UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	:	
	:	
Central Sprinkler Corp., a Corporation,	:	
451 North Cannon Avenue	:	
Lansdale, PA 19446	:	**CPSC Docket No. 98-2**
	:	
and	:	
	:	
Central Sprinkler Co., a Corporation,	:	**Motion To Dismiss Of Respondents**
451 North Cannon Avenue	:	**Central Sprinkler Corporation and**
Lansdale, PA 19446,	:	**Central Sprinkler Company**
	:	
Respondents.	:	
	:	

MOTION TO DISMISS OF RESPONDENTS CENTRAL SPRINKLER CORPORATION AND CENTRAL SPRINKLER COMPANY

Respondents Central Sprinkler Corporation and Central Sprinkler Company (collectively, "Central"), by and through their undersigned counsel, hereby move this Court to dismiss the administrative Complaint of the Consumer Product Safety Commission ("CPSC") regarding Central Sprinkler Company's Omega-brand fire sprinkler heads. Because Omega sprinkler heads are not consumer products, the CPSC lacks jurisdiction under 15 U.S.C. § 2051 et seq. to seek remedial measures or otherwise regulate Omega sprinkler heads. Therefore, the administrative Complaint must be dismissed.

In addition, because the CPSC's Complaint does not inform Central with "reasonable definiteness" of the factual basis of the alleged hazard and does not include a list of documentary evidence supporting the allegations of the Complaint, in violation of 16 C.F.R. § 1025.11(b)(3), the Complaint must be dismissed. At a minimum, the Complaint Counsel must amend the Complaint to provide Central with a sufficient factual basis for alleging that Omega sprinkler

heads are defective, and include a list of documentary evidence supporting the Complaint's allegations.

WHEREFORE, respondents respectfully request that the Administrative Law Judge grant their Motion To Dismiss, and dismiss the Complaint.

Further support for this Motion is contained in the attached Memorandum Of Law, which is incorporated by reference herein.

Respectfully submitted,

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DATED: March 26, 1998

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MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS OF RESPONDENTS CENTRAL SPRINKLER CORPORATION AND CENTRAL SPRINKLER COMPANY

I. INTRODUCTION

In an attempt to expand its jurisdiction beyond the statutory parameters of the Consumer Product Safety Act, staff of the Consumer Product Safety Commission ("CPSC") seeks to force a recall of all Omega-brand fire sprinkler heads manufactured by respondent Central Sprinkler Company ("Central"). Because a sprinkler head is neither a consumer product nor a component of a consumer product, the CPSC lacks authority under the Act to regulate or force remedial measures regarding Omega-brand sprinkler heads.

Unlike consumer products, fire sprinkler systems are incorporated as part of the original integrated design and construction of a building. It is indisputable that housing itself is not a consumer product, and that sprinkler systems have the characteristics of structural framing, electrical wiring, ventilation systems, and other integral parts of a building that disqualify them as consumer products. Sprinkler systems are not customarily marketed, sold or distributed to

consumers; neither are they used by consumers. Moreover, the design and construction of these systems takes place according to detailed codes regulated by state and local authorities involved solely in fire safety and construction approval. As the District of Columbia Circuit held with respect to electrical branch wiring in Consumer Product Safety Commission v. Anaconda Company, 593 F.2d 1314 (D.C. Cir. 1979), Congress never intended the Consumer Product Safety Act, 15 U.S.C. § 2051 et seq. ("the Act"), to reach these kinds of products and, therefore, potentially displace and preempt the extensive network of state-law regulation.

If it is determined that the CPSC has authority to recall Omega brand sprinkler heads, it would follow that the CPSC also has jurisdiction to recall, regulate, and create standards and rules governing the entire fire-sprinkler industry -- and, indeed, the entire building industry, -- because if the CPSC has jurisdiction to recall these parts of a building, it also has authority to promulgate rules and regulations regarding them. Such a result would be contrary to congressional intent and the express language of the Act.

In addition, the Complaint does not comply with the requirements of 16 C.F.R. § 1025.11(b)(3), which mandate that Complaint Counsel inform Central with "reasonable definiteness" of the factual basis of the alleged defect or hazard posed by Omega-brand sprinkler heads, and attach to the Complaint "a list and summary of documentary evidence supporting the charges." Its failure to meet these requirements warrants dismissal of the Complaint. At a minimum, Complaint Counsel must amend its Complaint to provide Central with a sufficient factual basis for alleging that Omega sprinkler heads are hazardous and include a list of the documentary evidence supporting the allegations of the Complaint

II. FACTS

Since 1983, Central has manufactured various models of Omega-brand sprinkler heads, which are designed to be incorporated in integrated fire-suppression systems built into a wide range of residential, commercial and industrial structures. See Aff. of Carmine Schiavone (attached hereto as Exhibit "A," ¶¶ 3-4.)[1/] Among the structures with Omega-brand sprinkler heads are office buildings, warehouses, storage facilities and factories. Id. ¶ 5; Aff. of Frank Hill (attached hereto as Exhibit "B," ¶ 25.) The overall internal fire suppression system incorporated into a building includes a network of in-wall piping, hydraulic devices, valves, and sprinkler heads installed in a pressurized water delivery system connected to the building's water source. Schiavone Aff., Ex. A ¶ 7. Construction requires preparing a detailed hydraulic design plan, obtaining approval from a local authority, running pipes in the framed walls and ceilings, anchoring the pipes to the building's internal structure, installing the sprinkler heads with special tools before the ceilings and walls are installed, and connecting the system to an external water source. Hill Aff., Ex. B ¶¶ 12-20. Like foundation, framing, wiring or ventilation systems, the sprinkler system is incorporated into a building by a knowledgeable, specialized contractor while the structure is under construction. See id. ¶¶ 9-10. Indeed, construction plans for a building's sprinkler system must be presented with other construction documents before a construction permit will issue. Id. ¶ 13; Building Official & Code Administrators National Building Code 1993 (hereinafter "BOCA Code") (attached hereto as Exhibit "C," Section 903.2.1.)

1/ In considering a motion to dismiss based on the lack of subject matter jurisdiction, a judge may consider affidavits and other matter outside of the pleadings that support the motion. Wright and Miller, Federal Practice and Procedure: Civil 2d § 1350; Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990).

Once incorporated into a building, the sprinkler head acts as a stopper to prevent pressurized water from flowing into the building until it is needed to suppress a fire. When activated by high temperatures, one or more sprinkler heads in the immediate area of a fire are designed to open automatically for a period of time as water is distributed through the heads over the fire.

Unlike other fire safety products such a smoke detector, Omega sprinkler heads are not distributed through retail channels, as they would be of no use to a consumer without the necessary intricate engineering, design, construction, piping and pressurized water network. Schiavone Aff., Ex. A ¶ 9. In fact, only a trained, specialized contractor is permitted to install a sprinkler system, including sprinkler heads. See id. ¶ 22; Hill Aff., Ex. B ¶ 9. In addition, sprinkler heads are not like portable fire extinguishers that can be picked up by an individual and sprayed onto a localized fire. Hill Aff., Ex. B ¶ 24. Rather, they are incorporated into a building as part of the structure and are not operated by any individual. Id. A sprinkler system is purposely designed to function as an automatic, passive system without the need for human use, control or intervention. BOCA Code, Ex. C, Sections 902.1, 906.4.

Many state and local governments require that automatic sprinkler systems be installed in residential, commercial and industrial buildings. Schiavone Aff., Ex. A ¶ 27. Such requirements are typically part of local building and fire codes. The codes and their referenced standards closely regulate every detail of the location, installation and operation of a sprinkler system, from the size of the piping needed, to the location and spacing of each sprinkler head. Id. ¶ 28. Contractors, in turn, install sprinkler systems in order to ensure that a structure complies with the relevant jurisdiction's building and fire codes. Hill Aff., Ex. B ¶ 8.

