

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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In the Matter of)	CPSC Docket No. 12-2
ZEN MAGNETS, LLC,)	
Respondent.)	Hon. Dean C. Metry
_____)	Administrative Law Judge

COMPLAINT COUNSEL'S NOTICE OF FILING

Complaint Counsel hereby files a redacted copy of Complaint Counsel's Post Hearing
Argument.

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April 2, 2015

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COMPLAINT COUNSEL’S POST HEARING ARGUMENT – REDACTED

Complaint Counsel initiated this proceeding pursuant to section 15 of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2064, seeking remedial action to protect the public from the substantial risk of injury created by Zen Magnets and Neoballs (Subject Products). Because a preponderance of the evidence establishes that the Subject Products present a substantial product hazard, Complaint Counsel asks this Court to order Respondent to implement a corrective action plan that includes a stop sale, notice to the public, and a refund.

I. LEGAL STANDARD

A. Substantial Product Hazard

The Commission may order a firm to stop sale of a consumer product, recall the product, and notify the public about the recall if the product “presents a substantial product hazard.” CPSA §§ 15(c) and (d). CPSA Section 15(a) defines a substantial product hazard as a consumer product that either: (a) fails to comply with an applicable consumer product safety rule under the CPSA, which creates a substantial risk of injury to the public; or (b) contains a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise), creates a substantial risk of injury to the public.

Although Complaint Counsel must satisfy only one prong of Section 15(a), the evidence demonstrates that Zen Magnets and Neoballs present a substantial product hazard because they

fail to comply with a consumer product safety rule and because they contain defects, both of which create a substantial risk of injury to the public.

B. Preponderance of the Evidence

Complaint Counsel must prove its case by a preponderance of the evidence. *See Steadman v. S.E.C.*, 450 U.S. 91, 104 (1981) (determinations in agency adjudicatory proceedings “are made according to the preponderance of the evidence”). This standard applies in a CPSA Section 15 proceeding. *See In re P&M Enterprises*, CPSC Docket No. 88-1, at 19 (Initial Decision, Mar. 30, 1989, unanimously upheld by Commission Jul. 17, 1991) (in adjudication to determine whether a product constitutes a substantial product hazard, Complaint Counsel must meet its burden of proof by “a preponderance of the evidence”). The preponderance of the evidence standard “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’” *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993), quoting *In re Winship*, 397 U.S. 358, 371–372 (1970) (Harlan, J., concurring). Complaint Counsel has met this burden here.

II. THE SUBJECT PRODUCTS CONSTITUTE A SUBSTANTIAL PRODUCT HAZARD UNDER SECTION 15(a)(1)

A. The Subject Products Fail to Comply with a Consumer Product Safety Rule

The Subject Products do not comply with the Standard for Consumer Safety Specification for Toy Safety, ASTM F963 (the Toy Standard) (CC-2), a mandatory consumer product safety rule pursuant to section 106 of the Consumer Product Safety Improvement Act of 2008. The Toy Standard establishes mandatory requirements for toys intended for use by children under 14. ASTM F963 § 1.3. The Toy Standard provides that “[t]oys must not contain a loose as-received hazardous magnet or a loose as-received hazardous magnet component.” ASTM F963 § 4.38.1.

A “toy” is “any object designed, manufactured, or marketed as a plaything for children under 14 years of age.” ASTM F963 § 3.1.81. Written in the disjunctive, this requirement is satisfied if a product meets any one of these criteria. Under the Toy Standard, a “hazardous magnet” has a flux index greater than 50 and is a “small object.” ASTM F963 §§ 3.1.37, 4.6, 8.24.1. A preponderance of the evidence demonstrates that the Subject Products are toys that contain hazardous magnets in violation of the Toy Standard, which creates a substantial risk of injury to the public. Accordingly, the Subject Products present a substantial product hazard.

1. The Subject Products are Toys Under ASTM F963

Zen Magnets and Neoballs are toys under the Toy Standard because they are designed, manufactured, or marketed to children under age 14. Testimony from Dr. Paul Frantz indicates that the Subject Products are designed so that individual small, rare earth magnets (SREMs) can be separated from a set and manipulated into different forms. CC-10A at 7; CC-11 at 12; Tr. at 254:9-17. That design allows users to create items of jewelry and refrigerator art, activities appealing to and engaged in by children under 14.¹

In addition to designing the Subject Products to appeal to children under 14, Respondent advertised and marketed the Subject Products to that age cohort. CC-10A at 26-27. Specifically, Respondent advertised the Subject Products as a “fun toy,” promoted them as play jewelry that “looks hot on girls” and “looks good on cute people,” and is “terrific for refrigerator art.”² In fact, Shihan Qu, founder of Zen Magnets, admits that he marketed and advertised the Subject Products for such purposes, stating that Zen Magnets are appropriate for a “wrist worthy chain”

¹ CC-10A at 10, CC-11 at 12 (marketed as jewelry, refrigerator art); CC-10A at 12 and CC-13 (refrigerator art); CC-10A at 12-13 and CC-12 (jewelry including lip and tongue piercings); CC-19A at 12-13 (“[c]hildren over the age of five are likely to be enticed by the advertised play features”); Tr. at 431:20.

² CC-44 (“Fun Toy”); CC-10A at 10, CC-11 at 12 (“look hot on girls”); Tr. at 2421:8-11 (“looks good on cute people”); Tr. at 2429:18-20 (“terrific for refrigerator art”); CC-63 at 2 (website promoting use as refrigerator art).

and may be used as jewelry and “self-adornment.”³ Mr. Qu exchanged email with middle school children, encouraging use of the Subject Products as jewelry, and admitted that Zen Magnets are appropriately used as “play jewelry.” CC-65; Tr. at 2425:3-7. What is more, Zen’s website reinforces Respondent’s presentation of the Subject Products as articles for play: “How old do you have to be to *play* with these?” (emphasis added). Tr. at 2570:11-14; CC-48 at 2; CC-50 at 2.

Testimony also showed that Respondent marketed to children under 14 by sponsoring contests featuring characters from products that are particularly appealing to children under 14. CC-10A at 26, 27; CC-11 at 15-16; CC-19A at 4; Tr. at 429:15-22, 2228:15-2231:8; CC-45, CC-46. Contest participants are encouraged to make figures and sculptures such as Super Smash Brothers that children play with in other contexts. CC-17; CC-19A at 4; CC-58; R-196. Moreover, children, one as young as seven years old, enter and win these contests. CC-17 at 1-2, Tr. at 2570:18-21 (no age restriction to enter contests). Specifically, 7-year-old “Little Kev” won a Zen contest with his creation of Monopoly pieces. CC-10A at 26; CC-17. Having prominently featured Kev’s winning entry on Zen’s website, Mr. Qu testified that it is acceptable for Kev to play with the Subject Products notwithstanding Kev’s age. Tr. at 2313:12-15; 2387:19-2388:4 (it is “up to the parent” to figure out an acceptable age); CC-10A at 26-27; CC-11 at 16; Tr. at 1953:20-1954:2 (“nine and eight would both be reasonable ages ... to use magnets safely”).

Zen’s strategy of marketing the Subject Products to children such as middle schoolers and Little Kev is underscored by the firm’s approach to warnings. That is, Zen’s warnings, regardless of the many iterations, confirm that Zen views the Subject Products as playthings for children under 14. For example, warnings that accompany many of the products state that the appropriate age to use Zen Magnets is “really, it’s whatever age at which a person stops swallowing non-foods.” CC-44. Dr. Frantz’s un rebutted testimony is that a child is old enough to

³ Tr. at 2410:15-21, CC-63 at 4 (jewelry, wrist-worthy chain); Tr. at 2411:16-2412:1, CC-63 at 2 (self-adornment).

stop swallowing non-foods by at least age five—well below age 14. Tr. at 316:1-5. Indeed, warnings that come with the Subject Products, as well as those on zenmagnets.com, state flatly that the product is appropriate for children under 14: “common sense recommendation is [age] 12.” Tr. at 2570:15-17; CC-48 and CC-50.⁴

To counter Complaint Counsel’s evidence that Respondent marketed the Subject Products as playthings for children under 14, Mr. Qu stated that he did not “primarily” intend to market to that age group. Tr. at 2541:4-8. In support of this contention, Respondent offered evidence of a marketing strategy that restricts sales to Respondent’s websites or retail locations such as marijuana dispensaries and hobby stores. Tr. at 2552:10-15, 2553:16-2554:2. Mr. Qu testified that those retailers must follow a rigorous protocol including: (1) obtaining identification from buyers to ensure the consumer is over 18 and (2) verbally warning buyers that the product should not be given to children under 14. Tr. at 1737:17-1738:4; 1754:20-1755:8.

Complaint Counsel demonstrated, however, that these measures are ineffective. Respondent’s zenmagnets.com site does not limit purchases by age, and allows Zen Magnets to be sent to someone of any age without a buyer seeing a warning or age restriction. Tr. at 2247:15-2254:2. Similarly, the neoballs.com site allows a user to click past a warning without reading it. Tr. at 2218:7-15. Neither site contains a failsafe that requires users to acknowledge receipt of warnings before ordering. Tr. at 2247:15-2254:2; Tr. at 2218:7-15.

Respondent’s purported retail sales restrictions are similarly ineffective. CPSC investigator Christina Fredrick testified that, on December 12, 2014, she was able to purchase the Subject Products from a Hobby Town retail store and a bath and crystal store, Soldis, without receiving any warnings or having to prove her age. Tr. at 2621:18-2622:7; 2625:2-10; 2626:15-

⁴ Tr. at 2231:2-14, CC-45, CC-46 (from Aug. 2009-Oct. 2011, Zen website warning was for age 12); 2237:15-19, 2244:3-2247:1, CC-48, CC-52 (in Nov. 2011 and since Nov. 2013, Zen website has had “common sense” age recommendation of 12); *see also* Tr. at 2584:21-2586:2 (Neoballs advertised at zenmagnets.com); CC-50 at 2.

18; 2628:13-19. In fact, at Soldis, a mall kiosk, when Ms. Fredrick asked a clerk whether he sold “toys,” Tr. at 2624:4-9, CC-68, the clerk took Zen Magnets out of a display case and showed them to her. Tr. at 2624:15-17; CC-69. She purchased Zen Magnets without receiving any verbal warnings from the clerk, and no warnings were visible on the outside of the packaging. Tr. at 2624:18-20; 2625:2-4. She was not asked to show identification or age verification. Tr. at 2625:8-10. Similarly, Ms. Fredrick saw Zen Magnets for sale at Hobby Town, which also sold toys and hobby items. Tr. at 2627:1-2628:19. She purchased Zen Magnets without receiving a verbal warning or verifying her age. Tr. at 2627:14-2628:19; CC-70. The evidence thus refutes Respondent’s claims that retail restrictions effectively confine access to the Subject Products.

Notwithstanding Respondent’s unsupported claims, the design of the Subjects Products, which facilitates their use as play jewelry and refrigerator art, coupled with a marketing strategy that promotes the Subject Products as toys and items for play, establish by a preponderance of the evidence that they are toys under ASTM F963.

