

UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION

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In the Matter of	)	
	)	
ZEN MAGNETS, LLC,	)	CPSC DOCKET NO. 12-2
	)	
RESPONDENT	)	
	)	

**RESPONDENT 'S MEMORANDUM IN SUPPORT OF MOTION TO DISQUALIFY  
THE COMMISSION OR SOME OF ITS MEMBERS**

Respondent Zen Magnets, LLC, through counsel, requests that the Consumer Product Safety Commission (hereafter “CPSC” or “Commission”) disqualify itself and decline to hear the appeal of Administrative Law Judge Metry’s Initial Decision and Order in *In re Zen Magnets, LLC*, CPSC Docket 12-2. In the alternative, Respondent requests that Chairman Elliot Kaye and Commissioners Robert Adler, Joseph Mohorovic, and Marietta Robinson disqualify themselves from hearing the appeal.<sup>1</sup> The Commission and the named Commissioners have prejudged material questions of fact and law in this case, and have issued statements indicating their bias against Respondent and the Subject Products, evidencing a lack of complete fairness. If the four members properly disqualify themselves, the Commission will not have a quorum to issue a Final Decision under 16 C.F.R. § 1000.9. In either event, Respondent requests that the Commission adopt the ALJ’s Initial Decision and Order as the Final Decision and Order, pursuant to 16 C.F.R. §1025.52 and further identify Zen Magnets as a prevailing party pursuant to 16 C.F.R. §1025.70 and 5 U.S.C. § 504.

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<sup>1</sup> See, by analogy, 16 C.F.R. § 1525.42(e)(1) (a Presiding Officer can disqualify him or herself).

## INTRODUCTION

On March 25, 2016, Administrative Law Judge Dean C. Metry issued an Initial Decision in *In re Zen Magnets, LLC*, CSPC Docket 12-2. Pursuant to 16 C.F.R. § 1025.53, Complaint Counsel filed their notice of intent to appeal the Initial Decision to the Commission on March 29, 2016. On, May 4, 2016, Complaint Counsel filed their appellate brief, perfecting the appeal pursuant to 16 C.F.R. § 1025.53(b). Prior to the issuance of the Initial Decision, Respondent voiced its concerns about the bias and prejudgment of facts and law in this matter by members of the Commission, with the exception of Commissioner Ann Marie Buerkle, in a motion filed October 20, 2014. Respondent's motion was denied on November 19, 2014 on two grounds: (1) Judge Metry did not believe he had the jurisdiction to rule on a motion to dismiss based on due process violations; and (2) even if Judge Metry had the authority to rule on the question of prejudgment by members of the Commission, he deemed the matter unripe because the case was not yet before the Commission on appeal. Judge Metry explained that, "[i]n the event there is an appeal, this prejudgment issue is more appropriately raised to the Commission and, if need be, upon further appeal to the federal courts." (Nov. 19, 2014 Order of J. Metry at 2.) Because Complaint Counsel has perfected the appeal to the Commission, this matter is now ripe for the Commission to consider. Respondent files this motion with the Commission to exhaust its administrative remedies and to follow Judge Metry's analysis and recommendation.

While the administrative case against Respondent was pending, and even prior to the trial on the issues raised by the administrative complaint in this matter, this Commission concluded its rulemaking concerning the exact same Subject Products on September 24, 2014. The Rule was published October 3, 2014 and became effective on April 3, 2015. Subject Products are aggregated masses of high-powered small rare earth magnets ("SREMs") known as Zen Magnets

and Neoballs, and at the time of the rulemaking, Respondent was the only domestic firm selling those types of magnets. *See* 79 Fed. Reg. 59962, 59962-59963 (Oct. 3, 2014); *see also* Chairman Kaye, Commission Meeting: Decisional Matter – Safety Standard for Magnet Sets – Final Rule (Sept. 24, 2014) (“Many are facing financial loss . . . and [there is] one business in particular who is in the future is [sic] likely to bear the brunt of our regulatory action approved today”). When it promulgated the magnet safety standard, codified at 16 C.F.R. part 1240, this Commission made certain factual and legal findings that necessarily prejudged numerous questions of fact and law in the administrative adjudication.

At least two members of this Commission recognized the risk of prejudgment by engaging in the rulemaking while the administrative action was pending. Commissioner Buerkle, on the one hand, chose to abstain from the rulemaking to ensure she did not engage in prejudgment. Commissioner Adler, on the other, issued a public statement supporting the rulemaking and rejected out of hand<sup>2</sup> the argument that “outlawing the very same product that is the subject of the adjudication would seem to be the ultimate prejudgment.”<sup>3</sup> Additionally, four sitting members of this Commission gave public statements indicating that they have not only prejudged laws and facts at issue in this case, but that they have a bias against Respondent and the Subject Products sold by Respondent.

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<sup>2</sup> Commissioner Adler, *Statement on the Final Rule for Magnet Sets*, [http://www.cpsc.gov/en/About-CPSC/Commissioners/Robert-Adler/Commissioner-Adler-Statements/Statement-on-the-Final-Rule-for-Magnet-Sets/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=Adler+Statements](http://www.cpsc.gov/en/About-CPSC/Commissioners/Robert-Adler/Commissioner-Adler-Statements/Statement-on-the-Final-Rule-for-Magnet-Sets/?utm_source=rss&utm_medium=rss&utm_campaign=Adler+Statements) (Sept. 29, 2014) (hereinafter “Adler Statement”).

<sup>3</sup> Commissioner Buerkle, *Statement on the Final Rule for Magnet Sets*, [http://www.cpsc.gov/en/About-CPSC/Commissioners/Ann-Marie-Buerkle/Ann-Marie-Buerkle-Statements/Statement-on-the-Final-Rule-for-Magnet-Sets/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=Commissioner+Buerkle+Statements+](http://www.cpsc.gov/en/About-CPSC/Commissioners/Ann-Marie-Buerkle/Ann-Marie-Buerkle-Statements/Statement-on-the-Final-Rule-for-Magnet-Sets/?utm_source=rss&utm_medium=rss&utm_campaign=Commissioner+Buerkle+Statements+) (Sept. 29, 2014) (hereinafter “Buerkle Statement”).

For the reasons set forth below, the four named members of this Commission (Kaye, Robinson, Mohorovic, and Adler) should disqualify themselves from hearing Complaint Counsel's appeal to prevent the violation of Respondent's Fifth and Fourteenth Amendment due process rights (Fifth Amendment: to have its case heard without prejudgment; Fourteenth Amendment to have its case heard by a non-biased and impartial tribunal).

