UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

MOTION FOR LEAVE
TO FILE AMENDED COMPLAINT

Pursuant to 16 C.F.R § 1025.13 of the Rules of Practice for Adjudicative Proceedings ("Rules"), Complaint Counsel moves this Court for leave to file an Amended Complaint in the instant matter. A copy of the Amended Complaint is attached as Attachment A. Under the Rules, the Presiding Officer "may allow appropriate amendments and supplemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay." 16 C.F.R. § 1025.13.

The proposed Amended Complaint revises the Complaint by (1) clarifying the count alleging that Zen Magnets® Rare Earth Magnetic Balls™ (the "Subject Product") presents a substantial product hazard under Section 15(a)(2) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064(a)(2), because it contains defects which create a substantial risk of injury to the public; and (2) adding a count alleging that the Subject Product presents a substantial product hazard under Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1), because it fails to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public. Complaint Counsel

submits that the filing of the Amended Complaint will neither unduly broaden the issues nor cause undue delay.

Wherefore, Counsel requests that the Presiding Officer grant this motion and allow Complaint Counsel leave to file the Amended Complaint.

Mary B. Murphy, Assistant General Counsel
Division of Compliance
Office of the General Counsel
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7809

Jennifer Argabright, Trial Attorney
Seth Popkin, Attorney
Leah Wade, Attorney

Complaint Counsel for
U.S. Consumer Product Safety Commission
Bethesda, MD 20814

Attachment A

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

AMENDED COMPLAINT

Nature of Proceedings

1. This is an administrative enforcement proceeding pursuant to Section 15 of the Consumer Product Safety Act ("CPSA"), as amended, 15 U.S.C. § 2064, for public notification and remedial action to protect the public from the substantial risks of injury presented by aggregated masses of high-powered, small rare earth magnets known as Zen Magnets® Rare Earth Magnetic Balls ("Zen Magnets" or the "Subject Product"), imported and distributed by Zen Magnets, LLC ("Zen" or "Respondent").

2. This proceeding is governed by the Rules of Practice for Adjudicative Proceedings before the Consumer Product Safety Commission (the "Commission"), 16 C.F.R. Part 1025.

Jurisdiction

3. This proceeding is instituted pursuant to the authority contained in Sections 15(c), (d) and (f) of the CPSA, 15 U.S.C § 2064 (c), (d) and (f).

Parties

4. Complaint Counsel is the staff of the Division of Compliance within the Office of the General Counsel of the Commission ("Complaint Counsel"). The Commission is an independent federal regulatory agency established pursuant to Section 4 of the CPSA, 15 U.S.C. § 2053.

5. Respondent is a Colorado Limited Liability Company with its principal place of business located at 4155 E. Jewell Avenue, Suite 908, Denver, Colorado 80222.

6. Respondent is an importer and distributor of the Subject Product.

7. As importer and distributor of the Subject Product, Respondent is a "manufacturer" and "distributor" of a "consumer product" that is "distributed in commerce," as those terms are defined in CPSA Sections 3(a)(5), (7), (8) and (11) of the CPSA, 15 U.S.C. §§ 2052(a)(5), (7), (8) and (11).

The Consumer Product

8. Respondent imported and distributed the Subject Product in U.S. commerce and offered it for sale to consumers for their personal use in or around a permanent or temporary household or residence, a school, and in recreation or otherwise. The Subject Product consists of small, individual, spherical-shaped magnets that are packaged as aggregated masses in different sized containers holding 72, 216, or 1,728 small magnets, ranging in size from approximately 4.98 mm to 5.11 mm, with a variety of coatings, and a flux index greater than 50.

9. Upon information and belief, the flux of the Zen Magnets ranges from approximately 577.1 to 581.4kg²mm² Surface Flux Index.

10. Upon information and belief, Zen Magnets were introduced in U.S. commerce in September 2009.

11. Upon information and belief, the Subject Product is manufactured by Bestway Magnet Corp. in the Northern Section of Huangcheng Westroad, Ningbo, China.

12. The Subject Product is sold in a velvet sack or an MDF hard case for the smaller sets of 72 and 216 magnets and range in retail price from approximately $12.65 to $50.00.

