

(June 27, 2018) (Dkt. No. 18-1, Doc. # 25). Judge Elliot subsequently extended the due date for filing an objection to August 17, 2018, but denied the joint motion of the parties for a stay of discovery pending resolution of the ongoing Securities and Exchange Commission (“SEC”) deliberations about the impact of *Lucia* on the SEC ALJs’ appointments, including his own. Order Regarding Motion for Stay at 1 (July 12, 2018) (Dkt. No. 18-1, Doc. # 29).

For the reasons set forth below, Britax submits that the manner of the appointment of the Presiding Officer in this case did not comport with the Appointments Clause of the United States Constitution.¹ For one thing, the validity of the Presiding Officer’s status as a properly-appointed ALJ by the SEC under the Appointments Clause is in question. Moreover (and more importantly under *Lucia*), the Presiding Officer was selected by the Chief Administrative Law Judge of the SEC, not the U.S. Consumer Product Safety Commission (“CPSC”). Thus, the Presiding Officer may well not have been eligible at all to be appointed Presiding Officer of a hearing in a proceeding seeking an order compelling a recall under the Consumer Product Safety Act (“CPSA”), and, even if he were otherwise eligible, he was not properly appointed by the CPSC under the Appointments Clause.

Recent guidance from the Department of Justice states that all pending administrative proceedings in which litigants have properly raised Appointments Clause challenges should be assigned to a different, properly-appointed ALJ. That should be the remedy here. However, as there appears to be government-wide consideration of the issues raised by *Lucia*, and the proper resolution of those issues may not be settled immediately, Britax respectfully renews its motion

¹ Britax raised this Constitutional objection in its Answer to the Complaint in this proceeding. Thus, the issue has been properly raised and preserved.

for a stay of these proceedings, including all discovery and depositions, until the status of the Presiding Officer can be determined by the CPSC.²

Britax is not questioning the integrity or expertise of the Presiding Officer and has deep respect for his long service to the United States. Rather, Britax seeks these remedies in order to avoid the potential waste of substantial resources that would result from continuing these proceedings under the same Presiding Officer and without a stay. Absent the replacement of the Presiding Officer and the grant of a stay, there is a substantial risk that, after these proceedings, if Britax raises its objection to the appointment of the Presiding Officer on appeal (an objection that Britax has expressly preserved in its Answer and has preserved again here), a court, consistent with *Lucia*, would order that the case be remanded for a new hearing. Thus, in the interests of a fair and efficient adjudicatory proceeding, as well as the preservation of the resources of the CPSC and the parties, Britax respectfully seeks the relief set forth herein.

BACKGROUND

On February 13, 2018, the CPSC ordered the issuance of a Complaint instituting an administrative proceeding to compel a recall of certain strollers imported and distributed by B.O.B. Trailers and Britax. *See* Compl., Dkt. No. 18-1, Doc. #1.

On March 12, 2018, Britax filed an Answer to the Complaint. *See* Respondent Britax Child Safety's Answer to Complaint ("Answer"), Dkt. No. 18-1, Doc. # 2. Among the defenses asserted in the Answer was one contending that "[t]he Presiding Officer for this proceeding is an 'Officer of the United States' who must be appointed in accordance with the Appointments

² The previously-filed Joint Motion for a Stay (Dkt. No. 18-1, Doc. # 28) proposed a stay for at least 30 days after the SEC completed its review of the *Lucia* issues. However, it is now clear that the Department of Justice and the Office of Personnel Management have directed government-wide consideration of the *Lucia* issues. Thus, the timing of the SEC's review is not as relevant as originally thought.

