UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

Opinion of Acting Chairman Ann Marie Buerkle
Concurring in Part and Dissenting in Part

Under the Consumer Product Safety Act (CPSA), the Commission cannot order a recall solely on the grounds that a product is dangerous. The Commission must also determine, after a hearing on the record, that the product (1) fails to comply with an applicable consumer product safety standard (or similar statutory requirement); or (2) contains a defect that gives rise to the hazard. 15 U.S.C. § 2064(a)(1), (2). In this case, the Commission originally authorized a complaint based on a defect theory (Count I). Later, the complaint was amended to add a count based on a failure to comply with the CPSC's toy standard (Count II).

In the Initial Decision, Administrative Law Judge (ALJ) Dean C. Metry distinguished three groups of the Subject Products: (1) those sold without warnings (before May 2010); (2) those sold with a suggestion that they were appropriate for age 12 and up; and (3) those sold later, with warnings and appropriate age recommendations. Judge Metry found that the Subject Products in the first two groups constitute a substantial product hazard and ordered public notice and a recall. Initial Decision at 16 n.6, 34, 36. As for the third group, he found that Complaint Counsel failed to prove the existence of a defect, either in the design of the product or in the warnings, or any noncompliance with the magnet provisions of the toy standard.

As Zen did not appeal the Initial Decision, Zen is not entitled to relief from the ALJ's recall order with respect to groups (1) and (2) of the Subject Products. I therefore concur in the majority's judgment with respect to those magnets.

With respect to the third group of magnets, I dissent. First, I do not agree with the majority that our defect regulation, 16 C.F.R. § 1115.4, recognizes a design defect that arises solely as a result of product misuse. Second, I agree with the ALJ that Complaint Counsel failed to prove that the warnings accompanying group 3 magnets were defective.

Given its resolution of Count I, the majority found it unnecessary to reach Count II "[a]s a matter of judicial economy." Majority Opinion at 42. In my view, however, the second count of the amended complaint was never properly authorized by the Commission. Therefore, there is no occasion to decide whether the Subject Products constitute a substantial product hazard under section 15(a)(1).

I. CPSC's Defect Regulation Does Not Tacitly Define "Use" to Include Misuse.

The majority excoriates the Administrative Law Judge for "the erroneous assertion that the CPSC cannot protect consumers from hazards resulting from reasonably foreseeable misuse." Majority Opinion at 10. The majority fumes that "[t]his fundamental misunderstanding by the ALJ permeates the entire Initial Decision and Order and is contrary to our regulatory guidance, legislative history, statutory authority, case law, and Commission precedent." *Id.*

As I see it, the majority ascribes to the ALJ a sweeping position he never took. Indeed, the ALJ ordered a partial recall in this case, confirming that the CPSC can protect consumers where appropriate. The majority's straw man only distracts from what is at issue in this case, namely the proper interpretation of our defect rule, 16 C.F.R. § 1115.4(d).

The Text of the Defect Rule. As the majority notes, a threshold legal issue is "whether a design defect that arises out of the 'operation or use' of a consumer product includes reasonably foreseeable misuse." Majority Opinion at 11. The majority points out that the text of the defect rule mentions consumer "misuse" in two places. *Id.* One is in an example of defective instructions or warnings. The other is in a list of factors to be considered in deciding whether a particular risk of injury is the type of risk that gives rise to a defect. In my view, these mentions of misuse elsewhere in the same regulation tend to undercut, rather than strengthen, the majority's position.

The defect rule does not mention or allude to "misuse" in the sentence that relates to "operation or use." That sentence was the basis for Complaint Counsel's second defect theory. *See* Majority Opinion at 5. The regulation states: "A design defect may also be present if the risk of injury occurs *as a result of the operation or use* of the product or the failure of the product to operate as intended." 16 C.F.R. § 1115.4 (emphasis added).

The majority evidently reads the word "use" in this sentence to encompass some types of misuse. In my view, that stretches the plain meaning too far. If the Commission intended to advise the public that a design defect may be present if a risk of injury occurs as a result of reasonably foreseeable misuse, as well as operation and use, it could have, and should have, said so expressly.[1]

The defect rule does refer to misuse elsewhere, but neither of those references interprets the sentence in question. The first mention is in Example (d), which illustrates that a defect can occur as a result of inadequate instructions or warnings. Here, the Commission refers explicitly to "reasonably foreseeable consumer use or misuse." This makes clear that the Commission expects product manufacturers to warn against reasonably foreseeable misuse. That is the essence of most warnings—they don't warn against proper use, of course, but against anticipated misuse.[2]

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[1] The express purpose of the defect rule is to assist subject firms (*i.e.*, manufacturers, retailers and distributors) in understanding the concept of "defect" as used in the Consumer Product Safety Act (CPSA). The rule declares that "a subject firm may be guided by the criteria the Commission and staff use in determining whether a defect exists." 16 C.F.R. § 1115.4.