13. The set of 1,728 magnets is packaged in a velvet-lined wooden teak box and retails for approximately $250.00.

14. Upon information and belief, more than 50,000 sets of Zen Magnets have been sold to consumers in the United States.

COUNT 1

The Subject Product is a Substantial Product Hazard Under Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2), Because It Contains Product Defects That Create a Substantial Risk of Injury to the Public

The Subject Product Is Defective Because Its Instructions, Packaging, and Warnings Are Inadequate

15. Paragraphs 1 through 14 are hereby realleged and incorporated by reference as though fully set forth herein.

16. A defect can occur in a product's contents, construction, finish, packaging, warnings and/or instructions. 16 C.F.R. §1115.4.

17. A defect can occur when reasonably foreseeable consumer use or misuse, based in part on the lack of adequate instructions and safety warnings, could result in injury, even where there are no reports of injury. 16 C.F.R. §1115.4.

18. Upon information and belief, from 2009 through mid-2011, Zen's U.S. direct sales website contained the following warning regarding the Subject Product: "Warnings: Try not to drop them. Ever play with magnets in 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 the ends 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."

19. Upon information and belief, in or about October 2011, Zen began including the following warning on the "buy" page of its website: "Magnets cause fatal intestinal pinching if swallowed. Keep from animals and children who don't understand this."

20. Upon information and belief, in October 2011, Zen requested that retailers that sold Zen Magnets through the Amazon LLC website include a "14+ age limit."

21. Upon information and belief, in October 2011, Zen began including the following warning on the "FAQ" page of its website:

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

A: According to the Consumer Product Safety Commission, 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.

22. Upon information and belief, sets of Zen Magnets are currently sold with packaging that contain the following warning 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 government 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."

23. Upon information and belief, Zen sells some sets of the Subject Product in packaging without this warning.

24. Since Zen Magnets were introduced into commerce in 2009, many children under the age of 14 have ingested products (the "Ingested Products") that are almost identical in form, substance, and content to the Subject Product.

25. Upon information and belief, the Ingested Products are marketed and used in substantially similar ways to the Subject Product.

26. Upon information and belief, on or about January 28, 2010, a 9-year-old boy used high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Product to mimic tongue and lip piercings, and accidentally ingested seven magnets. He was treated at an emergency room.

27. Upon information and belief, on or about September 5, 2010, a 12-year-old girl accidentally swallowed two high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Product. She sought medical treatment at a hospital, including x-rays and monitoring for infection and damage to her gastrointestinal tract.

28. Upon information and belief, on or about December 23, 2010, a 3-year-old girl ingested eight high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Product that she found on a refrigerator in her home. She

required surgery to remove the magnets. The magnets caused intestinal and stomach perforations, and had also become embedded in the girl's trachea and esophagus.

29. Upon information and belief, on or about January 6, 2011, a 4-year-old boy suffered intestinal perforations after ingesting three high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Product that he thought were chocolate candy because they looked like the decorations on his mother's wedding cake.

30. By November 2011, the Commission was aware of approximately 22 reports of ingestions of high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Product.

31. On November 11, 2011, the Commission issued a public safety alert warning the public of the dangers of the ingestion of rare earth magnets like the Subject Product.

32. Ingestion incidents, however, continue to occur.

33. Since the safety alert, the Commission has received dozens of reports of children ingesting high-powered, small, spherically-shaped magnets that are almost identical in form, substance, and content to the Subject Product, but may be manufactured and/or sold by firms other than the Respondent.

34. Upon information and belief, on or about January 17, 2012, a 10-year-old girl accidentally ingested two high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Product after using them to mimic a tongue piercing. The magnets became embedded in her large intestine, and she underwent x-rays, CT scans, endoscopy, and an appendectomy to remove them. The girl's father had purchased the magnets for her at the local mall.

35. All warnings on the Subject Product are inadequate and defective because they do not and cannot effectively communicate to consumers, including parents and caregivers, the hazard associated with the Subject Product and magnet ingestions.

36. Because the warnings on the Subject Product are inadequate and defective, parents will continue to give children the Subject Product or allow children to have access to the Subject Product.

37. Children cannot and do not appreciate the hazard, and it is foreseeable that they will mouth the items, swallow them, or, in the case of adolescents and teens, use them to mimic body piercings. These uses can and do result in injury.

38. All warnings on the packaging of the Subject Product are inadequate and defective because the packaging on which the warnings are written is often discarded such that consumers will be unable to review the warnings on the packaging prior to foreseeable uses of the Subject Product. These uses can and do result in injury.

