

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

COMPLAINT COUNSEL’S STATEMENT
OF MATERIAL UNDISPUTED FACTS

REDACTED

1. Zen Magnets, LLC (“Zen”) is a Colorado limited liability company with its principal place of business located in Denver, Colorado. Zen began doing business in 2009. Respondent Zen Magnets, LLC’s Answer to Second Amended Complaint at ¶ 5. [**Complaint Counsel’s Exhibit 1** at ¶ 5.]

2. Shihan Qu is the Founder and Owner of Zen. He is responsible for the general administration of the company. Respondent Zen Magnet LLC’s Responses to Complaint Counsel’s First Set of Interrogatories at ¶¶ 1-2 (“deals with most aspects of the business”); [**Complaint Counsel’s Exhibit 2** at ¶¶ 1-2]; Respondent Zen Magnet LLC’s Responses to Complaint Counsel’s First Set of Requests for Admissions ¶¶ 28-29. [**Complaint Counsel’s Exhibit 3** at ¶¶ 28-29.]

3. Zen is the importer of record and retailer for Zen Magnets and Neoballs (collectively, “Subject Products”). Complaint Counsel’s Exhibit 1 at ¶ 6; Complaint Counsel’s Exhibit 3 at ¶¶ 5-6.

4. Zen began selling Zen Magnets in September 2009. Complaint Counsel's Exhibit 1 at ¶ 23.

5. Zen began selling Neoballs in 2011. Complaint Counsel's Exhibit 1 at ¶ 72.

6. The Subject Products are "consumer products" as that term is defined in the Consumer Product Safety Act, 15 U.S.C. § 2052(a)(5). Complaint Counsel's Exhibit 3 at ¶ 9.

7. The Subject Products are "distributed in commerce" as that term is defined in the Consumer Product Safety Act, 15 U.S.C. § 2052(a)(8). Complaint Counsel's Exhibit 1 at ¶ 3.

8. Zen Magnets are individual, shiny, metallic-colored spherically-shaped magnets that are approximately 5 mm in diameter. They are packaged in aggregated masses of 72, 216, and 1728 magnets. Zen Magnets range in retail price from \$12.65 for 72 magnets to \$250.00 for 1728 magnets. Zen Magnets can also be purchased individually for 20 cents per magnet. Complaint Counsel's Exhibit 1 at ¶¶ 23-24; Complaint Counsel's Exhibit 3 at ¶¶ 14, 41-42.

9. Neoball Magnets are individual spherically-shaped magnets that are approximately 5 mm in diameter. Neoballs come in a variety of colors and are packaged in aggregated masses of 216 magnets at retail establishments. Neoballs may also be purchased directly from Zen. Neoballs purchased in quantities of less than 216 directly from Zen are packaged in a plastic bag.

Neoballs purchased in quantities greater than 216 directly from Zen are packaged in a rectangular tin with rounded corners. When purchased directly from Zen Magnets, Neoballs are sold for 8 to 10 cents per magnet and are charged a flat shipping rate, regardless of the amount of magnets ordered. Complaint Counsel's Exhibit 1 at ¶ 26. Complaint Counsel's Exhibit 3 at ¶¶ 63, 86-87, 89; Deposition Testimony of Shihan Qu at 53:22 [**Complaint Counsel's Exhibit 4** at 53:22.]

10. Zen Magnets sold Neoball brand magnets in a variety of "polymer" colors, as well

several “electric plate” colors. Complaint Counsel’s Exhibit 4 at 114; Screenshots from the Neoballs website, available at <http://neoballs.com/#> [**Complaint Counsel’s Exhibit 4A**, Ex. 7 to Deposition Testimony of Shihan Qu.] Buckyballs likewise could be purchased in colors. Respondent Craig Zucker’s Response to Complaint Counsel’s First Set of Requests for Admissions in CPSC Docket No. 12-1 at ¶ 21 [**Complaint Counsel’s Exhibit 33** at ¶ 21.]

11. Zen has sold more than 50,000 sets of Zen Magnet sets to consumers in the United States. Complaint Counsel’s Exhibit 3 at ¶ 33.

