UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

OPINION AND ORDER APPROVING
PUBLIC NOTIFICATION AND ACTION PLAN

On October 26, 2017, the U.S. Consumer Product Safety Commission ("Commission") issued its Final Decision and Order in this matter. The Commission's Final Decision and Order set aside, in full, the Initial Decision and Order of Administrative Law Judge Dean C. Metry ("ALJ") because the Commission concluded the decision was based on numerous errors in fact and law. The Commission found that Complaint Counsel proved by a preponderance of the evidence that Zen Magnets and Neoballs (the "Subject Products"), small rare-earth magnets imported and distributed by Respondent, present a substantial product hazard and are subject to public notification and recall measures under Sections 15(c) and (d) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. §§ 2064(c) and (d).

In its Final Decision and Order, the Commission ordered Complaint Counsel to submit draft Public Notifications, in accordance with Sections 15(c) and (i)(2) of the CPSA, 15 U.S.C. §§ 2064(c) and (i)(2), and 16 C.F.R. part 1115, subpart C, to Respondent within ten (10) days of service of the Final Decision and Order, and for Respondent to notify Complaint Counsel of any objections to the draft Public Notifications within twenty (20) days of service of the Final Decision and Order. Final Decision and Order at 51, 54. The Commission also ordered Respondent to submit a draft Action Plan that provides for refund of the purchase price of the Subject Products, less a "reasonable allowance for use," in accordance with Sections 15(d) and (e) of the CPSA, 15 U.S.C. §§ 2064(d) and (e), to Complaint Counsel within ten (10) days of service of the Final Decision and Order, and for Complaint Counsel to notify Respondent of any objections to the draft Action Plan within (20) days of service of the Final Decision and Order. *Id.* at 55. If the parties had no objections to the draft Public Notifications or draft Action Plan, the Commission ordered the parties to submit them within thirty (30) days of service of the Final Decision and Order, for review and approval by the Commission pursuant to 16 C.F.R. § 1115.29(c) and Section 15(d)(2) of the CPSA, respectively. *Id.* at 54-55. If Complaint Counsel and Respondent could not agree on the draft Public Notifications or draft Action Plan, the Commission ordered the parties to submit, within thirty (30) days of service of the Final Decision and Order, a joint statement of the disputed factual and legal issues to be resolved by the Commission. *Id.* at 55.

On November 27, 2017, the parties submitted a Joint Statement to the Commission Regarding Factual and Legal Issues in Dispute Regarding the Draft Action Plan and Draft Public Notification ("Joint Statement"). After careful review and consideration of the Joint Statement, subject to the modifications ordered herein, the Commission hereby approves, by this order, the

Public Notifications and the Action Plan for the Subject Products. *See* 15 U.S.C. § 2064(d)(3)(A); 16 C.F.R. § 1115.29(a), (c).[1]

I. PUBLIC NOTIFICATION

On November 6, 2017, Complaint Counsel submitted draft Public Notifications to Respondent. Pursuant to the Commission's Final Decision and Order, Complaint Counsel's draft Public Notifications provided for the following:

- A joint press release from the Commission and Respondent;
- A video news release;
- A recall notice to be posted prominently and for an extended period of time on all of Respondent's Internet websites;
- A recall notice or similar communication to appear prominently and for an extended period of time on every social media platform used by Respondent, including, but not limited to, Google+, YouTube, Twitter, Reddit, Flickr, Facebook, and Internet blogs;
- Direct notice via first-class mail and electronic mail to each third party Internet website on which Respondent placed the Subject Products for sale;
- Direct notice via first-class mail and electronic mail to each manufacturer, distributor, and retailer, including, but not limited to, marijuana dispensaries and head shops, of the Subject Products;
- Recall poster to be provided with each direct notice sent to retailers with instructions regarding posting;
- Direct notice via first-class mail and electronic mail to each third party Internet platform on which the Subject Products may be sold by persons other than Respondent, including, but not limited to, eBay; and
- Direct notice via first-class mail and electronic mail to each person whom Respondent knows each product was delivered or sold.

On November 16, 2017, Respondent submitted its written responses and objections to the draft Public Notifications. The parties conferred on November 21, 2017, to resolve Respondent's objections and were able to resolve some, but not all, of the issues. On November 27, 2017, the parties submitted the Joint Statement.

After reviewing the parties' submissions, for the reasons set forth below, the Commission approves the following Public Notifications.

A. Joint Press Release

As part of their Joint Statement, the parties have submitted to the Commission a proposed joint press release, attached as Exhibit E1. Respondent proposes the following changes to that proposed joint press release: (1) removing the name(s) of the foreign manufacturer(s);

[1] The Commission voted (3-1) to issue the Opinion and Order Approving Public Notification and Action Plan with attached changes, which are reflected herein. Commissioners Adler, Kaye, and Robinson voted to issue the Opinion and Order Approving Public Notification and Action Plan with attached changes, which are reflected herein. Acting Chairman Buerkle voted to take other action – to file the attached statement.