39. All warnings in the instructions included with the Subject Product are inadequate and defective because the instructions are not necessary for the use of the Subject Product and are often discarded. Because the instructions are unnecessary and are often discarded, consumers likely will not review the warnings contained in the instructions prior to foreseeable uses of the Subject Product. These uses can and do result in injury.

40. All warnings on the Subject Product are inadequate and defective because once the Subject Product is removed from the packaging and/or the carrying case prior to foreseeable uses of the Subject Product, the magnets themselves display no warnings, and the small size of

the individual magnets precludes the addition of warnings. These uses can and do result in injury.

41. All warnings on the Subject Product are inadequate and defective because the magnets are shared and used among various consumers, including children, after the packaging and instructions are discarded; thus, many consumers of the Subject Product will have no exposure to any warnings prior to using the Subject Product. These uses can and do result in injury.

42. All warnings displayed on the carrying cases, if any, are inadequate and defective because consumers are unlikely to disassemble configurations made with the Subject Product after each use, many of which are elaborate and time-consuming to create, to return the Subject Product to the carrying case or to put the Subject Product out of the reach of children.

43. Upon information and belief, some sets of Zen Magnets come with a "laser etched stainless steel building platform." This use of this platform makes it unlikely that a consumer will return the Zen Magnets to the carrying case and out of reach of children and more likely that he or she will display the creation.

44. The effectiveness of the warnings on the Subject Product is further diminished by the advertising and marketing of the Subject Product.

45. Upon information and belief, as late as October 2011, Zen was aware that Zen Magnets were displayed with other toys on the Amazon LLC website.

46. Upon information and belief, Respondent only recently changed Zen Magnet's marketing to comply with ASTM Standard F963. Zen Magnet's website now states that "CPSC recommends minimum age of 14" and "U.S. Government age recommendation is 14 years."

47. Respondent has advertised Zen Magnets as, *inter alia,* "fun to play with" and items that "look good on cute people." The advertising encourages consumers to use them to "relieve boredom."

48. Upon information and belief, despite making no significant design or other physical changes to Zen Magnets since their introduction in 2009, Respondent attempted to subsequently rebrand Zen Magnets as, *inter alia,* an educational "science kit" suitable for eight year olds despite providing no educational material with the Subject Product.

49. The advertising and marketing of the Subject Product conflict with the claimed 14+ age grade label on Subject Product.

50. Because the advertising and marketing of the Subject Product conflict with the age label, the effectiveness of the age label is diminished.

51. The advertising and marketing of Subject Product conflict with the stated warnings on the Subject Product.

52. Because the advertising and marketing conflict with the stated warnings, the effectiveness of the warnings is diminished.

53. No warnings or instructions could be devised that would effectively communicate the hazard in a way that would be understood and heeded by consumers and would reduce the incidences of magnet ingestions.

54. Because of the lack of adequate instructions and safety warnings, a substantial risk of injury occurs as a result of the foreseeable use and misuse of the Subject Product.

The Subject Product Is Defective Because the Risk of Injury Occurs as a Result of Its Operation and Use and the Failure of the Subject Product to Operate as Intended

55. A design defect can be present if the risk of injury occurs as a result of the operation or use of the product or a failure of the product to operate as intended. 16 C.F.R. § 1115.4.

56. The Subject Product contains a design defect because it presents a risk of injury as a result of its operation and/or use.

57. Upon information and belief, the Subject Product has been advertised and marketed by the Respondent to both children and adults. As a direct result of such marketing and promotion, the Subject Product has been, and is currently used by, both children and adults.

58. The risk of injury occurs as a result of the use of the Subject Product by adults, who give the Subject Product to children or allow children to have access to the Subject Product.

59. The risk of injury occurs as a result of the foreseeable use and/or misuse of the Subject Product by children.

60. The Subject Product contains a design defect because it fails to operate as intended and presents a substantial risk of injury to the public.

61. Upon information and belief, Respondent contends that the Subject Product is a manipulative that provides stress relief and other benefits to adults only.

62. The Subject Product is intensely appealing to children due to its tactile features, its small size, and its highly reflective, shiny metallic coatings.

63. The Subject Product is also appealing to children because it is smooth, unique, and makes a soft snapping sound as it is manipulated.

64. The Subject Product also moves in unexpected, incongruous ways as the poles on the magnets move to align properly, which can evoke a degree of awe and amusement among children enticing them to play with the Subject Product.

65. Despite the Respondent's current age label and asserted use of the Subject Product, it does not operate as intended because it is intensely appealing to and is often played with by children.

