

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

_____)	
In the Matter of)	
)	
LEACHCO, INC.)	CPSC DOCKET NO. 22-1
)	
)	Hon. Michael G. Young
)	Presiding Officer
Respondent.)	
_____)	

COMPLAINT COUNSEL’S OPPOSITION TO LEACHCO, INC.’S MOTION TO DISQUALIFY THE PRESIDING OFFICER AND STAY THE PROCEEDING OR, IN THE ALTERNATIVE, MOTION TO STAY DISCOVERY

Pursuant to 16 C.F.R. § 1025.23(c), Complaint Counsel respectfully submits its Opposition to Respondent Leachco, Inc. (“Leachco”)’s August 17, 2022 Motion to Disqualify the Presiding Officer and Stay the Proceeding or, in the Alternative, Motion to Stay Discovery.

I. INTRODUCTION

Leachco filed the instant motion seeking disqualification of the Presiding Officer and a stay of this matter pending the resolution of a civil lawsuit that Leachco initiated on the same day against the Consumer Product Safety Commission and its Commissioners in the U.S. District Court for the Eastern District of Oklahoma.¹ In the alternative, Leachco seeks a stay or continuance of discovery in this matter so that its new counsel may become familiar with this matter.

In essence, Leachco contends that (a) the Presiding Officer lacks Constitutional authority to proceed with this matter because he is insulated from removal at the discretion of the

¹ *Leachco, Inc. v. Consumer Product Safety Commission*, Case No. 6:22-CV-00232-RAW (E.D. Okla.).

President;² (b) the CPSC Commissioners themselves unconstitutionally are insulated from removal at the discretion of the President;³ and (c) this administrative proceeding should be stayed while Leachco litigates those issues in federal district court.⁴

Leachco's motion should be denied. The Presiding Officer need not disqualify himself, nor should the proceeding be stayed. *First*, the motion is procedurally defective because it does not request relief that is permitted under the Administrative Procedures Act ("APA"), 5 U.S.C. § 556(b), and the CPSC Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 1025.42(e), because it does not seek disqualification based on extrajudicial reasons specific to this particular Presiding Officer. *Second*, the "rule of necessity" dictates that a motion to disqualify cannot prevail under these facts. *Third*, the declaration supporting Leachco's motion to disqualify is inadequate. *Fourth*, the motion to disqualify is untimely. *Fifth*, a stay of this proceeding is not warranted because it would delay the resolution of this public-safety-related adjudication. *Finally*, discovery in this matter need not be stayed because Complaint Counsel has volunteered to continue until late October the depositions noticed in this case, and the close of discovery is not as imminent as Leachco represents in its motion.

Each of these grounds counsels in favor of denying Leachco's motion. But should the Presiding Officer desire briefing on the Constitutional arguments raised in Leachco's motion, Complaint Counsel is willing to supplement this brief as explained in more detail below.

² See Motion to Disqualify the Presiding Officer and Stay the Proceeding or, in the Alternative, Motion to Stay Discovery ("Mot.") at pp. 5–13.

³ *Id.* at pp. 13–17.

⁴ *Id.* at pp. 17–18.

II. BACKGROUND

Since 2009, Leachco has manufactured and placed into commerce approximately 180,000 Podsters.⁵ Podsters are cushioned lounging pillows designed to be used by a uniquely vulnerable population: infants.⁶ To date, at least two infants have died after being placed in Podsters.⁷

After investigating the Podsters and conducting technical evaluations of the products, Complaint Counsel initiated this administrative proceeding in February of this year. Complaint Counsel alleges that the Podsters pose a substantial product hazard because, among other things, (a) Podsters can cause airflow obstruction leading to suffocation if an infant rolls, moves, or is placed in a position where their nose and mouth are obstructed by the Podster; (b) the design of the Podsters prevent infants from self-rescuing once their nose and mouth are obstructed; (c) the design of the Podster facilitates infant movement on the Podster, which can result in an infant's nose and mouth becoming obstructed by the Podster; and (d) the design of the Podster facilitates movement off the Podster, which can result in an infant's nose and mouth being obstructed by another object in the infant's environment, such as soft bedding.⁸ An infant can suffocate and die in three to 10 minutes if the infant rolls, moves, or is placed in a position where the infant's nose and mouth are obstructed by the Podster or another object, such as soft bedding.⁹

In light of this alleged infant suffocation hazard posed by the Podsters, Complaint Counsel sought a hearing in this matter by no later than March 2023. But the Presiding Officer orally granted Leachco's request for additional time to prepare, and the hearing currently is scheduled for June 2023 with the close of discovery set for January 20, 2023.