Of the 20 different models of Omega sprinkler heads, many are designed, marketed and sold for commercial and industrial use and specifications. Schiavone Aff., Ex. A ¶ 4. Central does not market any of the models with any of the methods or means associated with consumer marketing. Id. ¶ 10. The sprinkler heads are not advertised in the popular press or media, but only through the industry or trade press to trained professionals. Id. ¶ 12. Packaging is not designed to attract consumer attention but, conversely, to function as protection from, and notification of, potentially damaging temperatures. Id. ¶ 14. Central's catalogue includes extensive technical data and installation information. Id. ¶ 19. Central uses no glossy advertisements, in-store demonstrations, cents-off coupons, celebrity spokespersons, jingles, billboards, or any other indicia of customary consumer marketing. Id. ¶ 15. Central's salespeople are trained to explain to professional contractors the technical details of the sprinkler heads, including, for example, the water distribution patterns associated with Omega heads, the different Underwriters Laboratories specifications of the various models, and the design specifications of the sprinkler heads. Id. ¶ 18.

Although the Complaint alleges that Omega-brand sprinkler heads "do not and will not function in a significant percentage of instances," (compl. ¶ 10), nearly 9 million Omega-brand sprinkler heads have been sold over the past 15 years, and there have been a total of seven fires in which someone has alleged that an Omega-brand sprinkler head failed to open.[2/] Moreover,

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2/ There are three other reported fires involving Omegas. In one of these fires, involving Mel's Marina in Florida, there was an initial allegation that Omega heads failed to open. Central's on-site investigation revealed, inter alia, that the sprinkler system did not receive an adequate water supply. In the remaining two fires, the fires started outside the structures and burned into the structures, and the Omega sprinkler heads did, in fact, operate.

sprinkler systems universally are designed with redundancies so that if one head fails to open, an adjacent head will supply water to extinguish a fire. There have been no injuries associated with those seven occurrences.

III. LEGAL ARGUMENT

A. Omega Sprinkler Heads Are Not Consumer Products.

Congress passed the Consumer Product Safety Act, 15 U.S.C. § 2051 et seq., and established the CPSC to protect consumers from injuries associated with use of dangerous products in the home. See S. Rep. 94-251, p. 4, reported at 1976 U.S.C.C.A.N. 993, 996. The purpose of the Act was to establish one independent agency with comprehensive jurisdiction "to regulate all . . . common household products." See S. Rep. 92-835, reported at 1972 U.S.C.C.A.N. 4573, 4574, 4579.

Adoption of the Act followed a two-year study by the National Commission on Product Safety, which identified and revised a list of products categorized as consumer products. Notably, the Commission listed an entire category of "Home Alarm, Escape and Protection Devices." Although it specified such products as fire extinguishers; fire, smoke and burglar alarms; chain ladders; and locks, the Commission did not include automatic fire sprinkler systems on its list of consumer products. See Bureau of Nat'l Affairs, The Consumer Product Safety Act: Text, Analysis and Legislative History, App. N, pp. 353-55 (1973). Because the National Commission on Product Safety clearly considered the category of home protection products and specified many such items as consumer products, the exclusion of sprinkler systems is significant.

By definition, the CPSC's jurisdictional authority extends only to consumer products, defined in the statute as

> any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; . . . .

15 U.S.C. § 2052(a)(1).

The statute also lists numerous exceptions, including

> any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer.

15 U.S.C. § 2052 (a)(1)(A).

Thus, the Act specifies three requirements, each of which must be met before an item can be found to be within the CPSC's jurisdiction. First, the product must be produced or distributed for sale to consumers. 15 U.S.C. § 2052(a)(1)(i). Second, the product must be produced or distributed for use by the consumer. Id. Third, the use by the consumer must be in or around a household, residence or school, in recreation or otherwise. Id. Clause (ii), which does not have the sale requirement, was intended to encompass products that are distributed, but not sold, to consumers, such as free samples and promotional items. Robert K. Bell Enter. v. Consumer Product Safety Comm'n, 645 F.2d 26, 28 (10th Cir. 1981) (clause (ii) added because of congressional concern over free samples and items on loan, lease or approval); Anaconda, 593 F.2d at 1320 n.17.

The first exception underscores that a product is not a consumer product unless it is customarily produced or distributed for consumer sale or use, and that occasional use by a

consumer does not make it a consumer product. Further, as the District of Columbia Circuit has recognized, integral components of housing or buildings are not consumer products. Anaconda, 593 F.2d at 1321 (systems purchased as a component part of a house are not covered by the Act, "for a house is not a consumer product."). Moreover, the Anaconda court cautioned that Congress did not intend for CPSC regulation to supplant state and local regulations regarding building construction. Id. at 1320. That warning must be heeded carefully in this instance, where fire sprinkler systems are already the subject of extensive state and local control. Based on these provisions, the CPSC lacks jurisdictional authority over Omega sprinkler heads.

1. Omega Sprinkler Heads Are Not Customarily Produced For Sale Or Distribution To Consumers.

The first part of the three-prong statutory definition of "consumer product" is production for sale or distribution to consumers. Unlike products over which the CPSC has jurisdiction, Omega sprinkler heads are neither distributed, sold nor given away as distinct articles to consumers. In contrast to smoke detectors, for example, which can be purchased off the shelf at a hardware store, Omega sprinkler heads are not available in retail outlets. Schiavone Aff., Ex. A ¶ 9. See CPSC Adv. Op. dated Oct. 24, 1986, 1986 WL 223428, *1 (in advising that manufacturer would not be liable under Federal Hazardous Substance Act or Poison Prevention Packaging Act for heavy-duty industrial cleansers sold to restaurants, landlords and janitorial services, CPSC considered it significant that product "would never be available in a retail store"). Nor can the general public purchase sprinkler heads. Schiavone Aff., Ex. A ¶ 17. Central does not suggest that privity of contract is required for distribution of a consumer product. What is necessary, however, is that the product be available for separate acquisition by consumers.

Anaconda, 593 F.2d at 1321. In this case, the sprinkler heads are sold only to professional contractors through Central's distribution outlets. Schiavone Aff., Ex. A ¶ 16.

This point is reinforced by the first statutory exception, which excludes from the definition of consumer product items not customarily produced or distributed for sale or use to consumers. 15 U.S.C. § 2052(a)(1)(A). The exception thus compels the conclusion that sprinkler heads are not within the CPSC's jurisdiction. Before a product can be considered as being customarily produced for sale to, or use by, consumers, there must be a "significant marketing of the product as a distinct article of commerce" for that purpose. ASG Indus., Inc. v. Consumer Product Safety Comm'n, 593 F.2d 1323, 1328 (D.C. Cir.), cert. denied, 444 U.S. 864 (1979). As described above, Central does not market or sell sprinkler heads to consumers. Rather, Central sells only to the professional construction trades through non-retail distribution channels. Central does not advertise the Omega sprinkler heads in the popular press or on television and does not sell Omega sprinkler heads in retail stores. Schiavone Aff., Ex. A ¶¶ 12, 16. Consequently, because Central does not customarily produce, distribute or market sprinkler heads to consumers, sprinkler heads are excepted from regulation under the Act.[3/]

3/ Indeed, certain Omega models contemplate construction and installation of the sprinkler system in distinctly non-consumer locations. The Flow Control, for example, is specifically designed and marketed for use in industrial or commercial structures where water damage could be as harmful as fire damage, as in a computer control room or electronics assembly facility. Schiavone Aff., Ex. A ¶ 5. Similarly, Model "M" Omega-brand sprinkler heads are designed to work in structures with exposed piping, such as warehouses or storage facilities. As such, both models are industrial products not customarily produced for consumer use. Id. Even if there is "crossover" of industrial products into consumer use, the "occasional use of industrial products by consumers would not be sufficient to bring the product under the Commission's jurisdiction." Kaiser Alum. and Chem. Co. v. Consumer Product Safety Comm'n, 574 F.2d 178, 181 (3d Cir.) (quoting H.R. Rep. No. 1153, 92d Cong. 2d Sess. 27 (1972)), cert. denied, 439 U.S. 881 (1978).
(continued...)

Nor are Omega sprinkler heads marketed to consumers as distinct articles for sale. Building owners do not choose which type, brand or model of sprinkler system or sprinkler head to purchase any more than they choose what type of cement will be used to pour the building's foundation. Hill Aff., Ex. B ¶ 6. To the contrary, professional contractors make those decisions, in compliance with applicable local building and fire codes. These products are not subject to consumer choice or evaluation.[4/] Unlike the glazing material at issue in ASG Industries, consumers cannot purchase Omega sprinkler heads in retail outlets for home installation.