66. This defective design of the Subject Product poses a risk of injury because parents and caregivers buy the Subject Product for children and/or allow children to play with Subject Product.

The Type of the Risk of Injury Renders the Subject Product Defective

67. The risk of injury associated with a product may render the product defective. 16 C.F.R. § 1115.4.

68. Upon information and belief, the Subject Product has low utility to consumers.

69. Upon information and belief, the Subject Product is not necessary to consumers.

70. The nature of the risk of injury includes serious, life-threatening, and long-term health conditions that can result when magnets attract to each other through intestinal walls, causing harmful tissue compression that can lead to perforations, fistulas, and other gastrointestinal injuries.

71. Children, a vulnerable population protected by the CPSA, are exposed to risk of injury by the Subject Product.

72. The risk of injury associated with the ingestion of the Subject Product is neither obvious nor intuitive.

73. Warnings and instructions cannot adequately mitigate the risk of injury associated with ingesting the Subject Product.

74. Children mouthing and ingesting the Subject Product is foreseeable.

75. Respondent promoted the use of the Subject Product for body art, including mimicking tongue piercings. Such use by children is foreseeable.

76. The type of the risk of injury renders the Subject Product defective.

The Subject Product Creates a Substantial Risk of Injury to the Public

77. The Subject Product poses a risk of magnet ingestion by children below the age of 14, who may, consistent with developmentally appropriate behavior, place a single magnet or numerous magnets in their mouth.

78. The risk of ingestion also exists when adolescents and teens use the product to mimic piercings of the mouth, tongue, and cheek and accidentally swallow the magnets.

79. If two or more of the magnets are ingested and the magnetic forces of the magnets pull them together, the magnets can pinch or trap the intestinal walls or other digestive tissue between them, resulting in acute and long-term health consequences. Magnets that attract through the walls of the intestines result in progressive tissue injury, beginning with local inflammation and ulceration, progressing to tissue death, then perforation or fistula formation. Such conditions can lead to infection, sepsis, and death.

80. Ingestion of more than one magnet often requires medical intervention, including endoscopic or surgical procedures.

81. Because the initial symptoms of injury from magnet ingestion are nonspecific and may include nausea, vomiting, and abdominal pain, caretakers, parents, and medical professionals may easily mistake these nonspecific symptoms for other common gastrointestinal

upsets, and erroneously believe that medical treatment is not immediately required, thereby delaying potentially critical treatment.

82. Medical professionals may not be aware of the dangers posed by ingestion of the Subject Product and the corresponding need for immediate evaluation and monitoring. A delay of surgical intervention or other medical treatment due to the patient's presentation with nonspecific symptoms and/or a lack of awareness by medical personnel of the dangers posed by multiple magnet ingestion can exacerbate life-threatening internal injuries.

83. Magnets that become affixed through the gastrointestinal walls and are not surgically removed may result in intestinal perforations which can lead to necrosis, the formation of fistulas, or ultimately, perforation of the bowel and leakage of toxic bowel contents into the abdominal cavity. These conditions can lead to serious injury and possibly even death.

84. Endoscopic and surgical procedures may also be complicated in cases of multiple magnet ingestion due to the attraction of the magnets to the metal equipment used to retrieve the magnets.

85. Children who undergo surgery to remove multiple magnets from their gastrointestinal tract are also at risk for long-term health consequences, including intestinal scarring, nutritional deficiencies due to loss of portions of the bowel, and, in the case of girls, fertility problems.

86. The Subject Product contains defects in packaging, warnings, and instructions, that create a substantial risk of injury to the public.

87. The Subject Product contains defects in design that pose a substantial risk of injury.

88. The type of the risk of injury posed by the Subject Product creates a substantial risk of injury.

89. Therefore, because the Subject Product is defective and creates a substantial risk of injury, the Subject Product presents a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. §2064(a)(2).

Count 2

The Subject Product Is a Substantial Product Hazard Under Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1)

90. Paragraphs 1 through 89 are hereby realleged and incorporated by reference as though fully set forth herein.

91. Upon information and belief, the Subject Product is an object designed, manufactured, and/or marketed as a plaything for children under 14 years of age, and, therefore, the Subject Product that was imported and/or otherwise distributed in commerce after August 16, 2009, is a "toy" as that term is defined in ASTM International Standard F963-08, *Standard Consumer Safety Specification for Toy Safety,* section 3.1.72 and its most recent version, ASTM 963-11 section 3.1.81 ("the Toy Standard").