[2] The power tool example hinges on the fact that injury could result from "[r]easonably foreseeable consumer use or misuse, based *in part* on the lack of adequate instructions and safety warning . . .." 16 C.F.R. § 1115.4 (emphasis

The second reference to misuse is in the last paragraph of the defect rule. This paragraph explains why some products may not be defective even if they present a risk of injury. Specifically, the rule confirms that there is no defect if "the risk of injury is outweighed by the usefulness of the product which is made possible by the same aspect which presents the risk of injury . . .." 16 C.F.R. § 1115.4. In this context, the rule lists a number of factors that the Commission and staff will consider, as appropriate, in determining whether the risk of injury associated with a product is the type of risk which will render the product defective. Among the factors that may be considered is "the role of consumer misuse of the product and the foreseeability of such misuse." *Id.*

This reference makes clear that consumer misuse may be a consideration in balancing the injury risk of a product against its utility. *See* p. 7, infra. But this reference does not address the "use or operation" sentence being interpreted by the majority in this case. As with Example (d), it only underscores the point that the Commission did not hesitate, in promulgating the defect rule, to address consumer misuse explicitly when it might potentially play a role in the analysis. The fact that the rule explicitly refers to "misuse" in these other locations only strengthens the view that it should not be transplanted into the sentence about design defects based on operation or use.[3]

Legislative History. In support of its reading of the defect rule, the majority next turns to the legislative history of the Consumer Product Safety Act. It points out that in the Senate version of the legislation, the term "use" was actually defined to include not only "normal use" but also "reasonably foreseeable misuse." Majority Opinion at 12-13 (citing 92 S. 3419-4A and S. Rep. No. 92-749, at 15). As the majority concedes, however, this version of the legislation was not enacted, and the CPSA as passed does not include any such definition of the word "use." Majority Opinion at 13. In my view, the fact that Congress considered and rejected such a definition tends to cut against the majority's position here, rather than support it.[4]

Other Statutes. Next the majority discusses other statutes administered by the Commission. The majority observes: "These statutes recognize explicitly the important and significant role that reasonably foreseeable consumer misuse of products presents in executing the Commission's mission to protect the public, particularly children, from unreasonable risks of injury, including risks arising from ingesting part or all of a consumer product." Majority Opinion at 13.

I don't dispute that the concept of reasonably foreseeable misuse plays an important role in several of the laws that CPSC administers. Perhaps most significantly, the Federal Hazardous Substances Act (FHSA) defines the term "hazardous substance" to include various types of

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added). Under these circumstances, the rule says, the product "contains a defect because of the inadequate warnings and instructions." Id. Significantly, the rule does not indicate that the product is also defective in design due to the fact that injury could result from reasonably foreseeable misuse of the product.

[3] The reference to misuse as a factor in weighing risk versus utility was added to the defect rule in July 2006. See 71 Fed. Reg. 42028 (July 25, 2006). If that amendment had been intended to alter the meaning of the "use or operation" sentence, one would expect the preamble accompanying the amendment to address the point. In reality, there is no hint of such intent in the preamble. Id.

[4] The majority's argument also proves too much: if the word "use" were understood to encompass "misuse," there would be no need for the latter word to appear in the defect rule where it does.

substances or mixtures if they "may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including *reasonably foreseeable ingestion by children*." 15 U.S.C. § 1261(f)(1)(A)(emphasis added). Significantly, the FHSA also has its own recall provision, which was not relied upon here. 15 U.S.C. § 1274.

By contrast, the "operation and use" sentence of the defect rule makes no reference whatsoever to consumer misuse, much less reasonably foreseeable ingestion by children. It makes no sense to argue that explicit references to consumer misuse in other statutes should transform the ordinary meaning of a sentence in the defect rule that does not mention consumer misuse, but only use.

Case law. The majority next points to case law as upholding the CPSC's authority to address reasonably foreseeable consumer misuse of consumer products that present a risk of injury under the CPSA. Majority Opinion at 13-14. Its first citation is to *Southland Mower Co. v. CPSC*, 619 F.2d 499, 513 (5th Cir. 1980). That case involved the Commission's mandatory standard for lawn mowers. One petitioner in that case argued that the Commission lacked authority to adopt a particular requirement of the standard because the risk of injury it was addressing resulted from consumer misuse (removing safety shields). 619 F.2d at 513.