⁵ Complaint, Dkt. 1 at ¶ 10.

⁶ *Id.* at ¶¶ 7, 42.

⁷ *Id.* at ¶¶ 35–37, 42.

⁸ *Id.* at ¶ 50.

⁹ *Id.* at ¶ 34.

Leachco now seeks to derail this action, disqualify the Presiding Officer, and stay the matter while Leachco pursues its newly filed federal case. It should not be permitted to do so because the law and facts do not support Leachco's requests for relief.

III. ARGUMENT

A. The Motion to Disqualify Does Not Comply with the APA and the CPSC's Rules of Practice for Adjudicative Proceedings

The Commission's adjudicative proceedings are conducted in accordance with the APA. See 16 C.F.R. § 1025.2 ("Adjudicative proceedings shall be conducted in accordance with Title 5, United States Code, Sections 551 through 559, and these Rules."). The APA requires that a motion to disqualify be supported by "a timely and sufficient affidavit of personal bias or other disqualification" 5 U.S.C. § 556(b).¹⁰ Similarly, the CPSC's adjudicatory rules provide "[w]henver, for good and reasonable cause, any party considers the Presiding Officer to be disqualified to preside, or continue to preside, in any adjudicative proceedings, that party may file with the Secretary a motion to disqualify and remove, supported by affidavit(s) setting forth the alleged grounds for disqualification." 16 C.F.R. § 1025.42(e).

Leachco's motion to disqualify is improper under both the APA and the CPSC adjudicatory rules. The APA and Section 1025.42(e) of the Rules of Practice permit a party to move for disqualification of a *particular* Presiding Officer in a *particular* proceeding. The basis for disqualification must, therefore, be extrajudicial in nature, and specifically linked to some disqualifying factual circumstances related to the Presiding Officer. *Liteky v. United States*, 510

¹⁰ The "other disqualification" language is not a broad catchall provision capturing factors other than those going to the bias or prejudice of an individual judge. When applying Section 556(b), courts evaluate factors individual to the particular ALJ that "display a clear inability by the ALJ to render fair judgment" and "unfair bias or prejudice." *St. Anthony Hosp. v. U.S. Dep't of Health and Human Servs.*, 309 F.3d 680, 711–13 (10th Cir. 2002).

U.S. 540, 551–54 (1994) (affirming criminal convictions and discussing extrajudicial factors as basis for recusal for federal judges under federal statute, 28 U.S.C. § 455). Yet Leachco has not alleged any personal bias on the part of this Court, or any other “extrajudicial” source that would require Judge Young specifically to be disqualified. Indeed, the word “bias” or a synonym thereof does not even appear in Leachco’s motion. Because Leachco has failed to allege anything specific or personal to Judge Young, this Court need not engage in the typical disqualification analysis that requires a review of whether the facts propounded would upset the usual “presumption of honesty and integrity” that applies to administrative decision-makers. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (reversing imposition of preliminary injunction relating to state medical board suspension of physician’s license).

What Leachco appears to be arguing is not that this Presiding Officer should be disqualified, but rather that *any* Presiding Officer should be disqualified. Not only would that contention essentially gut the authority of the Commission or any federal safety agency to protect the public from harm, such an argument is procedurally improper under the APA and 16 C.F.R. § 1025.42(e). Leachco argues that “[a] core constitutional problem like the one Leachco raises here is surely ‘good and reasonable cause’ to disqualify the Presiding Officer. 16 C.F.R. § 1025.42(e)(2). Indeed, it is hard to imagine *better* cause to disqualify an ALJ than such a constitutional defect”¹¹ However, the APA and adjudicatory rules do not permit disqualification by supposition. The APA and disqualification rule provide a particularized mechanism to disqualify when there are appropriate grounds linked to a *specific individual* Presiding Officer such as, for example, a personal or financial conflict of interest. However, as there is no support for disqualification under the APA or the adjudicatory rules—and Leachco

¹¹ Mot. at 11.

has provided no such authority—the motion should be rejected on that basis. *See also United States v. Greenspan*, 26 F.3d 1001, 1005 (10th Cir. 1994) (“[A] judge has as much obligation not to recuse himself where there is no reason to do so as he does to recuse himself when the converse is true.”).