(2) inserting the word "perhaps" to qualify the word "death" when describing the type of hazard the Subject Products pose; (3) inserting language suggesting that "a direct causal link is not certain" when describing an incident involving the death of a 19-month-old girl who died after ingesting high powered magnets; (4) and limiting the sales dates to "between 2009 and 2011," instead of all Subject Products sold online at Neoballs.com and ZenMagnets.com and specified retailers "beginning in January 2009." Joint Statement at 3-4. Complaint Counsel disputes all four of these changes. *Id.* The Commission addresses each disputed issue below.

1. Manufacturer Name

Respondent asserts that the names of its foreign manufacturers are confidential business information and are a trade secret. *Id.* at 3. Complaint Counsel states that 16 C.F.R. § 1115.27(h) requires that foreign manufacturers be identified in a press release regarding the recall. *Id*.

The preamble to the Commission's final rule on Guidelines and Requirements for Mandatory Recall Notices, 75 *Fed. Reg*. 3355, 3365 (Jan. 21, 2010), states:

> The identity of a foreign manufacturer is not a trade secret or commercially sensitive information in every case. For example, many voluntary recall notices issued in the past identify a foreign manufacturer. In the context of a mandatory recall situation, whether identification of a foreign manufacturer is indeed trade secret, confidential information, and/or whether an exception to section 6 of the CPSA applies, will necessarily be litigated in the judicial or administrative proceeding. These issues require a fact-dependent, individualized analysis in every case; it is not something that could ever be decided broadly and apply to all manufacturers. To the extent that section 6 of the CPSA is applicable, the Commission acknowledges that it, and a firm, must comply with the law and any exceptions thereto.

Although the names of foreign manufacturers represent important information for the Commission's enforcement efforts, and publication of such information may often be helpful for public notice and recall efforts, in this case, the Commission declines to determine whether the identities of Respondent's foreign manufacturers constitute confidential business information or a trade secret.

The record demonstrates that the Subject Products are too small to be labeled with any information. Final Decision and Order at 31. Moreover, a review of the packaging for the Subject Products demonstrates that the packaging does not contain any discernable name of the foreign manufacturer. *See, e.g.*, Exs. R-1D, CC-11A, and CC-5(s) (foreign manufacturer not provided); Exs. R-1 and R-1A (containing two symbols next to the words "Made in"). Based on an examination of the Subject Products, the Commission finds that it is unnecessary in this case for the names of foreign manufacturers to be provided to the public, because such information is unlikely to increase recall effectiveness in these particular circumstances. 15 U.S.C. § 2064(i)(2); 16 C.F.R. § 1115.29(b). However, as set forth in section F, *infra*, the Commission requires, under Section 15(c)(1)(e) of the CPSA, that Respondent notify its foreign manufacturers of this recall. Finally, as set forth in Section 16(c) of the CPSA, 15 U.S.C. § 2065(c), upon request, Respondent shall provide the names of all foreign manufacturers of the Subject Products to Complaint Counsel for enforcement and monitoring purposes.

2. Hazard Description

The Commission agrees with Complaint Counsel that the word "perhaps" should not preface "death" in the joint press release's description of the hazard. The Commission's regulation requires recall notices to state clearly and concisely the actual or potential hazards that result from the product condition or circumstances giving rise to the recall. 16 C.F.R. § 1115.27(f). Recall notices must also allow consumers to "readily identify and understand the risks and potential injuries or deaths." *Id*. As set forth at length in the Commission's Final Decision and Order, the Commission has found that the nature of the risk presented by the Subject Products is serious and can be fatal. *See* Final Decision and Order at 22-28. The use of the word "perhaps" in describing the hazard would suggest otherwise, and downplay this risk of death in a misleading manner. The phrase "perhaps death" would not provide consumers with an accurate picture of the hazard that results from swallowing the Subject Products. Accordingly, the Commission finds that the press release should not include the term "perhaps death" in the hazard description, but rather, should simply state, as Complaint Counsel proposes, that swallowing two or more high powered magnets can "result in perforations, twisting and/or blockage of the intestines, infection, blood poisoning, and death."

3. Incidents/Injuries Description

The Commission also agrees with Complaint Counsel that the phrase "though a direct causal link is not certain," should not be added to the joint press release's reference to a 19-month-old girl who died after ingesting high powered magnets. The Commission concluded in its Final Decision and Order that Complaint Counsel presented evidence that a 19-month old girl died as a result of ischemic bowel due to small rare-earth magnet ingestion. Final Decision and Order at 24. Accordingly, the Commission finds that it would be inaccurate, based on the record, for the joint press release to state that a direct causal link between the death and ingesting high-powered magnets was "not certain," and the press release should state, as Complaint Counsel proposes, that "A 19-month-girl died after ingesting similar high-powered magnets."[2]

4. Dates of Sale

The Commission agrees with Complaint Counsel that the proposed joint press release should state that the Subject Products were sold "beginning in January 2009." The Commission's Final Decision and Order was not limited to the Subject Products sold between 2009 and 2011; the Commission found that the evidence established that Respondent began distributing two brands of small rare-earth magnet sets, Zen Magnets and Neoballs, in 2009 and 2011, respectively. *See* Final