Clause of the U.S. Constitution,” and that CPSC’s “procedures for appointing a Presiding Officer are not consistent with the Constitutional requirements for appointments of ‘Officers of the United States.’” *Id.* at 9 (Ninth Additional Defense).³

On April 23, 2018, the Secretary of the CPSC issued a Notice Regarding Appointment and Delegation of Administrative Law Judge to Serve as Presiding Officer. Dkt. No. 18-1, Doc.# 16. In that Notice, the Secretary stated that, on March 28, 2018, the U.S. Office of Personnel Management approved the loan of an ALJ from the SEC to hear this case on a temporary, intermittent, and reimbursable basis, under the authority of 5 U.S.C. § 3344 and 5 C.F.R. § 930.208. *Id.* The Secretary’s Notice went on to state that “SEC Chief Judge Brenda Murray selected Judge Cameron Elliot to hear the matter.” Thereafter, the Acting Chairman of the Commission appointed Judge Elliot to serve as the Presiding Officer, and on April 23, 2018, the full Commission approved the appointment. *Id.*

Lucia v. SEC, No. 17-130, was pending before the U.S. Supreme Court at the time of Judge Elliot’s appointment in this case. Britax’s Ninth Additional Defense was based on the issues raised in *Lucia*, and was presented in Britax’s Answer before any Presiding Officer was appointed in this proceeding. The Supreme Court’s decision in *Lucia* confirms the conclusions anticipated by Britax in the Ninth Additional Defense.⁴

³ Article II, § 2, cl. 2 of the United States Constitution prescribes the means for appointing “Officers of the United States.” This clause is referred to as the “Appointments Clause.” Although it prescribes that some “Officers of the United States” be appointed by Presidential nomination, with the advice and consent of the Senate, the authority to appoint the class of officers at issue here—so-called “inferior Officers”—may be vested “in the President alone, in the Courts of Law, or in the Heads of Departments.”

⁴ The request for a stay set forth herein is not intended to, and does not, waive this defense. Britax renews the objection stated in the Ninth Additional Defense and, accordingly, requests that the Presiding Officer be replaced with one whose appointment is proper under the Appointments Clause.

In *Lucia*, the Supreme Court considered whether the ALJ in that proceeding was properly appointed by the SEC. In its June 21, 2018 decision, the Court held that SEC ALJs are “Officers of the United States” (specifically, inferior officers) under the Appointments Clause (Art. II, § 2, cl. 2) and, thus, may be appointed only by the President, a court of law, or a head of a department. The Court concluded that the ALJ in the *Lucia* proceeding had not been appointed in conformity with the requirements of the Appointments Clause. Slip op. at 5, 12. The Court remanded the petitioner’s case to the SEC for a new hearing before a properly appointed official. *Id.* at 12. Significantly, the Court also held “[t]hat official cannot be” the ALJ originally appointed to hear the case. *Id.*

During the *Lucia* proceedings, “the SEC issued an order” attempting to “ratif[y] the prior appointment of its ALJs,” including the Presiding Officer in the present CPSC proceeding. *Lucia*, slip op. at 13 n.6. Notwithstanding the SEC’s attempt to remedy the defective appointment of its ALJs (including the Presiding Officer here) through a ratification of their prior appointments, the Court expressly declined to address whether this ratification was valid or what its effects, if any, were. *Id.*

Doubts about the effectiveness of the SEC’s purported ratification of the ALJ appointments were buttressed by the SEC itself, which, on the same day that the U.S. Supreme Court decided *Lucia*, issued a Notice staying “any pending administrative proceeding initiated by an order instituting proceedings that commenced the proceeding and set it for hearing before an administrative law judge, including any such proceeding currently pending before the Commission.” SEC, *In re: Pending Administrative Proceedings* (various Release Nos.) (June 21, 2018) (available at <https://www.sec.gov/litigation/opinions/2018/33-10510.pdf>). “The stay is

effective immediately and shall remain operative for 30 days or further order of the Commission.” *Id.* The SEC directed all of its ALJs to issue stays in each of their cases.

On June 27, 2018, Judge Elliot issued an Order Regarding Appointment in this case, stating, “In light of the Supreme Court’s recent decision in *Lucia v. SEC*, No. 17-130, if any party has an objection to the manner of my appointment or ratification of the prehearing conference scheduling order, that party shall file the objection by July 20, 2018.” Order Regarding Appointment, Dkt. No. 18-1, Doc. # 25.

In response to this Order, the parties jointly filed a Motion on July 10, 2018 seeking a stay of the proceedings, including discovery and depositions, until 30 days after the SEC lifts the stay imposed in its June 21, 2018 Order, and further seeking an extension of time in which to file objections regarding the appointment of the Presiding Officer. The parties reasoned that the SEC’s evaluation of the *Lucia* issues might be helpful in evaluating the issues related to the manner of the appointment of the Presiding Officer in this case. Joint Motion for Stay and Extension of Time to File Motions Regarding Appointment, Dkt. No. 18-1, Doc. # 28.