B. The “Rule of Necessity” Requires Denial of the Motion to Disqualify

A closely related reason to deny the motion is the line of precedent articulating a “rule of necessity” which prohibits wholesale disqualification that conflicts with statutory duty and Congressional mandate. In short, Leachco cannot disqualify this Presiding Officer and all other possible ALJs because an ALJ must issue an Initial Decision in this case. *See* 16 C.F.R. § 1025.51 (“The Presiding Officer shall endeavor to file an Initial Decision with the Commission within sixty (60) days after the closing of the record or the filing of post-hearing briefs, whichever is later.”); 15 U.S.C. § 2064(f)(1) (requiring a hearing before an administrative law judge in accordance with the APA before the Commission may determine that a product presents a substantial product hazard). Faced with a similar circumstance, the Commission ruled that it cannot be disqualified based on Supreme Court precedent following the common law “rule of necessity” that permits the Commission act to even if they are disqualified. *See Zen Magnets, LLC*, CPSC Docket No. 12-2, Opinion and Order Denying Respondent’s Motion to Disqualify the Commission or Some of its Members (Sept. 1, 2016) at 7–8 (ruling that disqualification of Commission to impair its ability to rule is not permissible);¹² *see also United States v. Will*, 449 U.S. 200, 211–17 (1980) (Supreme Court should not be disqualified where all federal judges had a pecuniary interest); *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948) (finding that

¹² The Commission’s decision denying the motion to disqualify ultimately was affirmed by the United States Court of Appeals for the Tenth Circuit in *Zen Magnets LLC v. Consumer Product Safety Commission*, 968 F.3d 1156 (10th Cir. 2020).

disqualification of entire agency would prevent decision to be made as Congress intended). Disqualification of any and all ALJs that might be assigned to this case, therefore, is a remedy not available under the APA and the adjudicatory rules.

C. Leachco’s Declaration Fails to Satisfy the Requirements of 16 C.F.R. § 1025.42(e)

Leachco’s motion to disqualify must also be denied because its affidavit or declaration is insufficient. The declaration, prepared and executed by newly retained counsel for Leachco, states in relevant part that “[t]o the best of my knowledge, information, and belief, each citation to legal and factual matters in the Motion is accurately and completely represented” and “[t]he legal arguments set forth in the Motion reflect good-faith statements of the law or good-faith arguments for a new application of previously articulated law.”¹³

Nothing in the declaration, however, alleges facts which go to “personal bias or other disqualification” as required by the APA. 5 U.S.C. § 556(b). Counsel’s declaration is really an affirmation of what this Court expects of every attorney who appears before it and what the adjudicatory rules specifically demand: “The Commission expects all persons appearing before the Commission or the Presiding Officer to act with integrity, with respect, and in an ethical manner.” 16 C.F.R. § 1025.66(a). And yet the affidavit requirement is no mere formality—it has been held to provide a decision-maker critical information upon which to make a disqualification determination. *See Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995) (denying disqualification because of failure to submit an affidavit “laying out the basis for his request for recusal or substantiating his allegation of bias, and his failure to do so if fatal to his claim”); *Gibson v. FTC*, 682 F.2d 554, 565 (5th Cir. 1982) (with respect to disqualification rule

¹³ Decl. of Counsel in Support of Leachco, Inc.’s Mot. at p. 2 ¶ 10.

similar to CPSC's, examining FTC disqualification decision and noting the FTC's decision described the affidavit requirement as "not an empty formality to be cast aside unilaterally by a party to a Commission proceeding."). Although Leachco's counsel did technically provide a declaration along with its motion to disqualify, it was insufficient—it essentially is a makeweight designed to appear to meet the evidentiary requirements of disqualification without providing any of the required factual substance showing bias or extrajudicial prejudice.

