



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action Commissioners Voting by Ballot*

Commissioners Voting: Acting Chairman Ann Marie Buerkle
 Commissioner Robert S. Adler
 Commissioner Elliot F. Kaye
 Commissioner Dana Baiocco
 Commissioner Peter A. Feldman

ITEM:

EKO Development, Ltd. and EKO USA, LLC – Recommendation to accept \$1 million settlement for alleged violations of the Consumer Product Safety Act (Briefing package dated November 7, 2018, OS No. 5228)

DECISION:

The Commission voted 3-2 to provisionally accept the proposed Settlement Agreement and Order, which orders EKO Development, Ltd. and EKO USA, LLC to pay a civil penalty of \$1 million. The provisional Settlement Agreement and Final Order will be announced in a *Federal Register* Notice. The Compliance Division staff of the Office of the General Counsel negotiated the proposed Settlement Agreement. The Agreement resolves staff allegations that EKO knowingly violated section 19(a)(4) of the Consumer Product Safety Act (CPSA) by failing to timely report under section 15(b) information about the defect in its trash cans that posed an injury risk to consumers. Acting Chairman Buerkle, Commissioner Baiocco and Commissioner Feldman voted to provisionally accept the Settlement Agreement and Order. Commissioner Adler and Commissioner Kaye voted to take other action. Commissioner Adler and Commissioner Kaye submitted the attached joint dissenting opinion regarding the matter.

For the Commission:

A handwritten signature in blue ink, appearing to read "Alberta E. Mills", followed by a long horizontal line.

Alberta E. Mills
Secretary

* Ballot Vote Due November 19, 2018
(Commissioner Feldman extended the vote due date from November 14, 2018)

Attachment: Dissenting Opinion of Commissioner Adler and Commissioner Kaye

**DISSENTING OPINION OF
COMMISSIONER ROBERT S. ADLER AND COMMISSIONER ELLIOT F. KAYE
REGARDING THE CIVIL PENALTY SETTLEMENT WITH
EKO DEVELOPMENT, LTD. AND EKO USA, LLC**

November 19, 2018

On November 19, 2018, the Commission voted 3-2 to provisionally accept a settlement with EKO Development, Ltd. and EKO USA, LLC (collectively, EKO) to pay a civil penalty of \$1 million to resolve CPSC staff allegations that EKO knowingly failed to report a defect with its motion sensor trash cans. We cannot support this settlement agreement because we believe the size of the proposed penalty is too small and does not adequately reflect the seriousness of EKO's violation. Instead, we would direct staff to negotiate a higher penalty of \$4.25 million, with all but \$1 million suspended.¹

EKO is a Chinese company based in Guangzhou, China. Between November 2013 and May 2015, EKO manufactured 367,000 motion sensor trash cans that were sold exclusively at mega-retailer, Costco. In April 2014, EKO first became aware that a black plastic protective collar could detach from a sharp metal handle on the trash can, posing a laceration hazard to consumers. Section 15(b) of the Consumer Product Safety Act (CPSA) requires firms that learn that their product contains a defect which could create a substantial product hazard to immediately notify the Commission of the defect. Unfortunately, EKO did not report to CPSC.

Four months later, in August 2014, EKO redesigned the trash can to address the hazard, but still did not report to CPSC or notify its lone customer, Costco. In May 2015, EKO finally reported to CPSC but only after Costco urged it to do so. By the time of the joint recall in July 2015, EKO and Costco were aware of at least 92 complaints about the trash cans, including 60 complaints from consumers who received injuries, some serious.

¹ Our objection to the proposed settlement is limited to the penalty amount. We support the requirement for EKO to implement and enforce a written comprehensive compliance program designed to ensure compliance with CPSA.

Last month, the Commission approved, by a 4-0 vote, a \$3.85 million settlement with Costco for its failure to report the defect associated with these very products. Regrettably, the Commission has approved a \$1 million settlement with EKO for conduct that was considerably more culpable than that of Costco.

In doing so, the majority appears to have relied almost exclusively on only one of the several civil penalty factors enumerated in Section 20(b) of the CPSA, namely the language in the statute that directs the Commission to consider “the appropriateness of the size of the penalty in relation to the size of the business of the person charged, including how to mitigate undue adverse economic impacts on small businesses.”

There are, however, other equally important considerations that Section 20(b) directs the Commission to consider, including “the nature, circumstances, extent and gravity of the violation, including the nature of the product defect, the severity of the risk of injury, the occurrence or absence of injury, [and] the number of products distributed ...” By almost any measure of culpability, EKO, the designer and manufacturer of the allegedly defective product warrants a civil penalty at least equal to that imposed on the retailer of the product. The only distinction to be drawn between the two companies is their size – an important, but by no means controlling, factor. And, the simplest way to deal with this distinction would be to impose a penalty on EKO roughly equivalent to that assessed against Costco, but to suspend a large enough portion of the penalty so that it would not have an undue adverse economic impact on EKO.

Regrettably, anyone not conversant with the facts of this case will automatically assume that EKO’s transgression is minor compared to Costco’s.² In fact, the only hint that the Commission mitigated the civil penalty because of EKO’s small size is a paragraph in the agreement permitting EKO to pay its \$1 million penalty in installments. Nowhere in the agreement, however, is there any indication that EKO’s behavior was particularly troubling or worthy of a substantial penalty.

² Unfortunately, the restrictive information disclosure provisions in section 6(b) of the Consumer Product Safety Act prohibit us or anyone else at the agency from disclosing any facts beyond those set forth in the negotiated Settlement Agreement.

Conclusion

Upon consideration of the facts in this case, we believe a settlement of \$4.25 million, with all but \$1 million suspended, would be a more appropriate resolution of this matter.