12. Zen has also sold more than 1700 sets of Neoballs and over 678,257 “individual Neoballs.” Complaint Counsel’s Exhibit 2 at ¶ 41.

13. Zen has provided over [REDACTED] individual spare Zen and Neoball magnets to consumers. Expert Report, Exhibit B to Declaration of Complaint Counsel’s Expert, Dr. J. Paul Frantz, Ph.D, CPSM, CPE, at 24. [**Complaint Counsel’s Exhibit 5B Expert Report, Exhibit B to Declaration of Complaint Counsel’s Expert, Dr. J. Paul Frantz, Ph.D, CPSM, CPE, at 24.**]

14. [REDACTED] of [REDACTED] purchased a set of 216 Zen magnets plus 6 free spares on [REDACTED]. Sales Records of Zen Magnets, Customer # [REDACTED] [**Complaint Counsel’s Exhibit 6, Customer # [REDACTED].**]

15. [REDACTED] of [REDACTED] purchased a Gift Pak of 216 Zen magnets and six spares on [REDACTED]. The magnets came in a velvet sack with a PVC card, steel platform, cloth and guide. [Complaint Counsel’s Exhibit 6, Customer # [REDACTED].]

16. Zen Magnets have an average flux index that ranges from approximately 577.1 and 581.4 ($\text{kG}^2 \text{mm}^2$) and are capable of attracting other similar magnets across a distance of 1.5 cm or greater. Complaint Counsel’s Exhibit 1 at ¶ 11; Complaint Counsel’s Exhibit 3 at ¶ 17; Declaration of Complaint Counsel Expert Vincent Amodeo dated September 23, 2014 at ¶¶ 6-7

[Complaint Counsel's Exhibit 7 at ¶¶ 6-7.]

17. Neoball magnets have an average flux index that ranges from approximately 438.8 to 565.0 ($\text{kG}^2 \text{mm}^2$) and are capable of attracting other similar magnets across a distance of 1.5 cm or greater. Complaint Counsel's Exhibit 1 at ¶ 12; Complaint Counsel's Exhibit 3 at ¶¶ 65-66; Complaint Counsel's Exhibit 7 at ¶¶ 10, 11.

18. Buckyball magnets have an average flux index that ranges from approximately 414.3 to 556.6 ($\text{kG}^2 \text{mm}^2$) and are capable of attracting other similar magnets across a distance of 1.5 cm or greater. Complaint Counsel's Exhibit 7 at ¶¶ 15-16.

19. A hazardous magnet is defined by F963-11 Standard Consumer Safety Specification for Toy Safety as a magnet that is a small object that has a flux index greater than 50. ASTM 963-11 Standard Consumer Safety Specification for Toy Safety [**Complaint Counsel's Exhibit 8.**]¹

20. The Subject Products can connect together in strings, rings or clumps. Complaint Counsel's Exhibit 3 at ¶ 18, 67.

21. The Subject Products also attract to non-magnetic ferrous items such as steel ball bearings. Complaint Counsel's Exhibit 3 at ¶ 19.

22. The Subject Products are about the same size and magnetic force as Buckyball magnets. Complaint Counsel's Exhibit 4 at 283-284, 287, 290; Letter from Shihan Qu to "CPSC" titled "Re: Your Letter Requesting Us to Shut Down," dated August 2, 2012 [**Complaint Counsel's Exhibit 9.**]

23. The Subject Products are not permanently encased within any container. The Subject Products are sold in a bag or box that can be used for storage, but is not required for use. The Subject Products are designed to be easily separated. Deposition Testimony of Complaint

¹ This court took judicial notice of this Safety Specification on July 30, 2014. *See* Order Granting Complaint Counsel's Motion for Official Notice (July 30, 2014).

Counsel; J. Paul Frantz, Ph.D. at 43, 60 [**Complaint Counsel's Exhibit 10** at 43, 60] (Subject Products are "easily separated"); screenshots from neoballs.com website (magnets "easily removed" from container for use) [**Complaint Counsel's Exhibit 47.**]

24. An individual Zen or Neoball magnet is too small to carry a legible warning label or label of any kind. Complaint Counsel's Exhibit 3 at ¶ 101.

