UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

STATEMENT OF THE HONORABLE THOMAS H. MOORE IN THE MATTER OF DAISY MANUFACTURING COMPANY
CPSC DOCKET NO. 02-02
November 14, 2003

On May 12, 2003, the Administrative Law Judge (ALJ) in the Daisy case forwarded an Order Staying Proceedings and Transmitting Offer of Settlement (Offer) to the Commission. To facilitate Commission review of the Offer, the Office of the Secretary asked Daisy and Complaint Counsel if they would waive the rules against *ex parte* contact to allow the Commissioners to speak freely with them about the settlement proposal. Daisy refused this request. At that point the only possible options under our regulations were to vote to accept or deny the settlement offer based on the relevant pleadings of the parties. Under our rules, if the Commission voted to deny the settlement proposal it could give guidance to the parties as to the deficiencies of the Offer. 16 C.F.R. § 1025.26. Instead of doing this, a majority of the Commission decided to propose mediation to the parties as a means of resolving the lawsuit. A neutral mediator was chosen and the mediation was held, but it did not result in an agreement. Subsequently, on September 22, 2003, a majority of the Commission voted to reject the settlement offer, without elaboration, and returned the case to the judge for further proceedings.

Daisy next moved to recuse the judge by a Motion dated September 24, 2003. The judge rejected that motion and resumed his control of the proceedings. A majority of the Commission then voted to stay the proceedings pending a review of the Motion to Recuse and in order to review an additional Motion filed by Daisy on October 1, 2003 to Reconsider the previously rejected Proposed Settlement Offer. This latter motion was based on new information that Daisy wanted to proffer to the Commission about its financial condition.

Under our procedural rules, all settlement offers are to be transmitted to the judge, and, therefore, the Motion to Reconsider should have been addressed to him and not to the Commission. Indeed, contrary to our rules, the judge was never served with the Motion.[1] It was the judge's responsibility to decide whether to refer the same Offer of Settlement to the Commission that it had just rejected. However, a majority of the Commission voted to stay the proceedings in order to consider the Motion and to review the financial information provided by Daisy. I voted against the stay because, while it was appropriate for the Commission to stay the proceedings to review the recusal motion, the reconsideration motion was not properly before the Commission under our rules and we should not interfere with the Court's processing of it.[2] I also

[1] Since the judge had no opportunity to do so and the Commission has also not issued an order to receive and preserve the Motion and related documents *in camera*, they are apparently freely accessible by the public to the extent no confidential treatment was claimed under our rules. 16 C.F.R. § 1025.45.
[2] Action on the recusal motion was informally delayed by a majority of the Commission. I supported this delay as that Motion could be rendered moot by action the Commission might take on the Motion for Reconsideration.

believed that the Commission's receiving this financial information, and trying to make a determination about it on its own, was inappropriate at this stage of the proceedings. Daisy's new issue of financial viability should have been brought before the judge, which would have allowed Complaint Counsel the opportunity to analyze the material and question Daisy and others about its validity. We should not allow this newly-raised financial issue to be used as a device to reconsider a settlement proposal already rejected by the Commission. There has been no ruling on Complaint Counsel's allegations that Daisy's Powerline BB guns are a substantial product hazard, in fact there has not even been a hearing. If a substantial product hazard is found to exist (after the various layers of review provided in our statutes and regulations have been exhausted) then a company's financial situation may be relevant in determining what level of corrective action it is capable of performing. If a substantial product hazard is not found, then no corrective action would be required. Our statutes do not put a company's finances above the public's safety.

Wanting to make its new financial argument directly to the Commission caused Daisy to drop its objections to *ex parte* communications between the parties and the Commissioners. Subsequently Daisy met with my two colleagues and provided them with financial information. My office received no contact from Daisy and no financial information from them.[3] Thus the only information before me is the pleadings of the parties. It is also my understanding that at the point where Complaint Counsel was offered an opportunity to review Daisy's financial information, Counsel would not have had time to do a proper review of it, so the Commission has been deprived of our staff's valuable input on this issue.[4]

Now representatives of the Commission have brokered a settlement agreement solely with Daisy, presumably on the basis of Daisy's private representations. This is completely outside of the agency's rules of practice. Those rules were adopted and published, after extensive public review through notice and comment rulemaking, so that every person appearing before the Commission would understand his or her procedural rights and could predict with a fair amount of certainty how the complaint would be processed. The rules establish a level judicial playing field both for outside parties and for the Commission's lawyers. They also serve to insulate the Commission from the proceedings so it can function without bias in its role as decision maker on appeals from the administrative law judge's rulings.

