

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

COMPLAINT COUNSEL’S MEMORANDUM
IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE
PUBLIC OPINION POLLS COMMISSIONED BY RESPONDENT

Background

Respondent Zen Magnets has identified two public opinion polls that it proposes to offer as evidence. The first poll, commissioned by Zen and drafted by Zen’s President Shihan Qu, is a phone poll conducted by Public Policy Polling in July 2013 (PPP Poll).¹ The second poll is an automated online Google Consumer Survey conducted by Google in July 2014, based on questions crafted by Zen (Google Poll).²

The polls ask a series of questions focused on magnets and products such as balloons, all-terrain vehicles and trampolines, and also inquire whether the responder is aware of this administrative action or of CPSC attempts to ban small rare earth magnets (SREMs). For example, responders are asked what level of age restriction “do you believe is appropriate for

¹ The PPP Poll is attached as Exh. 1 to the Declaration of Ray M. Aragon (Aragon Declaration), filed herewith. In his deposition, Zen President Shihan Qu stated that he drafted the questions for the PPP Poll: “I would kind of write the questions, and then one of the [polling company] editors would need to approve the questions or make modifications. . . . they didn’t contribute to the content directly.” Shihan Qu Depo at 540-41, attached as Exh. 2 to Aragon Declaration.

² The Google Poll is attached as Exh. 3 to Aragon Declaration. It also is available online at <https://www.google.com/insights/consumersurveys/view?survey=tfztutgoo725s&question=1&filter&rw=1>.

consumer high-powered magnet sets. . . .”³ The polls also ask whether the responders believe that a variety of products (alcohol, tobacco, motor vehicles, firearms, skateboards, balloons, swimming pools, trampolines, marijuana, and fireworks) should be banned.⁴

Although the question of whether magnets should be banned is never raised directly in either survey, Zen has publicly interpreted the PPP poll as concluding that “the majority of registered voters in the US believed the magnets should be available to ages 8+, which is the age at which a child is expected to be able to read and follow warnings.” *See* <http://www.einpresswire.com/article/211238349/new-voluntary-standard-for-zen-magnets> citing PPP Poll). Some of the Zen's proposed experts also have espoused such a conclusion.⁵

Complaint Counsel asks this Court to preclude Zen from introducing the polls into evidence because they are wholly irrelevant to the issue to be addressed in this action—which is whether the Subject Products present a substantial product hazard.⁶

Discussion

Pursuant to the Commission’s Rules for Adjudicatory Proceedings, “the Federal Rules of Evidence shall apply to all proceedings held pursuant to these Rules.” 16 C.F.R. § 1025.43(a).⁷

³ PPP Poll at 1; *see also* Google Poll Question 5 (“What age restriction for sales do you believe is appropriate, if warnings clearly communicate the ingestion hazard?”).

⁴ PPP Poll at 1, Question 2 (alcohol, tobacco, motor vehicles, firearms); Question 3 (skateboards, balloons, swimming pools, trampolines). *See also* Google Poll Question 1 (trampolines, all-terrain vehicles, balloons, skateboards, swimming pools); Question 2 (tobacco, marijuana, firearms, fireworks, alcohol).

⁵ One of Zen’s proposed expert witnesses, Dr. Boyd Edwards, interpreted the PPP Poll as concluding that 88 percent of voters oppose a sales ban on SREMs, that only 6 percent support such a ban, and that “6[%] were undecided.” Boyd Edwards Dep. at 141-42, attached as Exh. 4 to Aragon Declaration. Dr. Edwards, a physicist and college administrator, admits he “should not be considered an expert in public polling.” *Id.* at 147, attached as Exh. 4.

⁶ There are also many serious evidentiary problems arising from the PPP and Google Polls, however, Complaint Counsel respectfully reserves all objections except to the polls’ relevance. These evidentiary problems include their flawed methodology, low response rates, bias raised in the questions (most of which were written by Zen’s President), and the conclusions that responsibly can be drawn from them. Moreover, the surveys, which appear to have been crafted entirely for this litigation, are hearsay and are not supported by any expert analysis or testimony.

⁷ The Commission’s Rules also provide that the Federal Rule of Evidence “may be relaxed by the Presiding Officer if the ends of justice will be better served by so doing.” *Id.*

Under the Rule 402 of the Federal Rules of Evidence, evidence is relevant only if:

- (a) it has any tendency to make the fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.⁸

Under Rule 402 of the Federal Rules of Evidence, irrelevant evidence is not admissible.⁹

Public opinion polls simply are not relevant to the issues to be decided by the Court, and therefore are not admissible.

The legal issue to be decided in this proceeding is whether SREMs manufactured by Respondent create a “substantial product safety hazard” under Section 15 of the Consumer Product Safety Act, 15 U.S.C. § 2064. Complaint Counsel asserts that Zen-manufactured SREMs are a substantial product hazard because they contain product defects that create a substantial risk of injury to the public.¹⁰

The elements of a “defect” are set forth in the Commission’s regulations at 16 C.F.R. § 1115.4. A “defect” may include a defect in the product’s design or warnings.¹¹ A design defect may be present “if the risk of injury occurs as a result of the operation or use of the product.”¹² In determining whether a risk of injury renders a product defective, the Commission considers the following factors, as appropriate:

The utility of the product involved; the nature of the risk of injury which the product presents; the necessity for the product; the population exposed to the product and its risk of injury; the obviousness of such risk; the adequacy of

⁸ Fed. R. Evid. 401.

⁹ Fed. R. Evid. 402.

¹⁰ See Second Amended Complaint at 4-22.

¹¹ 16 C.F.R. § 1115.4.

¹² *Id.* A “risk of injury” includes “a risk of death, personal injury, or serious or frequent illness.” CPSA Section 3(a)(14); 15 U.S.C. § 2052(a)(14).

warnings and instructions to mitigate such risk; the role of consumer misuse of the product and the foreseeability of such misuse; the Commission's own experience and expertise; the case law interpreting Federal and State public health and safety statutes; the case law in the area of products liability; and other factors relevant to the determination.

16 C.F.R. § 1115.4; *see also* CPSA §15(a)(2); 15 U.S.C. § 2064(a)(2).

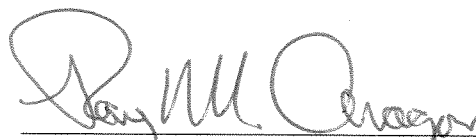
The legal question of whether Zen-manufactured SREMs present a substantial product safety hazard must be guided by the statutory and regulatory factors set forth above. These include eleven factors relating to the hazard posed by the product, none of which includes a survey of public opinion. *See* 16 C.F.R. § 1115.4. Such a finding simply cannot be informed by public opinion about age grading or whether balloons or alcohol should be banned, any more than public opinion polls can assist a court in making any legal decision that requires careful weighing of competent scientific evidence.

A substantial product hazard determination involves an evidence-based evaluation of the risk posed by a product. In this case, the consideration of the PPP and Google Polls will not assist the Court in this inquiry. Rather, the polls will inject irrelevant, unhelpful, and potentially misleading information into the case. They should therefore be excluded as irrelevant.

Conclusion

In this litigation, the Court will determine, based on competent evidence, whether Zen-manufactured SREMs constitute a substantial product hazard. Because public opinion surveys simply cannot assist in this determination, the Court should exclude the PPP and Google Polls from being introduced into evidence.

Respectfully submitted,



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