### **LEGAL STANDARD FOR DISQUALIFICATION**

While this Commission has not promulgated rules for determining when a commissioner should be disqualified from hearing a matter on appeal, other sources of law provide ample bases for determining when a Commissioner should be disqualified. Section 455 of Title 28 of the United State Code provides in relevant part that a federal judge *shall* disqualify his or herself where they have a "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." In the administrative context, "[t]he test for disqualification has been succinctly stated as being whether 'a disinterested observer may conclude that [the agency] has *in some measure* adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Cinderella Career Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (*Cinderella II*) (quoting *Gilligan Will & Co. v. SEC*, 267 F.2d 461, 469 (2nd Cir. 1959), *cert. denied*, 361 U.S. 868)) (emphasis added).

As set forth below, Chairman Kaye and Commissioners Adler, Mohorovic, and Robinson have engaged in conduct that would require their disqualification under either the federal judicial standard or the administrative standard. Consequently, allowing these members of this Commission to hear the appeal will violate Respondent's due process rights to have the matter decided by a non-biased, impartial tribunal made up of members who have not already decided what they believe should be the outcome of the case.

## ARGUMENT

### **I. The administrative adjudication (CPSC Docket 12-2) and the magnet safety standard have significantly overlapping questions of law and fact that have been prejudged by this Commission.**

The magnets sold by Respondent are the same as those covered by the rule. *See e.g.* 79 Fed. Reg. at 59962-59963; Buerkle Statement. It would defy logic to suggest that the findings made in the rulemaking have no bearing on the considerations in the administrative adjudication. They relate to the exact same products. Therefore, when this Commission decided to promulgate the rule, it necessarily made factual and legal findings regarding Respondent's products pursuant to 15 U.S.C. § 2058(f)(1), (3). That same conclusion was reached by one member of this Commission, Ann Marie Buerkle, who stated that "outlawing *the very same product* that is the subject of the adjudication would seem to be the ultimate prejudgment." (Buerkle Statement.) (Emphasis added.)

Among the findings that this Commission *has already made* regarding Respondent's Subject Products include: use of the product; the risk of injury; the degree and nature of the risk of injury posed by the products; the need for the SREMs and the probable effect of the rule on the utility, cost, or availability of the SREMs to meet that need; that no feasible safety standard or warning would adequately protect the public from the risk associated with SREMs; that warnings are ineffective; that the danger posed by the Subject Products is not obvious;<sup>4</sup> the number of injuries associated with SREMs; that the benefits of the rule bear a reasonable relationship to its costs; and ultimately that banning<sup>5</sup> the Subject Products is reasonably

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<sup>4</sup> Complaint Counsel is now appealing Judge Metry's findings regarding obviousness of the risks. (*See* Complaint Counsel's Appeal Brief at 49.)

<sup>5</sup> The rule prohibits the Subject Products from being imported or distributed in the United States. When the rule was promulgated, the public commenters and commissioners alike understood that the rule really is a ban. This Commission has since asserted the rule is not a ban in its defense of Zen's challenge to the rule in the Tenth Circuit Court of Appeals.

necessary to reduce the risk of ingestion of injuries associated with SREMs. *See* 16 C.F.R. § 1240.5. Commissioner Adler’s assertion that the administrative adjudication and rulemaking involved “different facts” (*see* Adler Statement) is unfounded.

#### **A. Use, Need, and Utility of the Subject Products**

Both the administrative adjudication and rulemaking addressed the use and utility of the Subject Products. *See* 16 C.F.R. § 1240(c); (Initial Decision at 20-22). Complaint Counsel is now appealing Judge Metry’s findings regarding utility. (*See* Complaint Counsel’s Appeal Brief at 39-40.) In the administrative adjudication, the parties exhausted days of testimony to adduce how the Subject Products are used, who might use or misuse the magnets, and the various applications for the Subject Product in different disciplines, such as research, teaching, art, and therapy. (*See e.g.* Initial Decision at 7-12 (discussing the use and operation of Subject Products); *id.* at 17-19 (discussing who can be injured by Subject Products and how); *id.* at 20-23 (discussing the utility of Subject Products); *id.* at 25-26 (discussing the role of consumers in the misuse of Subject Products); *id.* at 28-29 (discussing the risk of injury vis-à-vis the usefulness of Subject Products).) When Judge Metry evaluated the respective arguments for and against the magnets having a high utility, he did so as a neutral finder of fact. Judge Metry considered and gave little weight to the opinions of Complaint Counsel’s hired experts, Dr. Frantz and Dr. Steinberg (Initial Decision at 20), and found that, “[u]pon review of the record, . . . SREMs’ utility is indeed high.” (*Id.* at 20.)

This Commission examined the same questions about utility in the rulemaking. *See* 79 Fed. Reg. at 59968, 59980-59982. There, this Commission glossed over beneficial uses of the magnets and ultimately concluded that the loss of utility of the magnets was outweighed by the need for banning the magnets from the market. Not only did this Commission examine the same questions of use and utility in the rulemaking, this Commission examined *the same evidence*.

Each individual whose testimony was stipulated to by Complaint Counsel and relied upon by Judge Metry initially submitted their comments to this Commission during the notice and comment period for the rulemaking. (*See* R-70A; Respondent’s Stipulated Testimony Exs. L through W; Initial Decision at 20-22.) *See also* CPSC-2012-0050-0515; CPSC-2012-0050-2138; CPSC-2012-0050-1092; CPSC-2012-0050-1137; CPSC-2012-0050-0938.

In addition to finding that the magnets were of great utility, Judge Metry found they were unique and efficacious tools. (Initial Decision at 20-22.) Because of their unique physical characteristics, the magnets cannot be replaced. This Commission, on the other hand, has already determined in the rulemaking that “magnet sets are not necessities,” and that other products might be developed to serve the same purposes as the Subject Products. 79 Fed. Reg. at 59987; 16 C.F.R. § 1240.5(c).

In the rulemaking, Commission ignored the same comments put before Judge Metry, as cited above, which make it clear that altering the fundamental characteristics of the magnets would render them useless as the commodity sought by those commenters. Judge Metry understood the unique value of the magnets, and found that their “usefulness outweighs the risk of injury associated with the product.” (Initial Decision at 28.) This Commission has already necessarily rejected such a finding by promulgating a rule it deemed necessary to address an unreasonable risk of injury, even considering the magnets’ benefits vis-à-vis their costs, *see* 15 U.S.C. § 2058(f)(1), (3), as discussed forthwith.