At least the first Commission-driven settlement attempt, while outside of our rules, was with a neutral, professional mediator. However, this latest activity where representatives of the Commission talked to only one side about the underlying merits of the Motion and negotiated their own alternate settlement agreement was clearly inappropriate.[5] Under our rules, an offer of settlement is to be transmitted to the Commission through the administrative law judge who

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[3] My colleagues did offer to provide me with the information they received from Daisy, but as Daisy, for whatever reason, did not provide me with the material directly, I declined their kind offers.

[4] In its Motion for Procedural Clarification, Complaint Counsel asked permission to file a brief responding to Daisy's Motion for Reconsideration. The Commission never responded to that request and thus was also denied the opportunity to hear Complaint Counsel's objections to that Motion.

[5] The General Counsel, in his September 5, 2003 memorandum to Commissioner Gall, noted a "significant" distinction between the Commission offering the suggestion of mediation as opposed to negotiating acceptable settlement terms. The General Counsel felt the former was acceptable but the latter constituted active involvement in the merits of the case, which raised issues in his mind (that he did not articulate).

screens it to make sure it contains the requirements of 16 C.F.R. § 1025.26(c) and also makes sure the offer, among other things, is not clearly frivolous or **duplicative of offers previously rejected by the Commission.** We followed our procedures (in that regard) on the Offer that the Commission rejected on September 22, 2003, but did not do so with the Offer submitted by Daisy's Motion to Reconsider or with the Commission-brokered proposal transmitted directly to the Commissioners by Daisy on November 5, 2003. As I stated in the context of the first mediation attempt, the Commission has two choices in dealing with a settlement proposal that has been referred to it by the ALJ. It can accept it or it can reject it. 16 C.F.R. § 1025.26. That these are the only two choices allowed by the Commission's Rules of Practice for Adjudicative Proceedings was made clear by the Commission when it reviewed the merits of a comment submitted during the rulemaking on the adoption of this section. The comment suggested that the Commission not restrict itself to just these two options, but give itself more flexibility. In response the Commission stated:

> "The Commission views the section as drafted to be the preferred language. As a practical matter an offer can only be accepted or rejected. **It would be inappropriate and procedurally unwieldy for it to attempt to negotiate acceptable settlement terms with the respondents.** [Emphasis added.] In rejecting an offer of settlement, the Commission will endeavor to set forth its reasons and, where appropriate, indicate what modifications to the rejected offer would make it acceptable to the Commission. Thus, if a settlement offer is rejected, the party or parties offering the settlement may submit a revised offer, taking into consideration the reasons given in writing by the Commission for its having rejected the original offer."

I do not believe the Commission even has *those* choices on Offers that are not transmitted to it as directed by our Rules. Our only option in those cases is to refer the Offers to the administrative law judge for appropriate review under our Rules of Practice. These Rules have governed Commission adjudications for most of the Commission's existence and cannot be changed even by a vote of the Commission without first giving public notice of the proposed change and soliciting public comment. We cannot just decide to steer the parties to mediation or to accept a settlement offer directly from the parties or to broker private settlement agreements. If parties, including the Commission's Complaint Counsel cannot rely on the Commission to follow its own Rules of Practice, then chaos will reign.

The settlement agreement negotiated between Daisy and certain Commission representatives does not differ significantly in form or substance from the Settlement Offer that Complaint Counsel found unacceptable and that was rejected by the Commission in September 2003. It does not contain the major element sought by Complaint Counsel—a retroactive corrective action plan.[6] It is basically an information and education campaign on safe airgun handling. The campaign is not much different than the one Daisy already sponsors and has sponsored for a number of years. Why should we expect this campaign to work any better than

[6] See page 3 of Complaint Counsel's Brief Regarding Respondent's Offer of Settlement, dated May 30, 2003: "As Respondent's counsel knows, the Compliance staff repeatedly indicated that it would not recommend the Commission's acceptance of Daisy's settlement offer unless it included an offer of corrective action to address the BB lodging defect."