25. The Subject Products are intended to be used as manipulatives to create various objects, including jewelry, artistic designs, models, sculptures and other structures. The products are also marketed for stress relief. Complaint Counsel's Exhibit 4 at 188-89 (jewelry); 184 (stress relief); 44-45 (design); Deposition Testimony of Respondent's Proposed Expert, Boyd Edwards, Ph.D. at 48 (sculptures); 83 ("magnet spheres can be used as a math manipulative;") 135 (models). [**Complaint Counsel's Exhibit 11** at 48, 83, 135.]

26. Zen encourages consumers to display their designs, models, sculptures and other structures, and consumers are likely to do so. Complaint Counsel's Exhibit 4. at 45:5-9 (Zen sponsors regular design contests); Complaint Counsel's Exhibit 11 at 86:3-9; Selected screenshots taken of zenmagnets.com/blog/ [**Complaint Counsel's Exhibit 30**, Selected Screenshots.]

27. Someone who doesn't understand the dangers associated with the Subject Products is more likely to "misuse" the Subject Product. Complaint Counsel's Exhibit 4 at 363:14-16.

28. When removed from the packaging, Buckyball magnets and Zen magnets look very similar. Photographs of Neoballs, Zen Magnets and Buckyballs [**Complaint Counsel's Exhibits 12A-12C**, Photographs of Neoballs, Zen Magnets and Buckyballs]; Deposition of Respondent's Proposed Expert, David Richter at 75:16-19, 76 13-19, 95 [**Complaint Counsel's Exhibit 13** at p. 75 at 16-19, 76 13-19, 95]; Deposition Testimony of Anthony Pelletier at 46 [**Complaint**

Counsel's Exhibit 14 at 46.]

29. The safety risks for both Buckyballs and Zen magnets are very similar when the product is out of the package. Complaint Counsel's Exhibit 4 at 486:20-21; Declaration of Complaint Counsel Medical Expert, Dr. R. Adam Noel dated September 24, 2014, at ¶ 16 [**Complaint Counsel's Exhibit 15** at ¶ 16.]

30. Consumers can and will lose individual magnets from Zen Magnets and Neoballs sets. Zen offers spare magnets so that consumers may easily replace such magnets without having to find the lost magnets. These spare magnets may come without any warnings. Complaint Counsel's Exhibit 4 at 88:16, 91:17-20, 148:13-22; Complaint Counsel's Exhibit 5B at 12-13, 23-24; Complaint Counsel's Exhibit 11 at 53:1-10, 56-61, 70-73; Complaint Counsel's Exhibit 14 at 39, 44-45.

31. Zen does not warn consumers that they must not lose any magnets; that they must account for and find each magnet that becomes separated from the set, or that they must replace each magnet securely in packaging when finished playing with the Subject Products. Further, even if consumers did count each magnet, consumers may easily miscount the number of magnets and fail to realize that a magnet has been lost. Complaint Counsel's Exhibit 5 at 62-63; Complaint Counsel's Exhibit 15 at 102:16-17, 112:9-13, 479:1-9.

32. A caregiver acting with reasonable care is highly unlikely to count the number of individual magnets that remain in a set after each use to ensure that individual magnets have not become separated from the set or lost. Declaration of Complaint Counsel's Expert Dr. Laurence Steinberg, dated September 22, 2014 at ¶ 11 [**Complaint Counsel's Exhibit 16** at ¶ 11.]

33. A caregiver acting with reasonable care likely will not search for magnets that have become separated from the set and are highly unlikely to count the number of individual magnets

that remain in a set after each use to ensure that individual magnets have not become separated from the set or lost. Complaint Counsel's Exhibit 14 at 40; Complaint Counsel's Exhibit 16 at ¶ 12.

34. Children under the age of five learn about objects in their world through sensory exploration, including by putting things that they see in their mouth. Children under the age of five are attracted to the shiny, reflective, smooth qualities of the Subject Products. Children under the age of 5 will be attracted to models created from the Subject Products that are displayed in cabinets and on tables. Complaint Counsel's Exhibit 4 at 333:21-22; Complaint Counsel's Exhibit 16 at ¶ 9.