2. Consumers Do Not Use Omega Sprinkler Heads.

The second prong of the statutory definition requires use of a product by consumers. Although not expressly defined in the statute, "use" should be understood as enjoying, holding, occupying, or actively availing oneself of a product. State Fair of Texas v. United States Consumer Product Safety Comm'n, 650 F.2d 1324, 1329 (5th Cir.), judg. vac. and rem., 454 U.S. 1026 (1981). When debating the Act, the Senate initially had defined "use" broadly to include not only "normal use or reasonably foreseeable misuse," but also mere "exposure to," the product. Conf. Rep. 92-1593, reported in 1972 U.S.C.C.A.N. 4596, 4634. In conference, the

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3/(...continued)
Therefore, even if some commercial or industrial sprinkler heads models are sometimes installed in consumer sites, that occasional location does not make them consumer products. ASG Indus., 593 F.2d at 1328. The jurisdictional limit thus applies whenever production for sale or use by a consumer is not customary. Anaconda, 593 F.2d at 1322.

4/ The self-described purpose of the Act also compels the conclusion that sprinkler systems and sprinkler heads are not consumer products. One of the purposes of the Act is "to assist consumers in evaluating the comparative safety of consumer products." 15 U.S.C. § 2051 (b)(2). Because a building owner does not purchase, choose, evaluate or specify a model, type or brand of sprinkler head or overall sprinkler system, CPSC regulation of sprinkler heads would not further the statute's purpose of assisting consumers in an evaluation or comparison.

Senate deferred to the House of Representatives, and the Senate's sweeping definition of "use" as including "exposure to" was not part of the final law. Instead, "use" must be understood as requiring some sort of active consumer interaction with the product. Thus, even under an expansive reading of the Act, when considering "the common sense of the word," the Fifth Circuit in State Fair held that consumers "used" an amusement park gondola ride even though they did not control it, because passengers "literally occupy the Skyride" and "also enjoy it for sight-seeing and benefit from being transported." 650 F.2d at 1329.

In contrast, consumers do not use, consume or enjoy Omega sprinkler heads. Although they may occupy a house into which a sprinkler system is incorporated, housing itself is not, as the Anaconda court established, a consumer product. 593 F.2d at 1321. Sprinkler heads are installed as part of a sprinkler system with the purpose of constructing a building to code compliance. Hill Aff., Ex. B ¶ 8. A resident of a sprinklered site does not control, activate, turn on and off, or adjust the sprinkler system or sprinkler heads once they are installed as part of the built-in piping system. The system remains passive until it is automatically activated by a fire. Id. ¶ 24. In fact, it is particularly designed and installed so that a consumer is not able to manipulate the system or the sprinkler heads. See BOCA Code, Ex. C, Sections 902.1, 906.4. Nor do consumers use the sprinkler system or sprinkler heads in order to use or enjoy other consumer products. Because consumers do not interact with, enjoy, hold, occupy, or actively avail themselves of the sprinkler system or sprinkler heads, sprinkler heads are not consumer products under the Act.

3. Omega Sprinkler Heads Are Not Used In Or Around A Household, Residence Or School Because They Are Part Of The Building Itself.

The third and final prong of the Act's definition of consumer product requires that the use by consumers must be in or around a household, residence or school, in recreation or otherwise. In construing this requirement, the Anaconda court properly held that housing itself is not a consumer product. 593 F.2d at 1320. The Anaconda court rooted its determination on two bases of reasoning. First, as the court explained in parsing the textual language of the Act, the statute's definition requiring that a consumer product be used "in or around" a household "would on its face seem to preclude the possibility that housing was intended to be within the Commission's jurisdiction." Id. at 1320 n.19. A house or a building clearly is not used in or around itself. Therefore, based on the Act's language, products that are sold to contractors for incorporation into the fundamental structure of a building as part of a complex system are not within the jurisdiction of the Commission. Second, the court considered that the field of building and housing historically has been regulated at the state and local level, and, citing federalism concerns, noted that Congress in no way evinced an intention to displace this localized regulation.

In Anaconda, the District of Columbia Circuit reversed the district court's finding that electrical wiring systems in residential housing constituted consumer products subject to the jurisdiction of the CPSC. 593 F.2d 1314. The CPSC had investigated reports that fires resulting in injuries and death had been caused by failures of residential aluminum branch wiring systems. Thereafter, the Commission brought an action to declare those systems as "imminently hazardous" consumer products. The District Court denied the manufacturers' motion to dismiss

for lack of jurisdiction and the Court of Appeals reversed and remanded. In reaching this conclusion, the Court stated that housing and integrated component systems are not consumer products:

> Housing is not a "consumer product." Generally, an aluminum branch circuit wiring system is produced and distributed for sale to a consumer or for the use of a consumer as a component part of a residential structure. The language of the statute as well as the legislative history make clear that housing as such is not a "consumer product."
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> Id. at 1320.

The Court specifically rejected the CPSC's view that its jurisdiction extended to integral component parts of a dwelling, finding that such a construction of the statute ignored congressional intent and would intrude on areas of building construction that are heavily regulated by the states and localities:

> [T]he Commission has taken the position that its jurisdiction extends to every component part of a dwelling including the central wiring and plumbing systems as well as the wall and flooring systems and their various building components. Such an extension of the statutory language would seem to ignore a contrary congressional intention and potentially raises significant problems of federalism in areas of building construction currently regulated extensively by local jurisdictions.
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> Id.

The court noted the Commission's inability to identify any component of a house that would not be subject to Commission jurisdiction under its theory, id at 1321 n. 20, and pointed to the obvious flaws in the CPSC's argument "in the face of the conceded congressional

unwillingness to grant jurisdiction over housing and the pervasive tone of a statutory scheme that carefully limits the scope of the agency's authority." Id. at 1320-21.[5/]

Like aluminum branch circuit wiring, a fire suppression system is an internal, fundamental component part of a residence or industrial or commercial structure. Hill Aff., Ex. B ¶ 3; see BOCA Code, Ex. C, Section 902.1 (defining automatic sprinkler system as "integrated system of underground or overhead piping designed in accordance with fire protection engineering standards.") It is incorporated into the structure from the ground up, and plans for the sprinkler system must be included in the original construction documents presented to the local regulatory authority before a construction permit will issue. Because the sprinkler system is a fixed and integral part of the basic building structure itself and is neither portable nor transferrable, it is a fundamental component of the building and is not a consumer product.[6/] Indeed, courts in other contexts have recognized that sprinkler heads incorporated in a built-in

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5/ In Kaiser, the Third Circuit held that branch circuit wiring in a home was a consumer product. Kaiser does not control the inquiry, however, for two reasons. First, the Kaiser Court wrongly construed the statute as potentially reaching elaborate systems such as electrical wiring installed in buildings. Second, Kaiser is distinguishable because its reasoning rested in substantial part on consumers' use of the branch wiring system to enjoy the use of other consumer products such as small personal appliances. 574 F.2d at 180. In contrast, consumers do not use a fire sprinkler system in order to use and enjoy consumer products. Nor do the Omega sprinkler heads enable the consumer to use or control the sprinkler system itself. See text at pp. 10-11, supra. Thus, even under the Kaiser court's flawed reasoning, Omega sprinkler heads cannot be considered consumer products subject to the CPSC's jurisdiction.

6/ After much litigation and conflicting results about whether amusement park rides are consumer products, Congress amended the Act to provide that amusement rides are consumer products unless they were "permanently fixed to a site." 15 U.S.C. § 2052. In exempting rides based on whether they were fixed or movable, Congress signaled that mobility and permanence should be considered as a factor in defining whether an item is a consumer product. Just as an amusement ride permanently fixed to a site is not a consumer product, neither are a building and its internal structural components -- also fixed to a site -- consumer products.

fire-control system are structural components of a building. See, e.g., Texas Instruments v. Commissioner of Internal Revenue, 1992 Tax Ct. Memo Lexis 328, *176 (U.S. Tax Ct. May 27, 1992) (in rejecting argument that sprinkler heads were tangible personal property, tax court found that sprinkler heads and associated lines were structural components of a building).

