

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
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BRITAX CHILD SAFETY, INC.)	CPSC DOCKET NO. 18-1
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)	
Respondent.)	
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**COMPLAINT COUNSEL’S
RESPONSE TO BRITAX’S RESPONSE TO ORDER REGARDING APPOINTMENT,
MOTION TO DISQUALIFY PRESIDING OFFICER, AND MOTION FOR A STAY
PENDING RESOLUTION OF THE MOTION TO DISQUALIFY**

On August 3, 2018, Respondent Britax Child Safety, Inc. (“Britax”), filed a Response to this Court’s Order Regarding Appointment, Motion to Disqualify Presiding Officer, and Motion for a Stay Pending Resolution of the Motion to Disqualify (“Britax’s motion” or “Motion”). On August 6, the Court ordered Complaint Counsel to submit any response to Britax’s motion by August 17.

The Court should deny Britax’s motion to disqualify because it fails to comply with the Administrative Procedure Act (“APA”) and adjudicatory rules governing this proceeding, which require that such a motion must be supported by an affidavit setting forth the alleged grounds for disqualification. Even if Britax had complied with the APA and adjudicatory rules, however, Britax’s motion should be denied because the presiding officer was properly appointed under the Constitution. Because Britax’s motion to disqualify has no merit, Britax has not shown good cause to require a stay of the proceedings.

BACKGROUND

Complaint Counsel filed the Complaint in this proceeding on February 16, 2018, alleging that certain models of strollers imported and distributed by Britax and its merger partner, B.O.B. Trailers, Inc., create a substantial product hazard under Section 15 of the Consumer Product Safety Act (“CPSA”). Pursuant to CPSA Section 15(f)(1), 15 U.S.C. § 2064(f)(1), Britax is entitled to an opportunity for a hearing conducted in accordance with the APA, 5 U.S.C. § 554. Hearings are conducted by an administrative law judge (“ALJ”) acting as the presiding officer. 16 C.F.R. § 1025.3(i).

On March 28, 2018, the U.S. Office of Personnel Management (“OPM”) approved the loan of an ALJ from the U.S. Securities and Exchange Commission (“SEC”) to the U.S. Consumer Product Safety Commission (“CPSC” or the “Commission”). *See* Notice Regarding Appointment and Delegation of Administrative Law Judge to Serve as Presiding Officer, April 23, 2018 (Doc. No. 16) (hereinafter “Notice Appointing ALJ”). The loan was made pursuant to the ALJ Loan Program. *See* 5 U.S.C. § 3344; 5 C.F.R. § 930.208.

Thereafter, the SEC selected Judge Cameron Elliot as the ALJ to be loaned to the CPSC for this proceeding. *See* Notice Appointing ALJ. Months previous to the loan, the SEC had ratified Judge Elliot’s appointment as an ALJ. *See* SEC Order, In re: Pending Administrative Proceedings, Other Release Nos.: 34-82158, IA-4816, IC-32929, Nov. 30, 2017 (hereinafter “SEC Order”).

On April 19, 2018, Acting CPSC Chairman Ann Marie Buerkle appointed Judge Elliot to serve as the presiding officer in this proceeding. *See* Notice Appointing ALJ. On April 23, 2018, the Commission held a vote regarding the “Approval of Administrative Law Judge Appointment” and voted 4-0 to approve the “appointment of Administrative Law Judge Cameron

Elliot” to be the presiding officer. Record of Commission Action, April 23, 2018.¹ The Commission then issued a “Notice Regarding Appointment and Delegation of Administrative Law Judge to Serve as Presiding Officer,” stating that the Commission had approved the appointment. *See* Notice Appointing ALJ.

ARGUMENT

I. The Motion to Disqualify Does Not Comply With the APA and the Adjudicatory Rules

The Commission’s adjudicative proceedings are conducted in accordance with the APA. *See* 16 C.F.R. § 1025.2. The APA requires that a motion to disqualify must be supported by “a timely and sufficient affidavit of personal bias or other disqualification” 5 U.S.C. § 556(b). Similarly, the CPSC’s adjudicatory rules require that such a motion “be supported by affidavit(s) setting forth the alleged grounds for disqualification.” 16 C.F.R. § 1025.42(e)(2).

