

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)

ZEN MAGNETS, LLC)

Respondent.)

CPSC Docket No: 12-2

**ORDER DENYING RESPONDENT'S MOTION TO STAY
COMPLAINT COUNSEL'S APPEAL OF THE INITIAL DECISION AND ORDER AND
SETTING A BRIEFING SCHEDULE**

Pending before the Commission are two motions from Respondent: (1) a Motion to Stay Complaint Counsel's Appeal of the Initial Decision Pending Disposition of Respondent's Motion to Disqualify the Commission or Some of Its Members ("Motion to Stay"), and (2) a Motion to Disqualify the Commission or Some of its Members ("Motion to Disqualify"). For the reasons set forth below, the Commission denies Respondent's Motion to Stay. By this Order, the Commission is also setting a briefing schedule for the Answering and Reply Briefs. The Commission does not address the Motion to Disqualify in this Order. The Commission will decide the Motion to Disqualify later in these proceedings.

BACKGROUND

On August 6, 2012, Complaint Counsel filed this case on behalf of the Commission. On September 20, 2012 and February 11, 2013, Complaint Counsel amended the complaint. The Second Amended Complaint alleges that Respondent imports and distributes small rare earth magnets, described as "small, individual, spherical-shaped magnets, approximately 5.03 mm in diameter with a flux index greater than 50, that are packaged as aggregated masses in different size containers holding 72, 216, or 1,728 small magnets" ("magnets" or "SREMs"). Second Amended Complaint ¶ 9. We refer to SREMs imported and distributed by Respondent as the "Subject Products." The Second Amended Complaint alleges that the Subject Products are a substantial product hazard under sections 15(a)(1) and 15(a)(2) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064(a)(1) and (a)(2), and seeks "public notification and remedial action to protect the public from the substantial risks of injury presented by" the Subject Products. Second Amended Complaint ¶¶ 1, 126, 134.

From December 1 – 17, 2014, an administrative hearing was held before an administrative law judge ("ALJ"). On March 25, 2016, the ALJ issued an Initial Decision and Order. Complaint Counsel filed a Notice of Intent to Appeal on March 29, 2016, and perfected its appeal on May 4, 2016 by filing an Appeal Brief (the "Appeal").

On May 6, 2016, Respondent filed a Motion to Disqualify and a Motion to Stay. Complaint Counsel filed a response opposing Respondent's Motions on May 13, 2016.

Respondent withdrew and re-filed its Motion to Disqualify and Motion to Stay on May 16, 2016, attaching the Affidavit of Mr. Shihan Qu. Complaint Counsel filed a brief response on the same day, indicating that Complaint Counsel intended to rely on the reasons set forth in its previously-filed response.

DISCUSSION

The Commission does not have a rule directly applicable to Respondent's Motion to Stay. Generally, however, the Commission's rules for adjudicative proceedings do not favor stays. The Commission's regulations encourage prompt resolution of adjudicatory matters to fulfill the Commission's congressional mandate "to protect the public against unreasonable risks of injury associated with consumer products." Rules of Practice for Adjudicative Proceedings, 45 *Fed. Reg.* 29,206, 29,207 (May 1, 1980). The Commission has a duty to "take appropriate action to avoid unnecessary delay in the disposition of proceedings, and to maintain order." 16 C.F.R. § 1025.42(a). Adjudicative proceedings "shall be conducted expeditiously and with due regard to the rights and interests of all persons affected." 16 C.F.R. § 1025.2. Also, the regulations specifically instruct the Presiding Officer and all parties to "make every effort at each stage of any proceedings to avoid unnecessary delay." *Id.*

The Commission decides Respondent's Motion to Stay pursuant to the Commission's authority to oversee the adjudication. 16 C.F.R. §§ 1025.42, 1025.48. The Supreme Court has stated that the power to stay proceedings is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936). The party moving for a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Id.* at 255. Respondent has not shown good cause for a stay of these proceedings.

As mentioned, Respondent moves both for a stay and for disqualification. Although the Commission's regulations do not address directly disqualification of individual Commissioners or the Commission itself from hearing an appeal of an administrative decision, the regulations governing the disqualification of Presiding Officers provide relevant guidance relating to the Motion to Stay. Under 16 C.F.R. § 1025.42(e)(2), a party may file a motion to disqualify and remove the Presiding Officer "whenever, for good and reasonable cause,..." that party considers the Presiding Officer to be disqualified to preside. The Commission's regulations specifically state that a motion to disqualify "shall not stay the proceedings unless otherwise ordered by the Presiding Officer or the Commission." *Id.* Thus, the Commission's regulations anticipate an adjudicative matter will proceed even when a party moves to disqualify the Presiding Officer.

Respondent has offered no support for a general stay of these proceedings other than "it makes sense." The Commission does not agree, particularly with regard to the briefing schedule. As the Commission's rules recognize, delay is generally not in the interest of consumer safety. Without expressing any views at this time on the merits of the Motion to Disqualify, the Commission finds no basis to conclude that Respondent will be harmed by filing an Answering

Brief in this case. Regardless of the outcome of the Motion to Disqualify, the Commission, whether it consists of all, some, or none of the current Commissioners, must issue a Final Decision and Order in this case. *See* 16 C.F.R. § 1025.55(b) (upon appeal, the Commission must “adopt, modify, or set aside the findings, conclusions, and order contained in the Initial Decision” and must “issue an order reflecting its Final Decision”); *see also FTC v. Cement Institute*, 333 U.S. 683, 701 (1948). Accordingly, regardless of the outcome of the Motion to Disqualify, Respondent must still file an Answering Brief at some juncture in the proceeding. Because Respondent will be required to file an Answering Brief with the Commission regardless of the outcome of the Motion to Disqualify, we see no reason to grant the stay on that basis. The Commission will, however, extend the filing deadline for Respondent’s Answering Brief by ten days.

Respondent further argues that staying the proceeding is “in the interests of justice” because the Motion to Disqualify is based on Respondent’s Fifth and Fourteenth Amendment Due Process Rights. Motion to Stay ¶¶ 3-4. Respondent’s argument assumes that the Commission will reach a decision on the merits of the Appeal before deciding the Motion to Disqualify. The Commission, however, will determine who may hear the Appeal before considering the merits. Accordingly, in the interest of efficiency and fairness, the Commission will rule on the Motion to Disqualify before considering the Appeal. 16 C.F.R. §§ 1025.23(a); 1025.42.

As noted earlier, the Commission has discretion to control its docket in a manner that affords efficiency and fairness to the parties. Requiring the parties to brief the issues on appeal, which should not vary based on the disposition of the Motion to Disqualify, prevents unnecessary delay. By choosing to rule on Respondent’s Motion to Disqualify without delay, and before considering the merits of the Appeal, the Commission will ensure that Respondent’s due process concerns are addressed in a timely fashion without hindering progress of the Appeal.

Accordingly,

IT IS ORDERED THAT:

1. Respondent Zen Magnets, LLC’s Motion to Stay Complaint Counsel’s Appeal of the Initial Decision Pending Disposition of Respondent’s Motion to Disqualify the Commission or Some of Its Commissioners **IS DENIED**;
2. Respondent Zen Magnets, LLC’s Answering Brief must be filed no later than June 13, 2016;
3. Complaint Counsel’s Reply Brief, if any, must be filed no later than June 27, 2016; and

4. The Commission will rule on Respondent's Motion to Disqualify before considering the merits of the Appeal.

SO ORDERED this 25th day of May, 2016.

BY THE COMMISSION



Todd A. Stevenson
Secretary
Consumer Product Safety Commission