[2] The Commission notes that the CPSA also generally requires recall notices to include "[t]he ages of any individuals injured or killed, and the dates on which the Commission received information about such injuries or deaths," unless the Commission determines that it is unnecessary or inappropriate under the circumstances. 15 U.S.C. § 2064(i)(2)(G); *see also* 16 C.F.R. § 1115.27(m). The proposed joint press release submitted to the Commission for approval, arguably, does not include this level of specificity in its description of incidents and injuries associated with the Subject Products. *See* Joint Statement, Ex. E1. Nevertheless, the Commission determines that providing any additional incident data in the recall notices is unnecessary under the circumstances. 16 C.F.R. § 1115.29(b). The approved recall notices provide consumers with a clear overview of the types of incidents (including death) and age ranges of individuals injured or killed (referencing children and teenagers) associated with the Subject Products and other high-powered magnets. In this case, the Commission believes that providing additional incident data, such as the specific dates on which the Commission received each report of injury or death, would not significantly contribute to consumers' understanding of the hazard and remedy, and may, in fact, dilute the safety message provided to consumers.

Decision and Order at 1. Therefore, Respondent's proposal to limit the sales dates to "between 2009 and 2011" would be inconsistent with the Commission's Final Decision and Order, and would exclude Subject Products covered by the Final Decision and Order sold after 2011.[3]

B. Video News Release

Complaint Counsel has developed and proposes a video news release, attached to the parties' Joint Statement as Exhibit E2. Respondent objects to this video news release, contending that it "fails to convey the ingestion risk of magnets in a fashion that is easily understandable to the general public, and fails to . . . inform the public not only of the recall, but to educate the public in an effort to prevent any injuries from occurring in the first instance." Joint Statement, Ex. D. Respondent instead proposes working with Commission staff to develop a "mutually acceptable, informative video," similar to a YouTube video produced by Respondent, attached as Exhibit D to the Joint Statement. *Id.* Complaint Counsel objects to Respondent's proposal. Joint Statement at 5.

Among other things, recall notices must readily and accurately identify the recalled product. *See* 16 C.F.R. § 1115.27(c). Recall notices also must provide a clear and concise summary description of all incidents associated with the product conditions or circumstances giving rise to the recall, as well as a clear and concise statement of the remedy. *See* 16 C.F.R. § 1115.27(m)-(n). Consistent with the Commission's regulatory guidelines, Complaint Counsel's proposed video news release provides a clear, easy-to-understand overview of the hazard, recall and remedy that is consistent with the language the parties have agreed upon in the joint press release, as well as additional footage that could aid consumers in identifying the recalled product. In contrast, the sample YouTube video offered by Respondent does not provide any information to consumers regarding the recall or remedy ordered by the Commission. Respondent's YouTube video also does not provide any guidance that would "educate the public in an effort to prevent any injuries from occurring." Instead, Respondent's video, titled, "The (CPSC) Epidemiology Elephant in the Room," appears to downplay the severity of risk associated with high-powered magnet sets by questioning the Commission's incident data underlying its 2014 rulemaking package for high-powered magnet sets. The Commission fails to see how this video, or a similar video, would provide any meaningful guidance to consumers regarding the risks associated with the Subject Products that is consistent with the Commission's findings in the Final Decision and Order, let alone a clear and concise statement of the hazard, recall, and remedy. Accordingly, the Commission rejects Respondent's proposal to develop a "mutually acceptable, informative video" similar to its YouTube video. The Commission approves Complaint Counsel's proposed video news release, subject to the same decisions regarding disputed issues that the Commission approved for the joint press release in Sections I.A.1-4 *supra*.

[3] The CPSA requires recall notices to include the dates between which the product was manufactured and sold, unless the Commission determines that its inclusion is unnecessary or inappropriate under the circumstances. 15 U.S.C. § 2064(i)(2)(F); *see also* 16 C.F.R. § 1115.27(k) ("A recall notice must state the month and year in which the manufacture of the product began and ended, and the month and year in which the retail sales of the product began and ended. These dates must be included for each make and model of the product."). Again, in this particular case, the parties do not request this level of specificity. *See* Joint Statement, Ex. E1. In addition, this recall does not involve multiple models or a complex range of manufacturing dates among a class of products. Accordingly, the Commission determines that the proposed recall notices provide sufficient information for consumers to determine whether they own or possess the Subject Products and that providing any additional information regarding the dates of manufacture and sale is unnecessary under the circumstances. 16 C.F.R. § 1115.29(b).

C. Recall Notice on Respondent's Internet Websites

Complaint Counsel has developed and proposes a draft recall notice to be posted on the home page of all Respondent's websites, attached to the parties' Joint Statement as Exhibit E3. Respondent proposes to add the terms "genuine" and "sold by Zen Magnets LLC," when referencing the Subject Products. Joint Statement at 5. Complaint Counsel objects to the addition of these terms, contending that their use suggests that consumers may be denied a remedy if they purchased the Subject Products through a retailer rather than directly from Respondent. *Id.* Complaint Counsel also contends that the use of these terms suggests to consumers that they will bear a high burden of establishing proof of purchase, thereby discouraging participation in the recall. *Id.*

The Commission approves of Respondent adding the term "genuine" to this recall notice to clarify that the Subject Products are defined as Zen Magnets and Neoballs imported and distributed by Respondent. The Commission does not believe, under these circumstances, that use of this term alone will suggest to consumers that they cannot avail themselves of a refund if they purchased the Subject Products from a retailer rather than directly from Respondent. However, the Commission agrees with Complaint Counsel that the term "sold by Zen Magnets LLC" would improperly suggest that the recall excludes Subject Products purchased from a retailer or otherwise obtained by or gifted to a consumer. Thus, the Commission does not approve including this phrase in the recall notice on Respondent's Internet website.