35. A child under the age five would likely intentionally put a magnet from the Subject Product in his or her mouth to learn more about it and such behavior is representative of this age group. Complaint Counsel's Exhibit 16 at ¶ 10.

36. A hazard associated with the Subject Products include children under the age of 5 mouthing or "tonguing" magnets from the Subject Product and then either accidentally or intentionally ingesting the magnets. Complaint Counsel's Exhibit 4 at 333:14.

37. Children under the age of 5 can and do ingest magnets from the Subject Products. Complaint Counsel's Exhibit 6; Medical Records for M [REDACTED] M [REDACTED] [Complaint Counsel's Exhibit 17.]

38. Children under the age of five can and do ingest magnets from products like the Subject Products. Complaint Counsel's Exhibit 5B at 35-36; Complaint Counsel's Exhibit 15 at ¶ 7; Declaration of S [REDACTED] A [REDACTED], September 21, 2014, at ¶¶ 10-11, 20 (22-month-old found and swallowed SREMs) [Complaint Counsel's Exhibit 18 at ¶¶ 10-11, 20]; Declaration of Dr. J. Scott Somerset, M.D., Ph.D. (19-month-old ingested SREMs) [Complaint Counsel's Exhibit

19.]

39. Another hazard associated with the Subject Products include children over the age of 5 accidentally ingesting them when using them as piercings, sticking them to mouth appliances, or otherwise swallowing them after allowing the magnets near or in their mouths. Complaint Counsel's Exhibit 4 at 333:15; Complaint Counsel's Exhibit 16 at ¶ 17.

40. Children over the age of five are likely to want to play with the Subject Products if they are available or displayed. Complaint Counsel's Exhibit 16 at ¶ 16; Declaration of K█████ B█████, dated September 3, 2014, at ¶¶ 3, 7 (nine-year-old ingested magnets stored on shelf) [Complaint Counsel's Exhibit 20 at 3, 7]; Declaration of J█████ H█████, dated September 8, 2014 at ¶¶ 7-9 (seven-year-old girl attracted to and played with magnets) [Complaint Counsel's Exhibit 21 at ¶¶ 7-9.]

41. Children over the age or five can and do use the Subject Products for self-adornment, including for bracelets. Further, Zen encourages such use. Complaint Counsel's Exhibit 4 at 376, 545-546, 565-66; Complaint Counsel's Exhibit 14 at 75-76; Complaint Counsel's Exhibit 21 at ¶¶ 7-9 (seven-year-old girl attracted to magnets and used them as bracelet).

42. Caregivers acting with reasonable care of older children and teenagers are likely to discount a warning concerning ingestion if they believe that their own child or teenager would not intentionally ingest the Subject Products, and thus they will allow access to the Subject Products. Zen encourages parents to use their own judgment regarding a decision to allow their children to have access to the Subject Products. Complaint Counsel's Exhibit 16 at ¶ 21; Complaint Counsel's Exhibit 20 at ¶ 3 (mother of nine-year-old did not consider SREMs a risk to him); Complaint Counsel's Exhibit 4 at 46:15-16; 328:5-17; Complaint Counsel's Exhibit 13 at 71-72; Complaint Counsel's Exhibit 14 at 52-53, 79.

43. Caregivers acting with reasonable care of older children and teenagers are unlikely to consider that their children would engage in behavior such as mimicking piercing or sticking magnets to their braces, and thus are unlikely to warn against the dangers of such behavior. Complaint Counsel's Exhibit 16 at ¶ 21 (reasonable caregiver likely to allow older children and teenagers to have access to SREMs).

44. Older children and teenagers can and do engage in behavior such as mimicking piercing and sticking magnets like the Subject Products to their braces, and such behavior is representative of this age group. Complaint Counsel's Exhibit 16 at ¶ 17; Complaint Counsel's Exhibit 5B at 48; Declaration of H■■■■ G■■■■, dated September 18, 2014, at ¶ 3 (nine-year-old placed SREMs in mouth during class to simulate tongue piercing) [**Complaint Counsel's Exhibit 22** at ¶ 3]; Declaration of G■■■■ E■■■■ dated September 25, 2014 at ¶ 4 (ten-year-old attached SREMs to braces) [**Complaint Counsel's Exhibit 23** at ¶ 4.]