State and local building and fire codes also recognize that a sprinkler system is a fundamental, integral part of building structures, and these codes regulate these systems extensively. Every municipality has a building and/or fire code, which either includes or references extensive regulations governing fire protection systems, the size of sprinkler system piping, the number and types of sprinkler heads, and specific requirements reflecting the local water supply and water source. Schiavone Aff., Ex. A ¶ 28. These codes address all manner of buildings and uses, and are enforced locally by professional fire officials with considerable experience and expertise, from local fire chiefs and fire marshals to municipal licensing officials and fire inspectors. Id. ¶ 30. Moreover, the codes define automatic sprinkler systems as inherent, built-in components of a building, integrated and installed into the very structure of a building. See, e.g., BOCA Code, Ex. C, Section 902.1.

There are three professional organizations -- Building Officials & Code Administrators ("BOCA"), Southern Building Code Congress International, and International Conference of Building Officials -- that promulgate detailed model building codes relating to every aspect of fire safety in all types of buildings from the initiation of construction to the finished structure. Schiavone Aff., Ex. A ¶ 27. Every state has adopted one of the three model codes, which dictate when and in what types of buildings fire sprinklers must be installed. Id. ¶ 28. The codes, in turn, reference the standards of the National Fire Protection Association ("NFPA"), which detail

how to implement the mandated fire safety provision of the code. Id.; BOCA Code, Ex. C, Section 906.2.1. In sum, sprinkler systems are standardized and regulated as part of building construction at several overlapping levels.

In addition to experienced organizations dedicated to establishing appropriate building and fire codes and product standards, there exists an extensive network of professional fire safety officials in local jurisdictions implementing and enforcing the developed standards. Schiavone Aff., Ex. A ¶ 30. These officials include fire marshals, licensing and inspections officials and local regulators who are long experienced in responding to the local requirements of their jurisdictions regarding fire safety.

For example, although every state has adopted one of the three model codes, and the model codes themselves reference NFPA standards, local "Authorities Having Jurisdiction" necessarily adapt the codes and/or NFPA standards to address local conditions and needs. Schiavone Aff., Ex. A ¶ 29. These adaptations may include requiring increased fire protection beyond that in the code or standards to account for heightened fire risk or an excess of caution. In short, local jurisdictions historically have borne the responsibility for implementing and enforcing fire safety, including the design, installation and operation of sprinkler systems, and there is no suggestion in the Consumer Product Safety Act that Congress intended to displace them. Indeed, as Congress emphasized when it amended the Act, the CPSC's mission did not include establishing standards that conflicted with or displaced state and local regulations. See H. Rep. 158, vol. II, 97th Cong., 1st Sess. 385, 390 (1981). Because granting the CPSC jurisdiction to seek adjudicated relief regarding sprinkler heads would also give the CPSC

authority to regulate and create rules for fire sprinkler systems, this Court should decline to extend the CPSC's jurisdiction to fire sprinkler heads.

As the Anaconda court recognized, the CPSC's authority to seek adjudicated relief is more limited than its jurisdiction to engage in investigation and rulemaking. 593 F.2d at 1319. Therefore, if the Court finds that the CPSC has jurisdiction to seek adjudicated relief concerning fire sprinkler heads, then it would follow that the CPSC would have even greater authority to make rules and set standards for sprinkler systems. Id. at 1319, 1322 n.27 (if component part of aluminum wiring system is determined to be a consumer product, there would be a jurisdictional basis for investigation and rulemaking on the entire aluminum wiring system as a whole). Granting the CPSC authority over sprinkler systems in building construction raises significant federalism concerns by permitting sweeping federal regulation in an area that traditionally has been regulated by state and local governments. Such a grant of authority could result in a dangerous transfer of regulatory authority over building construction and fire safety from the many state professionals and experts long trained and experienced in the field, to an agency with less experience and expertise in the area and whose resources already are limited. In addition, placing such responsibility on the CPSC would result in a dilution of CPSC personnel and resources available to address other products which are not so highly regulated, and which demand the CPSC's attention to ensure consumer safety.

In Walt Disney Productions v. United States Consumer Product Safety Commission, the court held that a theme park ride was not a consumer product within the terms of the Act. 1979 U.S. Dist. Lexis 12996, *6 (C.D. Cal. Apr. 18, 1979). In declining to find that the ride fell under the CPSC's jurisdiction, the Court stated that

> The Consumer Product Safety Commission was created as a specialized agency to guard consumers against risks associated with the products they use . . . . Too expansive a reading of the Act's definition of a "consumer product" could result in the Commission spreading its limited resources too thinly, and might rob consumers of the specialized agency expertise that Congress has attempted to guarantee.

1979 U.S. Dist. Lexis 12996 at *8.

As in Walt Disney Productions, expanding the CPSC's jurisdiction to include products not within its specialized expertise would have the unintended consequence of cannibalizing CPSC resources that could better be devoted to protecting consumers against the risk of unsafe products in unregulated fields. See Report to the Chairman, Sen. Comm. on Commerce, Science and Transportation and House of Rep. Comm. on Commerce, Consumer Product Safety Commission: Better Data Needed to Help Identify and Analyze Potential Hazards, U.S. General Accounting Office, Sept. 29, 1997 (noting that partly due to reduced resources, CPSC has inadequate data collection and tracking systems to select properly new projects, to identify product hazards, to conduct adequate risk assessments and cost-benefit analyses, and to monitor results of agency regulatory programs). This is particularly true with regard to fire sprinkler systems, where there are already specialized bodies of rulemakers, regulators and inspectors carefully governing the industry.[7/] In amending the Act, Congress noted that the CPSC had

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7/ When the Act was introduced in the Senate, Elliott Richardson, then-Secretary of the Department of Health, Education and Welfare, charged that creation of a separate consumer-related agency would "deal the cause of consumer safety a crushing setback" by "destroying existing mechanisms for regulation." S. Rep. 749, 92nd Cong., 2d Sess. p. 150 (1972). Secretary Richardson also noted that the budgets of independent regulatory agencies did not fare as well as departmental agencies, thus running counter to the goal of helping consumers. Id.

been criticized in its early days for "trying to do too much and accomplishing too little," and observed with approval that the agency had since become more focused in using its resources. H. Rep. 158, vol. II, 97th Cong., 1st Sess. 385, 391 (1981). In this instance, recalling sprinkler heads and concomitantly regulating fire sprinkler systems would be a regressive, ineffective and redundant use of CPSC resources because sprinkler systems are already highly regulated at the state, local and industry levels. The CPSC's resources can and should be focused instead on products that consumers actively use in their daily lives, and which are produced by industries far less regulated than the fire safety industry.

B. Even If Certain Omega Models Are Deemed Consumer Products, They Do Not Remain Subject To The Act When Installed In Commercial And Industrial Settings.

Respondents assert that none of its Omega-brand sprinkler heads are consumer products for the reasons stated above. Assuming for purposes of argument, however, that some Omega-brand sprinkler heads could be considered consumer products, those sprinkler heads incorporated into commercial and industrial buildings are not within the CPSC's jurisdiction.

As discussed above, some Omega models are designated for incorporation into residential structures, although most are designed for commercial and industrial use. Because the so-called "residential" models may also be appropriate for, and distributed to, commercial and industrial facilities, those types of facilities also contain those models. Even if those models are deemed consumer products when installed in "consumer" settings like residences, it does not follow that sprinkler heads are within the CPSC's jurisdiction when installed in non-consumer structures such as warehouse facilities, factories and other commercial or industrial settings.