In my view, *Southland Mower* has no application here. In the first place, as noted earlier, the ALJ never claimed that the Consumer Product Safety Act precludes the Commission from addressing injuries that arise in part from consumer misuse. As *Southland Mower* shows, for example, the Commission has clear authority to address such problems through the adoption of consumer product safety standards. Indeed, after the complaint in this case was filed, the Commission promulgated a safety standard to address the risk of ingestion of small, powerful magnets. Final Rule: Safety Standard for Magnet Sets, 79 Fed. Reg. 59962 (Oct. 3, 2014). That standard was vacated by the U.S. Court of Appeals for the Tenth Circuit after the ALJ had issued the Initial Decision in this matter. *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141 (10th Cir. 2016); *see also* Safety Standard for Magnet Sets; Removal of Final Rule Vacated by Court, 82 Fed. Reg. 12716 (March 7, 2017). But the Tenth Circuit never suggested that the Commission lacks authority to regulate such a risk, only that its factual findings were incomplete and inadequately explained. 841 F.3d at 1144.

The majority also cites two administrative (CPSC) decisions in support of its position. These are *In re Dye*, 1989 WL 435534 [hereinafter cited as "Worm Probes"], and *In the Matter of Francis Alonso, Jr., d/b/a/ Mylar Star Kites*, Initial Decision and Order (June 18, 1976), aff'd in part and set aside in part, Final Decision and Order (Sept. 16, 1977) [hereinafter cited as "Mylar Kites"].

The Administrative Law Judge carefully reviewed each of these decisions and concluded that neither supports Complaint Counsel's position. Initial Decision at 9-11. I agree. Both products involved electrocution hazards that could occur even when the product was being used as expected. The product at issue in *Worm Probes* consisted of two to twelve uninsulated rods, designed to conduct electricity into the ground and so drive earthworms to the surface. The lack of insulation exposed consumers to a risk of death by electrocution, and contact with the energized rods or earth could occur by accident or negligence. Likewise, the product in *Mylar Kites* created a risk of death by electrocution as a result of ordinary use—flying the kite.

As Judge Metry recognized, the possibility of electrocution from an accident, such as slipping and falling on or near the charged electric probes, or getting a kite tangled in an overhead electric wire, does not transform the expected use of the product into a misuse. *Id.* at 9. These are problems that may be difficult or impossible to avoid despite proper use (or warnings). Here, by contrast, proper use of the Subject Products "creates no exposure to danger whatsoever." *Id.* at 10.

In sum, I do not maintain that the Commission is powerless to deal with "reasonably foreseeable misuse" of a consumer product. Rather, I believe that in a rule intended to guide the public, the Commission should say what it means. By the same token, I see no basis for interpreting the words "operation and use" as applying equally to misuse, foreseeable or otherwise. The fact that other portions of the same rule expressly address product misuse only reinforces my conclusion that the "operation and use" sentence was not intended to do so tacitly.

II. Complaint Counsel Failed to Prove that Respondent's Warnings Are Defective.

While the Subject Products pose no risk of injury as a result of operation and use, they pose a serious risk of injury if more than one is swallowed. This is a hazard that consumers should certainly be warned about.

The ALJ ordered a recall of the earliest-sold Subject Products, which were distributed without warnings. The Subject Products sold later, however, were accompanied by warnings. As to this latter group, the ALJ found that Complaint Counsel failed to prove that Zen's warnings were defective. With respect to the warning content, Judge Metry found that the ingestion risk was "roundly, repeatedly and expressly addressed by the Respondent's warnings." Initial Decision at 15. He also rejected Complaint Counsel's argument that the warnings were defective because they did not accompany each individual magnet. *Id.* Finally, the ALJ found that Complaint Counsel "did not present any credible evidence linking any injury to Respondent's product." *Id.* at 16. In the ALJ's view, it was "more than a reasonable inference" that the reason there is so little evidence of injury from the use of Respondent's product (as opposed to other brands of small, powerful magnets) is that "Respondent's warnings sufficiently deter ingestion." *Id.*

The majority claims that the ALJ "completely ignored evidence demonstrating the fact that the risk of injury occurs when magnets are separated from their set, so that even the best warning is unlikely to be seen by the user." Majority Opinion at 31. The majority goes on to say that "*regardless of the warning content*, Respondent's warnings are defective because warnings that are never seen, cannot be read, or are not understood or heeded, cannot mitigate the risk of injury associated with [the magnets]." *Id.* (emphasis added).