Respondent failed to submit an affidavit in support of its motion as required by the rules. Britax asserts that it was free to ignore the requirement in the APA and adjudicatory rules because it believes its arguments are “predominantly legal.” Motion at 8 n.6. The APA and the rules contain no such exception to the affidavit requirement, and Britax cites no legal authority in support of its contention that it was free to disregard the requirements of the affidavit. To the contrary, case law establishes that submission of an affidavit is not optional and warrants rejection of Britax’s motion. In *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995), the Petitioner moved for disqualification of the agency’s Director from the proceedings because of alleged bias, but failed to support the motion by affidavit. The Ninth Circuit refused

¹ Available at <https://cpsc.gov/s3fs-public/RCA-Vote-Regarding-Approval-of-ALJ-Appointment-and-Delegation-of-Commission-Authority-in-In-the-Matter-of-Britax-042318.pdf?fzTKaVg.DK8fYLCDDpv42jeFJFMmIjB0>.

to disqualify the Director, holding that the Petitioner “did not submit to the agency an affidavit laying out the basis for his request for recusal or substantiating his allegation of bias, and his failure to do so is fatal to his claim.” *Id.* at 326.

Similarly, in *Gibson v. Federal Trade Comm’n*, 682 F.2d 554, 565 (5th Cir. 1982), the Fifth Circuit examined a motion to disqualify an ALJ under the FTC’s disqualification rule, 16 C.F.R. § 3.42(g)(2), which is nearly identical to the CPSC’s disqualification rule, 16 C.F.R. § 1025.42(e)(2). The court in *Gibson* explained that requiring an affidavit in support of such a claim “is not an empty formality to be cast aside unilaterally by a party to a Commission proceeding.” *Gibson*, 682 F.2d at 565 (quoting decision of Federal Trade Commission). The Court explained that:

There are many reasons for such a requirement. An affidavit provides an exact, sworn recitation of facts, collected in one place; a disqualification motion must not be made by a party, nor taken by the Commission, lightly Accordingly, the affidavit requirement serves not only to focus the facts underlying the charge, but to foster an atmosphere of solemnity commensurate with the gravity of the claim. Respondents’ failure to submit affidavits is thus an independently sufficient basis to deny their petitions in this respect.

Id.

Pursuant to the APA, Commission rules, and case law, Respondent’s allegations that the Presiding Officer should be disqualified must be supported by an affidavit. Britax’s failure to comply with this requirement is “fatal to [its] claim,” *Keating*, 45 F.3d at 326, and the Court should therefore deny the motion to disqualify.

II. The Presiding Officer’s Appointment Was Valid Under the Constitution

Even if Britax had complied with the APA and the adjudicatory rules, its motion should be denied because the presiding officer’s appointment here was valid.

The Constitution’s Appointments Clause requires that the President, a court of law, or a head of department, rather than agency staff, must appoint an ALJ who serves as presiding officer in contested adjudicatory proceedings. *See Lucia v. S.E.C.*, 138 S. Ct. 2044, 2046 (2018). In *Lucia*, the Petitioner challenged an SEC order in an administrative proceeding where the ALJ who issued the initial decision had been appointed by SEC staff and not by the Commission. The Supreme Court held that the SEC’s ALJs are “Officers of the United States” within the meaning of the Appointments Clause, whose appointments must be made pursuant to the Appointments Clause. *Id.* at 2050. The Court held that the “Commission itself counts as a ‘Head[] of Department[]’” under the Appointments Clause, so that an appointment would be valid if it was done by the Commission itself rather than staff. *Id.* at 2050.

In contrast to the facts in *Lucia*, here both the SEC and CPSC Commissioners, and not staff, appointed Judge Elliot. Indeed, before the Complaint was filed in this proceeding, the SEC ratified the appointment of Judge Elliot as an ALJ. *See* SEC Order. By the time the SEC loaned Judge Elliot to the CPSC, there could be no doubt that the appointment had been approved by the SEC itself and that it was not merely “SEC staff members [who] gave him an ALJ slot.” *Lucia*, 138 S. Ct. at 2051.²

The CPSC further underscored the validity of the appointment by taking steps for the Commission itself, and not CPSC staff, to make the appointment. The CPSC did this through a unanimous, 4-0 vote on the “Approval of Administrative Law Judge Appointment,” Record of Commission Action, April 23, 2018, and issued a notice stating that the CPSC had made an

² Cases decided since *Lucia* do not compel a result different than the argument advanced by Complaint Counsel in this response. *See Jones Bros., Inc. v. Sec’y of Labor*, 2018 U.S. App. LEXIS 21164, 2018 FED App. 0158P (6th Cir. July 31, 2018) (ALJ’s decision on the merits invalidated where it was issued prior to ratification of her appointment by full Federal Mine Safety and Health Review Commission).