As discussed above, the legislative history of the Act indicates that Congress' concerns focused primarily on dangerous household products. Robert K. Bell Enter., 645 F.2d at 32 (citing H.R. Rep. No. 92-1153); S. Rep. 94-251. Indeed, the Act defines consumer products with reference to their location and use in or around households, residences and schools. 15 U.S.C. § 2052(a)(1). By statutory definition then, products located in places other than a house, residence or school are not within the CPSC's reach. This is particularly so because, as explained in Anaconda, the CPSC's adjudicatory authority -- and therefore its authority to force remedial action – is limited. 593 F.2d 1314. Given the statutory limit on the CPSC's adjudicatory jurisdiction, extending that limited authority to include products in commercial and industrial facilities is unwarranted and contrary to the Act's purpose. See State Fair of Texas v. Consumer Prod. Safety Comm'n, 481 F. Supp. 1070, 1081-82 (N.D. Tex. 1979) (even if broad scope of products is subject to CPSC inspection, those products are not subject to inspection regardless of their location), aff'd in part, rev'd in part, vac. in part, 650 F.2d 1324 (5th Cir. 1981).

Moreover, commercial purchasers are not within the class of persons subject to the protection of the Act. As the Third Circuit noted in Kaiser, the first statutory exclusion "was undoubtedly intended to exclude industrial products, on the theory that industrial purchasers are better able to protect themselves . . . ." 574 F.2d at 180-81. See also State Fair of Texas, 481 F. Supp. at 1078 (in contrast to industrial products, state fair aerial tramway is used for consumer's enjoyment and is a consumer product).

Similarly, the Act expressly forbids CPSC regulation over risks of injury "associated with a consumer product if such risk could be eliminated or reduced to a sufficient extent by actions taken under [OSHA]." 15 U.S.C. § 2080(a). OSHA is designed to provide a safe work

environment. ASG Indus., 593 F.2d at 1329. Therefore, with regard to Omega sprinkler heads destined for, or used in, commercial and industrial workplaces, the CPSC lacks authority to regulate those sprinkler heads because OSHA has the authority to ensure workplace safety. Id. at 1330.

OSHA standards detail fire protection and prevention requirements in the workplace. 29 C.F.R. §§ 1910.155 - 1910.165 and Pt. 1910, Subpt. L, App. A. The standards specifically address automatic sprinkler systems, id. § 1910.159, and refer to NFPA standards regarding the design and maintenance of sprinkler systems. Id. Pt. 1910, Subpt. L, App. A. Employers are charged with assuring, inter alia, that only approved designs and equipment are used to construct a required sprinkler system, that the water supply is adequate, and that the sprinkler heads are approved and protected from mechanical damage. Id. § 1910.159(c)(1), (4), and (8). Because OSHA standards thoroughly address workplace fire safety generally and sprinkler systems specifically, sprinkler heads in the workplace are not within the Act's purview.

Therefore, the CPSC's jurisdiction under the Act does not extend to products in commercial and industrial settings because jurisdiction over products in those sites would not further the Act's purpose and would, to the contrary, negate the Act's express exception for products used for industrial purposes. Therefore, even if certain models of sprinkler heads integrated into "consumer" structures are considered consumer products -- a result that would be directly contrary to Anaconda and the statute's clear intent -- the provisions of the Act do not extend to those sprinkler heads in commercial and industrial settings.

C. The Complaint Should Be Dismissed For Failure To Comply With 16 C.F.R. § 1025.11(b)(3) Because It Does Not Inform Central Of The Factual Basis Of The Alleged Defect And Does Not Include A List Of The Documentary Evidence Supporting The Complaint's Allegations.

The CPSC's regulations are explicit regarding the requirements for specificity of, and documentation supporting, any Complaint brought by its Staff. Section 1025.11(b)(3) requires that the Complaint contain a "clear and concise statement of the charges, sufficient to inform each respondent with reasonable definiteness of the factual basis or bases of the allegations of violation or hazard. A list and summary of documentary evidence supporting the charges shall be attached." 16 C.F.R. § 1025.11(b)(3). The Complaint herein is deficient in two aspects. First, it does not contain the requisite factual specificity. Second, it identifies no documentary evidence supporting the Staff's charges.

The Complaint alleges only that Omega-brand sprinkler heads "do not and will not function in a significant percentage of instances" and that the sprinkler heads are defective because of "this failure to operate." (Compl. ¶ 10.) The Complaint Counsel then alleges, circularly, that Omega sprinkler heads could fail to function "as a result of the defect referenced above." (Compl. ¶ 14.) Because the "defect referenced above" is the supposed failure to operate, the Complaint thus alleges that Omega sprinkler heads could fail to function as a result of a failure to operate. This circular, conclusory allegation does nothing to inform Central with reasonable definiteness of the factual basis for the CPSC's Complaint, does not satisfy the regulations' rules governing complaints, and must therefore be dismissed. See, e.g., Hudson v. Wilhelm, 651 F. Supp. 1062, 1066 (D. Colo. 1987) (even under liberal notice pleading rules, plaintiff must still give defendant fair notice of the grounds on which plaintiff's claim rests, and

court dismissed vague and ambiguous claim). In the instant matter, Complaint Counsel has not alleged any facts supporting its claim of defect, much less provided the factual basis of the Complaint. Because the assertion of defect is vague, ambiguous, and does not provide a factual basis for the claim with reasonable definiteness, the Complaint must be dismissed.

At the very least, Complaint Counsel must provide a more definite statement of its allegation of defect, specifying the factual basis -- not merely the conclusory assertions -- of its claim. Bowers v. Crystal Valley, R.V. 1996 WL 169415, *1, *2 (N.D. Ill. Apr. 9, 1996) (after court granted one motion for a more definite statement under Federal Rule of Civil Procedure 12(e) because plaintiffs did not specify the nature and location of the alleged defects in their motorhome, and plaintiffs' second pleading was still unspecific, court gave plaintiffs final chance to specify the "precise nature" of the defect and specify which component was defective); MTV Networks v. Curry, 867 F. Supp. 202, 207, 208 (S.D.N.Y. 1994) (where defendant alleged in counterclaim that plaintiff "misappropriated the fruits of his labors and expenditures," but did not specify what was misappropriated, plaintiff deserved amplification of counterclaim, and court granted plaintiff's Rule 12(e) motion); Venta, Inc. v. Frontier Oil and Refining Co., 827 F. Supp. 1526, 1530 (D. Colo. 1993) (where opposing party could not formulate response to antitrust claim because factual allegations were sparse, court granted party's motion for more definite statement and required plaintiffs to allege with greater particularity the period of alleged conspiracy and actions taken by alleged coconspirators to effect it); Schonberger v. Serchuk, 1992 WL 27074, *9 (S.D.N.Y. Jan. 31, 1992) (vague allegation that defendants "negligently failed to advance legal and factual arguments" did not provide basis for framing of a responsive pleading, and court ordered plaintiffs to specify the arguments allegedly omitted by defendants);

Fennell v. Svenska Amerika Linien A/B, 23 F.R.D. 116, 117 (D. Mass. 1958) (where mere assertion that man was injured due to third party's negligence or contract breach did not even colorably comply with Rule 8(a), neither would it withstand lesser attack of a Rule 12(e) motion). Without a more definite statement of the factual basis of the claim against Central, Central cannot ascertain which aspects of its sprinkler heads are under scrutiny and is impaired in its ability to plead responsively. Similarly, Central cannot effectively and adequately engage in discovery and cannot retain an appropriate expert in the time parameters set by the administrative regulations if Complaint Counsel does not properly plead the factual basis of its claim of defect.

In addition to the allegations that must be set forth in the Complaint itself, the CPSC's regulations also require that a list and summary of documentary evidence supporting the charges be attached to the Complaint. 16 C.F.R. § 1025.11(b)(3). As originally proposed, the regulations would have required that the actual documents that accompanied the Staff's recommendation to the CPSC to initiate the pleading be attached to the Complaint. 45 Fed. Reg. 29206 - 207 (May 1, 1980). As promulgated, the regulation requires that a list and summary -- but not the documents themselves -- be attached to the Complaint. Id. at 29212.

In the instant matter, Complaint Counsel has failed to identify a single document. Complaint Counsel instead attached a "List and Summary of Documentary Evidence" consisting exclusively of two entries:

> 1. Data compilations depicting over 40% failure rates in testing of Central's Omega brand fire sprinklers.
>
> 2. Documents evidencing failure of Omega fire sprinklers in actual fire situations.

