

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

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

**RESPONDENT ZEN MAGNETS' RESPONSE TO COMPLAINT
COUNSEL'S MOTION IN LIMINE TO EXCLUDE PUBLIC OPINION POLLS
COMMISSIONED BY RESPONDENT**

INTRODUCTION

Respondent Zen Magnets (“Zen”) opposes Complaint Counsel’s motion to exclude two opinion polls as potential sources of evidence in this enforcement proceeding against Zen. The first poll was conducted in 2013 by Public Policy Polling (“PPP Poll”), and the second is a Google Consumer Survey (dated 7/23/2014). As discussed herein, neither poll should be excluded as potential evidence because each poll is relevant in the consideration of prescribed factors in determining whether Zen Magnets and Neoballs (collectively “Subject Products”) have a design defect that creates a substantial risk of injury to the public under 16 C.F.R. § 1115.4, and thereby present a substantial product hazard under 15 U.S.C. § 2064. Complaint Counsel’s Motion for Summary Decision, at 28.

As Complaint Counsel has noted, the Federal Rules of Evidence apply to this proceeding. 16 C.F.R. § 1025.43(a); Complaint Counsel’s Motion In Limine, at 2. Therefore, the governing rule for admissibility of evidence is Fed. R. Evid. 402, which provides simply that relevant evidence is admissible, and irrelevant evidence is not. Fed. R. Evid. 402. “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b)

the fact is of consequence in determining the action.” Fed. R. Evid. 401(a), (b).

In this enforcement proceeding, the facts at issue include: (1) whether Subject Products are defective; (2) that defect creates a substantial risk of injury to the public; and (3) because of that risk of injury, Subject Products present a substantial product hazard. In determining whether a defect exists, several additional factors are at issue, including: (a) the utility of Subject Products; (b) the nature and risk of injury posed by Subject Products; (c) the necessity of Subject Products; (d) the population exposed and its risk of injury; (e) the obviousness of the risk; (f) the adequacy of the warnings and instructions to mitigate risk; and (g) other factors relevant to the determination. 16 C.F.R. § 1115.4.

Complaint Counsel, on behalf of the Consumer Products Safety Commission (“the Commission”), that Subject Products will cause future harm because, among other things, that the public is unaware of the risks posed by Subject Products, and that warning labels will not be adequate in mitigating such risks. The surveys in question are admissible under Fed. R. Evid. 401 and 402, because they speak directly to whether members of the public can understand warning labels, as well as whether the public is aware of the risks associated with Subject Products.

DISCUSSION

I. Both Polls Contain Relevant, Reliable, and Admissible Evidence that is Material to the Instant Case.

Both contested polls contain questions relevant to the discussion of the enumerated factors above. Specifically, the Google Consumer Survey poll is comprised in part of the following questions relevant to this proceeding:

(A) “When 2 or more magnets are swallowed, they can stick to the intestines causing serious injury or death.” [Survey takers were asked to state whether they were aware of this, believed it but were not aware, did not believe the statement, or did not understand the statement.] Google Consumer Survey (page 8 of 15).

This question is directly related to the issue of whether the risks posed by Subject Products are hidden, or otherwise unknown to the public at large. The hidden nature of the risk is material to this case because it is a factor argued by the Commission and listed in 16 C.F.R. § 1115.4 in determining whether Subject Products have a hazardous design defect. *See* Complaint Counsel's Motion for Summary Decision, at 35-36. It is also the belief of HF Staff that the more information that is available regarding the Subject Products' risks, the more hazard awareness there is among the public and medical personnel. HF Staff PSA, Neoballs Website, at 4, *See* Exhibit 10 attached to Respondent's Response to Complaint Counsel's Motion for Summary Decision. This survey question is therefore admissible evidence under Fed. R. Evid. 401, 402.

(B) "What age restriction for sales do you believe is appropriate, if warnings clearly communicate the ingestion hazard?" Google Consumer Survey (page 10 of 15) [attached as Complaint Counsel's Ex. 3 to Aragon Declaration].

(C) "If you are a parent, or plan to be a parent, at what age do you expect your children to be able to not swallow magnets?" Google Consumer Survey (page 12 of 15).

(D) "If you are a parent, or plan to be a parent, at what age do you expect your children to be able share magnets safely, without endangering other children?" Google Consumer Survey (page 14 of 15).

These three questions relate directly to the issues of what population segment is at risk and the nature of the risk posed by Subject Products, generally, which are both material matters in this case. *See* Complaint Counsel's Second Amended Complaint, ¶¶ 73, 108. It is also relevant to the Commission's assertion that warnings and instructions cannot adequately mitigate the risks. *Id.* at ¶ 110. These survey questions are therefore relevant and admissible under Fed. R. Evid. 401, 402.