45. Older children and teenagers can and do share the Subject Products with friends at school or otherwise away from caregiver supervision, and such behavior is representative for this age group. Complaint Counsel's Exhibit 14 at 67-68; Complaint Counsel's Exhibit 16 at ¶ 24; Complaint Counsel's Exhibit 22 at ¶ 3 (nine-year-old given SREMs by classmate); Complaint Counsel's Exhibit 23 at ¶¶ 4, 12 (ten-year-old given four SREMs by friend); Declaration of B■■■■ R■■■■ dated September 25, 2014 at ¶ 3 (fourteen-year-old given SREMs by friend) [**Complaint Counsel's Exhibit 24**]; Declaration of Dr. L■■■■ A■■■■ dated September 17, 2014 at ¶¶ 3, 5 (ten-year-old obtained SREMs from friend at school) [**Complaint Counsel's Exhibit 25**.]

46. The Subject Products are small, portable, easily hidden and easily shared. Thus, it is highly likely that children will be exposed to the Subject Products in places other than the home,

like a school, playground or friend's home without adult supervision. Complaint Counsel's Exhibit 1 at 46 (warning on packaging recognizing that product will be shared); Complaint Counsel's Exhibit 16 at ¶ 24; Complaint Counsel's Exhibit 22 at ¶ 3 (nine-year-old given four SREMs at school); Complaint Counsel's Exhibit 23 at ¶¶ 4, 12 (ten-year-old given SREMs by friend); Complaint Counsel's Exhibit 24 at ¶¶ 3-5 (fourteen-year-old received SREMs from friend and took to school); Complaint Counsel's Exhibit 25 at ¶¶ 3, 5 (ten-year-old received SREMs at school).

47. Children can and do unconsciously put magnets, including the Subject Products, in or around their mouth while playing with them, and such behavior is representative of this age group. Complaint Counsel's Exhibit 16 at ¶ 18; Complaint Counsel's Exhibit 24 at ¶ 5 (fourteen-year-old accidentally swallowed SREMs); Complaint Counsel's Exhibit 25 at ¶ 5 (ten-year-old accidentally swallowed SREMs).

48. Older children and teenagers can and do accidentally ingest magnets from the Subject Products. Complaint Counsel's Exhibit 24 at ¶ 5 (fourteen-year-old accidentally swallowed Zen Magnets while holding them in mouth).

49. Older children and teenagers can and do accidentally ingest magnets from products like the Subject Products. Complaint Counsel's Exhibit 5B at 48; Complaint Counsel's Exhibit 10 at 56; Complaint Counsel's Exhibit 15 at ¶ 7; Complaint Counsel's Exhibit 20 at ¶¶ 3, 7; Complaint Counsel's Exhibit 22 at ¶ 3 (nine-year-old accidentally swallows SREMs while drinking water); Complaint Counsel's Exhibit 23 at ¶ 4 (ten-year-old accidentally swallows SREMs attached to braces); Complaint Counsel's Exhibit 25 at ¶ 5 (ten-year-old).

50. Anytime someone swallows a magnet from the Subject Products, either intentionally or unintentionally, it could potentially do serious harm, and the damage could be catastrophic,

including death. Complaint Counsel's Exhibit 4 at 177:11-22; Complaint Counsel's Exhibit 15 at ¶¶ 4, 17; Declaration of M█████ J█████, dated September 22, 2014 at ¶¶ 10-20 (19-month-old suffers multiple surgeries, ostomy, and removal of most of small intestine, necessitating intravenous and stomach tube feeding after ingesting SREMs) [**Complaint Counsel's Exhibit 26** at ¶¶ 10-20]; Declaration of K█████ L█████, dated September 22, 2014 at ¶¶ 16-17 (4-year old suffers nine perforations to intestines from ingested SREMs) [**Complaint Counsel's Exhibit 27** at ¶¶ 16-17]; (Declaration of A█████ C█████, dated September 24, 2014 at ¶¶ 9,10; (19-month old dies after ingesting SREMs) [**Complaint Counsel's Exhibit 28**]; See generally Complaint Counsel's Exhibits 17-28; Full Report of Zen Magnets to CPSC Staff dated May 29, 2012 at 4 [**Complaint Counsel's Exhibit 34** at 4.]