92. As toys, and as toys intended for use by children under 14 years of age as addressed in the Toy Standard, the Subject Product that was imported and/or otherwise distributed in commerce after August 16, 2009, were and are covered by the Toy Standard.

93. Pursuant to the Toy Standard, a magnet that has a flux index greater than 50 and that is a small object as determined by the Toy Standard is a "hazardous magnet."

94. The Toy Standard prohibits toys from containing a loose as-received hazardous magnet.

95. The Subject Product that was imported and/or otherwise distributed in commerce after August 16, 2009, consists of and contains loose as-received hazardous magnets. As a result, the Subject Product that was imported and/or otherwise distributed in commerce after August 16, 2009, fails to comply with the Toy Standard.

96. The Subject Product that was imported and/or otherwise distributed in commerce after August 16, 2009, creates a substantial risk of injury to the public.

97. Because the Subject Product that was imported and/or otherwise distributed in commerce after August 16, 2009, fails to comply with the Toy Standard and creates a substantial risk of injury to the public, it is a substantial product hazard as the term "substantial product hazard" is defined in Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1).

Relief Sought

Wherefore, in the public interest, Complaint Counsel requests that the Commission:

A. Determine that the Subject Product presents a "substantial product hazard" within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2), and/or presents a "substantial product hazard" within the meaning of Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1).

B. Determine that extensive and effective public notification under Section 15(c) of the CPSA, 15 U.S.C. § 2064(c), is required to adequately protect children from the substantial product hazard presented by the Subject Product, and order Respondents under Section 15(c) of the CPSA, 15 U.S.C. § 2064(c) to:

(1) Cease importation and distribution of the Subject Product;

(2) Notify all persons that transport, store, distribute or otherwise handle the Subject Product, or to whom such product has been transported, sold, distributed or otherwise handled, to immediately cease distribution of the product;

(3) Notify appropriate state and local public health officials;

(4) Give prompt public notice of the defects in the Subject Product, including the incidents and injuries associated with ingestion including posting clear and conspicuous notice on Respondent's website, and providing notice to any third party website on which Respondent has placed the Subject Product for sale, and provide further announcements in languages other than English and on radio and television;

(5) Mail notice to each distributor or retailer of the Subject Product; and

(6) Mail notice to every person to whom the Subject Product were delivered or sold;

C. Determine that action under Section 15(d) of the CPSA, 15 U.S.C. § 2064(d), is in the public interest and additionally order Respondent to:

(1) Refund consumers the purchase price of the Subject Product;

(2) Make no charge to consumers and to reimburse consumers for any reasonable and foreseeable expenses incurred in availing themselves of any remedy provided under any Commission Order issued in this matter, as provided by Section 15 U.S.C. § 2064(e)(1);

(3) Reimburse retailers for expenses in connection with carrying out any Commission Order issued in this matter, including the costs of returns, refunds and/or

replacements, as provided by Section 15(e)(2) of the CPSA, 15 U.S.C. § 2064(e)(2);

(4) Submit a plan satisfactory to the Commission, within ten (10) days of service of the Final Order, directing that actions specified in Paragraphs B(1) through (6) and C(1) through (3) above be taken in a timely manner;

(5) To submit monthly reports, in a format satisfactory to the Commission, documenting the progress of the corrective action program;

(6) For a period of five (5) years after issuance of the Final Order in this matter, to keep records of its actions taken to comply with Paragraphs B(1) through (6) and C(1) through (4) above, and supply these records to the Commission for the purpose of monitoring compliance with the Final Order;

(7) For a period of five (5) years after issuance of the Final Order in this matter, to notify the Commission at least sixty (60) days prior to any change in its business (such as incorporation, dissolution, assignment, sale, or petition for bankruptcy) that results in, or is intended to result in, the emergence of a successor corporation, going out of business, or any other change that might affect compliance obligations under a Final Order issued by the Commission in this matter; and

D. Order that Respondent shall take other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA.

ISSUED BY ORDER OF THE COMMISSION:

Dated this 20 day of September, 2012

BY: Kenneth Hinson
Executive Director

U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7854

Mary B. Murphy, Assistant General Counsel
Division of Compliance, Office of General Counsel
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7809

Jennifer Argabright, Trial Attorney
Seth Popkin, Trial Attorney
Leah Wade, Trial Attorney

Complaint Counsel
Division of Compliance
Office of the General Counsel
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7808