the past one? Changing behavior through safety campaigns is difficult at best, which is why, whenever possible, a hazard should be designed out of a product to achieve real injury reduction. Many users of these guns, the users expected to pay attention to and to act upon the safety information, are children. And children will be children. They grow up pointing toy guns at each other. To expect them not to point BB guns at each other when they believe they are empty of BB's is to expect too much. In the incidents that would have been presented to the court in the administrative law proceeding, no one would have gotten hurt if the airguns had not unexpectedly had BB's in them, no matter where the airguns were pointed.[7] If children are led to believe the airguns are empty, but through some defect in the airguns they are not and other children are killed or seriously injured, then we need more than an information and education campaign. The settlement agreement now before us does not contain a corrective action plan with regard to airguns already in the hands of children. Under our Rules of Practice, a settlement agreement must contain a corrective action plan, as outlined in 16 C.F.R. § 1115.20(a). *See* 16 C.F.R. § 1025.26(c)(6). Now there will be no hearing that would have determined whether these airguns contain defects that present a substantial product hazard. Without benefit of a hearing and a reviewable record, the Commission is deciding, in effect, that no substantial product hazard exists. I, for one, am not comfortable with such a decision. While it is possible that I might have come to a conclusion similar to that of my fellow Commissioners after a review of a judge's decision and analysis of the hearing record, it is definitely not a conclusion I can come to now.

When our Rules of Practice were being adopted, some commenters wanted them to have less detailed requirements for the settlement proposal. In particular, some felt there should be no requirement for a corrective action plan in a settlement proposal. As I noted in my earlier statement on Daisy's original settlement offer, the Commission's response was:

> "The comments suggested there be more "give and take" in the settlement process. The comments ignore the fact that in authorizing adjudication under these rules, the Commission is acting upon behalf of the public, and often to protect the public from exposure to a consumer product that allegedly presents a substantial product hazard or is dangerously flammable. The Commission staff, therefore, lacks the freedom to "give and take" in the same way as counsel for parties in private litigation. This is especially so in adjudications for an order under section 15 of the CPSA, 15 U.S.C. 2064, where issuance of an administrative complaint signifies that the Commission and the respondent were unable to arrive at a voluntary corrective action plan as provided for in 16 CFR 1115.20. **Permitting settlements that fail to meet the requirements for a voluntary corrective action plan will encourage individuals and firms to believe that they may be able to achieve more favorable terms after issuance of an administrative complaint. Such an expectation is unrealistic because authorization of a complaint means that the Commission has determined that the respondent's "best offer" for a voluntary corrective action plan did not meet the Commission's estimate of the minimum corrective action required to adequately protect the public.** [Emphasis added.] Since the Commission is concerned that matters in adjudication either be settled promptly and completely or else proceed through the judicial process in a timely manner, the

[7] In addition to two deaths, these incidents have resulted in such serious injuries as eye loss, permanent brain damage and paralysis.

> Commission will retain the provisions in § 1025.26(c) relating to the contents of settlement proposals."

Only time will tell how much the Commission's actions in this case will hamper our enforcement staff's ability to negotiate voluntary corrective action plans in future pre-Complaint situations.

We are operating under section 15 of the CPSA in the Daisy matter. The Commission has already declared that Complaint Counsel's role is not to settle for anything less than a corrective action plan that will protect the public from harm. Absent a determination on the issue of a substantial product hazard, I believe we have to make assumptions in favor of the public about the need for, and the contents of, a corrective action plan. Complaint Counsel does not have the traditional "give and take" ability to compromise a case for reasons other than protecting the public and the Commission should not do so based on allegations of financial harm to a company without first determining what degree of hazard the public faces from the products that company manufactures. THAT is our first order of business.

When the Commission authorized the filing of the Complaint against Daisy, it determined that Daisy's best pre-Complaint offer did not adequately protect the public. The Commission voted just two months ago that Daisy's most recent Offer also did not adequately protect the public. Now Daisy is back with basically the same Offer, through a different tactic and in the wrong forum. Quite apart from the procedural defects, the Offer must fail for the same reason that it failed last September—the plan does not do enough to protect the public from harm. Adding warning labels to boxes of BB's does not change my assessment of the Offer.