“Appointment and Delegation of Administrative Law Judge to Serve as Presiding Officer.” *See* Notice Appointing ALJ. These actions by the SEC and CPSC more than satisfy the requirement in *Lucia* that the ALJ appointment must be made at the level of the Commission and not solely by Commission staff.

In addition, unlike in *Lucia*, here Judge Elliot had been appointed by the relevant heads of departments prior to making any substantive decisions in the proceeding. The Supreme Court in *Lucia* ordered that the same ALJ could not hear that case on remand because he had “already both heard Lucia’s case and issued an initial decision on the merits.” *Lucia*, 138 S. Ct. at 2055. In contrast, here Judge Elliott made no substantive decisions in this proceeding prior to his appointment by the CPSC. Indeed, Judge Elliot’s only act in this proceeding before the Commission’s April 23 vote was the purely ministerial act of scheduling a prehearing conference. *See* Order Scheduling Prehearing Conference, April 20, 2018 (Doc. No. 15). Britax does not allege that this ministerial act alone violated the Appointments Clause, and the facts would not support such a contention.

Britax also does not dispute that CPSC Commissioners, and not staff, issued the relevant order concerning Judge Elliot’s participation in this proceeding. Motion at 10. Instead, Britax argues that the CPSC Commissioners did not properly appoint Judge Elliot because they simply made the “assumption” that it was appropriate to appoint him without undertaking an investigation to “validate his status” – *i.e.*, they “merely signed off” on the SEC’s loan decision. Motion at 10-12. Nothing about *Lucia* requires that the reasoning and motivation behind an appointment decision be subject to such scrutiny. Here, pursuant to the ALJ Loan Program, the SEC properly selected Judge Elliot to loan to the CPSC. The Commission then held an on-the-record vote on his appointment. *See* Record of Commission Action, April 23, 2018. The CPSC

Commissioners were not bound to vote “yes” – in fact, they were free to vote “no” – and their votes were recorded so that they would be accountable for the appointment. *See id.* The Commission’s vote to approve Judge Elliot’s appointment was entirely proper. The Appointments Clause requires that the Commission, and not staff, make the appointment. That is precisely what happened here.

Britax also argues that it was improper to allow the SEC to appoint the ALJ in this matter because this contravened guidance provided by the Solicitor General subsequent to the *Lucia* decision in an attorney work product privileged memo to agency counsel that was apparently leaked to a news outlet. *See* Motion at 7 n.5 and 11. Although Complaint Counsel maintains that the Court should not rely upon the leaked memo, even if it did, that guidance is not binding and, in any event, CPSC did not contravene that guidance. To the contrary, Judge Elliot was properly selected by the SEC and loaned to the CPSC as authorized by statute in the ALJ Loan Program. *See* 5 U.S.C. § 3344. As explained above, the CPSC Commissioners then independently voted whether to accept or reject the loan. Nothing in *Lucia* invalidates the ALJ Loan Program. Both the SEC Commissioners who initially ratified Judge Elliot’s appointment and the CPSC Commissioners who voted to appoint him in this matter did not delegate their authority to staff. The Commissioners themselves issued on-the-record orders confirming their accountability – and not a delegation to staff – for that appointment. *See* Notice Appointing ALJ and Record of Commission Action, April 23, 2018.

Because both the SEC and CPSC as the relevant department heads appointed Judge Elliot, there can be no reasonable dispute that his appointment satisfies the Appointments Clause. Britax’s motion to disqualify is meritless and should be denied.

III. Britax's Request for a Stay Should Be Denied

Britax requests that the court stay the proceedings until the issue of Judge Elliot's appointment is resolved. However, the rules do not require that the Presiding Officer stay the proceedings, and provide in fact, that a motion to disqualify "shall *not* stay the proceedings unless otherwise ordered by the Presiding Officer or the Commission." 16 C.F.R. 1025.42(e)(2) (emphasis added). Because Britax's motion to disqualify Judge Elliot is procedurally deficient and substantively meritless, the request for a stay should be denied.

CONCLUSION

The record shows that Judge Elliot was properly appointed in this proceeding. Because Britax has not shown any violation of the Appointments Clause, its Motion should be denied.

Dated: August 17, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 17, 2018, I served Complaint Counsel's Response to Britax's Response to Order Regarding Appointment, Motion to Disqualify Presiding Officer, and Motion For a Stay Pending Resolution of the Motion to Disqualify 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
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Service by Email to the Secretary:

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