2. The Subject Products Contain a Loose, Hazardous Magnet

Respondent does not dispute that the Subject Products contain a loose as-received magnet, with a flux index greater than 50, that is a “small object” as defined in ASTM F963 § 4.6.⁵ Testimony from Vincent Amodeo further established that the magnets have a flux index greater than 50 and are small objects. Tr. at 97:13-18; CC-1A at 5-6.⁶ Thus, the Subject Products contain a “hazardous magnet” as defined in the Toy Standard. ASTM F963 § 3.1.37.

⁵ See Resp’t Responses to Complaint Counsel’s First Set of Requests for Admission ¶¶ 13-15, 62-64 (attached at Exh. A, admissible pursuant to 16 C.F.R. § 1025.34(c)); Resp’t Answer to Second Amended Complaint ¶¶ 11-12.

⁶ Zen samples have a flux index of 581.4 and 577.1 and are small objects; Neoballs samples have a flux index of 438.8 (blue) and 565 (green) and are small objects. CC-7; CC-8.

3. The Subject Products are Not Exempt Science or Hobby Kits

Despite Zen's marketing and warnings strategy aimed at children under 14, Respondent maintains that the Subject Products are not toys. Tr. at 1796:5-16. In the alternative, Zen contends that even if the Subject Products are toys, they fall within an exception to the Toy Standard that allows hazardous magnets to be used in science or hobby kits intended for children over 8 years of age. The Toy Standard provides:

Hobby, craft, and science kit-type items intended for children over 8 years of age, where the finished product is primarily of play value, that contain a loose as-received hazardous magnet or a loose as-received hazardous magnetic component, or both, are exempt from the requirements of 4.38.1 and 4.38.2 provided they comply with the requirements for safety labeling described in 5.17.

ASTM F963 § 4.38.3 (hereinafter "exempt kits"). Setting aside that this exemption would not address Zen's marketing to children under eight like 7-year-old "Little Kev," the evidence shows the Subject Products do not comply with the mandatory safety labeling requirements of ASTM F963 § 5.17 and are not, therefore, exempt kits.⁷ Respondent also concedes that Neoballs, which are sold as individual magnets, are not sold as a "kit."⁸

Respondent's effort to shoehorn its products into this exception in the Toy Standard belies Zen's actual marketing, labeling, and warning strategy, and is no more than a post hoc

⁷ Zen Magnets sold prior to May 2010 cannot be exempt kits because they were not sold with warnings as required by ASTM F963 § 4.38.3. Tr. at 2333:11-15. Zen Mini sets and Zen original sets sold through May 15, 2012, also had no warnings. Tr. at 2351:17- 2352:1; CC-55. While Subject Products sold thereafter had warnings, those warnings did not meet the requirements of ASTM F963 § 5.17, which requires that packaging and instructions for exempt kits must strictly comply with safety labeling requirements of ASTM F963 § 5.3. Every warning provided with the Subject Products, *see* CC-4, CC-4A, CC-5, CC-5A, CC-44, fails to comply with ASTM F963 § 5.17 because they do not have the mandatory ▲ alert symbol or all caps "WARNING." *See* ASTM F963 § 5.3.1. The warnings also fail to comply with the requirement that kits be "age labeled in a clear and conspicuous manner" only for children over age 8. ASTM F963 §§ 4.38.3, 5.2. Respondent's sarcastic age recommendations ("Btw, this product is a 'science kit' for sure" and is appropriate for "whatever age at which a person stops swallowing non-foods"), CC-44, do not satisfy this requirement. Inappropriately labeled warnings "shall be subject to the most stringent applicable requirements" and must be labeled according to the "highest age in the range" allowed; in this case, age 14. ASTM F963 § 5.2.

⁸ Respondent admitted that Neoballs are not a science kit, Tr. at 2316:21-2317:1, and have not been advertised or labeled as science kits. Tr. at 2218:16-19; 2320:6-9; CC-5; CC-5A.

argument to justify its clearly established outreach to children under 14. Other than Respondent's self-serving claims, no evidence establishes that the Subject Products qualify as a science or hobby kit under ASTM F963. On the contrary, a preponderance of the evidence demonstrates that the Subject Products are toys containing loose as received hazardous magnets that violate the Toy Standard.

B. The Failure of the Subject Products to Comply with ASTM F963 Creates a Substantial Risk of Injury to the Public

Toys containing hazardous magnets present a substantial risk of injury to the public. The Commission recognized this substantial risk beginning in 2006 when it sought the recall of dozens of toys with liberated hazardous magnets after children swallowed the magnets and suffered serious injuries. CC-10A at 5-6; CC-11 at 32. SREMs, including the Subject Products, present the same risk of injury created by toys recalled during this period due to liberated magnets. CC-10A at 6. That the Subject Products present the same risk is confirmed by incident data collected by CPSC staff about the Subject Products and Buckyballs, which are virtually identical in size, shape and strength to the Subject Products. Tr. at 114:7-11; *compare* CC-6 and CC-9 (Buckyballs PSA) with CC-4 and CC-7 (Zen PSA) and CC-5, CC-8 (Neoballs PSA). Tr. at 913:10-17; 1024:13-20; CC-10A at 7, 29-40; CC-18.1-18.95 (95 incident reports). The undisputed evidence establishes that when SREMs are ingested, they can attract through gastrointestinal tissue and cause necrosis, fistulas, intestinal perforations or ischemic bowel, which can lead to sepsis and death, thereby creating a substantial risk of injury to the public. CC-27A at 10 (Noel Direct Testimony); Tr. at 749:8-19; 751:3-753:16.

Because the Subject Products violate the Toy Standard and create a substantial risk of injury to the public, they constitute a substantial product hazard. Such a finding entitles Complaint Counsel to relief, including stop sale, recall, and refund. If, however, relief is limited

only to a change in warnings or marketing, such relief would provide an insufficient remedy because, as is demonstrated in Section III, no warnings could adequately address the hazard.

III. THE SUBJECT PRODUCTS PRESENT A SUBSTANTIAL PRODUCT HAZARD UNDER CPSA SECTION 15(a)(2) BECAUSE THEY CONTAIN DEFECTS WHICH CREATE A SUBSTANTIAL RISK OF INJURY TO THE PUBLIC

Under CPSA Section 15(a)(2), a “substantial product hazard” is a “product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise), creates a substantial risk of injury to the public.” 15 U.S.C. § 2064(a)(2). A defect may exist in a product’s design or warnings. *See* 16 C.F.R. §1115.4. The Subject Products present a substantial product hazard because they contain defects in their design and warnings that create a substantial risk of injury to the public.

A. The Products Are Defective as Designed Because a Risk of Injury Occurs as a Result of Their Operation or Use

A product may contain a defect even if it is manufactured exactly in accordance with its design if the design presents a risk of injury to the public. 16 C.F.R. § 1115.4. Moreover, a product may have a design defect if “a risk of injury occurs as a result of the operation or use of the product.” *Id.* A risk of injury includes a risk of death, personal injury, or serious or frequent illness. CPSA § 3(a)(14), 15 U.S.C. § 2052(a)(14).

The Subject Products present a risk of injury that occurs as a result of their operation and use. That is, the Subject Products are designed to be separated, creating a condition where access to liberated SREMs results in serious injury to children and teens who ingest them. The design defect is inherent in the product because the condition creating the risk—loose, separable, accessible SREMs that are easily lost or shared—constitutes the basic character of the Subject Products. Tr. at 343:5-344:3; 385:19-386:2; CC-10A at 7, 13-14.

That the expected operation and use of the Subject Products results in the loss and separation of individual magnets is uncontroverted. Indeed, Zen admits that some magnets may be lost or given away and never returned to the set. CC-10A at 19, 22-23; CC-33 at 1; CC-34; and CC-35. Expecting that consumers will lose or share magnets, Respondent accommodates this by including spares with the Gift and Mandala sets, and by offering spares online. CC-10A at 23-25; Tr. at 255:18-256:1; 346:5-348:15. Consumers who have lost SREMs can obtain spares with a simple online order, CC-10A at 17, 19, 21, 22-26; Tr. at 348:3-15, and the environment in which they have lost the magnets may then remain contaminated with SREMs where they can be accessed and ingested by children. CC-10A at 4; CC-11 at 23-25; Tr. at 346:8-21.

Lost or shared SREMs that are swallowed by children can result in severe injury or death. CC-10A at 32-34; CC-11 at 38-40; CC-19A at 8, 11 and 17; CC-27A at 8, 14. Severe injury caused by the operation and use of the Subject Products occurs because the space in which an SREM is lost becomes “contaminated.” CC-10A at 20-21; CC-11 at 51; Tr. at 254:9-17. Such a loss poses a hazard as evidenced by incidents in which young children accessed and ingested separated magnets and suffered serious injury. CC-10A at 29-30, 32-33, 35-36, 39-40. The only way a consumer can keep children away from SREMs is never to allow a child in a place where SREMs have been used, a precaution that is not possible to effectuate. CC-10A at 9, 20, 47.

SREMs separated from Subject Products are like a broken product from which hazardous magnets have been liberated. CC-10A at 6-7; Tr. at 253:5-254:17. Prior to the introduction of SREMs in 2009, magnet injuries typically occurred when high-powered magnets, which were components of another product, separated from that product. CC-10A at 5-6; CC-11 at 32-33; Tr. at 252:9-254:17. The hazard posed by liberated magnets led to toy recalls because children ingested liberated magnets and suffered serious injuries. CC-10A at 5-6. Here, the Subject

Products contain SREMs that, by design, are meant to be separated from sets. CC-10A at 7, 13. When used as intended, they are like the broken products that created a hazard as a result of liberated magnets. *Id.* at 6-7; CC-11 at 49; Tr. at 251:18-252:5. Because their design allows them to be routinely lost and shared, CC-10A at 7; Tr. at 346:5-16; 348:7-11; 353:17-22; 356:9-12; 366:11-14; CC-33 to 35, the Subject Products contain a defect through which the risk of severe injury to children “occurs as a result of the operation or use of the product.” 16 C.F.R. § 1115.4.

B. The Subject Products are Defective Because the Warnings Do Not and Cannot Mitigate the Risk

The warnings do not and cannot mitigate the risk posed by the Subject Products, CC-10A at 45-46, Tr. at 342:8-11; 367:16-368:14, and thus the Subject Products are defective. No warnings can attach to SREMs because of their small size, Tr. at 382:3-10, so children and caregivers who obtain lost or shared SREMs will not see any warning at all. Tr. at 2604:3-17; 2605:14-2606:1; CC-10A at 7, 14; CC-19A at 4. Similarly, many Subject Products were sold without any written warnings. Tr. at 2333:11-15 (no warnings with Zen Magnets before May 2010); CC-55, Tr. at 2350:16-21, 2351:17-2352:1 (no warnings with Zen Mini and Zen original sets through May 15, 2012). Even users who were provided with warnings were never warned that they must not lose or share SREMs or that they must count the sets every use. CC-10A at 10, 18, 20; CC-11 at 52-53.