51. If an SREM attracts to another object or magnet after it has been ingested, pressure necrosis or "tissue death" will occur if there is tissue trapped between the two objects and the magnet is not removed. This necrosis can cause fistulas and perforations, i.e. holes, to occur in the digestive tract, necessitating surgery and possible bowel or intestinal removal. These holes can and do lead to further complications if not found and treated, including death. Complaint Counsel's Exhibits 15 at ¶¶ 4, 17; See generally Complaint Counsel's Exhibits 17 through 28.

52. The symptoms associated with ingestion of magnets from the Subject Products are identical to other illnesses like a stomach virus or the flu. Thus, a caregiver or medical professional may misdiagnose a child that is exhibiting symptoms of ingestion if he or she is not aware that the child has ingested the Subject Product. Complaint Counsel's Exhibit 15 at ¶ 13 (SREM ingestion injury "easily confused" with virus by parents and medical professionals); Complaint Counsel's Exhibit 18 at ¶¶ 12-13 (parent confused SREM ingestion injury symptoms in young child with stomach virus); Complaint Counsel's Exhibit 21 at ¶¶ 13-16 (parents

confused SREM ingestion injury symptoms in two-year-old with stomach virus).

53. Even if a caregiver or medical professional is aware that a child has ingested the Subject Product, he or she is not always aware of how the dangers associated with the Subject Products differ from other foreign body ingestions like coins or marbles, and, therefore, may recommend or pursue a course of treatment that could compound the injuries by not removing the magnets promptly from the body. Serious injuries can occur in as little as twelve hours after ingestion. Complaint Counsel's Exhibit 18 at ¶ 21 (SREM injury symptoms initially confused with virus; surgery three days later revealed intestinal injuries); Complaint Counsel's Exhibit 24 at ¶ 6-11 (teen who swallowed SREM sent home by emergency room physician; surgery necessary several days later); Complaint Counsel's Exhibit 25 at ¶ 7 (after SREM ingestion doctor suggested that child return home to wait for magnets to pass); Deposition Testimony of Complaint Counsel Medical Expert Dr. R. Adam Noel at 78 [**Complaint Counsel's Exhibit 29** at 78.]

54. Children who ingest magnets such as those contained in the Subject Product experience a much higher rate of surgical intervention and a much higher rate of serious injury than children who ingest other foreign bodies. Complaint Counsel's Exhibit 15 at ¶ 12.

55. Children who have ingested rare-earth magnets like those contained in Zen Magnets have been treated for intestinal blockage, perforated intestines, infections, peritonitis (contamination of the body cavity when bowel contents leaks), and necrosis (tissue death) necessitating removal of sections of bowel. Some children have suffered the removal of most of their small bowel, rendering them unable to absorb sufficient nutrition through their digestive system, and requiring daily intravenous or stomach-tube feedings that bring with them a risk of infection or fatal liver damage. Complaint Counsel's Exhibit 29 at 216-18.

56. At least one child has died due to complications arising from ingestion of rare-earth

magnets. Complaint Counsel's Exhibits 19, ■.

57. Even children who escape serious injury from ingestion of rare earth magnets like those contained in Zen magnets are subject to risks related to radiation from x-rays, MRIs, and endoscopic procedures. Complaint Counsel's Exhibit 15 at ¶ 19.

58. Medical professionals do not and cannot differentiate between magnets that were once a part of a Zen magnet set or magnets that were once a part of a Buckyballs or other set of aggregate small rare earth magnets because there is no way to identify the brand once the magnet is separated from its packaging. Complaint Counsel's Exhibit 15 at ¶ 16; Complaint Counsel's Exhibit 29 at 209-10; 254.

59. The Subject Products are a toy and have been or are currently advertised as "fun to play with", "look good on cute people", "may have health benefits", a "wrist-worthy chain", "terrific for refrigerator art" good for "self-adornment". Complaint Counsel's Exhibit 1 at ¶ 79; Complaint Counsel's Exhibit 3 at ¶¶ 57-59; Complaint Counsel's Exhibits 4 at 86:10-20, at 107:6-9, 108:1-5, 376:2-4.