D. Leachco's Motion to Disqualify is Untimely

The motion to disqualify also should be denied because it is untimely. The APA requires a timely motion for disqualification. 5 U.S.C. § 556(b) ("On the filing in good faith of a *timely* and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.") (emphasis added). The prompt and timely filing of a motion to disqualify is required so a party raises disqualification for a valid and proper purpose and not for strategic gamesmanship. *See Klayman v. Judicial Watch, Inc.*, 744 F.Supp.2d 264, 270 (D.D.C. 2010) (motion to disqualify judge on federal statute untimely where movant aware of purported circumstances for disqualification but nevertheless waited to file motion). Timeliness is critical so that a party cannot use the motion to avoid resolution of the case and potential unfavorable results. *See Smuck v. Hobson*, 408 F.2d 175, 183 (D.C. Cir. 1969) (affidavit untimely based on remarks made by the judge two weeks prior); *In re Martin-Trigona*, 573 F. Supp. 1237, 1244–45 (D. Conn. 1983) (12–day delay untimely); *Bumpus v. Uniroyal Tire Co.*, 385 F. Supp. 711, 712 (E.D. Pa. 1974) (disqualification motion untimely based on purported predicate of "from two weeks to as far back as two months before").

The Complaint in this matter was filed on February 9, 2022. Leachco filed an answer on March 2, 2022. On April 21, 2022, the parties filed a document in advance of the initial prehearing conference in which Leachco specifically indicated that “Respondent plans to amend the [answer] to add a defense on constitutionality in light of a decision in *Consumer’s Research v. CPSC*, Case 6:21-cv-00256-JDK, dated March 18, 2022, after the Respondent filed its original answer.”¹⁴ *Consumers’ Research* involves the question whether CPSC Commissioners unconstitutionally are insulated from removal.¹⁵ Thus, Leachco has known of its purported grounds for disqualification for at least four months, but it failed to file the motion to disqualify until the matter was progressing through discovery and into the deposition stage. This type of delay and gamesmanship is prohibited under the APA and the related precedent under the federal judicial disqualification statute. Nor is such a strategic maneuver consistent with the Rules of Practice, which direct that “all parties shall make every effort at each stage of any proceedings to avoid unnecessary delay.” 16 C.F.R. § 1025.2. Failure to timely raise its motion to disqualify is an independent and additional ground to deny the motion, in addition to the lack of extrajudicial alleged conduct, the rule of necessity, and the insufficient declaration.

E. To the Extent the Presiding Officer Would Find It Helpful, Complaint Counsel Requests Additional Time to Permit Briefing on Constitutional Arguments

Because Leachco’s motion to disqualify runs afoul of the APA and CPSC Rules of Practice for Adjudicative Proceedings, the Presiding Officer has a sound basis to deny the motion on those grounds alone and need not reach the Constitutional issues raised by Leachco. *Dept. of Comm. v. U.S. House of Rep.*, 525 U.S. 316, 342 (1999) (rejecting census challenge

¹⁴ Joint Initial Prehearing Schedules and Statement on Prehearing Conference Matters, Dkt. 13 at p. 4. Leachco has not yet amended its answer.

¹⁵ 2022 WL 1577222, *appeal filed* May 16, 2022 and docketed as Case No. 22-40328 (5th Cir.).

based on federal statutory grounds and not reaching constitutional challenge (citing *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable”) and *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (“[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter”)).

In light of Leachco’s initiation of a lawsuit against the CPSC in federal district court, the CPSC is working with its outside legal counsel, the United States Department of Justice (“DOJ”), to evaluate the Constitutional challenges raised in this matter, the federal proceeding, and similar actions filed in federal court. Complaint Counsel believes Leachco’s Constitutional challenges are without merit and is willing to brief the issue if the Presiding Officer would like. However, Complaint Counsel would request until September 16, 2022 to provide such briefing so that the CPSC adequately may confer and work with the DOJ.