Even if all users could be warned, no warning could adequately address the fundamental risk—injury caused by lack of containment—because the essence of the Subject Products as loose, separable magnets makes containment impossible. CC-10A at 43 (Zen has no containment strategy); *id.* at 45-46 (warnings do not and cannot address risk); *id.* at 47 (not possible to keep away from children). Moreover, users who try to keep the Subject Products contained are unlikely to succeed. CC-10A at 21, 46, 47; CC-19A at 8 (a “reasonable caregiver may easily lose

this type of magnet... and most people would not count each individual magnet.”) Indeed, Zen’s own witnesses lost SREMs notwithstanding their efforts to prevent loss.⁹

Because Respondent’s warnings do not mitigate the risk posed by the Subject Products, the warnings are defective. Because no warning can be devised to address the inability to contain the magnets, no warning can mitigate the risk.

C. The Subject Products Are Defective Under the Factors in 16 C.F.R. § 1115.4

In addition to containing a design defect and a defect in their warnings, the Subject Products are defective under the factors set forth in 16 C.F.R. §1115.4.

1. The Subject Products Have Limited Utility

The evidence shows that the Subject Products have only limited utility. They may be used as a “fun toy” and to create sculptures and other figures. CC-44. Respondent’s witness, Boyd Edwards, a university administrator and former chemistry teacher, testified that they could illustrate scientific principles of electromagnetism even though Dr. Edwards never used the Subject Products in his teaching. Tr. at 1404:4-7. In fact, Dr. Edwards knows of only two cases in which SREMs were used as part of a science curriculum. Tr. at 1422:1-1423:18. Additional testimony recounted limited experiences in which individuals used SREMs for instructional purposes. Joint Notice Regarding Witness Stipulations, Dec. 8, 2014, (Joint Notice) Exhs. L, N, O. In addition, Mr. Qu testified that the products have artistic value. Tr. at 2023:8-13.

Complaint Counsel does not dispute that the Subject Products have limited utility. This factor is not determinative, however, because a showing of utility—a limited utility at that— is only one factor to be considered in the analysis of whether these products are a substantial

⁹ R-189 at 35:16-36:37:1 (Dr. Pelletier); Tr. 1404:8-1405:12 (Dr. Edwards). Dr. Edward has posted videos in which he creates an “exploding top.” CC-43; Tr. 1407:17-1408 (“exploding top” shows SREMs “scattered” and lost).

product hazard. A consideration of the other factors set forth in 16 C.F.R. §1115.4 demonstrates that the risk of injury posed by the Subject Products renders them defective.¹¹

2. The Nature of the Risk Posed by the Subject Products Renders Them Defective

Dr. Adam Noel and Dr. Paul Frantz testified concerning the serious injuries caused by ingestion of the Subject Products. The stipulated testimony of parents whose children suffered severe injuries or death after ingesting SREMs underscores this testimony.

A pediatric gastroenterologist, Dr. Noel testified that ingested SREMs can attract through intestinal tissue and clamp together. CC-27A at 7. The SREMs compress gastrointestinal tissue with sufficient force to cause tissue necrosis or death. *Id.* In as little as eight hours, SREMs that attract through gastrointestinal tissue can burrow through intestinal walls, creating fistulas or holes through which bowel contents can escape and cause serious infection and sepsis. *Id.* at 8, 10. SREMs also can attract through two separate portions of intestines and cut off blood flow to the lower portion, resulting in ischemic bowel. *Id.* at 9. Respondent stipulated to the testimony of medical examiner Dr. J. Scott Somerset that this condition caused the death of Annaka Chaffin. *See* Joint Notice, Exh. K at ¶¶ 11-12.

Dr. Noel's expert opinions are based on his review of an extensive body of medical data, including 95 incident reports prepared by CPSC staff of SREM ingestion incidents. CC-27A at 4. Noel noted that children who ingested SREMs suffered serious injuries and were required to undergo invasive medical intervention that ranged from x-rays, to endoscopies and surgeries. *Id.* at 8, 10-13 citing, *e.g.*, CC-18.35 and CC-30 (Patient M In-Depth Investigation (IDI) and medical records); CC-18.7 and CC-31 (Bruski incident report and medical records); CC-18.15 (Chaffin IDI and medical records); CC-18.48 (Rivas IDI and medical records); CC-18.9 and CC-

¹¹ Respondent also introduced a public opinion poll, R-75, that asked about age restrictions for "high-powered magnets." Because the poll provided responders only limited information about the risks of a product they may never have seen or experienced before, it is of no value in determining the utility of the Subject Products.

32 (Bustamante IDI and medical records); CC-28 at 8; CC-29 at 4; CC-39. The surgeries carried a risk of permanent injury or death, and were performed to remove magnets when endoscopies were not successful, to repair holes in the bowels, or remove damaged intestines. Tr. at 588-90; CC-27A at 7, 10. Even non-surgical procedures to remove swallowed SREMs can result in life-threatening injuries, such as the trauma suffered by Jocelyn Bustamante when doctors attempted to flush ingested SREMs from her digestive system but mistakenly introduced fluid into her lungs, resulting in respiratory distress. *See* Joint Notice at Exh. D, ¶¶ 5-7; CC-27A at 13.

Dr. Noel's testimony about the mechanism of injury was further informed by a North American Society for Pediatric Gastroenterology, Hepatology and Nutrition (NASPGHAN) study of 481 cases of magnet ingestion by children, 123 of which were reported in clinical detail. The study revealed that children who ingest SREMs are at a higher risk of medical intervention than children who ingest other foreign bodies. CC-27A at 6. Nearly 80% of children who ingest SREMs require medical intervention, compared to 10-20% who ingest other foreign bodies. *Id.*; Tr. at 742:14-743:12. A significant percentage of children in the study needed invasive medical intervention or surgery: 52% needed endoscopies; 21% needed both endoscopy and surgery, sometimes because of unsuccessful endoscopies, and an additional 6% needed surgery to remove magnets or repair holes in their intestines. CC-27A at 6; Tr. at 589:1-22; 742:14-20; CC-28 at 8; CC-29 at 4. Dr. Noel also testified that the safe removal of SREMs can be impeded by the attraction force between surgical equipment and the magnet. Tr. at 588:19-589:9; 775:6-776:1.

Although physicians commonly see foreign body ingestions only in children under three, the risk presented by SREMs is unique because SREM ingestions span a wider population. The NASPGHAN study, which was approved by the LSU Health Science Center Institutional Review Board, Tr. 557:8-19, revealed many cases in which infants and toddlers suffered serious

SREM ingestion, but the injury patterns associated with SREM ingestions also evidenced a second peak among tweens and teens. Tr. at 734-36; CC-27A at 7. This injury pattern is unique to SREMs and places a different category of children at risk. CC-27A at 7; Tr. at 735:10-736:2.

Although SREMs pose a new and unique risk, the evidence demonstrates, and Respondent agrees, that the brand of SREM does not matter because, once ingested, the injury is the same.¹² CC-27A at 13 (“all 5 mm SREMs, regardless of the brand name, behave the same way once ingested, and pose the same risk of serious injury.”); *id.* at 15 (“From a medical standpoint, the brand name of small rare earth magnets ingested is inconsequential.”) As Vince Amodeo testified, the size and strength of Zen Magnets, Neoballs, and competitor Buckyballs are virtually identical and there is no qualitative difference between those products. Tr. at 114:7-11; CC-1A at 8 (Buckyballs are “small objects” with an average flux index of 414.3 to 556.6, and are hazardous magnets.)¹³ Thus, the extensive incident and injury data associated with Buckyballs and other SREMs informs the analysis of the risk of injury posed by the Subject Products.

In addition to data from IDIs and the NASPGHAN study, Kathleen Stralka, a CPSC expert in epidemiology and statistical analysis, testified about the National Electronic Injury Surveillance System (NEISS). Tr. at 885:18-22; 887:1-10. Ms. Stralka explained how NEISS data were collected from emergency rooms, coded and analyzed, and used to project nationwide SREM incidents. Tr. at 894-896:1-4; 902-906. The projections are based on a hospital coder’s summary of medical data, which is then sent to CPSC staff. Tr. at 890:8-17; 902:6-19; 1143:6-15. Staff consulted with in-house experts to review the data to determine if an incident involved SREM ingestion. Tr. at 889:5-10; 916:13-15; 1007:5-1008:13; 1047:10-22; 1048:1-6. Technical

¹² Mr. Qu admitted in his Full Report to the Commission that ingestion of multiple magnets “can cause holes (perforations), twisting and/or blockage of the intestines, infection, blood poisoning (sepsis) and death.” CC-57 at 4.

¹³ CC-7 though CC-9. Dr. Frantz also testified that a review of Zen’s sales and marketing practices shows that Zen’s SREMs pose the same ingestion hazard as other SREMs. CC-10A at 29.

staff who reviewed NEISS data also reviewed anecdotal evidence of ingestions, identifying SREMs in the NEISS data not by a specific product code or keyword, but through an analysis of narratives in ingestion reports. Tr. 1161:20-1162:19. Staff incorporated a dynamic range of descriptors based on terminology that evolved considerably from 2009 to 2013. *Id.* Ms. Stralka used her expertise to assess the NEISS incident data and compute a nationwide projection based on that data. Tr. at 889:1-13; 912:1-913:4. The projection showed that, from 2009 to 2013, an estimated 2,900 SREM nationwide ingestion incidents were treated in hospital ERs. Tr. 913:10-17; CC-39 at 1. Respondent presented no expert testimony to counter Ms. Stralka's conclusions.

Respondent did, however, dispute the NEISS projections with lay witness testimony challenging the methodology used by CPSC staff to categorize incidents as relevant for making SREM ingestion projections. Mr. Qu testified that he believed that staff included incidents that should not have been used as part of the calculus. Tr. at 2181:17-19. When questioned about his own counter-analysis, however, Mr. Qu admitted that his lay analysis was based on the assumption that Ms. Stralka had merely used keyword search terms to identify SREM ingestion incidents. Tr. at 2147:2-17; 2152:13-19. The evidence showed that Mr. Qu's conclusion was incorrect; Ms. Stralka's analysis was not based merely on keyword searches, but rather included a multi-step review process that relied on subject matter expert analysis of NEISS data. Tr. at 1006:18-1007:10. Mr. Qu ultimately conceded that his analysis resulted in a mischaracterization of incidents due to his flawed keyword searches. Tr. 2175:2-6 ("this was actually an error in my methodology"); Tr. at 2177:17-20 ("that was also a mistake on my part"); Tr. at 2185:10-17, 20-21.

Complaint Counsel demonstrated by a preponderance of the evidence that Ms. Stralka's testimony is a valid projection of 2,900 estimated yearly SREM ingestions. The NEISS data,

along with the IDI case studies, the NASPGHAN study, and testimony from Dr. Noel provide substantial evidence, uncontroverted by Respondent, that SREMs pose a severe risk of injury.

