

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

In the Matter of)	
)	CPSC Docket No: 12-2
ZEN MAGNETS, LLC)	
)	HON. DEAN C. METRY
Respondent.)	
)	

ORDER DENYING AGENCY’S MOTION TO STRIKE EXPERT WITNESSES

Complaint Counsel moves to strike two (2) of Respondent’s proposed expert witnesses, Dr. David Richter and Dr. Boyd Edwards. Complaint Counsel claims these witnesses do not possess the necessary skill, knowledge, experience, training or education to be qualified as experts. Complaint Counsel further claims these witnesses offer only personal opinions and speculation and not opinions grounded in any scientific, technical or specialized knowledge.

In response, Respondent asserts the proposed witnesses not only have extensive experience with the subject products but are also both university level educators with advanced training in mathematics and physics. As such, both these witnesses have the ability to opine on the utility and educational value of the subject products.

Law and Discussion

The decision to admit or restrict the testimony of a proposed expert rests comfortably within the sound discretion of the trial judge. Gen. Elec. Comp. v. Joiner, 522 U.S. 136, 143 (1997). A witness may be a qualified expert if by virtue of knowledge, skill, experience, training or education and may testify if that testimony will help the trier of fact to understand a fact in issue. See Fed. R. Evid. 702. While the undersigned

certainly agrees the burden of establishing that the listed witnesses are indeed experts rests with the proponent, the matter of qualifications lies with the sound discretion of the gatekeeper. See Conroy v. Vilsack, 707 F.3d 1163 (10th Cir. 2013).


Additionally, it cannot be argued that when the gatekeeper and the trier of fact are the same person, the reasons for exclusion are virtually eliminated as the court is better equipped to determine the reliability of the evidence. United States v. 100.01 Acres in Buchanan County, VA., 2002 WL 9239925 (W.D. Va. 2002). Indeed, the gatekeeper doctrine was designed to protect juries and is largely irrelevant in the context of a bench trial. See Deal v. Hamilton Cnty. Bd. of Educ., 392 F.3d 840, 852 (6th Cir. 2004). The undersigned does not err in deciding to admit evidence subject to later disregarding it or excluding it if the requirements of FRE 702 are not met. See In re Salem, 465 F.3d 767, 777 (7th Cir. 2006).

While the undersigned certainly recognizes the value of a pre-hearing motion to exclude expert testimony, based on my later ability to disregard such testimony, I will exercise my discretion to not strike the proposed witnesses. Here, the proposed witnesses are university level professors in the fields of mathematics (Dr. Richter) and physics (Dr. Edwards). Their purported testimony will concern the utility and educational value of subject products in their specific fields. Many of Complaint Counsel's contentions speak more toward the weight of the testimony and opinions offered and not to admissibility. Moreover, to the extent Respondent attempts to exceed the scope of these witnesses' capabilities to offer expert testimony, Complaint Counsel can object to the witnesses' proffered testimony at that time.

Based on the law and discussion above, I will reserve for hearing the decision of whether or not the experts are qualified to testify as experts for a fact in issue and whether or not the testimony is reliable and relevant. Counsel's Motion is therefore **DENIED.**

SO ORDERED.

Done and dated this 26th day of November 2014, at Galveston, TX



DEAN C. METRY
Administrative Law Judge