D. Recall Notice on Social Media

Complaint Counsel has developed and proposes draft social media recall notices for posting on Respondent and the Commission's Facebook, Twitter, and other social media pages, attached to the parties' Joint Statement as Exhibit E4. The parties agree to these recall notices. Joint Statement at 6. Accordingly, the Commission approves the social media recall notices agreed to by the parties.

E. Direct Notice to Third Party Internet Retailers

Complaint Counsel has developed and proposes a draft recall notice to be sent to all third party Internet retailers that have been identified as having sold the Subject Products, attached to the parties' Joint Statement as Exhibit E5. Respondent proposes two changes to this draft recall notice. First, consistent with its proposal for the draft press release, Respondent proposes limiting the sales dates to "between 2009 and 2011," instead of noting that the third party retailers may have sold the Subject Products "sometime in the past few years." Joint Statement at 6. Second, Respondent proposes changing the sentence that states: "The magnets create a risk of injury or death to younger children and teens when swallowed, either accidentally or intentionally," to "The magnets present a substantial risk of injury to children if swallowed, either accidentally or intentionally." *Id.* Complaint Counsel objects to both of these proposed changes. *Id.*

For the same reasons discussed in Section I.A.4 *supra*, the Commission agrees with Complaint Counsel that the sales dates referenced in the recall notice should not be limited to "between 2009 and 2011." As noted above, the Commission's Final Decision and Order was not limited to Subject Products sold between 2009 and 2011. Respondent's proposal to limit the sales

dates to "between 2009 and 2011" would be inaccurate and would exclude Subject Products covered by the Commission's Final Decision and Order sold after 2011.

The Commission also agrees with Complaint Counsel that the recall notice's description of the risk of injury should not be limited to just "children" and should state that there is a risk of death, as well as injury, from the Subject Products. As addressed at length in the Commission's Final Decision and Order, as well as the draft press release agreed to by the parties, the risk of injury or death from Subject Products is not limited to children, but includes "teens and tweens" ages 9-16, as well. *See, e.g.*, Final Decision and Order at 3; Joint Statement, Ex. E1 (stating that the Commission is aware of "teenagers" ingesting high-powered magnets and citing the death of a 19-month-old girl after ingesting similar high-powered magnets). The Commission agrees with Respondent, however, that these risks are substantial. *See* Final Decision and Order at 38-42. Accordingly, the Commission approves the following language to be used to describe the reason for the recall: "The magnets present a substantial risk of injury or death to younger children and teens when swallowed, either accidentally or intentionally."

F. Direct Notice to Manufacturers, Distributors and Retailers

Complaint Counsel proposes a draft recall notice to be sent to all manufacturers, distributors and retailers that have been identified as having sold Subject Products, attached to the parties' Joint Statement as Exhibit E6.[4] In addition to the same objections that the Commission has already addressed and resolved in Section I.E *supra*, Respondent objects to providing the notice to foreign manufacturers. Joint Statement at 6. Respondent contends that this notice would be unnecessary because "Zen is the manufacturer" and "the factory that provides component parts is not the manufacturer." *Id.*, Ex. D. Complaint Counsel disagrees with this characterization. *Id*. at 6-7.

Under the CPSA, a "manufacturer" is defined as "any person who manufactures or imports a consumer product." 15 U.S.C. § 2052(a)(11). In the parties' Joint Statement, Respondent acknowledges that "there were several overseas manufacturers who manufactured the magnets and packaging." *Id*. at 3. The fact that Respondent was the entity that imported and packaged the Subject Products for sale does not preclude the manufacturing firms that actually produced the underlying product, *i.e.*, the small rare-earth magnets, from falling under the CPSA's definition of "manufacturer." Accordingly, the Commission finds that Respondent must provide the recall notice to all of the foreign manufacturers that produced small rare-earth magnets for Respondent, either as sets, or as individual magnets.

G. Recall Poster

Complaint Counsel proposes a draft recall poster, attached to the parties' Joint Statement as Exhibit E7. Respondent objects to the following sentence in the recall poster: "In many cases, children required surgery to remove ingested magnets, including two children who ingested Zen Magnets and required emergency surgery to remove parts of their intestines and bowels." *Id.* at 7,

[4]Although characterized as the proposed "Manufacturer and Retailer Notice," the Commission notes that the Joint Statement only provides a copy of the manufacturer notice. *See* Joint Statement, Ex. E6. As a point of clarity, the Commission approves the content of the manufacturer notice attached to the Joint Statement as Exhibit E6, with the changes addressed in this section, for use as the distributor and retailer notices as well, with edits to reflect the appropriate party.