Obviously neither a list of documents nor a comprehensive summary of them, the attachment constitutes a blatant violation of the CPSC's own regulations.[8/]

In order to preserve all of its rights, and because CPSC regulations, unlike the Federal Rules of Civil Procedure, do not expressly suspend the time to file an Answer pending resolution of a Motion to Dismiss, Central is filing an Answer contemporaneously with this Motion. Although the pleading deficiencies noted above impair Central's ability fully to plead its Answer, Central has attempted to comply with CPSC regulations by filing an Answer in this matter.

8/ Although not itself a model of detail, the Staff's document list filed in another pending proceeding, In the Matter of Black & Decker Co., CPSC Dkt. No. 98-1, attached hereto as Exhibit "D," illustrates how deficient and flawed the instant document list is.

IV. CONCLUSION

For all of the foregoing reasons, respondents Central Sprinkler Corporation and Central Sprinkler Company respectfully request that this Court dismiss the CPSC's Complaint for lack of jurisdiction or, in the alternative, for failure to comply with the CPSC's own pleading requirements.

Respectfully submitted,

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DATED: March 26, 1998

Exhibit A

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of **Central Sprinkler Corp., a Corporation,** **451 North Cannon Avenue** **Lansdale, PA 19446** **and** **Central Sprinkler Co., a Corporation,** **451 North Cannon Avenue** **Lansdale, PA 19446,** **Respondents.**	**CPSC Docket No. 98-2** **Affidavit of Carmine Schiavone**

AFFIDAVIT OF CARMINE SCHIAVONE

I, Carmine Schiavone, do hereby declare as follows:

1. I am Vice President for Customer Services of Central Sprinkler Company ("Central"), and am authorized to make this declaration on behalf of Central.

2. I have been employed by Central for 10 years, the last two years of which I have been Vice President of Customer Services. I am familiar with the design, manufacture, marketing, sale, installation and regulation of Central's Omega sprinkler heads.

3. Central has manufactured various models of Omega-brand sprinkler heads since 1983, and nearly 9 million have been installed nationwide over the past 15 years.

4. Central currently manufactures over 20 models of Omega-brand sprinkler heads, which are designed to be component parts of integrated fire suppression systems incorporated into building structures. Nearly all of the Omega models are designed for commercial and industrial use, although some models may also be used in residential structures.

5. For example, the Flow Control model is designed for commercial installations where water damage is considered as dangerous as fire damage, as in computer rooms or a telephone switching station. Similarly, the "M" model is designed to work with either concealed or exposed piping systems, making it well-suited for installation in industrial locations such as warehouses or storage facilities.

6. A sprinkler head -- whether an Omega model or not -- has no use as a free standing item. Rather, an Omega sprinkler head is designed to be an integrated part of a building's overall internal fire suppression system.

7. A fire sprinkler system includes, in addition to the sprinkler heads, a network of piping, hydraulic devices and a pressurized water delivery system connected to the structure's external water source.

8. Central markets its Omega sprinkler heads to professional fire suppression contractors and specifying engineers designing a building's sprinkler system, which system is to be incorporated into a building by the contractor as part of an overall sprinkler system.

9. Unlike a smoke detector, which a consumer can purchase off the shelf in a retail outlet, Omega sprinkler heads cannot be purchased in a retail establishment and are of no use to a consumer without the accompanying intricate engineering, hydraulic design plan, internal construction piping and pressurized water network.

10. Central does not market Omega sprinkler heads to consumers. If a consumer happens to inquire about purchasing or maintaining sprinkler heads, Central directs them to contact a professional contractor.

11. Consumers do not evaluate or choose the brand or specific model of sprinkler heads to be placed in a particular structure. To the contrary, professional installers evaluate and choose the sprinkler heads that will meet the construction specifications of a particular structure, requirements of local building and fire codes, the available water supply and the distinct requirements of operation.

12. Because Central neither markets nor sells to consumers, Central does not advertise in the popular press or media. Instead, Central advertises the sprinkler heads only in the industry and trade press or through contacts in the professional trade.

13. Central markets Omega-brand sprinklers to installation contractors for the purpose of regulatory code compliance.

14. Central packages the Omega sprinkler heads to protect the heads from potential physical damage and to ensure notification of exposure to potentially damaging temperatures. Notification is accomplished by means of heat-sensitive materials that change color if the sprinkler head has been exposed to excessive temperature. Central does not package the Omega sprinkler heads to attract consumer attention.

15. Similarly, Central does not employ jingles, billboards, coupons, in-store demonstrations or celebrity spokespeople to market Omega sprinkler heads.

16. Omega sprinkler heads, like all Central sprinkler heads, are not sold in any retail outlet. To the contrary, sprinkler heads are sold solely through Central's distribution outlets to professional contractors.

17. Central does not sell Omega sprinkler heads to the general public.

18. Central's sales personnel are trained to explain to professional contractors the technical differences among various sprinkler heads brands or models, the water distribution patterns associated with Omega sprinkler heads, the different Underwriters Laboratories specifications of various Omega models, and the technical design and operation of the sprinkler heads.

19. Central's product catalog, compiled by Central's Director of Technical Services, is geared to installation contractors, not to consumers. For example, the product catalog consists of black and white photographs of Omega models, as well as technical data and complex schematic diagrams for installation.

20. The catalog also depicts the special tools that a professional installer needs to install a sprinkler head properly. A consumer would not have, and cannot buy, these tools, which are marketed only by Central and only to professional contractors.

21. Central further instructs professional installers about the proper installation standards for installing Omega sprinkler heads. For example, Central's product catalog advises installers about local codes and standards, national standards, overall sprinkler system piping, and temperature ratings.

22. A person untrained in the professional installation of fire suppression systems and regulatory code compliance would not be able to install an Omega sprinkler head or a fire sprinkler system.

23. Because a sprinkler system is incorporated into a building's fundamental structure by a contractor, it must be constructed according to a detailed design plan submitted by the contractor. The design plan, therefore, must be approved by the Authority Having Jurisdiction

before construction. The Authority Having Jurisdiction checks the design plan for compliance with local building and fire codes and, issues a permit for construction and installation of the sprinkler system if the design plan is in compliance with the applicable codes.

24. Once the permit issues, the contractor constructs and installs the sprinkler system as the building is being built. The contractor must do so early in the construction process because the sprinkler system includes concealed piping. Hence, the sprinkler system must be integrated into the building before the internal structure is concealed by ceiling construction, wallboard or plastering.

25. Similarly, because local fire and building codes dictate how many sprinkler heads must be placed in a structure and how far apart they can be located, the sprinkler heads must be chosen and prepared for installation before any ceilings or roofing is installed, to ensure that the ceilings will accommodate the number and placement of sprinkler heads needed.

26. Once installed, neither the sprinkler heads nor the sprinkler system are controlled, activated or used by the building owners. To the contrary, the overall integrated sprinkler system, including the attached sprinkler heads, is designed to be, and is, a passive system built into the building's structure. A building can not turn the overall system on and off, cannot switch certain sprinkler heads on and off, and cannot use certain sprinkler heads to the exclusion of others. In short, the building owner has no active interaction with the sprinkler system as a whole or the sprinkler heads as a component part.

27. As stated above, construction and installation of sprinkler systems are governed by state and local building and fire codes. Three professional organizations -- Building Officials & Code Administrators ("BOCA"), Southern Building Code Congress International, and

International Conference of Building Officials -- promulgate detailed model building codes relating to every aspect of fire safety in all types of buildings from the initiation of construction.

28. Every state adopts one of the three model codes. The codes, in turn, reference standards of the National Fire Protection Association ("NFPA"), which detail how to implement the mandated fire safety provision of the codes, including, among other things, the adequacy of water supply, the selection of sprinkler heads, piping, valves, materials and accessories, the water discharge characteristics of sprinkler heads, the orifice size of the sprinkler heads, the square footage to be protected by the sprinkler system, and the spacing of the sprinkler heads.

29. A locality may adapt both the adopted code and the pertinent NFPA standards to implement more stringent fire safety requirements or to address localized fire safety needs relating to that locality's geology, climatic conditions, fire safety risks, or other factors.

30. In each Authority Having Jurisdiction, local building and fire codes are implemented and enforced by a network of trained fire safety professionals and inspectors.