F. A Stay of This Proceeding Is Not Warranted Because It Would Impede the Resolution of This Adjudication Involving Public Safety

The Presiding Officer also should deny Leachco’s request under 16 C.F.R. § 1025.42(e) to stay the case until the newly filed federal lawsuit has been resolved. Leachco fails to appreciate that Section 1025.42(e)(2) contains an express presumption *against* staying administrative lawsuits. That provision expressly provides that where, as here, a party moves to disqualify the Presiding Officer, “the motion *shall not stay the proceedings* unless otherwise ordered by the Presiding Officer or the Commission” (emphasis added). That is, the governing regulations direct that the administrative lawsuit presumptively should continue to proceed as scheduled unless the Presiding Officer or Commission orders that it should not.

There is good reason for this: the CPSC is a safety agency entrusted with protecting American consumers from products that pose an unreasonable risk of injury and death, and, because of that, “[a] major concern of the Commission is that all matters in adjudication move forward in a timely manner, consistent with the Constitutional due process rights of all parties.” 16 C.F.R. § 1025.1. Indeed, in promulgating the Rules of Practice, the Commission explained that the Rules’ “primary objective is to achieve a just, speedy and inexpensive determination based upon the evidence, with a uniformity of treatment in all adjudications.” 45 Fed. Reg. 29,206 (May 1, 1980). To that end, the Rules of Practice direct that “the Presiding Officer and all parties shall make every effort at each stage of any proceedings to avoid unnecessary delay.” 16 C.F.R. § 1025.2.

Staying the matter does not promote a just and speedy resolution of the case, nor does it help protect American consumers and vulnerable infants from the approximately 180,000 Podsters in use by caregivers. To the contrary, a stay would impede the Commission in its duty to protect the American public and delay the resolution of this proceeding by months, if not years. Leachco’s request for a stay accordingly should be denied. *See Grant v. Nat’l Transp. Safety Bd.*, 959 F.2d 1483, 1487 (9th Cir. 1992) (declining to impose a stay where it would impair the FAA’s “ability to protect the public safety”).

G. There Is No Need to Stay Discovery Because There Are No Imminent Deadlines

In the alternative, Leachco requests that the Presiding Officer stay or continue discovery for an unspecified amount of time to permit Leachco’s new attorneys to review the matter and adequately prepare. But there is no need for the Presiding Officer to intervene and stay or continue discovery.

Although the parties have exchanged motions to compel and Leachco has objected to each of the five depositions noticed by Complaint Counsel, there are no imminent discovery deadlines in the case. There is no new written discovery pending, and Complaint Counsel has offered to continue the depositions currently noticed for September. After receiving Leachco's motion and learning that Leachco had retained new counsel, Complaint Counsel contacted Leachco's new counsel and volunteered to hold the noticed depositions no earlier than the week of October 24, 2022 and on mutually agreeable dates. That should alleviate any concern that Leachco's new counsel would have to prepare for depositions within a relatively short timeframe.

Leachco's motion also overstates the imminence of the discovery deadline. Leachco contends that discovery closes on November 16, 2022.¹⁶ But, to the contrary, the Presiding Officer orally adopted Leachco's proposed prehearing schedule at the prehearing conference and ordered that discovery close on January 20, 2023¹⁷—more than 4.5 months from now.

Given the need for expediency in this proceeding aimed at ensuring the safety of vulnerable infants, Complaint Counsel's willingness to continue by over a month the only imminent discovery (the depositions), and the fact that the close of discovery still is over four months away, there is no need for a stay or continuance of discovery at this time. American consumers could be prejudiced by delaying this case, and new counsel should have ample time to become familiar with the matter.

¹⁶ Mot. at p. 19.

¹⁷ Dkt. 13 at p. 3.

IV. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Presiding Officer deny Leachco's motion in its entirety. The Presiding Officer should not be disqualified from presiding over this proceeding, nor should the matter be stayed.

To the extent that the Presiding Officer would like briefing on the Constitutional issues raised by Leachco, Complaint Counsel requests that the Presiding Officer afford Complaint Counsel leave to supplement this opposition by September 16, 2022.

Dated this 29th day of August, 2022

Respectfully submitted,

/s/ Brett Ruff

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2022, I served Complaint Counsel's Opposition to Leachco, Inc.'s Motion to Disqualify the Presiding Officer and Stay the Proceeding or, in the Alternative, Motion to Stay Discovery on all parties and participants of record in these proceedings as follows:

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