Ex. E7. Respondent proposes to replace the terms "surgery" with "medical treatment" because the record reflects that some cases of ingestion involved no medical intervention, non-invasive treatment or other forms of invasive treatment. *Id.* at 7. Complaint Counsel disagrees with this proposed change because the term "surgery" conveys more accurately the "severe risk" posed by the Subject Products. *Id.*

The Commission agrees with Respondent that if the Subject Products are ingested and become lodged in the digestive track, surgery may not be the only form of intervention required, even though the surgical intervention rate for small rare-earth magnet ingestion greatly exceeds the intervention rate for most other foreign body ingestions. *See* Final Decision and Order at 25-26 (discussing the range of treatments for small rare-earth magnet ingestion). However, the evidence on the record demonstrates that the two children who ingested the Subject Products required surgery. *See id.* at 23-24. Accordingly, to provide the most accurate description of the Commission's findings in its Final Decision and Order, the Commission approves the following language to be used on the recall poster: "In many cases, children required medical treatment to remove ingested magnets, including two children who the CPSC found had ingested Zen Magnets and required surgery to remove parts of their intestines and bowels."

Respondent also raises the same objections regarding limiting the sales dates to "between 2009 and 2011," which the Commission has already addressed and resolved in Section I.A.4 *supra*.

H. Direct Notice to Third Party Internet Platforms

Complaint Counsel proposes a draft recall notice to be provided to third party Internet platforms, attached to the parties' Joint Statement as Exhibit E8. Respondent raises the same objections regarding the description of the reason of the recall, Joint Statement at 7, which the Commission has already addressed and resolved in Section I.E *supra*. The Commission approves the same language for this notice as it approves in Section I.E.

I. Direct Notice to Consumers

Finally, Complaint Counsel proposes a draft recall notice to be provided directly to consumers, attached to the parties' Joint Statement as Exhibit E9. Respondent raises the same objections regarding limiting the sales dates to "between 2009 and 2011" and the description of the reason for the recall, Joint Statement at 7-8, which the Commission has already addressed and resolved in Section I.E *supra*. The Commission approves the same language for this notice that it approves in Section I.E.

II. ACTION PLAN

On November 6, 2017, Respondent submitted a draft Action Plan to Complaint Counsel. Pursuant to the Commission's Final Decision and Order, Respondent's draft Action Plan provided Respondent's proposed plan to provide for a refund of the purchase price of the Subject Products that considered:

- The generally accepted useful life of the magnets;
- The original cost paid by consumers;
- Incentives to encourage returns;
- Whether and how many magnets should be returned by consumers to qualify for a refund;
- The timing and duration of any refund;
- Shipping or other costs associated with returns; and
- The limits, if any, of the refund.

On November 15, 2017, Complaint Counsel submitted its written responses and objections to the draft Action Plan. The parties conferred on November 21, 2017, to resolve Complaint Counsel's objections, and they were able to resolve some, but not all, of the issues. On November 27, 2017, the parties submitted the Joint Statement, which identifies the issues upon which the parties agree, and those that remain in dispute.

After reviewing the parties' submissions, for the reasons set forth below, the Commission approves the following terms in the Action Plan.

A. Terms and Conditions of Refund

Respondent proposes that the refund shall apply to all consumers who purchased the Subject Products on Respondent's website, through third party Internet retailers, and through retail outlets. Joint Statement at 8. Furthermore, Respondent proposes that consumers will be provided a refund for magnets returned within what Respondent claims are the generally accepted useful life of the magnets: 6 months for Zen Magnets and 4 weeks to 3 months for Neoballs. *Id*. Respondent proposes offering a refund of the full purchase price to consumers who return at least 50 percent of the magnets, and the parties agree that consumers who return less than 50 percent of the magnets are entitled to a prorated refund based on the percentage of magnets returned. *Id*. at 10-11. Respondent proposes offering to reimburse consumers for certain shipping costs associated with returns of the Subject Products. *Id*. at 11. Respondent also proposes limiting the terms of the refund in the following ways: (1) consumers who purchased the Subject Products more than 180 days before the refund or who return less than 50 percent of the set will only be entitled to a refund if Respondent determines that the magnets are returned in "like new condition and in proper working order"; and (2) consumers must make all claims in writing and provide proof of purchase, consisting of a receipt showing the purchase was made in the United States or a notarized affidavit acknowledging the purchase was made in the United States, the place of purchase, and the purchase price, to qualify for a refund. *Id*. at 11-13.

Complaint Counsel agrees with Respondent that the refund shall apply to all consumers who purchased the Subject Products on Respondent's website, through third party Internet retailers, and through retail outlets. *Id*. at 8. However, Complaint Counsel proposes expanding the scope of the recall to all owners of the Subject Products beyond the original purchasers, and argues that Respondent's proposed proof–of-purchase requirements would discourage consumers from participating in the recall and exclude from eligibility many consumers with the Subject Products. *Id*. at 8, 12-13. Complaint Counsel also disputes Respondent's contention that the generally accepted useful life is 6 months for Zen Magnets and 4 weeks to 3 months for Neoballs. *Id*. at 8-9. Complaint Counsel contends that the Subject Products retain their magnetism for many years and

will continue to pose a hazard even if magnetism is somewhat reduced or the coating is reduced or shows wear. *Id*.

