mail correspondence with Respondent, and Respondent's sales records. By contrast, the Commission considered a distinct body of evidence in the rulemaking, 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 factors are considerations in a Section 15 proceeding.

To the extent that similar facts are relevant to both the rulemaking and this proceeding, courts have repeatedly recognized that Commissioners routinely analyze facts within their area of expertise such that prior consideration of these facts cannot serve to disqualify a Commissioner. *See Hortonville*, 426 U.S. at 493 (decisionmaker not "disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute"); *Nuclear Information & Research Serv. v. Nuclear Reg. Comm'n*, 509 F.3d 562, 571 (D.C. Cir. 2007) (Commissioner who publicly disparaged Respondent not disqualified); *In the Matter of The Stuart-James Co., Inc.*, 50 S.E.C. 468, 470 (1991) (rejecting prejudgment claim even though Commissioners had reviewed settlement of co-defendants alleging same facts). As these cases make clear, the fact that the Commissioners reviewed some overlapping facts in connection with the Final Rule on magnet sets does not preclude participation in this proceeding. To hold otherwise would make the "experience acquired from their work as commissioners … a handicap instead of an advantage." *Cement Institute*, 333 U.S. at 702.[3]

Respondent also has not demonstrated any prejudgment of the law. Respondent asserts that by acting under Sections 7 and 9, "the Commission has already decided the matter" at issue here. Motion at 10. Although Respondent acknowledges that Congress used admittedly "facially different" standards of an "unreasonable risk of injury" in Sections 7 and 9 compared to a "substantial product hazard" determination under Section 15, Respondent dismisses such distinction as meaningless. Motion at 8. Yet nothing in the CPSA prohibits the Commission from simultaneously pursuing rulemaking under Sections 7 and 9 to protect the public from unreasonable risks posed by future sales of a product, while Complaint Counsel seeks recalls

[3] *But see Cinderella Career and Finishing Schools, Inc. v. Fed. Trade Comm.*, 425 F.2d 583, 591 (D.C. Cir. 1970) (personal bias versus institutional knowledge may form basis for prejudgment, where decisionmaker engages in "flagrant disregard of prior decisions" warning about his personal bias and is "determined either to distort the holdings in the cited cases beyond all reasonable interpretation or to ignore them altogether").

under Section 15 for substantial product hazards already in consumers' hands.

As the Supreme Court has recognized, agency officials acting as decision makers 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. *Cement Inst.*, 333 U.S. at 703.[4] Indeed, because the Commission's focus on consumer products means that Commissioners may repeatedly consider similar facts, regulations implementing the CPSA have stringent safeguards to ensure impartiality, including the requirement to establish a clear wall between Complaint Counsel and the Commissioners during the pendency of a proceeding. *See* 16 C.F.R. § 1025.68.

Respondent has not shown any prejudgment and has failed "to overcome the presumption of honesty and integrity in policymakers with decisionmaking power." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. at 496-97.

## CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the motion be denied.

DVice

Digitally signed by DVice
DN: o=CPSC, ou=HQ, ou=OGC, cn=DVice
Date: 2014.10.27 11:43:05 -04'00'

Jennifer Argabright, Trial Attorney
Daniel Vice, Trial Attorney
Ray Aragon, Trial Attorney
Mary B. Murphy, Assistant General Counsel
Office of the General Counsel
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7809
Complaint Counsel for
U.S. Consumer Product Safety Commission

[4] *See also In re J.P. Linahan, Inc.*, 138 F.2d 650, 651 (2d Cir. 1943), "If…'bias' and 'partiality' be defined to mean the total absence of preconception in the mind of the judge, then no one has ever had a fair trial and no one ever will."

## CERTIFICATE OF SERVICE

I hereby certify that I have provided on this date, October 27, 2014, Complaint Counsel's Response to Respondent's Motion to Dismiss in the following manner:

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

One copy by electronic mail to the Presiding Officer:

The Honorable Dean C. Metry
U.S. Coast Guard
U.S. Courthouse
601 25th St., Suite 508A Galveston, TX 77550
Janice.M.Emig@uscg.mil

One copy by electronic mail to counsel for Respondent Zen Magnets, LLC:

David C. Japha
The Law Offices of David C. Japha, P.C.
950 S. Cherry Street, Suite 912
Denver, CO 80246
davidjapha@japhalaw.com

DVice
Digitally signed by DVice
DN: o=CPSC, ou=HQ, ou=OGC, cn=DVice
Date: 2014.10.27 11:43:19 -04'00'

Daniel Vice