#### **B. The Degree and Nature of the Risk of Injury Posed by the Products**

The rulemaking and administrative adjudication also considered the degree and nature of the risk of injury posed by the Subject Products. Complaint Counsel is now appealing Judge Metry’s findings regarding the nature and risk of injury posed by the Subject Products. (*See*

Complaint Counsel’s Appeal Brief at 27-33 (including support for its argument that this Commission “was well aware of the risks posed by liberated magnets”; *see also id.* at 41-45, 49, 56-59.)

Identical incident reports, National Electronic Injury Surveillance System (“NEISS”) data, and estimates based on that NEISS data were used to establish both the need for the rule, *see* 16 C.F.R. § 1240.5(a), and Complaint Counsel’s attempt to prove the existence of a substantial product hazard in the administrative adjudication. (*See* Second Amended Complaint at ¶¶ 56-59, 61, 63, 113; Testimony of Kathleen Stralka, Dec. 8, 2014 to Dec. 9, 2014); 79 Fed. Reg. at 59987-59988, 59962, 59964-59965; 16 C.F.R. § 1240.5(a). (*See also* Initial Decision at 17-19 (discussing the nature of the risk of injury); CC-18, CC-18.1 to 18.95 (incident reports and CPSC investigations); CC-40 (NEISS records from 2009 through 2013); R-111 (NEISS data from 2009 through 2013); R-117, R-117A (summary charts of ingestion incidents).)

In the administrative adjudication, Judge Metry assessed the above data and determined that “the nature of the risk of injury which the product presents is negligible when accompanied by proper warnings and appropriate age restrictions.” (Initial Decision at 19.) In his findings of fact, Judge Metry also found that “[t]he number of SREM ingestions is relatively insignificant when compared to the number of SREMs in the market.” (Initial Decision at 5 ¶ 16.) In the rulemaking this Commission concluded differently, finding that magnets almost identical in form, substance, and content to the Subject Products had been ingested an estimated 2,900 times between January 1, 2009 and December 31, 2014 (using the same NEISS data admitted in CC-40), which this Commission deemed to be an unreasonable risk of injury to the public. 79 Fed. Reg. at 59962, 59967, 59987-59988; 16 C.F.R. § 1240.5(a), (e).



Based on the same data, this Commission in the rulemaking and Judge Metry in the administrative action also came to different conclusions regarding the population that is exposed to the Subject Products' risk. Judge Metry concluded, "[t]he population exposed to the product and the population exposed to the product's risk of injury are substantially different." (Initial Decision at 22.) Judge Metry explained that "[t]here is no single individual or group of individuals consistently subjected to the product's risk of injury simply because not all individuals, no matter the age, will ingest the product. . . . These [NEISS] numbers are insignificant to show any specific, identifiable population, particularly given the mass amount of magnets purchased and already on the market." (Initial Decision at 23.) This Commission's rule, on the other hand, is focused on risks to children and, based on the NEISS data and incident reports, deemed the number of estimated injuries to present an unreasonable risk of injury or death. 79 Fed. Reg. at 59962 (finding the rule necessary); *id.* at 59973 (noting that the word "children" in the propose rule was changed to "consumers" in the final rule); Commissioner Adler, Commission Meeting: Decisional Matter – Safety Standard for Magnet Sets – Final Rule (Sept. 24, 2014) (disagreeing with the decision of Judge Metry by stating that this Commission is "faced with a product that's extremely appealing to children"); Dr. Midgett, Commission Meeting: Final Rule – Safety Standard for Magnet Sets (Sept. 10, 2014) ("We have a vulnerable population at risk with an injury mechanism that's very difficult for parents to foresee. The diagnosis is very difficult for the medical community. The severity of the injuries is extremely high and there are acute long-term health effects associated with those injuries"). And, because Complaint Counsel is also appealing the findings of Judge Metry regarding the population exposed to the risks of Subject Products and their vulnerability (*see* Complaint Counsel's Appeal Brief at 47-48), this Commission cannot be objective or unbiased in deciding questions it

believes it has already answered. None of the individually named Commissioners who have already decided these issues can objectively weigh Zen Magnets' arguments to the contrary.

Of great importance is the finding in the Initial Decision that characterized the "nature of the risk of injury" to be *low* when properly marketed and labeled – the exact opposite of this Commission's finding in 16 C.F.R. § 1240.5(a). Judge Metry explained:

If the products were marketed . . . [for] ingestion in any way, the ALJ would be forced to conclude the nature of the risk of injury which the product presents to be high. But that is not this case. The record supports a finding that these products are not intended for ingestion and *the nature of the risk of injury from an un-ingested SREM is nil.*

(Initial Decision at 17-18.) "[T]he nature of the risk of injury which the product presents is negligible when accompanied by proper warnings and appropriate age restrictions." (*Id.* at 19.) This Commission has, however, already made a contradictory regulatory finding in the rulemaking, and in doing so has thereby prejudged this issue.

### **C. The Number of Injuries Associated with SREMs**

The same NEISS data, incident reports, and CPSC investigatory reports were also used to establish the total number of injuries associated with SREMs, including those sold by Respondent. *See* 79 Fed. Reg. at 59969; CC-40; CC-18. This Commission has prejudged the issue of whether Respondent's product has caused injuries by including the Subject Products in the 2,900 injury estimate. Judge Metry found that this Commission, after nearly three weeks of hearings, "did not present any credible evidence linking any injury to Respondent's product. [Footnote omitted.] The importance of this evidence, or the lack thereof, cannot be overstated. . . ." (Initial Decision at 16.) Complaint Counsel is now challenging these findings made by Judge Metry. (*See* Complaint Counsel's Appeal Brief at 41-45.)

At trial, Respondent also challenged the validity of this Commission's estimated number of injuries in the administrative adjudication. It is preposterous to think that this Commission, having sought to vilify Respondent for injuring and endangering children in the rulemaking process, the administrative proceeding and most recently in a civil proceeding in United States District Court, is open to changing its mind, discarding its own estimated number of injuries, and accepting the evidence before it on appeal. This Commission cannot be an objective, unbiased tribunal, with all of the powers granted to it by 16 C.F.R. § 1025.55(a), regarding the question of the number of injuries associated with SREMs and the Subject Products.