The Commission addresses each disputed issue below.

1. Scope of Refund

The Commission finds that the refund shall apply to all consumers who own or possess the Subject Products, including, but not limited to, consumers who purchased them on Respondent's website, through third party Internet retailers, and through retail outlets.

The Commission disagrees with Respondent's proposal to limit the refund to consumers who purchased the Subject Products within 180 days of the refund or consumers who return more than 50 percent of the set unless Respondent determines that the magnets are returned in "like new condition and in proper working order." Joint Statement at 11-12. Respondent has not provided any justification for limiting the refund to products purchased within 180 days of the recall. The Commission concludes that such a restriction would unduly and arbitrarily limit the scope of the recall, leaving many hazardous products in the hands of consumers and significantly limiting the consumer safety purpose and effectiveness of the recall.

The Commission also disagrees with Respondent that consumers must provide proof of purchase, consisting of a receipt showing the purchase was made in the United States or a notarized affidavit acknowledging the purchase was made in the United States, the place of purchase, and the purchase price, in order to qualify for a refund. *Id*. at 13. Such requirements would unduly burden consumers and potentially require some consumers to pay for the costs of availing themselves of the remedy by having to obtain or hire a notary in violation of Section 15(e)(2) of the CPSA. *See* 15 U.S.C. § 2064(e)(1) ("No charge shall be made to any person . . . who avails himself of any remedy provided under an order issued under [Section 15(d) of the CPSA] . . . ."). Accordingly, the Commission finds that Respondent must provide a refund to all consumers who provide a written affirmation, in any form, that they are returning the Subject Products, and provide, to the best of their knowledge (1) the specific name and/or model of Subject Products (*i.e.*, the type of set or individual magnets) they are returning, (2) the place of purchase, and (3) the approximate year they purchased or otherwise acquired the Subject Products.

2. Amount of Refund

Respondent must provide a refund of the purchase price of the Subject Products, less a reasonable allowance for use, where the Subject Products have been in possession of a consumer for one year or more. *See* 15 U.S.C. § 2064(d)(1)(C) (permitting the Commission to order a refund less a reasonable allowance for use where product has been in possession of consumer for one year or more).

Therefore, for consumers who have been in possession of the Subject Products for less than a year at the time of public notice, or when the consumer receives actual notice of the defect, whichever occurs first, the Commission approves a full refund of the purchase price.

For consumers who have been in possession of the Subject Products for one year or more at the time of public notice, or when the consumer receives actual notice of the defect, whichever

occurs first, the Commission concludes that the most appropriate method of providing a reasonable allowance for use under the circumstances is to look to the useful life of the product. In this case, the Commission further concludes that the useful life of the Subject Products is best based on their relative magnetism over time.[5] The record reflects that magnetic flux is the essential element to the Subject Products' proper operation and use, as they are intended to be separated and reattached to create and reshape the magnets into a variety of figures, sculptures, jewelry, and art. *See* Final Decision and Order at 2.

Here, absent exposure to "excessive shock or heat," the record reflects that the Subject Products have a long useful life based on their magnetism – according to Respondent's own website, as entered in the record, the demagnetization of the Subject Products "due to time alone is about 5% in a human lifetime." *See* CC-47; CC-48; CC-50. Thus, although the Subject Products demagnetize – and thereby become less effective – incrementally over the course of a human lifetime, the Subject Products nevertheless have a high flux index (Final Decision and Order at 2; Ex. CC-1A at 4-6), such that a loss of 5% in magnetic strength would not appreciably diminish the usefulness of the magnets. Even if the Commission provided for a reduction in the purchase price based on this 5% reduction in strength over a lifetime for consumers who have been in possession of the Subject Products for one year or more, such reduction would be so infinitesimally small that, for all practical purposes, no reduction of the purchase price is warranted in these particular circumstances.

The parties agree that Respondent will provide a refund of the full purchase price to consumers who return at least 50 percent of a magnet set and will provide a prorated refund based on the percentage of magnets returned to consumers who return less than 50 percent of a magnet set. Joint Statement at 10-11. Accordingly, the Commission approves the inclusion of this term in the Action Plan.

The parties also agree that the Subject Products were sold at prices of $12.65 for a 72-piece set, $32.98 to $38.24 for a 216-piece set, and up to $263.85 for the 1,728-piece set, and could be purchased individually for 20 cents per magnet. *Id*. at 9. These amounts are consistent with the Commission's finding, based on the record, in its Final Decision and Order. Accordingly, the Commission finds that these prices are the appropriate baseline to calculate the refund of the purchase price of the Subject Products.

For consumers who did not purchase the Subject Products on Respondent's website, through third party Internet retailers, or through retail outlets (*e.g.*, received them as a gift), the Commission finds that Respondent must provide consumers with a refund based on the average purchase price of the specific type or model as described above.