31. I declare under penalty of perjury that the foregoing is true and correct.

Carmine Schiavone

Dated: March 24th, 1998

Exhibit B

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	:	
	:	
Central Sprinkler Corp., a Corporation,	:	
451 North Cannon Avenue	:	
Lansdale, PA 19446	:	**CPSC Docket No. 98-2**
	:	
and	:	
	:	**Affidavit of Frank Hill**
Central Sprinkler Co., a Corporation,	:	
451 North Cannon Avenue	:	
Lansdale, PA 19446,	:	
	:	
Respondents.	:	

AFFIDAVIT OF FRANK HILL

I, Frank Hill, do hereby declare as follows:

1. I have a degree in electrical engineering and have been in the fire protection field for 40 years. For 26 years, I was Executive Vice President of Culligan Fire Protection in Indiana. I am currently with McDaniel Fire Systems, Inc. in Indiana. I am Chairman of the Engineering Standards Committee of the National Fire Sprinkler Association and am a past Board member of the National Fire Protection Association ("NFPA"). I have served on the NFPA 13 Committee, which writes the standard for fire sprinkler installation.

2. I have been employed by McDaniel Fire Systems, Inc. for five and one-half years. I am familiar with the design, construction and operation of fire suppression systems. I construct different types of sprinkler systems and am familiar with the Omega-brand sprinkler head manufactured by Central Sprinkler Company ("Central"), having installed at least 2,000 Omega sprinkler heads.

3. A fire suppression sprinkler system is designed and constructed as part of a building's fundamental construction. Like the electrical wiring, plumbing system and air duct/ventilation systems, a sprinkler system must be designed as part of the original building structure and incorporated into the construction plan of a building.

4. Because sprinkler systems are designed and constructed as part of the "ground up" construction of a building, sprinkler systems are not typically installed as add-on features after new building construction is completed. When a contractor undertakes to retrofit a building after the structure has been constructed, the retrofit is designed in accordance with currently applicable regulatory codes and is integrated into the basic building structure.

5. Like other sprinkler system contractors, I work directly with the architect and general construction project manager to ensure that the sprinkler system is a fully integrated part of the building's design and construction.

6. A building owner generally does not specify a type, brand or model of sprinkler head.

7. The installation contractor will select a sprinkler head as part of the overall design of the sprinkler system to meet the needs dictated by the conditions and construction of a particular building, as well as the applicable building code in that jurisdiction. For example, the contractor's choice of sprinkler head depends in part on the area to be protected, the type of piping that will be used, temperature and water supply in a specific locale, the shape of the structure's roof, and the relevant state and local regulations governing fire protection.

8. As an installation contractor, I provide overall sprinkler systems to building owners for purposes of compliance with codes and standards, taking into account the location,

design, use, size, and architectural plan of a specific building. In providing a sprinkler system to a building owner in order to make sure the structure is being built or brought to code, I must take into account the local jurisdiction's building code and fire regulations.

9. A sprinkler system is a specialized fire protection system requiring knowledgeable and experienced design and installation.

10. Sprinkler systems, and therefore the sprinkler heads, are installed in a building early in the construction process. Specifically, because the sprinkler system includes concealed piping, the sprinkler system must be integrated into the structure before the internal structure is concealed by ceiling construction, wallboard or plastering. Similarly, because local fire and building codes reference regulations that dictate how many sprinklers must be placed in a structure and how far apart they can be located, the sprinkler heads must be chosen and prepared for installation before any ceilings or roofing is installed, to ensure that the construction will accommodate the number and placement of sprinklers needed.

11. As a result, the sprinkler system, including the sprinkler heads, is typically installed in the building being constructed before the drywall or ceiling material is placed and formed around the sprinkler heads.

12. Installing a sprinkler head as part of the fire suppression sprinkler system involves several steps. First, a contractor prepares a detailed design plan, incorporating hydraulic calculations based on appropriate NFPA standards. Different sprinkler systems and sprinkler heads require different minimum water flows and water pressures. The hydraulic plan takes into account, for example, the number of stories in the building, the locally available water supply and whether backup water supplies exist.

13. A contractor then submits the plan for approval to the Authority Having Jurisdiction, which checks for code compliance before issuing a permit for installation. In some cases, the contractor also submits the plan to the building's insurer for approval.

14. Next, as a structure is being framed, an installer runs the sprinkler pipe through the walls and ceiling frames of the construction, working in conjunction with plumbing and electrical contractors who, typically, are installing their systems at the same time.

15. A sprinkler head will function properly only when the overall sprinkler system piping is anchored to the building structure. If the piping is not so anchored, activation of the sprinkler system in a fire could cause movement in the piping and sprinkler head alignment and disrupt the water distribution pattern.

16. To anchor the sprinkler system, the pipes are permanently and rigidly attached to the internal framing and structural support of the building, in accordance with national standards, to prevent movement of the sprinkler system's piping independent of the structure's movement.

17. Once the sprinkler system's piping has been properly installed, the sprinkler heads can then be installed. Special tools must be used to install Omega-brand sprinkler heads, because regular wrenches can damage the delicate deflector mechanism on the sprinkler head, thereby rendering it inoperative.

18. Similarly, a contractor must take special care with certain types of piping in a building's construction. The cement used on certain types of plastic pipe can affect the operation of the sprinkler head.

19. After the sprinkler heads are positioned and attached to the piping, drywall and ceiling materials can be installed around them.

20. The contractor then connects the sprinkler system to the building's external water supply.

21. Upon completion of construction of the system, the local Authority Having Jurisdiction inspects the entire sprinkler system to ascertain whether the sprinkler system complies with the approved design plan. Testing includes visual inspection, hydrostatic pressure tests, and water flow alarm tests.

22. Once a sprinkler system is constructed as part of a building, it must remain in compliance with applicable codes and standards and must be maintained accordingly. As a professional installation contractor, I service and maintain sprinkler systems in accordance with NFPA standards.

23. Part of the maintenance process involves keeping detailed records of any work performed on the sprinkler system. When a fire official inspects the building, he or she will also inspect the maintenance records to ensure that the sprinkler system is being maintained in accordance with NFPA standards and that the building continues to comply with the local building and fire codes.

24. Omega sprinkler heads are not controlled, activated or used by the building owner. To the contrary, the overall integrated sprinkler system, including the attached Omega sprinkler heads, is designed to be, and is, a passive system built into the building's structure. Unlike a portable fire extinguisher, a sprinkler head cannot be picked up and sprayed onto a localized fire. Unlike a security, lighting or ventilation system, the building owner has no active interaction with either the sprinkler system as a whole or the sprinkler heads as a component part.

A building owner does not turn the overall system on and off; nor can a building owner switch certain sprinkler heads on and off or use certain sprinkler heads to the exclusion of others.

25. Omega sprinkler heads are incorporated in a wide variety of buildings, including high rise office buildings, warehouses and industrial sites. The Omega sprinkler head models provided to commercial and industrial building owners as part of an integrated sprinkler system are designed for commercial and industrial use and reflect the different specifications and needs of those types of structures.

26. I declare under penalty of perjury that the foregoing is true and correct.

Frank Hill

Dated: March 24, 1998

The BOCA® *National Building Code/* 1993

Model building regulations for the protection of public health, safety and welfare.

TWELFTH EDITION

As recommended and maintained by the voting membership of

BUILDING OFFICIALS & CODE ADMINISTRATORS INTERNATIONAL, INC.

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CHAPTER 9

FIRE PROTECTION SYSTEMS

SECTION 901.0 GENERAL

901.1 Scope: The provisions of this chapter shall specify where *fire protection systems* are required and shall apply to the design, installation, maintenance and operation of all *fire protection systems* in all buildings and structures.

901.2 Required systems: All *fire protection systems* required by this code shall be installed, repaired, operated and maintained in accordance with this code and the fire prevention code listed in Chapter 35. All required *fire suppression* and *standpipe systems* shall be provided with at least one automatic supply of fire-extinguishing agent of adequate pressure, capacity and reliability to perform the function intended.

901.3 Nonrequired systems: Any *fire protection system* or portion thereof not required by this code shall be permitted to be furnished for partial or complete protection provided that such installed system meets applicable requirements of this code.