#### **D. Marketing, Manufacture, and Design of Subject Products**

A critical question of fact and law in the administrative adjudication was whether Zen designed, marketed, or manufactured its products to children under the age of 14. (*See* Complaint Counsel's Post-Hearing Argument at 3.) Judge Metry found that Zen's products (*i.e.*, Zen Magnets and Neoballs) were not intended to be used by children under the age of 14: "Respondent's testimony confounds [sic] any notion that he intentionally marketed, designed or manufactured his product as a toy. . . . While there may exist circumstantial evidence offered by the Agency as to the knowledge by Respondent of who may use the product, the expressed intent of Respondent in only offering his products to adults or on-line, through restrictive access brick and mortar locations is far more compelling." (Initial Decision at 32.) Complaint Counsel is now challenging these findings by Judge Metry. (Complaint Counsel's Appeal Brief at 59-64.)

This Commission has, however, already implicitly assumed that Zen's products were intended for and marketed to children by lumping in Respondent's Subject Products with those from other firms whose magnets were marketed to those under the age of 14. 79 Fed. Reg. at 59962. This Commission's Human Factors staff also looked at the design of the products and

concluded that they had characteristics that “are likely to seem magical to younger children,” and have some appeal to children of all ages. 79 Fed. Reg. at 59963. This Commission determined that these same magnets also “were labeled and marketed in a manner that appeared to promote use by children.” *Id.* at 59962.

Moreover, this Commission has already decided that no warning or marketing scheme could address the risks posed by the Subject Products. *See e.g.* Commissioner Robinson, Commission Meeting: Decisional Matter – Safety Standard for Magnet Sets – Final Rule (Sept. 24, 2014) (“I would quickly learn that the problem was however that *however they were marketed* that these were items that were being swallowed by young children and ingested by teenagers and were causing some very, very serious injuries and even deaths”) (emphasis added); *id.* (“So I was really struck with how this hidden hazard was something that as I say however marketed that this was something that needed to be addressed”); Commissioner Adler, Commission Meeting: Decisional Matter – Safety Standard for Magnet Sets – Final Rule (Sept. 24, 2014) (“First, it’s impossible the put warnings on the magnets themselves. So many adults have never fully appreciated the extremely hazardous nature of high-powered magnets and as we heard sometimes adults never read or have access to the warnings on the boxes”). This Commission has, again, therefore prejudged this question of law and fact now before it on appeal.

**E. No Warning can Adequately Protect the Public from the Risk Associated with SREMs, and that Zen’s Warnings are Ineffective**

In promulgating the rule, this Commission expressly rejected the alternative proposition that warnings and education programs could sufficiently address the risk of injury presented by the Subject Products. 79 Fed. Reg. at 59970-59971. Complaint Counsel, on behalf of this Commission, made the same argument in the administrative adjudication (Second Amended

Complaint at ¶ 64), which was rejected by Judge Metry (Initial Decision at 14, 36). Specifically, this Commission in both the administrative case and the rulemaking argued that warnings were ineffective because (1) they could not accompany each magnet ball and (2) cannot effectively communicate to consumers the hazard associated with the Subject Products. (*See* Second Amended Complaint at ¶ 64); 79 Fed. Reg. at 59975. In the rulemaking, this Commission made the determination that the warnings failed on both counts, while Judge Metry roundly rejected both arguments. Instead, Judge Metry found the warnings were in no way defective, “specifically notified consumers of the ingestion hazard,” and that it would “be near absurdity to fault Respondent for not labeling each individual SREM with a warning.” (Initial Decision at 15.) Judge Metry even found that the evidence adduced at the hearing suggested that Respondent’s warnings were indeed effective: “It is more than a reasonable inference that little evidence exists of injury resulting from use of Respondent’s product because Respondent’s warnings sufficiently deter ingestion.” (*Id.* at 16.) Complaint Counsel is now appealing these findings by Judge Metry. (*See* Complaint Counsel’s Appeal Brief at 33-38, 50-51.)

Again, this Commission addressed these issues in the rulemaking and concluded that no warning, even those deemed proper by Judge Metry, could possibly be effective in reducing the risk posed by the magnets. Having done so, this Commission has plainly and objectively prejudged this issue by making regulatory findings regarding warnings in the rulemaking. *See* 79 Fed. Reg. at 59975-59976; 16 C.F.R. § 1240.5(d).

#### **F. The Benefits of the Rule Bearing a Reasonable Relationship to its Costs**

In order to promulgate the rule, this Commission had to make the regulatory determination that the rule’s benefits bear a reasonable relationship to the costs of the rule. 15 U.S.C. § 2058(f)(3)(E); *see also* Commissioner Adler, Commission Meeting: Final Rule – Safety

Standard for Magnet Sets (Sept. 10, 2014) (“I did a little bit of calculation -- the cost benefit ratio is still so positive that this rule is easily justifiable”). The benefits of the rule, according to this Commission, stem from prospectively removing these magnets from the market. 79 Fed. Reg. at 59978. The costs include lost utility to consumers and lost benefits to producers, such as Respondent. *Id.* at 59981-59982; Final Rule Briefing Package at 27 (Draft 9/2/14) (noting that Respondent “might go out of business when the rule takes effect”). This Commission has therefore already considered the question of lost utility against the risk posed by the Subject Products, which was also a question put before Judge Metry. (*See* Initial Decision at 28-29.) As discussed above, Judge Metry found that the usefulness of the Subject Products outweighs the risk associated with them. (*Id.* at 28.)

#### **G. Ultimate Conclusions of Law and Fact**

While it is true that the legal standard in the administrative case (that the products present a substantial product hazard) varies to the slightest extent from the standard in the rulemaking (that the products present an unreasonable risk of injury), this Commission’s regulatory findings and factual analyses in the rulemaking make clear that it has prejudged pertinent facts in this case. Members of this Commission, through the rulemaking and in public statements, have already made it clear that Subject Products should not be made available to domestic consumers, *i.e.*, recalled. For example, Chairman Kaye stated that Zen’s products should no longer be available: “Mr. [Qu] this is what I would like to leave you with. I hope your dreaming will continue and that inspiration will strike again and that there is a path forward that secures for you that elusive childhood wonder *but in a way that can endure.*” Chairman Kaye, Commission Meeting: Decisional Matter – Safety Standard for Magnet Sets – Final Rule (Sept. 24, 2014). Commissioner Adler was even more to the point: “In short, despite everyone’s best effort *the*

*conclusion that I reach is that if these magnet sets remain on the market* irrespective of how strong the warnings on the boxes in which they're sold or how narrowly they are marketed to adults, *children will continue to be at risk of debilitating harm or death from this product.*" Commissioner Adler, Commission Meeting: Decisional Matter – Safety Standard for Magnet Sets – Final Rule (Sept. 24, 2014) (emphasis added).