60. Zen conducts design contests for its Subject Products, and other products similar to its Subject Products like Buckyballs, that have no age restrictions. Zen has given prizes to children as young as seven for sculptures children have submitted to these contests. The prizes usually consist of coupon codes that the children can and do use to purchase additional magnets through the www.zenmagnets.com or www.neoballs.com. Complaint Counsel's Exhibit 4 at 45:9, 49:10-11, 51:10-20.

61. Zen's design contests have had subject matter that is appealing to children, including video game characters and Monopoly tokens. Complaint Counsel's Exhibit 30.

62. Zen sells the Subject Products direct to consumers through its websites

www.zenmagnets.com and www.neoballs.com. Zen has also sold Zen Magnets through woot.com and amazon.com in the past. Zen currently sells the Subject Products through retailers in Colorado that are located in marijuana dispensaries or specialize in marijuana paraphernalia. Zen has also sold the Zen Magnets Subject Product at a “science toy store” called Science Toy Magic in Ft. Collins, Colorado and at a games store called “Dark Matters” in Lakewood, Co. Complaint Counsel’s Exhibit 3 at ¶¶ 25, 80; Complaint Counsel’s Exhibit 4 at 126:9, 126:15-17, 338:9-14, 415:4-11; Photographs of Dark Matters Games in Lakewood, Colorado [**Complaint Counsel’s Exhibit 31.**]

63. Anyone with access to a credit card, Paypal account or bitcoin can purchase the Subject Products through www.zenmagnets.com or www.neoballs.com. Complaint Counsel’s Exhibit 4 at 44:2-5.

64. Zen has plans to expand its distribution of the Subject Products to retail game stores and hobby stores, as well as other stores that previously sold Buckyballs brand magnets. Complaint Counsel’s Exhibit 4:167-169.

65. Zen Magnets frequently compared its magnets to Buckyballs and used the term Buckyballs to promote its own business. Complaint Counsel’s Exhibit 4 at 459:4-13.

66. Zen supports retail stores displaying the Subject Products for use by consumers. Complaint Counsel’s Exhibit 4 at 131:14-19, 141:16-17.

67. From 2009 through mid-2011, www.zenmagnets.com contained the following warning regarding Zen magnets: “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 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. Complaint Counsel's Exhibit 1 at ¶ 34; Complaint Counsel's Exhibit 3 at ¶ 44.

68. Starting in October 2011 www.zenmagnets.com included the warning "Magnets can cause fatal intestinal pinching if swallowed. Keep from animals and children who don't understand this." Complaint Counsel's Exhibit 1 at ¶ 35; Complaint Counsel's Exhibit 3 at ¶ 46.

69. Starting in October 2011, www.zen.magnets.com included the following information in its FAQ: "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." Complaint Counsel's Exhibit 1 at ¶ 37; Complaint Counsel's Exhibit 3 at ¶ 48.

70. Zen Magnets are currently sold with the following warning: "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." Complaint Counsel's Exhibit 1 at ¶ 39; Complaint Counsel's Exhibit 3 at ¶ 50.

71. Zen Magnets are also currently sold with the following warning: "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.” Complaint Counsel’s Exhibit 1 at ¶ 40; Complaint Counsel’s Exhibit 3 at ¶ 51.

72. The www.neoballs.com website on which Zen Magnets, LLC sells Neoballs magnets contains the following warning: “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.” Complaint Counsel’s Exhibit 1 at ¶ 46; Complaint Counsel’s Exhibit 3 at ¶ 91.

73. Neoballs are sold in a box that contains a warning that partially states: “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.” Complaint Counsel’s Exhibit 1 at ¶ 50; Complaint Counsel’s Exhibit 3 at ¶ 97.

74. Shihan Qu is not an expert regarding product safety, human behavior, ergonomics, statistics or the efficacy of warnings. Complaint Counsel’s Exhibit 4 at 27:7-22 and at 28:1.

Respectfully Submitted,



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