Also on July 10, 2018, the President of the United States issued an Executive Order revising the manner of appointment of ALJs. *See* Executive Order Excepting Administrative Law Judges from the Competitive Service (available at <https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service/>). On the same day, the Director of the U.S. Office of Personnel Management issued a Memorandum for Heads of Executive Departments and Agencies, providing guidance on the implementation of the new Executive Order (available at <https://chcoc.gov/content/executive-order-%E2%80%93-excepting-administrative-law-judges-competitive-service>).

At about the same time, the Solicitor General of the U.S. Department of Justice issued a Memorandum to all federal agency general counsels entitled “Guidance on Administrative Law Judges after *Lucia v. SEC* (S.Ct.)” In this memorandum, which is now publicly available in the media, the Solicitor General advised agencies to assign a different ALJ in any administrative proceeding in which the litigant preserved an Appointments Clause issue. *Id.* at 7-8.⁵

As noted above, on July 12, 2018, the Presiding Officer granted an extension of time in which to file objections until August 17, 2018, but denied the joint request for a stay of the proceedings and expressed doubts about whether the SEC’s “post-*Lucia* course of action will have any bearing on my ruling [on any objections that are filed in response to the June 27 Order].” Order Regarding Motion for Stay, Dkt. No. 18-1, Doc. # 29.

Thereafter, on July 20, 2018, the SEC issued a Notice further extending the stay of all pending administrative proceedings for an additional 30 days. SEC, *In re: Pending Administrative Proceedings* (various Release Nos.) (July 20, 2018) (available at <https://www.sec.gov/litigation/opinions/2018/33-10522.pdf>). The SEC’s extension of its stay reflects the difficult issues raised by *Lucia* concerning the validity of the SEC’s prior appointments of ALJs (notwithstanding its attempted ratification of those appointments).

ARGUMENT

The CPSC’s appointment of the Presiding Officer in this proceeding did not comport with the requirements of the Appointments Clause. Accordingly, pursuant to Rule 42(e) of the CPSC’s Rules of Practice for Adjudicative Proceedings (16 C.F.R. § 1025.42(e)), the Presiding

⁵ This document is available on Reuters.com at <https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf>.

Officer should be disqualified.⁶ Moreover, in light of the complexity of the issues raised by *Lucia*—as reflected in the government-wide consideration of the issues raised by that case and, in particular, by the SEC’s protracted consideration of them—it is clear that the proper resolution of the disqualification issue may require some time to achieve. Accordingly, Britax respectfully renews its motion for a stay of these proceedings, including all discovery and depositions, until the status of the Presiding Officer can be determined by the CPSC.

I. LUCIA’S APPOINTMENT CLAUSE ANALYSIS APPLIES TO THE PRESIDING OFFICER IN THIS PROCEEDING

There can be no question that *Lucia* is relevant and applicable to these proceedings. First, *Lucia*’s analysis of whether an official is an “Officer of the United States” compels the conclusion that Presiding Officers in this and other CPSC proceedings are “Officers of the United States” and are acting as such in CPSC proceedings. In determining that SEC ALJs are Officers of the United States, the Court noted that they hold a continuing office established by law, take testimony, conduct trials, rule on the admissibility of evidence, enforce compliance with discovery orders, exercise significant discretion, shape the overall administrative record, and make initial decisions. *See Lucia*, slip op. at 7-9.

Similarly, although the ALJs presiding in CPSC proceedings are on “loan” from other agencies, they clearly hold a continuing office (as ALJs for their respective agencies). And, under CPSC regulations, Presiding Officers in CPSC matters perform the very adjudicative functions that the Court found directly relevant to status as an “Officer of the United States.”

⁶ Rule 42(e) provides that a party may file a motion, supported by affidavit(s), with the Secretary to disqualify and remove a Presiding Officer whenever the party “for good and reasonable cause . . . considers the Presiding Officer to be disqualified to preside, or to continue to preside.” 16 C.F.R. § 1025.42(e). Here, the affidavit requirement is inapplicable because the grounds for disqualification, as set forth herein, are predominantly legal, and the specific facts supporting disqualification are set forth in documents in the docket of these proceedings.

