

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)
)
ZEN MAGNETS, LLC)
)
) CPSC DOCKET NO. 12-2
)
)
Respondent.)
)

**MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

On August 6, 2012, Complaint Counsel issued a Complaint authorized by the U.S. Consumer Product Safety Commission pursuant to the Rules of Practice for Adjudicative Proceedings (“Rules”), 16 C.F.R. § 1025.11(a). The Complaint alleges that Zen Magnets® Rare Earth Magnetic Balls (the “Subject Product”), which are imported and distributed by Respondent, contains defects which create a substantial risk of injury to the public, thus posing a substantial product hazard under 15 U.S.C. § 2064(a)(2). On August 28, 2012, Respondent filed an Answer.

Complaint Counsel hereby requests that the Court grant it leave to file the Amended Complaint because the amendments “do not unduly broaden the issues in the proceedings or cause undue delay.” 16 C.F.R. § 1025.13.¹

¹ Although not controlling, federal case law provides that Rule 15(a) of the Federal Rules of Civil Procedure allow courts to “freely grant leave to amend when justice so requires.” *Hurn v. Ret. Fund Trust of the Plumbing, Heating and Piping Indus.*, 648 F.2d 1252, 1254 (9th Cir. 1981). In *Hurn*, the Court of Appeals found that the District Court had erred in not granting the plaintiff’s motion to amend the

Under the Consumer Product Safety Act (“CPSA”), Section 15(a)(2), a product is a substantial product hazard if it contains a defect which creates a substantial risk of injury to the public. The Complaint alleges that the Subject Product contains defects in the warnings, instructions and labeling, and are defective because they do not operate as intended. In the Amended Complaint, Counsel clarifies these allegations through organizational revisions and other similar editorial changes. The revisions do not unduly broaden the issues but instead provide greater clarity that will assist both the Presiding Officer and the parties as the proceeding moves forward.

Similarly, the addition of a second count will not unduly broaden the issues in this proceeding. Under the CPSA, Section 15(a)(1), a product is a substantial product hazard if it fails to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public. ASTM F963-08, *Standard Consumer Safety Specification for Toy Safety*, and its most recent version, ASTM F963-11, (collectively, the “Toy Standard”) is a consumer product safety rule pursuant to Section 106 of the Consumer Product Safety Improvement Act of 2008. The Toy Standard prohibits toys from containing loose as-received hazardous magnets. Complaint Counsel alleges in the proposed Amended Complaint that the Subject Product that was imported and/or distributed in commerce after August 16, 2009 is a substantial product hazard because it

complaint to add a count under the Taft-Hartley Act, when the original complaint contained a cause of action under ERISA, because the “operative facts remain the same.” Similarly the Appellate Court found that there was not undue delay, even though the motion to amend was filed approximately two years after the original complaint because there was no prejudice to the other party, the amendment was not frivolous, nor was the amendment made in bad faith. Although this proceeding is governed by Commission Regulations and not the Federal Rules of Civil Procedure, “the Commission expects that interpretations of these Rules by the Presiding Officer will be guided by principles stated and developed in case law interpreting the Federal Rules of Civil Procedure.” *See* Preamble to 16 C.F.R. § 1025, 45 Fed. Reg. 29206, 29207 (May 1, 1980).

is a toy under the Toy Standard, violates the Toy Standard by consisting of and containing loose as-received hazardous magnets, and creates a substantial risk of injury to the public.

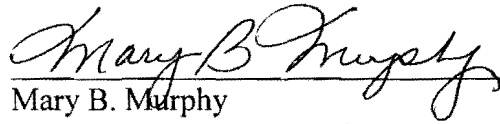
Notwithstanding the addition of a second count, the statutory basis of the Complaint remains essentially the same—that the Subject Products are a substantial product hazard under 15 U.S.C. §2064(a). Adding this count does not unduly broaden the issue. Instead, it merely alleges an alternative legal basis under the same statute that supports our contention that the Subject Product constitutes a substantial product hazard. As such, the operative facts underlying the original Complaint and the Amended Complaint remain constant and do not therefore unduly broaden the issues or prejudice Respondent in any way.

Finally, the issuance of an Amended Complaint will not cause undue delay. These proceedings have been pending for less than two months. Discovery has not been propounded by either party and a prehearing conference, which has been scheduled for September 27, 2012, has not yet occurred. Complaint Counsel notified counsel for the Respondent on September 19, 2012, that we intended to file an Amended Complaint, and provided a brief summary of the contents of the Amended Complaint. The Amended Complaint is a timely submission that will not materially affect the schedule of this proceeding.

Conclusion

Wherefore, for the foregoing reasons, Complaint Counsel respectfully requests

that the Court grant leave to file the Amended Complaint.



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