I cannot agree that Judge Metry ignored the evidence on this point. He fully understood that the magnets could get separated, but he also recognized that it would be impractical, if not impossible, to inscribe a warning on each individual magnet, given their size (approximately 5 millimeters in diameter). Initial Decision at 15. He also noted that even if someone could manage to make warnings that would travel with each magnet, "no consumer could possibly be informed by such a warning, because it would be simply too small to see . . .." *Id.*

I also take issue with the majority's conclusion that warnings are automatically defective if they don't accompany each individual magnet. With respect to the third group of Subject Products, at least, the original purchaser would have seen appropriate warnings before any magnets could have been separated from the pack. This purchaser was intended and expected to be an adult or older teenager who can read the warnings and is capable of understanding the ingestion risk.

CPSC has many regulations that require warning labels, on the assumption that they will be read and heeded by the purchaser. For example, our regulations generally ban any toy intended for children under 3 years of age if it presents a choking, aspiration or ingestion hazard because of "small parts" as defined. 16 C.F.R. § 1500.18(a)(9); *see also* 16 C.F.R. § 1501.2. If a product containing "small parts" is intended for children ages 3 to 6, on the other hand, it must bear a warning label on the packaging stating that it contains small parts and is not intended for children under 3. 16 C.F.R. § 1500.19(b). Similar warnings are required for small balls, balloons and marbles.

Small parts pose every bit as serious a risk of injury as small magnets. Every year, a substantial number of deaths occur when young children swallow or aspirate small parts. Yet the Commission does not ban all toys or other articles with small parts. It has banned such items only if they are intended for children under 3, whereas it requires warnings if they are intended for children from 3 to 6. No warning at all is required if the product is intended for teenagers or adults.

Nor do the small parts regulations require any warning on individual small items after they are unpackaged. For example, the packaging of a game that is intended for children ages 3 to 8 must display a specific warning label if it contains marbles. 16 C.F.R. § 1500.19(b)(4)(ii). There is no requirement, however, to label individual marbles inside the game, even though it is reasonably foreseeable that a marble might eventually be separated from the game.

These Commission rules count on original purchasers, primarily adults, to pay attention to the warnings and to help protect children from being exposed to the hazard. Unfortunately, they don't always do so, but that doesn't mean that the warnings are inadequate.

In my view, similar considerations should guide our judgment here. We should expect that the Subject Products are accompanied by clear warnings to the purchaser as to the appropriate ages and as to the ingestion risk. We should expect that the purchasers will heed the warnings, just as we expect them to do in the case of small parts.[5]

I also agree with the ALJ that the dearth of evidence linking injuries to the Subject Products suggests that Respondent's warnings were working. The ALJ highlighted some of the problems with other brands' warnings and contrasted them with Respondents'. On this basis, the ALJ found it unsurprising that few of the injury incidents could be traced to Respondent.

[5] I note that Zen Magnets recently petitioned the Commission to establish a mandatory safety standard for high-powered magnet sets that includes both warning and performance requirements. The Commission is seeking public comments on the petition. Petition Requesting Rulemaking on Magnet Sets, 82 Fed. Reg. 46470 (Oct. 6, 2017).

The majority protests that there were "two incidents where we know specifically that the Subject Products were associated with serious injuries." Majority Opinion at 23. In one of these, a mother testified (by stipulation) that her 14-year old daughter obtained six Zen magnets from a friend and accidentally swallowed two. She needed invasive surgery as a result. The ALJ recognized this injury but discounted the traceability of these magnets to Respondent as "little more than hearsay." Initial Decision at 16 n.5.[6]

The other incident involved a 15-month old girl who evidently swallowed a button battery as well as some Zen magnets. As Complaint Counsel recognized, however, the magnets leading to this injury were purchased during the time that Zen distributed its products without any warnings. Appeal Brief at 38. The ALJ determined that the Subject Products in this category should be recalled, and I concur. Nevertheless, this incident sheds no light on the adequacy of the warnings that accompanied the Subject Products in later years.[7]

In sum, I agree with the ALJ that Complaint Counsel failed to prove that Respondent's warnings accompanying the later-sold Subject Products were inadequate.[8]

III. The Utility of Zen Magnets Weighs Against a Defect Finding.

For one of its three defect theories, Complaint Counsel relies on the last paragraph of the Commission's defect rule, which recognizes that some products may not be defective even if they present a risk of injury. The classic example is a sharp knife. Although the knife presents a risk of injury, it is not defective under our law because the same feature that makes it potentially dangerous is the one that makes it useful.