By any objective measure, almost all pivotal questions of fact in the administrative adjudication have been previously examined and prejudged by this Commission in the rulemaking. Respondent agrees with Commissioner Buerkle's assessment that, "[t]o issue a final rule outlawing the very same product that is the subject of the adjudication would seem to be the ultimate prejudgment." (Buerkle Statement.)

## **II. THERE IS NO FUNCTIONAL DIFFERENCE BETWEEN A SUBSTANTIAL RISK AND UNREASONABLE RISK OF INJURY IN THIS CASE.**

In the rulemaking, this Commission made the legal finding that the magnets, including the Subject Products, present an unreasonable risk of injury. 79 Fed. Reg. 59962. In the administrative adjudication, this Commission sought, and continues to seek, a finding that the Subject Products present a substantial product hazard. (*See generally* Second Amended Complaint.) Commissioner Adler asked whether "a Commissioner's vote to promulgate a mandatory standard . . . mean[s] that this Commissioner has prejudged whether a product presents a 'substantial product hazard?'" The answer in this case is clearly in the affirmative.

Commissioner Adler examined the question of prejudgment and decided that, in his view, the two standards can be reconciled, and that no prejudgment would occur if this Commission undertook the rulemaking while the adjudication was pending:

Speaking as one Commissioner, I fully understand the difference between making a determination that a product presents an unreasonable risk of injury and should

not be sold in the future versus a determination that a product currently being distributed presents a substantial product hazard and should be recalled from the market. The two determinations involve different facts, different policies and different law.

(Adler Statement.)<sup>6</sup> But Commissioner Buerkle disagreed with Commissioner Adler's assessment:

Some have suggested that issuing a final rule would not be prejudicial in this instance because the criteria for promulgating a mandatory standard are different from the criteria necessary to justify a recall. ***In this case, the differences are more apparent than real.*** To obtain an involuntary recall, the staff must prove that the magnet sets constitute a "substantial product hazard." 15 U.S.C. § 2064(d). That term is defined in the CPSA to mean a product that creates "a substantial risk of injury to the public," either because of a failure to comply with an applicable standard or because of a defect. 15 U.S.C. § 2064(a). To promulgate a mandatory standard, this Commission must make a number of specific findings, of which one is that the rule "is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product." 15 U.S.C. § 2058(f)(3). ***While it may be possible to imagine an "unreasonable risk of injury" that is not also a "substantial risk of injury," there is at the least a very substantial degree of overlap between the two.*** [Footnote Omitted.]

(Buerkle Statement.) (Emphasis added.)

Commissioner Buerkle's understanding of the legal issues in this case is both more reasoned and more persuasive. Contrary to Commissioner Adler's assertion, the facts involved in the rulemaking and administrative adjudication are nearly identical, as discussed above. The incidents giving rise to the rulemaking as well as the enforcement proceeding against Zen are also identical. *See generally* Preamble to the NPR, 77 Fed. Reg. at 53785-53786. Moreover, the statement by Commissioner Adler that a "substantial product hazard" analysis "focuses almost exclusively on the risk of a product" is patently incorrect: this Commission's regulations

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<sup>6</sup> Commissioner Adler also noted that this Commission's actions were prescribed by Congress. *See* Commissioner Adler, Commission Meeting: Decisional Matter – Safety Standard for Magnet Sets – Final Rule (Sept. 24, 2014). Again, Congress merely permitted rulemaking to be initiated when a product posed an imminent hazard of severe injury or death (a finding *not* made in this case). And more importantly, making statements and taking actions that violate the constitutional rights of a party before this Commission would still violate the Constitution, even if Congress were to say otherwise.



demand that “*all information* should be evaluated to determine whether it suggests the existence of . . . a defect or an unreasonable risk of serious injury or death.” 16 C.F.R. § 1115.12(f) (emphasis added); *see also id.* at § 1115.4 (directing this Commission to consider a litany of factors in finding a product presents a substantial product hazard because of an alleged defect). Indeed, the factors that Judge Metry reviewed in the administrative adjudication include those that Commission had to not only *consider* in making an “unreasonable risk” determination in the rulemaking, but also factors for which this Commission made *factual findings* to support the need for the rule. *See* 15 U.S.C. § 2058(f)(1), (3).

Moreover, on a practical level, there is no functional distinction between a finding that subject products pose a “substantial risk,” versus an “unreasonable risk” of injury. This Commission in the instant case has already determined that the risk of harm posed by Plaintiff’s products is *both* substantial and unreasonable. In fact, in order to promulgate the magnet safety standard, this Commission necessarily had to find that the magnets present an unreasonable risk of injury. *See* 15 U.S.C. § 2058(f)(3). This Commission also characterized the type of “harm” posed by Subject Products in its rulemaking as “[s]erious injury and even death.” 79 Fed. Reg. at 59964. There is no getting around the fact that this Commission has adjudged in its rulemaking that the subject magnets create an unreasonable risk of serious injury or death, which is a condition that this Commission asserts renders Plaintiff’s products substantial product hazards under 15 U.S.C. § 2064(a)(2). *See* Complaint Counsel’s Second Amended Complaint, ¶¶ 123-126. It is hard to imagine that a risk of serious injury or death is not also “substantial.”

Additionally, how an individual commissioner understands the two standards is wholly irrelevant to the inquiry here: whether “a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of

hearing it.” *Cinderella II*, 425 F.2d at 591 (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2nd Cir.), *cert. denied*, 361 U.S. 896 (1959) (quotation marks omitted)).<sup>7</sup> Even the Department of Justice has acknowledged “*that the CPSC has deemed [Plaintiff’s products] to be hazardous.*” (USA’s Penalty Recommendation, No. 15-cv-00955-CMA-MJW (April 5, 2016) (emphasis added).) This Commission has simply already made up its mind about Plaintiff’s products presenting a substantial *and* unreasonable risk of injury to children. Even if, *arguendo*, this Commission has not prejudged this case, it should nonetheless be prohibited from hearing the appeal on constitutional due process grounds, as discussed below.