[5] The Commission rejects Respondent's suggestion that the useful life of Subject Products is limited to the existence of like-new coating because the record reflects that the Subject Products have a long useful life based on their magnetism. *See* CC-47; CC-48; CC-50. Although the record suggests that the "smoothness" of the coating may affect the "longevity" of the magnets, the record does not reflect the degree to which the loss of a magnet set's like-new coating alone would affect the magnetism of the product. *See* Tr: 1523:7-1524:6 (Mr. Qu testifying that much of the purpose of the coating on Zen Magnets is "esthetic").

3. Shipping and Other Costs Associated with Returns

The parties agree that Respondent will cover all shipping costs associated with returns, including any costs exceeding first-class package service by the U.S. Postal Service. Joint Statement at 11. As noted above, Respondent may not require consumers to incur charges in availing themselves of the refund remedy. *See* 15 U.S.C. § 2064(e)(1) ("No charge shall be made to any person . . . who avails himself of any remedy provided under an order issued under [Section 15(d) of the CPSA] . . . ."). Accordingly, the Commission approves this part of the Action Plan.

B. Timing and Duration of Refund

Respondent proposes to offer a refund to consumers for 6 months after the recall is announced. Joint Statement at 11. Complaint Counsel objects to this limited time frame, and proposes that consumers be allowed to return Subject Products for a full or partial refund for a period of 2 years, at which time the Commission's Office of Compliance and Field Operations ("Office of Compliance") staff will determine whether Respondent should continue to offer refunds and how long the refund program should continue based on the rate of return, number of recalled products still in circulation and "other relevant factors." *Id*.

The Commission agrees with Complaint Counsel that Respondent, or any legal successor, must accept consumers' returns of the Subject Products for a full or partial refund for an initial period of 2 years, at which time the Commission's Office of Compliance may determine whether the refund program should be continued. The Commission concludes that 6 months is too short a time to ensure that consumers will be informed of and have sufficient time to avail themselves of the remedy.

C. Incentives to Encourage Returns

To incentivize consumers to return the Subject Products, Respondent proposes to offer coupons for 20 percent off other products sold by Respondent and the opportunity to enter a contest to win a poster. Joint Statement at 9-10. Complaint Counsel objects to these incentives and contends that the best incentive to encourage consumers to participate in the recall is to provide a substantial refund. *Id*. at 10.

The Commission agrees with Complaint Counsel that a substantial refund, available to all owners of Subject Products, is the best and most adequate incentive to encourage consumers to participate in the recall. The Commission does not approve of Respondent's proposals to provide incentives in the forms of coupons or contest entries. Instead, the Commission concludes that Respondent will best incentivize consumers to participate in the recall by focusing its resources on advertising the recall and providing consumers with a robust and timely remedy.

D. Monthly Progress Reports

The parties agree that Respondent shall submit monthly progress reports to the Office of Compliance, as directed by the Office of Compliance's staff. Joint Statement at 13. The Commission approves this part of the Action Plan.

E. Adherence to Action Plan

The parties agree that Respondent shall contact the Office of Compliance if there are any issues with adherence to the Action Plan by Respondent or third parties. *Id*. The Commission approves this part of the Action Plan.

The parties also agree that Respondent will permit the Office of Compliance staff to monitor Respondent's implementation of the Action Plan, but Respondent objects to monitoring as provided under 16 C.F.R. § 1118.2. *Id*. at 13-14. Section 1118.2 of the Commission's regulations sets forth the Commission's procedures for investigations, inspections, and inquiries under the CPSA, including obtaining information for implementing, enforcing or determining compliance with the CPSA and the regulations, rules, and orders issued under that statute. Under Section 16 of the CPSA, 15 U.S.C. § 2065, the Commission has the authority to determine compliance with orders prescribed under the CPSA. Accordingly, regardless of whether Respondent agrees to monitoring, the Commission's investigative authority to ensure compliance with Commission orders under the CPSA is statutory and independent of the Action Plan currently before the Commission. To the extent the parties agree that Respondent will permit the Office of Compliance staff to monitor Respondent's implementation of the Action Plan, the Commission approves this part of the Action Plan.

F. Records

The parties agree that Respondent shall maintain all records relating to the Action Plan for a period of 5 years. Joint Statement at 13. The Commission approves this part of the Action Plan, with the 5 years to start running at the time of implementation of the Action Plan.

G. Disposal or Destruction of the Subject Products

Although not originally proposed in Respondent's draft Action Plan, Complaint Counsel proposes that the Action Plan require Respondent, prior to disposal, destruction, or transfer of the Subject Products, do the following: (1) ensure proper quarantine of all of the Subject Products that are in the distribution chain, in Respondent's inventory or returned by consumers; (2) notify the Office of Compliance of Respondent's plans to dispose, destruct, or transfer the Subject Products so that staff may approve and witness such disposal, destruction or transfer; and (3) ensure complete destruction of units of the Subject Products in compliance with all state and local regulations. *Id*. at 14. Respondent objects to these terms. *Id*.

The Commission agrees with Complaint Counsel that these steps should be included in the Action Plan because they are necessary to address the hazard posed by the Subject Products by preventing their redistribution. Accordingly, the Commission approves inclusion of Complaint Counsel's proposed terms regarding disposal or destruction of the Subject Products.