3. The Products are Not a Necessity

Although the Subject Products have limited utility, they are not a necessity. They may be used to illustrate scientific principles, but there is no evidence that any science curriculum would be impeded if these demonstrative aids were not available. In fact, Dr. Edwards admitted that he taught chemistry for 24 years before he knew SREMs existed, and he was able to successfully communicate centuries-old scientific principles without them. Tr. at 1401:14-1402:14.

Respondent's other witnesses were similarly unable to identify more than a few instances in which the Subject Products have been used in a class. Tr. at 1420:10-13, 1423:1-5. Admitting that that the products are unlike water, food and shelter, Tr. at 2210:18-21, Respondent presented no evidence to demonstrate that the Subject Products constitute a necessity.

4. The Population Exposed to the Subject Products Faces a Risk of Severe Injury

When the Subject Products are separated, shared or lost, they pose a serious risk of injury to children who may ingest more than one magnet. *See* CC-25 at 2. Based on reports and medical records of children accessing and ingesting SREMs, Dr. Steinberg testified that infants and toddlers are drawn to the Subject Products' shiny metallic features, and will touch, mouth, and ingest the products as they explore their environment. CC-19A at 2-4, 6; Tr. at 419:7-8, 420:20- 421:2, 423:8-11. Some of these children gained access to SREMs which were lost, unbeknownst to the child's caregiver. CC-19A at 11; Joint Notice, Exh. H. In other cases, infants or toddlers gained access to SREMs purchased for older siblings. The stipulated testimony regarding Emilyano Hoef, who ingested magnets his older sister was using as jewelry, and Muneeb Mokhtar, who ingested magnets his older brother was using to create sculptures,

illustrate these scenarios. Joint Notice, Exhs. A, G. Stryder Licata suffered devastating injuries after swallowing SREMs he thought resembled candy. Joint Notice, Exh. I, CC-20.

Tweens and teens are drawn to SREMs, Dr. Steinberg testified, because they see celebrities and others using them to simulate tongue piercings and jewelry. CC-19A at 13-14, CC-21, CC-22. Zen supports this usage by marketing the magnets for “self-adornment.” Tr. at 2411:16-2412:10; CC-64; CC-65. In many cases, children bring them to school where they share SREMs with friends and imitate behavior they see on the internet. CC-19A at 14-17. Tweens and teens who use the Subject Products to mimic piercings can accidentally ingest SREMs when the SREMs repel suddenly inside their mouth. Tr. at 378:1-6. Sara Andelin, Jocelyn Bustamante, and Marin Gold accidentally ingested SREMs in this manner. Joint Notice, Exhs. B, D, F. Similarly, Christin Rivas obtained six Zen Magnets from a friend without ever seeing warnings and accidentally swallowed two of them. Joint Notice, Exh. J. In the face of clear evidence that the Subject Products present a serious risk to children, a vulnerable population, Respondent failed to rebut Complaint Counsel’s showing.

5. The Risk is Not Obvious

Not only do the Subject Products present a serious risk of injury, the nature of that risk is compounded because it is hidden. Expert testimony offered by Dr. Frantz, Dr. Steinberg, and Dr. Noel demonstrates that the potentially catastrophic risks of the Subject Products are largely obscure to parents, caregivers, children, and medical professionals. CC-27A at 14 (SREM injuries “can be a hidden, ‘quiet’ type of injury”.)

Parents and caregivers may not appreciate that ingested magnets can cause life-threatening injuries. CC-27A at 15. As Dr. Frantz testified, many children obtain SREMs that are lost or shared among friends. CC-10A at 30-34. These magnets contain no warnings to alert

children or caregivers to the danger posed by SREMs. *Id.* at 7, 14; Tr. at 2604:13-17; 2605:14-2606:1. Moreover, because it is virtually impossible to tell by looking at a magnet set if as few as two are missing, caregivers may not realize that a child has accessed, let alone ingested, a magnet. CC-10A at 18-21; CC-19A at 8. In the unlikely event that they do realize that SREMs have been separated from a set, a parent is not likely to search for them because the nature of the risk posed by lost or shared SREMs is not obvious. CC-19A at 12.

In the same vein, Dr. Steinberg testified that tweens and teens who use the Subject Products to mimic piercings or test SREM strength on their braces do not understand how the SREMs can react and cause accidental ingestion. CC-19A at 13. Indeed, they do not appreciate that ingested SREMs pose any risk, underscoring the hidden nature of the hazard. *Id.* at 14-17. Moreover, parents of teens have no reason to suspect their children would use magnets to mimic piercings or to test the magnetic strength against their braces, and do not appreciate that such use can result in accidental ingestion that can result in catastrophic injury or death. CC-19A at 18; CC-27A at 14. Instead, they may believe and may even be told by doctors that SREMs are likely to pass through a digestive tract without incident. Joint Notice, Exh. G (Hoeft); CC-27A at 11.

Additionally, as explained by Dr. Noel, the hidden nature of the hazard extends beyond children and parents to the medical community, many of whom have not had sufficient training or experience with SREMs. CC-27A at 15. The risks are not obvious to medical professionals because children who ingest SREMs do not present with symptoms unique to SREM ingestion. CC-10A at 3, 4. Rather, children exhibit symptoms similar to the flu or a stomach illness. CC-27A at 10. As a result, parents whose children complain of a stomach ache may delay taking a child to the emergency room, which can allow the injury to worsen. CC-27A at 10, 14; CC-24 at 2. As Dr. Noel noted, multiple ingested magnets can cause serious injury in as little as eight

hours. CC-27A at 8. What is more, even when parents do take children to the hospital, doctors may not realize that immediate intervention is needed if they have no reason to suspect that a child ingested magnets. *Id.* at 14. As Dr. Noel testified, even if a doctor is advised that a child ingested SREMs, some doctors may determine that a wait and see approach is appropriate, consistent with treatment of other foreign body ingestions. CC-27A at 11. X-rays may identify the location and number of magnets, but will not identify whether the magnets have attracted through gastrointestinal tissue. *Id.* at 8. Medical professionals who do not understand the SREM mechanism of injury may wait to see if SREMs will pass, which can exacerbate injuries. Tr. at 766:16-19; CC-27A at 14. The evidence thus clearly establishes the latent nature of the risk. That the risk is a hidden hazard and not obvious to the vulnerable population at risk, their caretakers, or the medical community was uncontroverted by Respondent.

6. The Warnings and Instructions are Not Adequate to Mitigate the Risk

The record includes substantial evidence that warnings and instructions cannot adequately mitigate the risks associated with the Subject Products. The evidence shows that none of the warnings that have appeared on the products since 2009 convey adequately the risk associated with the Subject Products. CC-10A at 45-46; Tr. at 367:10-368:6. Furthermore, no warning could adequately convey these risks. Tr. at 307:16-21, 342:8-11; 343:1-4, 345:21-346:3; 367:10-15, 19-22; 368: 7-14; CC-10A at 46-47.

a. The warnings are inadequate because they are not kept with the products

As an initial matter, the warnings are defective because they do not remain with the SREMs. Tr. at 381:16-382:10. After the Subject Products are purchased and removed from the packaging, they are separated from the instructions and individual SREMs have no warnings, nor can they because their small size precludes that possibility. Tr. 381:16-382:10, CC-10A at 14;

CC-19A at 12, 15. Therefore, children and caregivers who obtain lost or shared SREMs will not see any warning at all. Tr. at 2604:3-2606:1; CC-10A at 7, 14; CC-19A at 4. Similarly, many Subject Products were sold without any written warnings. Tr. at 2333:11-15 (no warnings with Zen Magnets before May 2010); CC-55; Tr. at 2351:17-22; 2352:1 (no warnings with Mini sets and original sets sold through May 15, 2012). Even users who were provided with warnings were never warned that they must not lose or share SREMs, CC-10A at 10; CC-11 at 52-53, or that they must count every set after use. CC-10A at 18, 20. In addition, Zen promotes uses of its products to create figures, refrigerator art, and jewelry, activities that likely will result in SREMs being separated from each other and kept apart from the packaging. CC-10A at 13-16; CC-13.

That warnings are not kept with the Subject Products is confirmed by dozens of IDIs showing that infants and toddlers ingested SREMs purchased for an older sibling or relative and kept outside the packaging. CC-10A at 31-33. In addition, the IDIs and testimony revealed a common practice among tweens and teens to separate SREMs from sets and share a subset with friends. CC-10A at 31, 34, 37-40; Joint Notice, Exhs. B, D, F, and J. Neither the individuals who obtain the SREMs nor their parents ever sees a warning in such an instance. Tr. at 2605:14-2606:6; CC-10A at 7, 14. The absence of such warnings can and has led to ingestions by tweens and teens who used SREMs to mimic mouth piercings or test SREM magnetic strength against braces, or by infants and toddlers who accessed loose magnets and ingested them.¹⁴

b. The warnings do not advise against the real risk: a lack of containment

Even if the warnings were present for every use of the Subject Products, the warnings do not and cannot adequately warn against the basic risk of the SREMs, which Dr. Frantz identified

¹⁴ Exh. CC-10A at 27-30; Joint Notice at Exhs. B ¶¶ 12-13 (10-year-old swallowed SREMs given by friend with no warnings); D ¶¶ 4, 11 (10-year-old swallowed SREMs given by friend with no attached warnings); E ¶¶ 3-6 (19-month-old died after swallowing SREMs given by friend without warnings); F ¶¶ 15-16 (nine-year-old swallowed SREMs she got at school with no warnings); G ¶¶ 4-6 (three-year-old swallowed SREMs from a friend's house with no attached warnings); J ¶¶ 3, 13-14 (14-year-old swallowed Zen Magnets she got from a friend with no warnings).

as injury caused by a lack of containment. CC-10A at 9, 46-47; Tr. at 253:6-254:17. If a consumer is to heed warnings to keep the products away from children, consumers must not only keep children away from SREMs while in use, they also must keep sets intact and never lose or share magnets because lost or shared magnets place any child who obtains them at risk. CC-10A at 9, 20, 46-47. Such a warning is impossible, however, because the products are designed to be separated from sets. *Id.* at 7, 9-10, 13 (magnets come with a card to help break apart SREMs); Tr. at 255:14-256:1 (no warning can fix Zen's containment problem).