### **III. PUBLIC STATEMENTS ISSUED BY SOME COMMISSIONERS DEMONSTRATE THAT THEY ARE BIASED AGAINST RESPONDENT, AND THAT THIS COMMISSION WOULD NOT BE AN IMPARTIAL TRIBUNAL.**

The Supreme Court has stated that a “fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349 U.S. 133, 136 (1955). “This applies to administrative agencies which adjudicate as well as to courts.” *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (citing *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973)). In the administrative adjudication context, the administrative hearing “must be attended, not only with every element of fairness but with the very appearance of complete fairness.” *Cinderella II*, 425 F.2d at 591 (quoting *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated and remanded on other grounds*) (quotation marks omitted). *See also Amos Treat & Co. v. Securities and Exchange*

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This case is different from those in which the administrative agency acted as both an investigating body/body that initiated the adjudication and adjudicator. *See e.g. Withrow v. Larkin*, 421 U.S. 35 (1975). Rather, what this Commission has done here has made factual and legal findings in the rulemaking concerning the same products that are at issue in the adjudication that it now has before it on appeal. This case also differs from one filed pursuant to 15 U.S.C. § 2061 (CPSA Section 12), which permits this Commission to *initiate* a rulemaking while an action to seize a product that presents an imminent and unreasonable risk of death or serious injury. *Id.* at § 2061(c). In Respondent’s case, this Commission *concluded* a rulemaking while an administrative case was still pending, making legal findings about the same products involved in the administrative action.

*Commission*, 306 F.2d 260, 267 (D.C. Cir. 1962) (“[A]n administrative hearing of such importance and vast potential consequences must be attended . . . with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process.”) While this Commission is free to alert the public to suspected violations of law, it may neither prejudge cases, *nor even give the appearance* that the case has been prejudged, and that “the ultimate determination of the merits will move in predestined grooves.” *Cinderella II*, 425 F.2d at 591.

In the matter at hand, there can be no doubt that Chairman Kaye and Commissioners Robinson, Mohorovic, and Robinson have already passed judgment on the factual underpinnings of the administrative case against Plaintiff, and have further made statements that objectively show that they are not impartial and would be incapable of being disinterested arbiters. *See Amos Treat*, 306 F.3d at 264 (noting that, “with respect to agency adjudicatory proceedings, due process might be said to mean at least ‘fair play,’” which requires resolution of contested questions by an impartial and disinterested tribunal).

Rather than respecting Respondent’s due process rights to a fair and impartial tribunal, four members of this Commission have acted impermissibly by making public statements against Respondent and the Subject Products. The statements made by Chairman Kaye and Commissioners Adler, Mohorovic, and Robinson make clear that were this Commission to hear the appeal, it would violate Respondent’s Fourteenth Amendment due process right to have its case heard by a non-biased, impartial tribunal.

The only member of this Commission who refused to prejudge or make biased statements is Commissioner Buerkle. She explained that “[w]hile such an adjudication is pending, Commissioners are routinely cautioned to avoid making statements, or even asking questions,

that may suggest a prejudgment of the matter.” (Buerkle Statement.) Commissioner Buerkle concluded her statement with the following:

I express no view on the merits of the standard for magnet sets because I believe that doing so is inappropriate at this time. We may be called upon to serve as judges of the last remaining enforcement case, which is scheduled for trial shortly. Under these unusual circumstances, I believe we should have postponed the vote on the rule until the administrative enforcement case is settled or agency proceedings are concluded.

(*Id.*)<sup>8</sup>

#### A. Statements by Chairman Kaye

After promulgation of the rule, Chairman Kaye applauded this Commission and his decision to vote for promulgation of the rule: “I was *proud to join* with three of my fellow Commissioners to approve unanimously a new federal safety standard for high-powered magnet sets. Doctors, families of victims and consumers across the country called upon this Commission to vote yes to protecting children and teenagers from *the hidden and devastating hazard of magnet ingestion*—and we responded.”<sup>9</sup> (Emphasis added.) Chairman Kaye went on to sympathize with those who might have been injured by ingesting small magnets:

We all have fears in life. Every single one of us. For me, the biggest without any question, is something tragic happening to one of my boys. Every night, EVERY

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<sup>8</sup> See also Statement of Commissioner Buerkle read by Chairman Kaye, Commission Meeting: Decisional Matter – Safety Standard for Magnet Sets – Final Rule (Sept. 24, 2014):

I have decided that I will not participate in today's Commission Meeting or vote on the final rule for magnet sets. The mandatory standard being considered would apply to the same magnet sets that are subject of a pending CPSC Administrative Case which is scheduled for trial in December. Since this Commission may be called upon to review the Administrative Law Judge's decision in that case, I do not think it is appropriate for me to vote on a standard addressing the same magnet sets at this time. I appreciate the Chairman's allowing this statement to be read[.]

<sup>9</sup> Chairman Kaye, *Chairman Elliot Kaye's Statement on the Passage of a Federal Safety Standard for High Powered Magnet Sets*, <http://www.cpsc.gov/en/About-CPSC/Chairman/Kaye-Biography/Chairman-Kayes-Statements/Statements/Statement-of-Chairman-Elliot-Kaye-on-the-Passage-of-a-Federal-Safety-Standard-For-High-Powered-Magnet-Sets/> (Sept. 29, 2014) (hereinafter “Kaye Rule Statement”).

NIGHT, long after we have put them to bed, I sneak back into their rooms to kiss them one more time. As I do that, I feel tremendous gratitude they are alive and well, and that I am so blessed to have the privilege of hearing in the dark of their rooms the soothing and rhythmic sound of their breathing. I hug them tight, trying not to wake them, all the while knowing that, as long as I might hang on that particular evening, that moment is rather fleeting. And I also know each night that there is certainly no guarantee I will have even one more night to hold onto them tight.

As a parent and as the Chairman of the CPSC, I hurt so much for [AC's] family. I was so deeply moved that [AC's] mother, brothers, grandmother, aunt, and cousin took the time to drive from Ohio to attend this Commission's vote. I will always think of [AC] when it comes to this rule and the action this Commission has approved, and I am so deeply sorry for [AC's] family's loss.

(Kaye Rule Statement.)