The majority finds that the factors listed in the last paragraph of the defect rule "do not present a separate basis for a defect finding." Majority Opinion at 8, n.6. I agree. The last paragraph of the defect rule was never intended to supply an independent basis for finding a defect. Instead, it serves as a basis for absolving certain products that might otherwise appear to be defective. Apart from that situation, there is no occasion to consider these other factors.

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[6] Complaint Counsel and the majority both overreact to this comment. Judge Metry did not say that the statement was inadmissible as hearsay. Complaint Counsel argues that the statement was, by virtue of the stipulation, "entitled to the same weight as if she presented live testimony," Appeal Brief at 36. Nevertheless, the trier of fact is certainly not obliged to give the same weight to all evidence introduced at trial. Judge Metry obviously didn't find the statement very credible as proof that the injury was caused by Subject Products.

[7] The majority contends that it is often not possible to know which brand of magnets was involved in a particular injury incident because the Subject Products are "functionally identical" to other small, rare earth magnet brands. Majority Opinion at 23. I question this conclusion for two reasons. First, it is my understanding that Neoballs (one of the Subject Products) come in different colors, while Zen magnets (another of the Subject Products) and Buckyballs are all silver in color. This should be a readily observable and memorable difference. Second, it is my understanding that the Zen magnets are much more uniform in size than Neoballs and other popular brands and that this was a selling point. Cf. Majority Opinion at 1 (acknowledging less variation in size for Zen magnets than Neoballs). While these size differences may not be apparent to the naked eye, they might well allow experts to distinguish these brands in many instances.

[8] The majority chides Respondent for the use of "unconventional, tongue-in-cheek, warnings" that were not likely to convey the seriousness of the injuries associated with small rare earth magnets. Majority Opinion at 33. I note, however, that CPSC's own Office of Communications often employs similar unconventional approaches, particularly when it is trying to reach a younger demographic.

In Parts I and II of this opinion, I have concluded that the Subject Products falling into the third group—those accompanied by appropriate age recommendations and warnings against reasonably foreseeable misuse—are not defective. Accordingly, under my analysis, there is no reason to consider whether the factors listed in the last paragraph of the defect rule would weigh against a defect finding. Nevertheless, I touch on a few points of disagreement with the majority.

First, the majority asserts that "[q]uantitative risk analysis—meaning the number of injuries compared to the number of products sold—is not required to prove a defect in a section 15 case." Majority Opinion at 28. I agree that such an analysis is not strictly required, although I believe it would be informative in many cases, including this one. A better assessment of the true injury potential would permit a less subjective balancing of risk and utility than the majority conducts here.

Second, I believe the majority gives undue weight to the factor of "necessity." In this regard, the majority discusses the testimony of respondent's witness, Dr. Edwards, commenting that "for more than 20 years, Dr. Edwards managed to teach physics, and his students managed to learn various concepts, without the use of [small rare earth magnets]." Majority Opinion at 36. By that standard, there are many features of the modern classroom that would not qualify as a "necessity." Twenty years ago, the internet was practically still in its infancy. Physics used to be taught without calculators, too, but few would argue that we should go back to slide rules or counting on our fingers.[9]

Third, I agree with the ALJ that the Subject Products have high utility. The majority admits that there is record evidence showing that academic users who have experience with small rare earth magnets find them useful as teaching devices, but it discounts that finding on the grounds that "the record does not demonstrate widespread use of the Subject Products by academic users or a trend of increased use in academic settings." Majority Opinion at 38. Given that the Commission's 2014 regulation had outlawed magnet sets for the last several years, it is hardly surprising that there is not yet widespread use among academics or any strong trend towards increased usage.

Finally, I note that the majority recognizes two different user groups for purposes of its risk-utility analysis: recreational users and academic users. *Id.* While it acknowledges that the utility may be greater for the academic users, it seems to consider the injury risk as the same for both groups. I doubt that. I do not think there is the same risk of exposure from magnets that are used in a physics lab as there might be in a home with young children. Perhaps a more open-minded analysis might have led the majority to consider the possibility of a more limited recall.

IV. Count Two Was Never Authorized by the Commission.

Having decided that all of the Subject Products present a substantial product hazard under section 15(a)(2), *i.e.*, Count I, the majority found it unnecessary to reach the issue as to whether the same products also present a substantial product hazard under section 15(a)(1), *i.e.*, Count II.