During the course of expected use, magnets may be accidentally lost, misplaced, or separated from sets if shared among friends. CC-10A at 7, 13-14, 21-23; Tr. at 346:8-16; 348:7-11; 353:17-22; 356:9-12; 366:11-14; CC-33 through CC-35 (e-mails from Zen customers about lost SREMs). Not only did Dr. Frantz present a video illustrating the way in which magnets can scatter if dropped, CC-14, CC-15A, CC-15B, Tr. at 137:4-149:8, but Respondent's own expert admitted that he has lost magnets. Tr. at 1404:8-1405:12 (Edwards); CC-10A at 21, 44. *See also* R-189 at 39:8-40:18 (Pelletier). Moreover, admonishing consumers not to lose magnets would be ineffective, as even the most vigilant consumers may not appreciate that two small magnets out of a set of hundreds have become separated or be able to locate such lost magnets even if the user becomes aware magnets are missing. Tr. at 178:10-11; 370:18-371:7; CC-10A at 20, 44-45. The only way to ensure that magnets are not lost is to count every SREM after each use. CC-10A at 18-20. Consumers are not likely to engage in such a tedious and time consuming exercise, which, according to Mr. Qu, would take two people at least twenty minutes after using the Zen Mandala set. CC-10A at 10, 18; CC-19A at 8 ("most people would not count each individual magnet ball before storing the product.") This inability to contain the Subject Products renders meaningless any warning about the need for containment. CC-10A at 47.

c. The warnings on the website are ineffective because they can easily be bypassed

Respondent asserts that the initial lack of written warnings with its products, and the later deficiencies of its written warnings, are insignificant because its website contains warnings to all consumers who access the site. However, the evidence showed that these warnings can be bypassed easily. Tr. at 2247-2254. Through a few simple and direct clicks, a user could purchase Zen Magnets without ever seeing a warning or an age label for the products. Tr. at 2253:11-2254:2. The products also could be shipped directly to a person of any age, and then placed into the hands of a young child without the child or a parent ever seeing a warning. Tr. at 2251-2254. Similarly, the Neoballs website allows users to bypass a warning with one click. Tr. at 2218:7-15. Thus, a consumer could order the Subject Products and never see an online warning, undermining the warning's effectiveness.

d. Some Subject Products, including spares, were sold without any warnings

The evidence shows that prior to May 2010, the Subject Products were sold without any on-product warnings. Tr. at 2333:11-15. After May 2012, when CPSC staff conducted an inspection of Zen Magnets, investigators learned that the 72 Mini sets and the 216 Original set were still being sold without warnings provided with the product. Tr. at 2351:17-2352:1; CC-55. According to Zen sales records, Zen sold more than [REDACTED] Mini and Original sets by May 2012. CC-16. In addition, since the introduction of the Subject Products in 2009, spares are provided in a small, clear baggie with the gift sets or with the Mandala set without any warning on the spares baggie. Tr. at 2605:14-18. Six spares are provided with the gift set and eight with the Mandala set—just the right quantity for teens to share with friends. CC-10A at 23. Christin Rivas obtained six Zen Magnets from a friend, and accidentally ingested the magnets when she placed them in

her mouth. CC-10A at 28; Joint Notice at Exh. J, ¶¶ 3-4. Neither Christin nor her mother ever saw warnings associated with the Subject Products. *Id.* at ¶ 13.

The preponderance of the evidence establishes that Respondent's warnings are insufficient to mitigate the risk posed by the Subject Products. That the warnings were constantly evolving, yet never sufficient, only confirms their inadequacy. Coupled with the inability to contain the magnets, which Respondent was unable to refute, the warnings fail to address the risk and are thus defective.

7. The Role of Consumer Misuse and the Foreseeability of Such Misuse

It is highly foreseeable that children will use the Subject Products in ways that Respondent now characterizes as misuse. Tween and teen use of the Subject Products as tongue piercings was foreseeable because Respondent affirmatively promoted them as jewelry for "self-adornment" and commented that they "look[] good on cute people" and "look hot on girls." Tr. at 2411:16-2412:3, 2421:8-11; CC-10A at 8, 10, 13; CC-11 at 12. Videos of celebrities using SREMs to imitate tongue piercings garnered attention among tweens and teens and fueled the popularity of SREM use for this purpose. CC-10A at 11-15; CC-19A at 13-14. Given Zen's promotion and marketing, it is foreseeable that tweens and teens will use them in ways that can lead to accidental ingestion. CC-19A at 12-13. As Dr. Steinberg testified, such conduct is reasonable, age appropriate behavior for tweens and teens. *Id.* at 14. The foreseeability of this use is further highlighted by email exchanges between Mr. Qu and middle school students where he promoted the use of the products as jewelry. CC-65; Tr. 2410:13-21. Other than seeking to place blame for injuries on poor parenting, Respondent offered no evidence to demonstrate that the Subject Products were used in ways other than those that were completely foreseeable.

8. Commission Expertise Supports a Finding that the Products are Defective

The Commission has extensive experience in determining the risks and hazard posed by SREMs. In addition to the numerous recalls of toys with liberated magnets between 2006 and 2008, staff has carefully studied the history of SREM incidents. Of particular note is that magnet ingestions, which decreased when ASTM F963 became mandatory in 2009, surged after the Subject Products and other similar SREMs entered the market. CC-10A at 41-42; CC-11 at 34-35. CC-24 at 1 (increased ingestions in 2009 correlates to increase in SREM sales); CC-28 at 14 (in the three years before the NASPGHAN Study, “[a]ll types of intervention for magnet cases have increased...with a 10 fold increase in endoscopic procedures alone”); CC-27A at 6; CC-26 at 1; CC-28 at 3, 14; CC-29 at 1 (magnet ingestions increased dramatically in 2009-12). In addition to compiling 95 incident reports of ingestions, staff engaged its technical directorates from engineering, human factors and health sciences to analyze the products, assess the efficacy of warnings, and determine the risks posed by the Subject Products and other SREMs. Outside experts augmented staff’s experience as did testimony from families whose children ingested SREMs, including Zen Magnets. Joint Notice at Exhs. A-J.

9. Case Law Interpreting the CPSA

Case law established from two prior administrative proceedings supports a finding that the Subject Products present a substantial product hazard. In *In re P&M Enterprises*, CPSC Docket No. 88-1, the Commission alleged that the “WORM GETT’R,” an electric probe used to conduct electricity into the ground to force worms to the surface, created a substantial product hazard. The manufacturer disputed that the product created a risk of injury and argued that any injured consumers did not follow instructions. The Commission alleged that the warnings were inadequate to address the risk, and that the product and warnings were defective.

The Administrative Law Judge concluded that while the risk of injury may be limited if warnings were strictly followed, the evidence showed that warnings were not adequate to address the risk because users were not following, and not likely to follow, the warnings. *P&M Enterprises* at 20. In language directly applicable to this case, the court found that where, as here, warnings “have failed and continue to fail to convey adequately . . . the latent hazard” of the product risk, or where the warnings failed to “warn convincingly against permitting children of any age” to use the product, the warnings “in and of themselves constitute a product defect.” *Id.* Because of the pattern of defects, the number of products distributed, the severity of the risk, the latent hazard of the product, and the risk of injury or death, the court determined that the Worm Gett’r created a substantial product hazard. *Id.* at 21-23. The evidence in this case warrants the same result. The evidence shows that the pattern of defect arises from the use of the Subject Products as designed; the risk of injury from ingested magnets is severe; the hazard is hidden; millions of SREMs have been sold; and the warnings do not and cannot mitigate the risk.

A substantial product hazard finding here also is supported by *In re Francis Alonso, Jr. d/b/a Mylar Star Kites*, CPSC Docket No. 75-16 (Initial Decision, June 21, 1976, Decision and Order, *findings of fact affirmed; order set aside on jurisdictional grounds*, Sept. 16, 1977). In *Mylar Star Kites*, Commission staff charged that aluminized polyester film kites presented a substantial product hazard due to the risk of electric shock if the kite contacted power lines. The court found that the kite was “extremely hazardous.” Initial Decision at 11. The Court also found a proposal by the Respondent to “label the kites and distribute warning literature,” was “insufficient by itself to eliminate the hazard,” as there was no guarantee the instructions would be obeyed. *Id.* As such, the risk of incidents was “clearly foreseeable.” *Id.*¹⁵ Here, the evidence

¹⁵ Although the Commission set aside the ALJ’s order on procedural grounds, *Mylar Star Kites*, Decision and Order at 3-5, it affirmed the ALJ’s findings of fact, including the substantial product hazard determination. *Id.* at 3.

similarly shows that the warnings are inadequate to address the risk of injury posed by the Subject Products, and no warnings could adequately warn of the hazard.

10. Products Liability

Complaint Counsel is unaware of products liability case law involving the Subject Products. Although a finding of defect in a products liability action could be a factor in determining whether a defect exists in an action under CPSA Section 15, the Commission has noted that it would be inappropriate to apply product liability law to narrow the “broad, encompassing definition of defect” used in CPSA Section 15. 43 Fed. Reg. 34988, 34991 (Aug. 7, 1978). Given the lack of case law regarding the Subject Products, this factor is not instructive in this Court’s analysis of whether they constitute a substantial product hazard.

D. The Subject Products Present a Substantial Product Hazard

To prove a substantial product hazard, Complaint Counsel must show that the Subject Products’ defect creates a risk of injury because of one of the following factors: (1) the pattern of defect; (2) the number of products in commerce; or (3) the severity of the risk of injury. 15 U.S.C. § 2064(a)(2). Although a showing of only one factor is sufficient, *see, e.g.*, 16 C.F.R. § 1115.4 (“Most defects could present a substantial product hazard if the public is exposed to significant numbers of defective products or if the possible injury is serious or is likely to occur”), the facts demonstrate that all three have been proven here.

1. Pattern of Defect

Under 16 C.F.R. §1115.12(g)(1)(i), a “pattern of defect” analysis requires consideration of whether the defect arises from the “design, composition, contents, construction, finish, packaging, warnings, or instructions of the product....” A pattern of defect is established here with respect to both the design and warnings of the Subject Products. The Subject Products are

defective as designed because the operation and use of the product, whereby loose SREMs are meant to separate from a set, results in a risk of injury to children who ingest the SREMs. CC-10A at 7, 13-14, 16; CC-27A at 7-10; Tr. at 304:21-305:3. The warnings are also defective because they fail to identify the risk of lost or shared SREMs and cannot be remedied to adequately address the risk. CC-10A at 44-46; Tr. at 342:8-11, 367:16-368:14.

Even if the Subject Products had warnings that identified the risk posed by a lack of containment, the warnings would not be sufficient because it is not possible to account for every SREM in sets that contain up to 1,728 magnets. Tr. at 178:10-11, 370:18-371:7; CC-10A at 18-19, 46-47. Moreover, it is not possible to adequately advise consumers that they must either never lose a magnet or ensure that a child never enters a space where a SREM was lost. Tr. at 367:10-369:22; CC-10A at 9-10, 46-47. The warnings are thus defective, and cannot be modified to warn adequately of the risk posed by a failure to contain SREMs because containment is not possible. CC-10A at 9-10, 45, 47; Tr. at 342:8-11, 367:16-369:8.

Accordingly, the pattern of defect here, which arises from the both the operation and use of the product and its inadequate warnings, creates a substantial risk of injury to the public and presents a substantial product hazard under Section 15(a)(2) of the CPSA.

2. Number of Products in Commerce

Under 16 C.F.R. §1115.12(g)(1)(ii), even one defective product can present a substantial risk of injury and provide a basis for a substantial product hazard determination if the injury is serious and/or if the injury is likely to occur. Respondent has sold more than [REDACTED] SREMs. CC-10A at 24. Zen's sales record spreadsheet contains over [REDACTED] line items for sales of the Subject Products to consumers, and Zen sets with the exception of the mini set come with six or eight spares. CC-10A at 23; CC-16. In addition, Zen has provided more than [REDACTED] free

or low cost spare magnets. CC-10A at 24. The evidence demonstrates that it takes only two ingested magnets to cause serious, life threatening injuries to a child. CC 18.48 and Joint Stipulation Exh. J (Rivas swallowed two magnets, suffered serious injury); CC-57 at 4. The millions of individual SREMs sold by Respondent create a substantial risk of injury to the public.