Thus, by regulation, Presiding Officers:

shall have all powers necessary [to conduct full, fair, and impartial hearings], including the following powers:

- (1) To administer oaths and affirmations;
- (2) To compel discovery and to impose appropriate sanctions for failure to make discovery;
- (3) To rule upon offers of proof and receive relevant, competent, and probative evidence;
- (4) To regulate the course of the proceedings and the conduct of the parties and their representatives;
- (5) To hold conferences for simplification of the issues, settlement of the proceedings, or any other proper purposes;
- (6) To consider and rule, orally or in writing, upon all procedural and other motions appropriate in adjudicative proceedings;
- (7) To issue Summary Decisions, Initial Decisions, Recommended Decisions, rulings, and orders, as appropriate;
- (8) To certify questions to the Commission for its determination; and
- (9) To take any action authorized by these Rules or the provisions of title 5, United States Code, sections 551-559.

16 C.F.R. § 1025.42(a). Presiding Officers also have the power “to exclude from participation in any proceedings any party, participant, or representative who violates the requirements of § 1025.66” 16 C.F.R. § 1025.42(b). *See also* 16 C.F.R. § 1025.1 (noting “broad discretion. . . . vested in the Presiding Officer who will hear a matter being adjudicated to allow him/her to alter time limitations and other procedural aspects of a case, as required by the complexity of the particular matter involved”).

Moreover, under the governing statute and regulations, Presiding Officers must be either the Commission as a whole or ALJs. Specifically, Section 15(f) of the Consumer Product Safety Act (“CPSA”), 15 U.S.C. § 2064(f), provides for “a hearing in accordance with section 554 of

title 5” 15 U.S.C. § 2064(f)(1). Section 556(b) of Title 5 sets forth the officials who may preside at the taking of evidence at Section 554 proceedings. They include “(1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges appointed under section 3105 of this title.” 5 U.S.C. § 556(b).

CPSC regulations, however, narrow those eligible to act as Presiding Officers by excluding an individual Commissioner. *See* 16 C.F.R. § 1025.3(i) (defining *Presiding Officer* to mean “a person who conducts any adjudicative proceedings under this part , and may include an administrative law judge qualified under Title 5, United States Code, section 3105, but shall not include a Commissioner”). Because the Commission is not acting as the Presiding Officer here, governing statutes and regulations require the Presiding Officer in this case to be a validly appointed ALJ.

Thus, it is clear that CPSC Presiding Officers in proceedings seeking to compel a safety recall under the Consumer Product Safety Act are Officers of the United States and that the Presiding Officer here must be a validly appointed ALJ (because the Commission is not acting as the Presiding Officer). Therefore, *Lucia’s* analysis and its holding are directly applicable to this proceeding and pertinent to whether the Presiding Officer may continue to preside in this proceeding.

II. BECAUSE THE PRESIDING OFFICER WAS NOT VALIDLY APPOINTED, THE PRESIDING OFFICER SHOULD BE DISQUALIFIED, AND THE CASE SHOULD BE ASSIGNED TO A DIFFERENT PRESIDING OFFICER

The CPSC did not appoint Judge Elliot as an ALJ or independently validate his status as a qualified ALJ under the Appointments Clause or 5 U.S.C. § 3105. To the contrary, the “Notice Regarding the Appointment” of the Presiding Officer for this proceeding (Dkt. No. 18-1, Doc. # 16) shows that his appointment was predicated upon the *assumption* that he is a validly-appointed Administrative Law Judge. Indeed, the very caption of the notice so indicates. It is

styled “Notice Regarding Appointment and Delegation of *Administrative Law Judge* to Serve as Presiding Officer.” *Id.* (emphasis added).

But, as *Lucia* made clear, there are substantial grounds for doubting that the Presiding Officer was (or is) a validly-appointed ALJ, which was the predicate for his selection as the Presiding Officer in this proceeding. As noted above, the Supreme Court held in *Lucia* that the SEC’s method of appointing its ALJs—including Judge Elliot—was improper under the Appointments Clause. Moreover, as also noted above, the Supreme Court expressly refused to endorse the SEC’s purported ratification of its previously-appointed ALJs. *Lucia*, slip op. at 13 n.6.