Chairman Kaye even applauded a recent decision against Zen by a District Court:

Today's decision puts the rule of law and the safety of children above the profits sought by Zen Magnets," said Chairman Elliot F. Kaye for CPSC. "Far too many children have been rushed into hospital emergency rooms to have multiple, high-powered magnets surgically removed from their stomachs. Young children have suffered infections and one child tragically died from swallowing loose magnets that often look like candy. The ruling is a major victory for the safety of consumers.<sup>10</sup>

In these statements, Chairman Kaye has either stated or implied: (1) that Subject Products have a hidden danger; (2) that Subject Products are hazardous; (3) that magnets like Subject Products have injured children; (4) that magnets like Subject Products have killed a child; and (5) that removing Subject Products from the market is necessary to protect children, including his own. Chairman Kaye has also made it clear that he cannot separate his emotional feelings about the Subject Products. (*See* Kaye Rule Statement); Chairman Kaye, Commission Meeting: Decisional Matter – Safety Standard for Magnet Sets – Final Rule (Sept. 24, 2014) ("I will always think of [AC] when it comes to this rule and the actions this Commission has

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<sup>10</sup> U.S. Department of Justice, *Judge Orders Recall of Dangerous Magnets*, <https://www.justice.gov/opa/pr/judge-orders-recall-dangerous-magnets> (March 23, 2016) (hereinafter "Kaye DOJ Statement").

approved this morning and I'm so deeply sorry for your loss"). These are not the statements of an impartial, disinterested adjudicator, and these are not permissible factual statements. Much to the contrary, Chairman Kaye's statements represent an emotion-driven condemnation of Respondent and the Subject Products, and eviscerate any notion that Chairman Kaye would (or could) be an impartial trier of facts and law in this case.

## **B. Statements by Commissioner Adler**

Commissioner Adler has stated that he "proudly joined [the vote to promulgate the magnet safety standard] and believe[s] that it goes a long way towards protecting young children – among our most innocent and vulnerable citizens – *from the extremely serious internal injuries and death* that these magnets, if swallowed, can cause." (Adler Statement.) (Emphasis added.) Commissioner Adler has also stated that he has made up his mind that the Subject Products should no longer remain on the market – *the* subject of the administrative adjudication: "the conclusion that I reach is that if these magnet sets remain on the market irrespective of how strong the warnings on the boxes in which they're sold or how narrowly they are marketed to adults, children will continue to be at risk of debilitating harm or death from this product." Commissioner Adler, Commission Meeting: Decisional Matter – Safety Standard for Magnet Sets – Final Rule (Sept. 24, 2014). Commissioner Adler has stated he believes the administrative and rulemaking cases differ because the administrative case answers the question of whether the product should be removed from the market. He has, however, clearly already made up his mind that the magnets should be removed from the market to protect children. Commissioner Adler's statement is the ultimate prejudgment.

Commissioner Adler has therefore already decided that the Subject Products are extremely dangerous, present a risk of serious internal injuries and death, and should be recalled

– a decision that makes clear that he already has determined the case against Respondent and the Subject Products.

### **C. Statement by Commissioner Mohorovic**

Similarly, Commissioner Mohorovic stated that he was “proud” to support the rulemaking.<sup>11</sup> He also said, however, that the rule was necessary to address “*the* quintessential latent hazard to young children.” (Mohorovic Statement.) (Emphasis added.) Commissioner Mohorovic further provided:

While I am confident that this Rule will achieve its intended purpose, I remain troubled about the prevalence of other small, powerful magnets that may persist in the home environment – be it from jewelry, defective or recalled products. Therefore I anticipate and urge the agency to not view this rulemaking as the final step in mitigating this hazard, but rather one element of an overall risk-management strategy.

Furthermore, I hope the harrowing recent history with this product category compels the agency and the entire safety community to reevaluate our collective capabilities to quickly identify and respond to emerging hazards. In this regard, the agency should accept the reality of limited resources internally and pursue every viable option to leverage our external stakeholders’ data for effective and timely market surveillance.

(Mohorovic Statement.)

This statement from Commissioner Mohorovic either states or implies: (1) that Subject Products are dangerous; (2) that Subject Products pose a significant, hidden risk to children; and (3) that he is concerned about the continued existence of SREMs, not only in the marketplace (*i.e.*, Respondent’s Subject Products), but also magnets, generally. Again, this is not a statement by an impartial, disinterested finder of fact and law; this is a statement from someone who has

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<sup>11</sup> Commissioner Mohorovic, *Commissioner Joseph P. Mohorovic Statement Safety Standard for Magnet Sets – Final Rule*, <http://www.cpsc.gov/en/About-CPSC/Commissioners/Joseph-Mohorovic/Commissioner-Mohorovic-Statement/Statements/Commissioner-Joseph-P-Mohorovic-Statement-Safety-Standard-for-Magnet-Sets--Final-Rule/> (Sept. 29, 2014) (hereinafter “Mohorovic Statement”).

stated his desire to remove Respondent's products from the market – the ultimate issue in the administrative adjudication.

#### **D. Statements by Commissioner Robinson**

Commissioner Robinson issued a statement about the products sold by Maxfield and Oberton Holdings, LLC, the hazards of which this Commission has attempted to impute to Respondent's products. (*See* Second Amended Complaint at ¶¶ 53-54.) Commissioner Robinson's statement does, however, also discuss "this type of product" when discussing the estimated number of ingestions of SREMs. In her statement,<sup>12</sup> Commissioner Robinson states, "High-powered magnets are responsible for horrific, long-term, and life threatening injuries in infants and children estimated to be in the thousands[.]" (Robinson Statement.) "The CPSC exists to address just such dangerous products." (*Id.*) "I congratulate the parties on reaching this resolution. I hope, as a result, families who own Buckyballs will return the dangerous product as per the directions in the settlement and all companies and individuals will stop sale of Buckyballs in this country. I also hope that the publicity of this settlement and the accompanying Buckyballs recall and stop sale will lead to a significant decrease in injuries to high-powered magnets." (*Id.*)

Commissioner Robinson further commented that, "if anything I think that with the data that we had even though it made a compelling case for this being an unreasonable risk of injury it was understated so the risk was even higher." Commissioner Robinson, Commission Meeting: Decisional Matter – Safety Standard for Magnet Sets – Final Rule (Sept. 24, 2014).

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<sup>12</sup> Commissioner Robinson, *Statement of Commissioner Marietta S. Robinson on the Order in Maxfield and Oberton Holdings, LLC and Craig Zucker, Individually and as an Officer of Maxfield and Oberton Holdings, LLC*, [http://www.cpsc.gov/en/About-CPSC/Commissioners/Marietta-Robinson/Commissioner-Robinson-Statements/Statement-of-Commissioner-Robinson-on-the-Order-in-Maxfield-and-Oberton-Holdings-LLC-and-Craig-Zucker/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=Robinson+Statements](http://www.cpsc.gov/en/About-CPSC/Commissioners/Marietta-Robinson/Commissioner-Robinson-Statements/Statement-of-Commissioner-Robinson-on-the-Order-in-Maxfield-and-Oberton-Holdings-LLC-and-Craig-Zucker/?utm_source=rss&utm_medium=rss&utm_campaign=Robinson+Statements) (May 14, 2014) (hereinafter "Robinson Statement").