3. Severity of the Risk

Under 16 C.F.R. § 1115.12(g)(1)(iii), a risk is severe if the injury which might occur is serious and/or if the injury is likely to occur. The Commission interprets “serious injury” to include “[i]njuries necessitating hospitalization which requires actual medical or surgical treatment, . . . injuries to internal organs requiring medical treatment, and injuries necessitating absence from school or work of more than one day. . . .” 16 C.F.R. 1115.6(c). An injury may be considered likely based on the number of injuries, the intended use or reasonably foreseeable use or misuse of the product, and whether the risk relates to a vulnerable population such as children. *See* 16 C.F.R. § 1115.12(g)(1)(iii). The evidence, including reports of ingestions contained in the IDIs, the NASPGHAN study, and projections of incidents based on NEISS data, demonstrates the severity of the risk presented by the Subject Products. CC-27A at 10-13 (summary of injuries caused by SREMs); CC 18.1-18.95; CC-28 at 14; CC-29 at 5.

As the evidence showed, children who ingest SREMs are at a four times greater risk of medical intervention than children who ingest other foreign bodies. CC-27A at 6. The interventions include X-rays and life-threatening procedures including endoscopies, surgical repair, and bowel resections. Of the children in the NASPGHAN study who had endoscopies plus surgeries, almost half suffered intestinal perforations or fistulas. CC-27A at 7; CC-29 at 7. A quarter had deep pressure lesions that occurred when SREMs attracted through intestinal walls. CC-27A at 7. Of the children who required surgery, 16 percent required bowel resections. *Id.*

Some children, including Patient B, will suffer complications for the rest of their lives. *Id.* at 9-10. And while many of the children endured excruciating pain as a result of the ingested magnets, 19-month-old Annaka Chaffin died after ingesting SREMs. CC-27A at 12; CC-18.15; Joint Notice, Exh. K at ¶¶ 11-12.

Because the Subject Products create a risk of injury due to: (1) the pattern of defect; (2) the number of products in commerce; or (3) the severity of the risk of injury, they constitute a substantial product hazard.

IV. CONCLUSION

The Subject Products present a substantial product hazard because they (1) fail to comply with an applicable consumer product safety rule under the CPSA, which creates a substantial risk of injury to the public, and (2) contain a product defect which creates a substantial risk of injury to the public. Complaint Counsel asks that the Court find that the Subject Products pose a substantial product hazard, and order Respondent to implement a corrective action that includes a stop sale, recall and refund, and notice to consumers.

Respectfully submitted,



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April 2, 2015

CERTIFICATE OF SERVICE

I certify that I have provided on this date, April 2, 2015, Complaint Counsel's Post Hearing Argument – Redacted, to the Presiding Officer and Respondent in these proceedings.

Original and three copies by hand delivery to the Secretary of the U.S. Consumer Product Safety Commission: Todd A. Stevenson.

One copy by electronic mail to the Presiding Officer:

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EXHIBIT A

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of
MAXFIELD AND OBERTON HOLDINGS, LLC
ZEN MAGNETS, LLC
STAR NETWORKS, LLC
CRAIG ZUCKER,

CPSC DOCKET NO. 12-1
CPSC DOCKET NO. 12-2
CPSC DOCKET NO. 13-1
(CONSOLIDATED)

Respondents.

RESPONDENT ZEN MAGNETS, LLC'S RESPONSES TO
COMPLAINT COUNSEL'S FIRST SET OF REQUESTS FOR ADMISSION

Respondent, Zen Magnets, LLC, (hereafter "Zen"), through Shihan Qu, member/manager of Zen Magnets, LLC, and through counsel, responds to Complaint Counsel's first set of Requests for Admissions as follows:

1. The Subject Products were imported by Zen

Response: Admit.

2. The Subject Products were and are distributed in commerce by Zen.

Response: Admit.

3. Zen distributed in commerce the Subject Products, as the term "distribution in commerce" is defined in the Consumer Product Safety Act, 15 U.S.C. § 2052(a)(8).

Response: Admit.

4. Zen is a "distributor" of the Subject Products, as that term is defined in the Consumer Product Safety Act, 15 U.S.C. § 2052(a)(7).

Response: Deny. The Consumer Product Safety Act specifically states that an "importer" is

a "manufacturer," and a "manufacturer" cannot be a "distributor." 15 U.S.C § 2052(a)(7) and (a)(11.)

5. Zen is a "retailer" of the Subject Products, as that term is defined in the Consumer Product Safety Act, 15 U.S.C. § 2052(a)(13).

Response: Admit.

6. Zen is the importer of record for the Subject Products.

Response: Admit.

7. Zen is organized a Limited Liability Company under the laws of Colorado.

Response: Admit.

8. Zen is headquartered at 4155 East Jewell Ave, Ste 908, Denver CO 80222

Response: Admit.

9. The Subject Products are "consumer products," as that term is defined in the Consumer Product Safety Act, 15 U.S.C. § 2052(a)(5).

Response: Admit

10. The Subject Products are manufactured by Bestway Magnet Corp., in the Northern Section of Huangcheng Westroad, Ningbo, China.

Response: Admit.

11. The Subject Products are spherically shaped magnets.

Response: Admit.

12. Zen Magnets consist of individual magnets that are packaged as aggregated masses of magnets.

Response: Admit.

13. Zen Magnets consist of loose-as-received magnets.

Response: Admit.

14. Zen Magnets consist of individual magnets that are approximately 5.03 mm in diameter.

Response: Deny. The expected standard deviation for diameter tolerance of Zen Magnets are 5.00 +/- 0.01mm. This specification is one of the primary tangible differences between Zen Magnets and other brands.

15. Zen Magnets consist of individual magnets each of which has a surface flux index greater than $50\text{kg}^2\text{mm}^2$,

Response: Admit.

16: Zen Magnets consist of individual magnets each of which has a surface flux index greater than $577.1\text{Kg}^2\text{mm}^2$.

Response: Admit.

17. An individual Zen Magnet is capable of attracting to another similar magnet across a distance of 1.5cm or greater.

Response: Admit.

18. Zen Magnets may connect in configurations such as strings, rings, or clumps.

Response: Admit. Strings, rings and clumps are very basic configurations of magnet spheres.

19. Zen Magnets can attract to non-magnetic ferrous items such as steel ball bearings.

Response: Admit. This is a fundamental feature of all magnets.

20. The attraction force between two individual magnets that are separated by 1.5cm is approximately .5 grams.

Response: Admit.

21. N/a

Response: This question is missing.

22. The amount of force required to separate two individual Zen Magnets that are attached

together ranges from 0.728 to 0.768 lbf.

Response: Zen is without knowledge or information sufficient to form a belief as to the truth of this point, and on that basis denies the Request for Admission.

23. Zen Magnets have been distributed in commerce since September 2009.

Response: Admit.

24. As of August 14, 2013, Zen Magnets currently are being distributed in commerce.

Response: Admit.

25. As of August 14, 2013, Zen Magnets are currently being distributed in commerce on the website www.zenmagnets.com.

Response: Admit.

26. Zen's sales of Zen Magnets and/or Neoballs totaled approximately \$700,000 in the last year.

Response: Admit.

27. Zen's sales of Zen Magnets totaled approximately \$50,000 in 2009.

Response: Deny. Total sales were \$50,000.00 in approximately the first twelve months of operations.

28. Shihan Qu is the owner of Zen.

Response: Admit.

29. Shihan Qu is the founder of Zen.

Response: Admit

30. Shihan Qu acknowledged to Denver Post reporter that injuries can occur when rare earth magnets are ingested.

Response: Admit. Injuries can occur when products are misused.

31. The website, www.zenmagnets.com, was designed by Zen.

Response: Admit.

32. The website, www.zenmagnets.com, is operated by Zen.

Response: Admit.

33. More than 50,000 sets of Zen Magnets have been distributed in commerce since September 2009.

Response: Admit.

34. Zen Magnets are offered for sale on www.zenmagnets.com in sets of 72, 216 or 1728 magnets.

Response: Admit.

35. Zen Magnets distributed in sets of 72 are packed in a velvet sack.

Response: Admit. The Mini set contains 72 magnets, and are in a velvet sack.

36. The purchase price of a 72 magnet set of Zen Magnets is \$12.65.

Response: Admit.

37: Zen Magnets distributed in sets of 216 magnets are packed in either a velvet sack or an MDF hard case.

Response: Deny. The velvet sack comes with both versions of the Zen Set, while the MDF Hard Case only comes with the Gift Zen Set.

38: The purchase price for a 216 magnet set of Zen Magnets ranges from \$32.98 to \$38.24.

Response: Admit.

39: Zen Magnets distributed in sets of 1,728 magnets are packaged in a velvet lined wooden teak box.

Response: Admit.

40. The purchase price for a 1,728 magnet set of Zen Magnets is \$296.82.

Response: Deny. The Zen Magnets Mandala set is currently \$263.85, and in the past it has varied.

41. Zen Magnets can be purchased individually.

Response: Admit

42. An individual Zen Magnet can be purchased for \$0.20.

Response: Admit.

43. Some sets of Zen Magnets are sold with a "laser etched stainless steel building platform."

Response: Admit. The Zen Gift Set and Zen Mandala set include a laser etched stainless steel building platform.

44. From September 2009 through mid-2011, the following warning statement appeared on the home page of www.zenmagnets.com:

Warnings: try not to drop them. Ever play with magnets in the sand? Ferric dirt particles are hard to get off super magnets, and will quickly erode the poles. Zen Magnets can destroy or disrupt magnetically sensitive technology. Be cautious with open chains. Can cause serious problems if swallowed. Do not give to kids under the age of 12, and keep them away from pets. Call poison control if more than 1 magnet is swallowed.

Response: Admit.

45: On August 14, 2014, the following warning statement appears on the home page of www.zenmagnets.com:

Warnings: : Try not to drop them. Ever play with magnets in the sand? Ferric dirt particles are hard to get off super magnets, and will quickly erode the poles. Zen Magnets can destroy or disrupt magnetically sensitive technology. Be cautious with open chains. Can cause

serious problems if swallowed. Do not give to kids under the age of 12, and keep them away from pets. Call poison control if more than 1 magnet is swallowed.

Response: Deny. The statement following "Can cause serious problems if swallowed." was changed to "CPSC recommends minimum age of 14, and keep them away from pets." in 2011.

46: In October 2011, the following warning statement appeared on the "Buy" page of www.zenmagnets.com:

Magnets cause fatal intestinal pinching if swallowed. Keep away from animals and children who don't understand this.

Response: Admit.

47: As of August 14, 2013, the following warning statement appears on the "Buy" page of www.zenmagnets.com:

Zen Magnets may cause fatal intestinal pinching if swallowed. Don't leave them around animals, or children who don't understand this. US Government Age recommendation is 14 years.