Further, even more problematic than his status as a validly-appointed ALJ is the fact that the Notice Regarding Appointment (Dkt. No. 18-1, Doc. # 16) does *not* indicate that the *CPSC* properly appointed the Presiding Officer in this proceeding. Rather, he was appointed by an official *outside* the CPSC. This contravenes the Solicitor General’s Guidance on Administrative Law Judges after *Lucia v. SEC* (S. Ct.) (*supra* at 7), which admonishes agencies not to delegate their authority to properly appoint Officers of the United States, and cautions that, at most, agencies may merely “rely on agency human resources officials or other staff to vet applications, conduct interviews, and the like” (*id.* at 4).

Here, the CPSC clearly delegated its authority to appoint the Presiding Officer by allowing the Presiding Officer to be selected by SEC’s Chief Administrative Law Judge—an appointment later ratified by the Commission, as evidenced in *two* documents in the docket.

First, a letter, dated April 19, 2018, from Acting Chairman Buerkle to The Honorable Brenda Murray, Chief Administrative Law Judge, SEC, which was docketed in this proceeding

by Judge Elliot as an attachment to the Scheduling Order of May 3, 2018 (Dkt. No. 18-1, Doc. # 19), states:

This letter confirms that the Office of Personal Management has approved the U.S. Consumer Product Safety Commission's ("Commission") request for the loan of an Administrative Law Judge ("ALJ") from the Securities and Exchange Commission ("SEC"). The Commission is requesting the ALJ for administrative case – *In the Matter of Britax Child Safety, Inc., CPSC Docket No. 18-1*. This letter confirms that ***you have appointed Judge Cameron Elliot to preside over the above-referenced matter.*** Pursuant to my authority under section 4(g)(2) of the Consumer Product Safety Act, 15 U.S.C. § 4(g)(2), I appoint Judge Elliot to be the presiding officer in this matter.

Letter from Acting Chair Buerkle to the Hon. Brenda Murray, at 1 (attachment to Dkt. No. 18-1, Doc. # 19) (emphasis added).

The record also reflects that the CPSC merely signed off on SEC Chief Judge Murray's selection of the Presiding Officer in the Notice Regarding Appointment and Delegation of Administrative Law Judge to Serve as Presiding Officer, issued on April 23, 2018. Dkt. No. 18-1, Doc. # 16. There, the Secretary of the CPSC stated, "SEC Chief Judge Brenda Murray selected Judge Cameron Elliot to hear the matter." *Id.*

Thus, regardless of whether the SEC ratification of the Presiding Officer's appointment as an ALJ during the *Lucia* proceedings now makes his appointment as an ***SEC ALJ*** constitutionally valid—a point that the *Lucia* footnote referred to above and the SEC's two stays of its ALJ proceedings certainly put in doubt—it is clear that, by delegating its authority to appoint the Presiding Officer to the SEC Chief ALJ, the CPSC's manner of appointing the Presiding Officer fails to comport with the Appointments Clause.

The appropriate solution to this issue of constitutional dimensions would be to disqualify the Presiding Officer and assign this proceeding to a different ALJ—one who is both a validly appointed ALJ and who is ***validly*** appointed as a Presiding Officer ***by the CPSC***. This would be

consistent with the advice of the Justice Department. *See* Guidance on Administrative Law Judges after *Lucia v. SEC* (S.Ct.) at 7-8. Clearly, it would needlessly risk a vast waste of both Britax's and the CPSC's resources to allow the proceedings to continue to be presided over by the current Presiding Officer.

III. THE PROCEEDINGS SHOULD BE STAYED UNTIL THE STATUS OF THE PRESIDING OFFICER IS DETERMINED OR A NEW PRESIDING OFFICER IS APPOINTED

Pending resolution of the issues raised in this submission, the proceedings, including all discovery and depositions, should be stayed. As noted above, the SEC has now twice stayed its ALJ proceedings in light of *Lucia*, presumably to consider issues similar to those Britax has raised here.