Therefore, even if the standard for making a “substantial hazard” determination is greater than an unreasonable injury finding, Commissioner Robinson’s statement makes it clear that the risks posed by the magnets would satisfy either standard and should be removed from the market.

Commissioner Robinson has therefore, by imputation, made statements regarding: (1) the number of injuries caused by Subject Products; (2) the types of injuries caused by Subject Products; and (3) the desire for the recall of Subject Products. As a former litigator, (*see* CPSC, *Commissioner Robinson’s biography*, [CPSC.gov/en/about-CPSC/commissioners/marietta-robinson](http://CPSC.gov/en/about-CPSC/commissioners/marietta-robinson)) Commissioner Robinson should recognize the bias against Respondent in her statement, and like the previously-identified Commissioners, disqualify herself from hearing the appeal.

#### **E. Judicial Bias and Recusal**

Section 455 of Title 28 of the United State Code provides in relevant part that a federal judge *shall* disqualify his or herself where they have a “personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” This Commission, with the exception of Commissioner Buerkle, in deciding the appeal of this matter, would be acting as a panel of judges who made statements indicating their bias against Respondent and prejudgment on a number of factual and legal issues. The statements made by this Commissioners smack of unfairness in light of the fact they are the ones deciding Respondent’s case on appeal. These commissioners cannot decide the appeal in this case without denying Respondent its due process rights. *Cinderella II*, 425 F.2d at 591.

The statements quoted above are, in many cases, emotion-laden comments by accomplished individuals who have nevertheless prejudged Respondent’s products to present a substantial risk of injury to children – *including their own*. These are not the statements of

impartial, disinterested adjudicators, and they are not the factual, objective statements that are permissible for potential adjudicators to make. Additionally, the bias against Respondent has arisen in statements of opinion, not in statements of fact or jurisprudence. See *Cinderella II*, 425 F.2d at 591; *Liteky v. United States*, 114 S.Ct. 1147, 1157 (1994) (“Bias against a litigant must . . . arise from an extrajudicial source”); *United States v. Balistrieri*, 779 F.2d 1191, 1201 (7th Cir. 1985) (“The negative bias or prejudice from which the law of recusal protects a party must be grounded in some personal animus or malice that the judge harbors against him, of a kind that a fair-minded person could not entirely set aside when judging certain persons or causes”). Because of this Commission’s actions and the Commissioners’ statements, its members, with the exception of Commissioner Buerkle, should disqualify themselves to ensure that the administrative hearing in the form of the appeal is “attended, not only with every element of fairness but with the very appearance of complete fairness.” *Cinderella II*, 425 F.2d at 591 (quoting *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964)).

**IV. THERE IS NO DANGER OF ESTABLISHING A DANGEROUS PRECEDENT IF CHAIRMAN KAYE AND COMMISSIONERS ADLER, MOHOROVIC, AND ROBINSON WERE TO DISQUALIFY THEMSELVES.**

Commissioner Adler suggested that, were Respondent’s argument to be accepted, it would set a dangerous precedent by foreclosing this Commission from protecting consumers from dangerous products. Setting aside the fact that his concern implicitly states that he has decided Respondent’s products are in fact dangerous, Commissioner Adler’s concern is entirely unfounded. As Commissioner Buerkle explained:

Finally, I wish to address the possibility that postponing a decision on the final rule could lead to more injuries as a result of continuing sales of magnets sets that would be subject to the mandatory standard. Although it is possible that some additional injuries may occur from the small number of ongoing sales, it is far from certain. According to the preamble, there were 52 incidents of magnet ingestions by children reported to CPSC in 2012, but the reports dropped to 13

ingestions in 2013 (including a fatality) and 2 ingestions in 2014. Preamble at 4. Perhaps in view of this sharp decline, this Commission did not set the effective date of the standard for magnet sets as soon as possible, but kept it at 180 days after publication in the Federal Register (as proposed).[4] If we had postponed decision on the standard, as I recommended, it is entirely possible that the enforcement case would be over by then, and we could decide on the standard without any concern regarding prejudice.

(Buerkle Statement.)

Even if, *arguendo*, it is somehow permissible to make factual and legal findings concerning a product that is currently being adjudicated before this Commission, the Commissioners still may not make biased and prejudicial statements before that case has been decided. The question before this Commission and each of the Commissioners is whether the words and conduct of this Commission give the appearance that its members have *in some measure* adjudged the facts and law of the case in advance of hearing this appeal, and that any such hearing would not be attended with complete fairness. *See Amos Treat*, 306 F.2d at 267; *Cinderella II*, 425 F.2d at 591.

### **CONCLUSION**

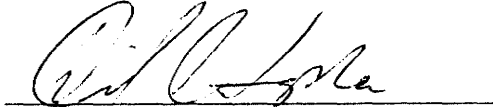
Because certain Commissioners issued statements showing their bias against Respondent and the Subject Products, neither they nor this Commission can be objective or unbiased, considering all of the powers granted them by 16 C.F.R. § 1025.55(a). Fairness and due process demand that this Commission and certain Commissioners be disqualified from hearing this appeal.

WHEREFORE, believing good cause having been shown, Respondent seeks an Order disqualifying this Commission or Chairman Kaye and Commissioners Adler, Mohorovic, and Robinson and adopting the ALJ's Initial Decision and Order as the Final Decision and Order,

pursuant 16 C.F.R. §1025.52 and further identifying Zen Magnets as a prevailing party pursuant to 16 C.F.R. §1025.70 and 5 U.S.C. § 504.

DATED THIS 6<sup>th</sup> day of May, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David C. Japha", is written over a horizontal line.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6<sup>th</sup> day of May, 2016, I served copies of **THE RESPONDENT'S MOTION TO DISQUALIFY THE COMMISSION OR SOME OF ITS MEMBERS** by the service method indicated:

Original and five copies by U.S. mail, and one copy by electronic mail, to the Secretary of the U.S. Consumer Product Safety Commission:

Todd A. Stevenson, Secretary  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814  
[tstevenson@cpsc.gov](mailto:tstevenson@cpsc.gov)

One copy by electronic mail (by agreement) and one mailed copy to Complaint Counsel: Mary B. Murphy, Complaint Counsel and Assistant General Counsel

[mmurphy@cpsc.gov](mailto:mmurphy@cpsc.gov)

and

Daniel Vice, Trial Attorney  
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