Response: Admit.

48: In October 2011, the following statements appeared on the "FAQ" page of www.zenmagnets.com:

Q: How old do you have to be to play with these?

A: According to the CPSC, 14 years old in the US for a strong, magnetic toy. Unless it's not a toy, then no age limit. Unless it's a "Science Kit," then the age regulation is 8+. Zen Magnets are classified as a science kit, so the minimum age as recommended by the U.S. Government is 8. Our common sense recommendation is 12.

Response: Admit.

49: As of August 14, 2013, the following statement appears on the "Relations" page of www.zenmagnets.com:

Q: How old do you have to be to play with these?

A: According to the CPSC, 14 years old in the US for a strong magnetic toy. Unless it's not a toy, then no age limit. Unless it's a "Science Kit," then the age regulation is 8+. Zen Magnets are classified as a science kit, so the minimum age as recommended by the US Government is 8. Our common sense recommendation is 12.

Response: Admit

50. As of July 2012, Zen distributed Zen Magnets with the following warning statement, contained on a 2" x 2" slip of paper:

Warning: **DO NOT SWALLOW MAGNETS.** How old do you have to be to play with these? Dunno. 14 years old in the U.S. for a strong magnetic toy, unless it's not a toy, then no age limit, but they're fun magnet spheres, aren't they a toy? Unless it's a "science kit" then the age recommendation is 8+. But really, it's whatever age at which a person stops swallowing non-foods. Strong magnets can cause fatal intestinal pinching. Place swallowing magnets on your don't do list along with breathing water, drinking poison, and running into traffic. Call poison control if more than one is swallowed. And keep these away from kids (and pets) who don't understand these dangers. BTW, this is a "science kit" for sure.

Response: Admit.

51. Beginning in August 2012, the lower portion of the opposite side of the 2" x 2" slip of paper that accompanies the magnets included the following warning statement:

"Government Warning": This product contains small magnets. Swallowed magnets can stick

together across intestines causing serious infections. Seek immediate medical attention if magnets are swallowed or inhaled. Keep away from all bodily orifices. CPSC 14+ Age Recommendation.

Response: Deny. The current back side of the 2"x2" is information regarding SaveMagnets.com, the website created to inform people about the truths of CPSC's magnet prohibition. Prior, the backside was blank. At no time were there warnings on both sides.

52. Some sets of Zen Magnets distributed in commerce were not accompanied by the 2" x 2" slip of paper containing a warning statement.

Response: Admit. From a period between 2009 and 2011, warnings were only online.

53. As of August 14, 2013, the following statement appeared on the home page of www.zenmagnets.com: "Busy Federal CPSC says magnets should not be allowed, guns entrenched to knees. Uncompromising stance, mean sting, and no mind for democracy that disagrees."

Response: Admit. The words "magnet", "allowed", "Uncompromising", "mean", "democracy", "disagrees" and "SaveMagnets.com" lead to the following URLs respectively:

http://www.denverpost.com/businessheadlines/ci_21305171?source%3DAP

http://blogs.westword.com/latestword/2012/08/federal_agency_targets_denver.php

<http://www.change.org/petitions/us-cpsc-cease-magnet-prohibition>

<http://savemagnets.com/massive-cpsc-misinformation-health-canada-analysis-shows/>

<http://savemagnets.com/cpsc-magnet-ban-the-polls-are-in-and-the-ban-is->

really-really-unpopular/

http://www.reddit.com/r/technology/comments/xinx7/zen_magnets_cause_d_0_injuries_is_now_the_second/

<http://savemagnets.com/>

54. As of August 14, 2013, the home page of www.zenmagnets.com contains a link to the website www.SaveMagnets.com.

Response: Admit.

55. The website, www.SaveMagnets.com, was designed by Zen.

Response: Admit.

56. The website, www.SaveMagnets.com, was operated by Zen.

Response: Admit.

57. As of August 14, 2013, Zen Magnets were advertised on www.zenmagnets.com as "fun to play with."

Response: Zen admits that the text appears on zenmagnets.com. But Zen denies the allegation insofar as it suggests that the subject product is primarily for children.

58. As of August 14, 2013, Zen Magnets were advertised on www.zenmagnets.com as items that "look good on cute people."

Response: Zen admits that the text appears on zenmagnets.com. But Zen denies the allegation insofar as it suggests that the subject product is primarily for children.

59. As of August 14, 2013, Zen Magnets were advertised on www.zenmagnets.com as items that "may have health benefits."

Response: Admit. Meditation, and dexterity exercises are commonly known to be healthy. Stretching is good, whether it is for the mind, or the hands.

60. As of August 14, 2013, the following is contained on the "Relations" page of www.zenmagnets.com:

Q: Do you have other colors?

A: Yes, and you can find them at Neoballs.com. However, these are not Zen Magnets. Zen Magnets will always only come in one flavor of perfection: mirror polished NiCuNi, unsurpassed geometric tolerances.

Response: Admit.

61. Neoballs consist of individual magnets that are packaged as aggregated masses.

Response: Deny. The customer determines how these magnets are to be packaged.

62. Neoballs consist of loose-as-received magnets.

Response: Admit.

63. Neoballs consist of individual magnets that range in size from 4.98 to 5.11 mm in diameter.

Response: Admit.

64. Neoballs consist of individual magnets, each of which as a surface flux index greater than $50\text{kg}^2\text{mm}^2$.

Response: Admit.

65. Neoballs consist of individual magnets each of which has a surface flux index greater than $438.8\text{ kg}^2\text{mm}^2$

Response: Admit.

66. An individual Neoball magnet is capable of attracting to another similar magnet across a distance of 1.5cm or greater.

Response: Admit.

67. Neoball magnets may connect in configurations such as strings, rings, or clumps.

Response: Admit. Strings, rings and clumps are very basic configurations of magnet spheres.

68. Neoball magnets can attract to non-magnetic ferrous items such as steel ball bearings.

Response: Admit. This is a fundamental feature of all magnets.

69. The attraction force between two individual Neoballs that are separated by 1.5cm is approximately .5grams or .002 lbf.

Response: Admit.

70. The amount of force required to separate two Neoball magnets that are attached together ranges from .566 to .748 lbf.

Response: Zen is without knowledge or information sufficient to form a belief as to the truth of this point, and on that basis denies the Request for Admission.

71. Neoballs are available in a variety of color coatings.

Response: Admit.

72. Zen began distributing Neoballs in commerce in September 2011.

Response: Admit.

73. In September 2011, Zen distributed Neoballs in sets of 216 magnets.

Response: Admit.

74. Zen distributed Neoballs in sets of 216 until September 13, 2012.

Response: Admit.

75. Zen stopped distributing Neoballs on September 12, 2012.

Response: Admit.

76. On October 2, 2012, Zen advised the US CPSC that Zen intended to begin distributing Neoballs again.

Response: Admit

77. On October 2, 2012, Zen advised the US CPSC that Zen intended to begin distributing Neoballs through the website: www.neoballs.com.

Response: Admit.

78. On October 2, 2012, Zen advised the US CPSC that Zen intended to begin distributing Neoballs as individual magnets.

Response: Admit.

79. In November 2012, Zen began distributing Neoballs.

Response: Admit.

80. In November 2012, Zen began distributing Neoballs through the website www.neoballs.com.

Response: Admit.

81. In November 2012, Zen Magnets, LLC, began offering Neoballs for sale as individual magnets.

Response:

82. As of August 14, 2013, Zen is currently distributing Neoballs in commerce.

Response: Admit.

83. The website, www.neoballs.com, was designed by Zen.

Response: Admit.

84. The website, www.neoballs.com, is operated by Zen.

Response: Admit.

85. The purchase price for individual Neoballs ranges from 6 to 10 cents per magnet.

Response: Admit.

86. Neoballs purchased in quantities of less than 216 magnets of a color are packaged in a plastic bag.

Response: Admit.

87. Neoballs purchased in quantities of 216 or more of a color are sold with a square tin.

Response: Deny. The tin is rectangular, with rounded corners.

88. Regardless of the number of Neoballs purchased, the shipping rate is the same.

Response: Admit.

89. As of August 14, 2013, the following statement appears on the "Purchase" page of www.neoballs.com: "However, shipping is flat rate no matter how many Neoballs you purchase, whether you buy 216, or 21,600 magnet spheres."

Response: Admit.

90. More than 900 sets of Neoballs sold in a set of 216 magnets have been distributed in commerce since September 2009.

Response: Admit.

91. From November 2012, until at least August 14, 2013, the following warning statement appears on the "Relations" page of www.neoballs.com:

Practice Responsible Magnet Usage! High power magnets may cause fatal intestinal

pinching if swallowed. Keep away from all orifices. RARE EARTH MAGNETS ARE NOT TOYS. Don't leave them around animals, or children who don't understand the dangers. Always communicate these dangers when sharing magnets. If magnets are ingested or aspirated to the lungs, immediate medical attention is required.

Response: Zen admits that the alleged text appears on the Relations page inter alia. However the full terms and conditions are longer, and appear as follows:

By purchasing from this site, you accept all Terms and Conditions:

1. Agreement. The terms and conditions set forth herein shall be deemed incorporated into the order confirmation, as the case may be, and shall constitute the agreement by and between Zen Magnets LLC ("Seller") and the party who is identified as the purchaser of the equipment, goods and/or services on the order acknowledgement/confirmation ("Buyer"). Acceptance of the goods specified in the order confirmation shall constitute acceptance of the terms and conditions listed regardless of whether Buyer has signed or acknowledged the Agreement herein.
2. Payment Terms. Payment of the full purchase price for the Products (i.e., the method of payment and due date) shall be due in accordance with the specifications appearing on the order confirmation. Buyer shall pay any and all shipping, transportation, freight, rigging, delivery and/or drayage costs, as well as any and all other costs associated with the shipping and/or delivery of the Products purchased pursuant to this Agreement.
3. Delivery. Buyer will be notified of the approximate delivery and arrival date(s) of the items of Products ordered, but Seller does not guarantee nor warrant a particular day of delivery. Delivery is contingent upon credit approval and/or adequate prior financial arrangements, if applicable. Buyer's requests for delivery rescheduling may be granted in Seller's sole and absolute discretion. Delivery of Products to a common carrier, licensed trucker, or vessel shall constitute delivery to Buyer. Accordingly, title to the Products and risk of loss shall pass to the Buyer upon Seller's delivery of Products to such common carrier, licensed trucker, or vessel. Seller shall not be liable for any delivery or shipping delays which arise from but which are not limited to the following: fire, explosion, flood, storm, acts of God, governmental acts, orders or regulations, hostilities, civil disturbance, strike, labor difficulties, machinery breakdown, transportation contingencies, difficulty in obtaining supplies or shipping facilities or delay of carriers.
4. Acceptance. Zen Magnets has a no-hassle return policy. No purchase is complete until you are satisfied. If for any reason you decide to not keep the merchandise you can return it within thirty (30) calendar days from delivery of the Products to Buyer, in its original box, packing material, and in resalable condition, for a full refund of the purchase price (shipping, insurance and handling are not refundable). Returned orders which qualified for free shipping will have the shipping charges deducted from the refund amount. Returned orders must be accompanied by all FREE items which may have been included with the order – any missing items will be deducted from the refund amount based on the items value as stated on the website. Damaged or missing goods not in original shipped condition will be deducted from the refund total. Buyer's failure to return any Products within the thirty (30) days constitutes unequivocal acceptance of the Products. Custom magnets and items sold as "clearance" or "liquidation" are non-refundable. Buyer must request a Return Merchandise Authorization (RMA) number before returning package by emailing contact@zenmagnets.com or the return package will be rejected.
5. No Offset. Payment of the purchase price and all sums due to Seller shall be made in full pursuant to the terms herein without any deduction, credit or offset. Buyer's failure to pay the full amount when due, without deduction, offset or credit, shall be a material breach of the Agreement.
6. Indemnity. The Buyer certifies that they are 18 years of age and understands that NdFeB magnets and all Products purchased from Zen Magnets can be very dangerous. Buyer shall and does hereby agree to defend, indemnify and hold Seller harmless of and from any and all liability loss, cost, injury, damage, demand and expense (including, without limitation, reasonable attorneys' fees) of any kind whatsoever

arising out of, on account of, or in connection with a breach of this Agreement and/or any use or misuse of the Products. This indemnity shall not be affected or terminated by reason of the termination of this Agreement or purchase, for any reason, with respect to all or any part of the Products.