[9] This tendency to undervalue the utility of Respondent's magnets was one of the key factors that caused the Tenth Circuit to vacate the magnet rule.

Majority Opinion at 42. As explained below, Count II was never authorized by the Commission. Therefore, I find it not only unnecessary, but improper, to decide Count II.

Under CPSC rules, "any adjudicative proceedings . . . shall be commenced by the issuance of a complaint *authorized by the Commission* . . .." 16 C.F.R. § 1025.11(a) (emphasis added). The rules prescribe the form and content of such a complaint. Of primary significance here, it must include a "clear and concise *statement of the charges*, sufficient to inform each respondent with reasonable definiteness of the factual basis or bases of the allegations of violation or hazard." *Id*. § 1025.11(b)(3)(emphasis added).

The rules permit the Presiding Officer (*i.e.*, the ALJ) in an adjudicative proceeding to approve an amended complaint, but only if the amendment "do[es] not unduly broaden the issues in the proceedings or cause undue delay." *Id.* § 1025.13. Plainly, this provision was never intended to allow an expansion of the case beyond what the Commission has authorized. Adding a new count, based on a different theory, would fall outside the scope of the original complaint approved by the Commission. For the staff to seek such an amendment without Commission approval would usurp the prerogative of the Commission under § 1025.11(a).

This understanding of the rule was emphasized in the preamble that accompanied it. Commenters on the proposed rule had expressed concern that allowing the Presiding Officer to approve certain amendments could "alter the charges originally authorized by the Commission, thereby usurping the Commission's function . . .." Rules of Practice for Adjudicative Proceedings, 45 Fed. Reg. 29206, 29207 (col. 3) (May 1, 1980). In response, the Commission observed: "[S]ince § 1025.11(a) provides that only a complaint authorized by the Commission may be issued, amendments to the complaint *must come within the scope* of the Commission's authorization." *Id.* at 29208 (col. 1).

In this case, the original complaint, duly authorized by the Commission, was based exclusively on 15 U.S.C. § 2064(a)(2). There was no count alleging noncompliance with the toy standard. On or about September 20, 2012, Complaint Counsel filed a motion seeking leave to file an amended complaint. As explained in the motion, the proposed amendment revised the original complaint by "adding a count alleging that the Subject Product presents a substantial product hazard under Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1), because it fails to comply with an applicable consumer product safety rule . . .." Motion for Leave to File an Amended Complaint, at 1. A week later, Complaint Counsel filed a supplemental motion attaching the same amended complaint plus a separate list and summary of documentary evidence.

Although it added a new count with a substantially different theory of the case, this amended complaint was never authorized by the Commission. On the signature page, however, the amended complaint states "ISSUED BY ORDER OF THE COMMISSION." This makes it look like the amendment was authorized by the Commission even though it was not.

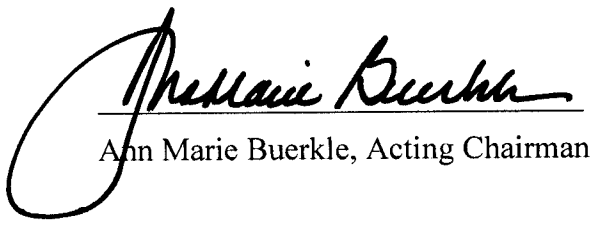
On October 10, 2012, Respondent filed a "Notice of No Objection to Complaint Counsel's Motion for Leave to File Amended Complaint." The notice states that Counsel for Respondent had read the motion and Amended Complaint and "cannot in good faith interpose any legal objection to Complaint Counsel's Motion." Respondent therefore left it up to the

ALJ's discretion whether to grant or deny the motion. Soon thereafter, on October 15, 2012, the ALJ granted the unopposed motion.

If Respondent had understood that the amended complaint was not authorized by the Commission, it would have been entirely appropriate to interpose a legal objection to its filing. Indeed, even though Respondent did not object to its filing, and even though the ALJ allowed the amendment, I believe that the noncompliance count is a nullity, having never been duly authorized by the Commission. Accordingly, I do not reach Count II on appeal, albeit for different reasons than the majority.

CONCLUSION

For the foregoing reasons, I would limit the recall in this case to the first and second groups of Subject Products, as did the ALJ. As for the majority's decision expanding the recall to the later-sold products and its injunction against further sales of the Subject Products, I dissent.



Ann Marie Buerkle, Acting Chairman