ORDER

Having reviewed and considered the arguments and evidence of record in this proceeding, and pursuant to the Commission's authority set forth in Sections 15(c), (d) and (e) of the CPSA, 15 U.C.S. §§ 2064(c), (d), and (e), and 16 C.F.R. part 1115, it is ORDERED:

1. That the Commission approves the joint press release attached to the Joint Statement as Exhibit E1 with the changes approved by the Commission in Sections I.A.1-4 *supra*;

2. That the Commission approves the video news release attached to the Joint Statement as Exhibit E2 with the changes approved by the Commission in Sections I.A.1-4 *supra*;

3. That the Commission approves the recall notice to be posted prominently and for an extended period of time, to the extent possible, on the home page of all Respondent's websites attached to the Joint Statement as Exhibit E3 with the changes approved by the Commission in Section I.C *supra*;

4. That the Commission approves the social media recall notices for posting prominently and for an extended period of time, to the extent possible, on Facebook, Twitter and other social media pages attached to the Joint Statement as Exhibit E4;

5. That the Commission approves the recall notice to be sent to all third party Internet retailers that have been identified as having sold the Subject Products attached to the Joint Statement as Exhibit E5 with the changes approved by the Commission in Section I.E *supra*;

6. That the Commission approves the recall notice to be sent to all manufacturers, distributors and retailers that have been identified as having sold the Subject Products attached to the Joint Statement as Exhibit E6 with the changes approved by the Commission in Sections I.E and I.F *supra*;

7. That the Commission approves the recall poster attached to the Joint Statement as Exhibit E7 with the changes approved by the Commission in Sections I.A.4 and I.G *supra*;

8. That the Commission approves the recall notice to be provided to third party Internet platforms attached to the Joint Statement as Exhibit E8 with the changes approved by the Commission in Sections I.E and I.H *supra*;

9. That the Commission approves the recall notice to be provided directly to consumers attached to the Joint Statement as Exhibit E9 with the changes approved by the Commission in Sections I.E and I.I *supra*;

10. That the Commission approves an Action Plan requiring that Respondent shall provide a refund to all consumers who own or possess the Subject Products, including but not limited to consumers who purchased them on Respondent's website, through third party Internet retailers and through retail outlets;

11. That the Commission approves an Action Plan requiring that Respondent shall provide a refund to all consumers who provide a written affirmation, in any form, that they are returning the Subject Products, and provide, to the best of their knowledge: (1) the specific name and/or model of Subject Products (*i.e.*, the type of set or individual magnets) they are returning, (2) the place of purchase, and (3) the approximate year they purchased or otherwise acquired Subject Products;

12. That the Commission approves an Action Plan requiring that Respondent shall provide a refund of the purchase price of the Subject Products regardless of when the consumer purchased or otherwise came into possession of the product, less a reasonable allowance for use, as defined in Section II.A.2 *supra;*

13. That the Commission approves an Action Plan requiring that, for consumers who did not purchase the Subject Products on Respondent's website, through third party Internet retailers, or through retail outlets (*e.g.*, received them as a gift), Respondent shall provide consumers with a refund based on the average purchase price of the specific type or model, as defined in Section II.A.2 *supra*;

14. That the Commission approves an Action Plan requiring that Respondent shall provide a refund of the full purchase price to consumers who return at least 50 percent of a magnet set and will provide a prorated refund based on the percentage of magnets returned to consumers who return less than 50 percent of a magnet set;

15. That the Commission approves an Action Plan requiring that Respondent shall cover all shipping costs associated with returns, including any costs exceeding first-class package service by the U.S. Postal Service;

16. That the Commission approves an Action Plan requiring that Respondent shall accept consumers' returns of the Subject Products for a full or partial refund for an initial period of two years, at which time the Commission's Office of Compliance may determine whether the refund program should be continued;

17. That the Commission approves an Action Plan requiring that Respondent shall submit monthly progress reports to the Office of Compliance as directed by the Office of Compliance's staff;

18. That the Commission approves an Action Plan requiring that Respondent shall contact the Office of Compliance if there are any issues with adherence to the Action Plan by Respondent or third parties and will permit the Office of Compliance staff to monitor Respondent's implementation of the Action Plan;

19. That the Commission approves an Action Plan requiring that Respondent shall maintain all records relating to the Action Plan for a period of 5 years; and

20. That the Commission approves an Action Plan requiring that Respondent, prior to disposal, destruction or transfer of the Subject Products, shall: (1) ensure proper quarantine of all of the Subject Products that are in the distribution chain, in Respondent's inventory, or returned by consumers; (2) notify the Office of Compliance of Respondent's plans to dispose, destruct or transfer the Subject Products so that staff may approve and witness such disposal, destruction or transfer; and (3) ensure complete destruction of units of the Subject Products and compliance with all state and local regulations.

SO ORDERED this 8th day of December, 2017.

BY THE COMMISSION, Acting Chairman Buerkle Issuing Separate Statement

Rockelle S. Hammond

Rockelle S. Hammond
Acting Secretary
Consumer Product Safety Commission