A stay is warranted here to enable the Presiding Officer and the Commission to assess the issues. The parties are currently expending significant resources on discovery, and attempting to resolve disputes about discovery issues. It appears that at least one such dispute will require a decision by a Presiding Officer before certain depositions are taken. It would be inappropriate, however, for the Presiding Officer to consider such disputes while this disqualification motion is being considered. Moreover, it would be unfair to the parties to expect them to continue with the currently scheduled discovery responses and depositions without having the open issues resolved. A stay would not inconvenience or burden the parties, but would prevent a potential waste of resources if the Presiding Officer was not validly appointed in these proceedings. There are no exigent circumstances requiring expedition of this case. The products at issue here are no longer manufactured, and the CPSC has not alleged that they pose an imminent hazard to consumers.

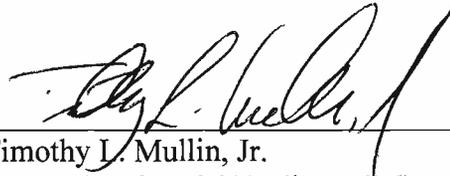
If a stay is not granted, and Britax subsequently raises its objection to the appointment of the Presiding Officer on appeal (an objection that, as noted above, Britax has expressly preserved

in its Answer and has preserved again here), there is a significant risk that a court might find the entire proceeding constitutionally defective and remand for a new hearing, at great and unnecessary cost to the Commission and Britax. Indeed, that is precisely what happened to the parties in *Lucia*. Accordingly, in the interests of a fair and efficient adjudicatory proceeding, and to avoid a potential waste of CPSC and party resources, Britax urges that the proceedings be stayed at least until the CPSC resolves the issues raised in this submission.

CONCLUSION

For the foregoing reasons, the appointment of the Presiding Officer in these proceedings is constitutionally invalid, and the Presiding Officer should be disqualified. The CPSC should follow the Department of Justice's recommendation and select and appoint a new Presiding Officer in a manner that satisfies Constitutional requirements. All proceedings, including all discovery and depositions, should be stayed pending resolution of the issues raised herein.

Dated: August 3, 2018



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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2018, I served the foregoing Respondent Britax Child Safety, Inc.'s Response to Order Regarding Appointment, Motion to Disqualify Presiding Officer, and Motion for a Stay Pending Resolution of the Appointment Issues upon all parties and participants of record in these proceedings by electronic mail ("Email"), as described below:

Service by Email to the Presiding Officer:

The Honorable Cameron Elliot
Office of Administrative Law Judges
Securities and Exchange Commission
100 F Street, NE
Mail Stop 2582
Washington, DC 20549
ALJ@SEC.GOV

Service by Email to the Secretary:

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Secretary
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Service by Email to Complaint Counsel:

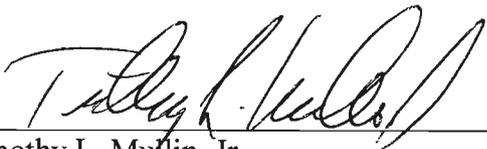
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Timothy L. Mullin, Jr.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)
)
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BRITAX CHILD SAFETY, INC.)
)
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CPSC DOCKET NO.: 18-1

Respondent.)
)
_____)

**[PROPOSED] ORDER REGARDING
RESPONDENT BRITAX CHILD SAFETY, INC.'S
RESPONSE TO ORDER REGARDING APPOINTMENT,
MOTION TO DISQUALIFY PRESIDING OFFICER,
AND MOTION FOR A STAY
PENDING RESOLUTION OF THE MOTION TO DISQUALIFY**

Having considered Britax Child Safety, Inc.'s Response to Order Regarding Appointment, Motion to Disqualify Presiding Officer, and Motion for a Stay Pending Resolution of the Motion to Disqualify ("Response and Motion"), and any responses, it is ORDERED as follows:

(1) the motion to STAY these proceedings until such time as the Consumer Product Safety Commission resolves the appointment issues raised by Britax Child Safety, Inc. in its Response and Motion is: GRANTED _____ DENIED _____

(2) the motion to DISQUALIFY the Presiding Officer is:
GRANTED _____ DENIED and REFERRED to the Commission for Decision _____

Dated: _____

The Honorable Cameron Elliot
Administrative Law Judge