7. Cancellations and Returns. Purchase orders submitted by Buyer are not subject to cancellation by Buyer. In the event Seller, in its sole discretion, allows the return of any Products purchased pursuant to this Agreement, Buyer shall be obligated to pay a restocking charge equal to \$3 OR 15% of the price paid (whichever is higher) and any transportation charges or other applicable expenses incurred in the shipment of such other non-Seller products between Seller and Buyer. In the event the return of Products includes other products, not sold by Seller, then Seller at its sole option may dispose of such. Please see further details under ACCEPTANCE above.

8. Warranty and Disclaimer. Seller warrants that Products shall be free of defects in material and workmanship for a period of thirty (30) days from the date of Seller's original invoice for the Products. This warranty is limited to the original purchaser of such Products and is non-transferable. All requests relating to this warranty and/or claims relating to this warranty must be directed to the original place of purchase. Seller will repair or replace, at its option, any genuine Product accompanied by an order number that, in Seller's sole judgment, is determined to be defective in materials or workmanship under normal use. Seller's obligations hereunder are limited to such repair or replacement. No cash reimbursement will be made. All parts submitted for warranty consideration must be returned with all transportation expenses prepaid. All Products replaced become the property of the Seller. WITH THE EXCEPTION OF THE LIMITED 30 DAY WARRANTY DESCRIBED HEREIN, SELLER DISCLAIMS ANY OBLIGATION OR LIABILITY WITH RESPECT TO THE PRODUCTS OR THEIR SALE AND USE, AND SELLER NEITHER ASSUMES NOR AUTHORIZES THE ASSUMPTION OF, ANY OBLIGATION OR LIABILITY IN CONNECTION WITH THE PRODUCTS. THIS DISCLAIMER INCLUDES ANY OTHER WARRANTIES, EXPRESS, IMPLIED OR STATUTORY RESPECTING THE PRODUCTS OR ANY PARTS OR COMPONENTS THEREOF, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

9. Liability Limitation. Seller's total liability to Buyer for any claim arising hereunder shall not exceed the purchase price specified on the order confirmation and paid by Buyer. SELLER SHALL NOT IN ANY EVENT BE LIABLE FOR INDIRECT, SPECIAL, CONSEQUENTIAL OR LIQUIDATED DAMAGES OR PENALTIES, INCLUDING CLAIMS FOR LOST REVENUE, PROFITS OR BUSINESS OPPORTUNITIES, EVEN IF SELLER HAD OR SHOULD HAVE HAD ANY KNOWLEDGE, ACTUAL OR CONSTRUCTIVE, OF THE POSSIBILITY OF SUCH DAMAGES.

10. Entire Agreement. This Agreement constitutes the final and entire agreement among the Parties with respect to the subject hereof. Any statement of Seller, Seller's sales representative, or any agent of seller or any different or additional terms and conditions of other order form(s) submitted by Buyer respecting the Products or the order shall be given no force or effect unless it has been accepted and signed by Seller's authorized representative.

11. General Provisions. Any amendment, addendum, or revision to this agreement shall be valid only if in writing and signed by the Parties. This Agreement constitutes a personal contract and the Buyer shall not transfer or assign the Agreement or any part thereof without the prior written consent of the Seller. In the event that litigation, judicial process or any other action is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to attorneys' fees and costs. Each party hereto acknowledges and represents that he has fully and carefully read this Agreement and is executing this Agreement as a free and voluntary act. This Agreement shall be deemed to have been drafted mutually between the Parties. Any ambiguity shall not be construed or interpreted against either party. The failure of either party at any time to require performance by the other party of any provision hereof shall not affect in any way the full right to require such performance at any time thereafter. Nor shall the waiver by either party of a breach of any provision hereof be taken or held to be a waiver of the provision itself. If any provision of this Agreement is held invalid or unenforceable by any court of final jurisdiction, it is the intent of the Parties that all other provisions of this Agreement be construed to remain fully valid, enforceable, and binding on the Parties. This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado. Any action between the Parties shall be venued in the State of California.

12. WARNING. Extreme care must be exercised when using or handling magnets. Do not use sharp metal objects to open packaging; cutting utensils may get out of control if they are made of ferrous metals. Always keep magnets away from any sort of magnetic media storage device, including desktop or laptop computers, VHS tapes, iPod's and credit cards. People with pacemakers must absolutely not be anywhere near a magnet let alone handle them. If you or someone in your household has a PACEMAKER, please ask your doctor about possible risks before purchasing these magnets.

13. Typographical Errors. In the event an item is listed at an incorrect price due to a typographical error, Zen Magnets LLC shall have the right to refuse or cancel any orders placed for product or service listed at the

incorrect price. Zen Magnets LLC retains the right to refuse or cancel any such orders whether or not the order has been confirmed or the credit card has been charged. If a credit card has already been charged for the purchase and the order is canceled, Zen Magnets, LLC shall issue a credit to your credit card account in the amount of the incorrect price.

92. On January 9, 2013, there was no warning statement regarding ingestion of rare-earth magnets on the home page of www.neoballs.com.

Response: Deny. The warning statement pops up when "purchase" is clicked, and mirrors the warnings, terms and conditions on the relations page. The warning has not been modified since sales resumed in November 2012.

93. As of August 14, 2013, the home page of www.neoballs.com contained the following statement: "Don't let CPSC bypass Democracy. If magnets are outlawed, only outlaws will have magnets."

Response: Admit.

94. As of August 14, 2013, the following warning statement is displayed in a pop-up window when the visitor clicks the "Purchase" page of www.neoballs.com.

Practice Responsible Magnet Usage! High power magnets may cause fatal intestinal pinching if swallowed. Keep away from all orifices. RARE EARTH MAGNETS ARE NOT TOYS. Don't leave them around animals, or children who don't understand the dangers. Always communicate these dangers when sharing magnets. If magnets are ingested or aspirated to the lungs, immediate medical attention is required.

Response: Admit.

95. As of August 14, 2013, the following statement appears on the "Purchase" page of www.neoballs.com: "Due to CPSC requests we are selling the magnets individually." If a user clicks on the bolded phrase "CPSC requests," the following statement appears in a pop-up window:

The CPSC is attempting to ban "Aggregates of powerful magnets," and have requested all magnet sphere brands to stop selling. However, you can still purchase as many neoballs as you would like.

Response: Admit.

96. As of August 14, 2013, the following statement appears on the "Purchase" page of www.neoballs.com under the heading "Frequently Asked Questions":

Can I buy more than one?

Yes! Absolutely! If you haven't heard, the CPSC has decided that an arbitrary quantity and shape of magnets is defective, and should be harder to purchase than ammunition online. Specifically, a quantity that can be considered an "aggregate" or "collection" of magnets shaped like spheres. To comply with the CPSC, we are now selling Neoballs individually. The CPSC's attempt to ban magnets is bad, and they should feel bad. Go to SaveMagnets.com to learn more and add your voice.

Response: Admit.

97. When Neoballs are purchased in quantities greater than 18 individual magnets, the products are accompanied by a 4.5" x 1.5" slip of paper that contains the following warning:

OMFG. READ ME. This is serious. The grumpy CPSC is about to BAN magnet spheres in the US because they are an ingestion hazard. They don't trust that you are capable of understanding and following warnings. Prove them wrong, or we all can't have nice magnets. Zen Magnets LLC, the producer of Neoballs, has had no record of ingestion and we'd like to keep it that way. High Powered magnets can cause potentially fatal intestinal pinching if swallowed. Keep magnet spheres away from all orifices,

especially the mouth and nose. High powered magnets are not a toy. Keep away from anybody who does not understand these dangers. SRSLY. Sorry about the lecture. We had to. Hope you understand.

With the exception of "OMFG" and "READ ME," the warning is less than 10 point font.

Response: Admit. The warning is less than 10 point font, but the instruction to read it is unlikely to be missed.

98. When less than 18 Neoballs are purchased, the product is not accompanied by any warning.

Response: Deny. Warnings are included regardless of number of magnets purchased. Warnings are also present on the website prior to purchase, and acknowledgment is required in order to purchase.

99. As of August 14, 2013, the home page of www.neoballs.com contained a link to: www.SaveMagnets.com.

Response: Objection. This Request is not calculated to lead to further discovery of any evidence admissible at a hearing on the issues raised. It is not probative of whether the Subject Products are dangerous.

100. As of July 29, 2013, the following statement appeared on www.SaveMagnets.com under the "FAQ to CPSC":

How does it make sense to make magnets harder to obtain than ammunition?

Their only response for this is that "guns are out of their jurisdiction." It seems democracy is out of their jurisdiction too.

Response: Objection. This Request is not calculated to lead to further discovery

any evidence admissible at a hearing on the issues raised. It is not probative of whether the Subject Products are dangerous

101. An individual Zen Magnet is too small to carry a legible warning label or label of any kind.

Response: Admit.

102. An individual Neoball Magnet is too small to carry a legible warning or label of any kind.

Response: Admit.

103. Zen took steps to preserve the Documents and information in the company's files that relate to the Subject Products.

Response: Admit. Almost all documents are digital. Emails and digital documents are never purposefully deleted. Rarely do hard-drive errors and data corruption occur.

104. Zen did not take steps to preserve the Documents and information in the company's files that relate to the Subject Products.

Response: Deny. Almost all documents are digital. Emails and digital documents are never purposefully deleted. Rarely do hard-drive errors and data corruption occur.

105. Shihan Qu authored the article titled "17 Fold Injury Data Inflation by CPSC, Health Canada Analysis Shows" that was posted on the website www.SaveMagnets.com on July 18, 2013.

Response: Admit.

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