Daisy's Motion for Reconsideration and its Memorandum Brief in support of that Motion are not persuasive (assuming they are relevant at this stage of the proceedings). Daisy argues that the costs of litigation are contributing to its alleged precarious financial position. Every litigant in every case factors in the costs of litigation and weighs them against the costs of settlement. If we yield our position to this argument, we give up one of our prime bargaining chips in reaching settlements favorable to the public. Daisy also argues that an unfavorable Commission decision will result in more litigation against it, resulting in financial ruin. The number of cases filed against Daisy is a direct result of people being killed or injured by Daisy BB guns. That number will not increase because of anything the Commission does in this case. Daisy could save itself from many future lawsuits by agreeing to a strong retroactive corrective action plan. The one real positive step Daisy has taken in the last couple of years is to change the Model 856 Powerline airgun from a multi-shot BB gun to a one-shot pellet gun. Over time that action should reduce the incidents (and Daisy's liability) from BB's lodging in that gun. By taking the position that it is not going to worry about the multi-shot 856 airguns that are already in the hands of consumers, Daisy increases it own liability without any help from the Commission.

Daisy also argues that even if the Commission eventually wins and Daisy is compelled to do a corrective action, that the Commission will have won a Pyrrhic victory because Daisy will no longer be in business to be able to do any corrective action plan. This is certainly not the first time a company has raised this argument. Most of these dire predictions never come to pass. Daisy's allegations about its finances need careful examination in the court proceeding. When

such allegations have come up in the past (usually in civil penalty cases) we have had outside experts, often from the Justice Department, review the company's finances to find out whether its allegations are accurate. As far as I know, this was not done in this case (a far more serious matter than a civil penalty case). Therefore I am unable to draw any conclusions about the state of Daisy's financial health. And I would not attempt to do so without expert guidance.

The bottom line is that we are not the Business Protection Agency; we are the Consumer Product Safety Commission. Our responsibility is to protect the public from dangerous consumer products. 15 U.S.C. § 2051(b). If we lose sight of that we will get entangled in endless discussions of company finances while consumers are being put at risk of death or serious injury. Our laws contemplate that companies must take responsibility for their unsafe products. In some cases that will mean taking responsibility both in the federal regulatory arena and in the civil court arena. Obviously we do not want our actions to drive a company out of business, and not just for the reason that Daisy threatens, that a defunct company cannot do a corrective action. However, it is a risk businesses face every day when they make products that have the capacity to kill and maim consumers.

Finally, there are problems with the proposed Consent Agreement and Order. Our Rules of Practice require the settlement offer to contain a statement that the allegations of the complaint are "resolved" by the Consent Agreement and Order. The latest proposed Agreement and Order uses the phrase "withdrawn and resolved." Since this phrase follows the much reduced list of items that Daisy is now offering to send to ASTM International for consideration in the voluntary standard arena, it appears that this is an attempt to put the Commission on record that those issues are no longer of concern to it.[8] That does not reflect my view. The Agreement omits the reference to a joint press release announcing the terms of the Consent Agreement and Order, a provision that was in the first Settlement Offer. Also, I do not believe the Commission has the authority to declare that the Consent Agreement can not be used as evidence in any state or federal court proceedings. Why would we want to restrict litigants from using an agreement that Daisy and a majority of the Commission have approved? The new proposal does include language on the BB boxes and additional language on the temporary hang tag, zip tie or sticker on the gun, as well as in the safety rules, to the effect that BB guns may appear to be empty when they are not. While this is a positive step, our Human Factors staff has not reviewed this language, so we have again denied ourselves the expertise of our in-house talent to evaluate the effectiveness of the language.

In summary, neither the Motion for Reconsideration nor the subsequent Offer of Settlement are properly before the Commission as they were not sent to the Administrative Law Judge as required by our Rules; it is inappropriate for the Commission (as opposed to Complaint Counsel) to negotiate deals with Daisy; Daisy's allegations as to its financial condition should have been examined in the court proceeding for their validity and their impact on any future corrective action plan that might have been ordered (or any settlement proposals Daisy may have made); failing an acceptable settlement offer, a judge should have been allowed to hear the case on the merits and render a decision which would have then come to the Commission for a review based on that record. For all of these reasons, I voted to reject the Proposed Settlement Offer.

[8] Those issues are whether the velocity of airguns should be reduced and whether airguns should have automatic safeties. The omission of these issues is a serious weakening of the Offer the Commission rejected in September.