Further, paragraphs 105 and 106 of the Second Amended Complaint state:

105. Upon information and belief, the Subject Products have low utility to consumers.

106. Upon information and belief, the Subject Products are not necessary to consumers.

Complaint counsel makes conclusions about the utility of the Subject Products. The

usefulness of the Subject Products is subjective, thus, it only makes sense that polling data, among other evidence such as expert testimony and anecdotal data, would be introduced to contest Complaint Counsel's allegations.

Similar to the Google poll, the PPP Poll contains admissible, relevant evidence. Specifically, the PPP Poll asked respondents to specify at what age, given the risks and clear warning about the risks, would be appropriate to use Subject Products.¹ This question speaks to the nature of the risk posed by subject products, including whether or not the risks are hidden or otherwise unknown to the public, as well as the population at risk from Subject Products. The question also examines the severity of risk, in terms of how a consumer values utility against risk. The poll questioned whether the risks are too great for any age to use. This question is relevant and admissible under Fed. R. Evid. 401, 402.

Generally, these two polls reveal relevant information, including statistical data about:

(1) the efficacy of magnet warnings; the degree of awareness of magnet ingestion hazard among adults; (2) the age at which parents expect their own children be able to use magnets safely; and (3) nationally representative information about expectations children to be able to safely share magnets.

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The question in its entirety reads: "The Consumer Product Safety Commission (or CPSC) is currently investigating sets of highpowered [sic] magnets typically used for art, education, and stress relief. The concern is that they are an ingestion hazard to children because magnets can pinch internally once two or more are swallowed, which may require surgery. If all legally required warnings are clearly labeled on the packaging, which of these levels of age restriction do you believe is appropriate for consumer high-powered magnet sets: do you think there should be no age restriction; should the magnets be limited to children 8 and over as currently required by federal regulation for science kits with high powered magnets; should the magnets be limited to children aged 16 and over, similar to motor vehicles; should the magnets be limited to persons aged 18 and over similar to tobacco; should the magnets be limited to persons aged 21 and over similar to alcohol, do you think the magnets should be completely banned and no one should." PPP Poll, Question 1 (Complaint Counsel's Ex. 1 to Aragon Declaration).

These polls also outline what the public deems to be “reasonable,” *i.e.*, the fair, proper, and moderate conduct that people are expected to exhibit – how most adults are expected to behave.

Therefore, the questions in the two surveys in question are relevant to enumerated factors under 16 C.F.R. § 1115.4. Additionally, as discussed below, Zen’s polls are relevant to the open-ended element in 16 C.F.R. § 1115.4, “any other factors relevant to the determination.”

II. The Opinion of the Public is Important in Considering Whether Subject Products Present a Substantial Product Hazard.

Even if, *arguendo*, complaint counsel did not include allegations about utility, the issue of utility would still arise naturally, in determining whether a product presents a substantial product hazard. The term *substantial product hazard*, as defined in Section 15(a)(2) of the Consumer Product Safety Act (CPSA), 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).

The Subject Products represent a unique medium of art, which, by their very nature, teach principles of physical science and mathematics through their use. The utility of art is naturally subjective, and the utility of Subject Products as an art form can best be shown through appraisals of utility. Public consensus provides evidence of the value that consumers place on the utility of the product. As such, the surveys are directly relevant to the issues of utility and necessity.

Finally, at this stage of the proceeding, without hearing the evidence in the context of Complaint Counsel’s case, it seems that the Complaint Counsel’s request is premature. The admission of this evidence should be decided in context. As such, it is not yet appropriate to make a determination about the relevance of the surveys Complaint Counsel seeks to exclude.

CONCLUSION

WHEREFORE, Respondent requests that this Honorable Court deny Complaint Counsel's motion to exclude the surveys identified.

DATED THIS 31st day of October, 2014

Respectfully submitted,

THE LAW OFFICES OF DAVID C. JAPHA, P.C.
DAVID C. JAPHA, Colorado Bar #14434
Attorney for Respondent Zen Magnets

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of October, 2014, I served copies of **THE RESPONDENT'S RESPONSE TO COMPLAINT COUNSEL'S MOTION IN LIMINE TO EXCLUDE PULIC OPINION POLLS COMMISSIONED BY RESPONDENT** by the service method indicated:

Original and three copies by U.S. mail, and one copy by electronic mail, to the Secretary of the U.S. Consumer Product Safety Commission:

Todd A. Stevenson, Secretary
4330 East West Highway
Bethesda, MD 20814
tstevenson@cpsc.gov

One copy by U.S. mail and one copy by electronic mail to the Presiding Officer for *In the Matter of Maxfield and Oberton Holdings, LLC*, CPSC Docket No. 12-1; *In the Matter of Zen Magnets, LLC*, CPSC Docket No. 12-2, and *In the Matter Of Star Networks UA, LLC*, CPSC Docket No. 13-2:

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One copy by electronic mail (by agreement) to Complaint Counsel:

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A handwritten signature in black ink, appearing to read "David C. Japha", written over a horizontal line.

David C. Japha