901.4 Maintenance: All *fire protection systems* shall be maintained in accordance with the requirements of the fire prevention code listed in Chapter 35.

901.5 Threads: All threads provided for fire department connections to *sprinkler systems*, *standpipes*, yard hydrants or any other fire hose connection shall be compatible with the connections used by the local fire department.

901.6 Signs: All signs required to identify fire protection equipment and equipment location shall be constructed of durable materials, be permanently installed and be readily visible. Letters and numbers shall contrast with the sign background and shall have an appropriate width-to-height ratio to permit the sign to be read easily.

901.7 Acceptance tests: All *fire protection systems* shall be tested in accordance with the requirements of this code and the fire prevention code listed in Chapter 35. The tests shall be conducted in the presence of the code official. All tests required by this code and the standards listed in this code shall be conducted at the expense of the owner or the owner's representative.

901.8 Certification: The contractor shall provide the code official with a certificate indicating that the system is installed in compliance with this code and the appropriate acceptance tests have been conducted.

SECTION 902.0 DEFINITIONS

902.1 General: The following words and terms shall, for the purposes of this chapter and as used elsewhere in this code, have the meanings shown herein.

Alarm verification: A feature of automatic fire detection systems to reduce unwanted alarms wherein *automatic fire detectors* report alarm conditions for a minimum period of time, or confirm alarm conditions within a given period, after being automatically reset to be accepted as a valid alarm initiation signal (see Section 918.0).

Automatic: As applied to fire protection devices, automatic refers to a device or system that provides an emergency function without the necessity of human intervention and activated as a result of a predetermined temperature rise, rate of temperature rise or increase in the level of combustion products — such as incorporated in an *automatic sprinkler system*, automatic *fire door*, etc.

Automatic fire suppression system: An engineered system using carbon dioxide (CO_2), foam, wet or dry chemical, a halogenated extinguishing agent, or an *automatic sprinkler system* to detect automatically and suppress a fire through fixed piping and nozzles (see Section 904.0).

Deluge system: An *automatic sprinkler system* consisting of open *sprinklers* with *water supply* valves activated by a separate automatic detection system (see Section 908.0).

Detector, heat: An alarm-initiating device that detects abnormally high temperature or rate of temperature rise (see Section 918.0).

Detector, smoke: An alarm-initiating device that detects the visible or invisible particles of combustion (see Section 918.0).

Fire alarm box, manual: A manually operated alarm-initiating device that activates a fire protective signaling system (see Section 917.0).

Fire command station: The principal location where the status of the detection, alarm, communications and control systems is displayed, and from which the system(s) has the capability for manual control (see Sections 403.7 and 917.9).

Fire detector, automatic: An alarm-initiating device that automatically detects heat, smoke or other products of combustion (see Section 918.0).

Fire protection system: Devices, equipment and systems used to detect a fire, activate an alarm, suppress or control a fire, or any combination thereof.

Preaction system: A fire *sprinkler* system employing automatic *sprinklers* attached to a piping system containing air with a supplemental fire detection system installed in the same areas as the *sprinklers*. Actuation of the fire detection system automatically opens a valve that permits water to flow into the *sprinkler* piping system and to be discharged from any open *sprinklers* (see Section 906.9.6).

Smoke detector, multiple station: Single-station smoke detectors that are capable of being interconnected such that actuation of one causes all integral or separate audible alarms to operate (see Section 919.0).

Smoke detector, single station: An assembly incorporating the detector, the control equipment and the alarm-sounding device in one unit, which is operated from a power supply either in the unit or obtained at the point of installation (see Section 919.0).

Sprinkler: A device, connected to a *water supply* system, that discharges water in a specific pattern for extinguishment or control of fire (see Section 906.0).

Sprinkler system, automatic: A *sprinkler* system, for fire protection purposes, is an integrated system of underground or overhead piping designed in accordance with fire protection engineering standards. The system includes a suitable *water supply*. The portion of the system above the ground is a network of specially or hydraulically designed piping installed in a building, structure or area, generally overhead, and to which automatic *sprinklers* are connected in a systematic pattern. The system is usually activated by heat from a fire and discharges water over the *fire area* (see Section 906.0).

Sprinkler system, limited area: An *automatic sprinkler system* consisting of not more than 20 *sprinklers* within a *fire area* (see Section 907.0).

Standpipe system: A *standpipe* system is a *fire protection system* consisting of an arrangement of piping, valves, hose outlets and allied equipment installed in a building or structure (see Section 914.0).

Supervisory device: An initiating device used to monitor the conditions that are essential for the proper operation of *automatic fire suppression systems* (i.e., switches used to monitor the position of gate valves, a low air-pressure switch on a dry-pipe *sprinkler system*, etc.) (see Section 923.0).

Voice/alarm signaling system: A system that provides, to the occupants of a building, dedicated manual or automatic facilities, or both, for originating and distributing voice instructions, as well as alert and evacuation signals that pertain to a fire emergency (see Section 917.0).

Water supply, automatic: A water supply that is not dependent on any manual operation, such as making connections, operating valves or starting pumps (see Section 914.5).

SECTION 903.0 CONSTRUCTION DOCUMENTS

903.1 Required: *Construction documents* or shop drawings, or both, for the installation of *fire protection systems* shall be submitted to indicate conformance to this code and shall be reviewed by the department prior to issuance of the permit.

Note: Since the fire department is responsible for inspecting for the proper maintenance of *fire protection systems* in buildings, the administrative authority shall cooperate with the fire department in the discharge of responsibility to enforce this chapter.

903.2 Construction documents: The *construction documents* and shop drawings submitted to the department shall contain sufficient detail as outlined herein to evaluate the protected hazard and the effectiveness of the system.

903.2.1 Information: *Construction documents* for *fire protection systems* shall be submitted with the *construction documents* for the construction permit. Included shall be information on the contents, the occupancy, the location and arrangement of the structure and the contents involved, the exposure to any hazard, the extent of the system coverage, the suppression system design criteria, the supply and extinguishing agents, the location of any *standpipes*, and the location and method of operation of detection and alarm devices.

903.2.2 Shop drawings: Shop drawings for the installation of *fire protection systems* shall be submitted for review and approval prior to the installation of a *fire protection system*. Included on the shop drawings shall be information showing the basis for compliance with the design density, the specific arrangement of the system, the devices and their method(s) of operation, and the suppression agent. The details on the *construction documents* or shop drawings for the *fire protection system* shall include design considerations, spacing and arrangement of fire protection devices, protection agent supply and discharge requirements, calculations with sizes and equivalent lengths of pipe and fittings, and protection agent source. Sufficient information shall be included to identify the apparatus and devices utilized and other information as required by this code.

SECTION 904.0 FIRE SUPPRESSION SYSTEMS

904.1 Where required: *Automatic fire suppression systems* shall be installed where required by this code, and in the locations indicated in Sections 904.2 through 904.11.

Exceptions

1. An *automatic fire suppression system* shall not be required in portions of buildings that comply with Section 406.0 for open parking structures.
2. In telecommunications equipment buildings, an *automatic fire suppression system* shall not be required in those spaces or areas occupied exclusively for telecommunications equipment, associated electrical power distribution equipment, batteries and standby engines, provided that those spaces or areas are equipped throughout with an automatic fire detection system in accordance with Section 918.0 and are separated from the remainder of the building with *fire separation as-*

basement shall be equipped throughout with an *automatic sprinkler system.*

Exception: Occupancies in Use Group R-3.

904.11 Other required suppression systems: In addition to the requirements of this section, the sections of this code indicated in Table 904.11 also require the installation of an *automatic fire suppression system* for certain buildings and areas.

Table 904.11
ADDITIONAL REQUIRED SUPPRESSION SYSTEMS

Section	Subject
302.1.1	Specific occupancy areas
402.10; 402.15.2	Covered mall buildings
403.2	High-rise buildings
404.2	Atriums
408.3.1	Public garages
408.4	Fuel-dispensing areas
411.7	Sound stages
412.6	Stages and enclosed platforms
413.4	Special amusement buildings
416.4	HPM facilities
419.3	Paint spray booths and storage rooms
507.1	Unlimited area buildings
1020.3	Exit lobbies
2806.4	Drying rooms
2807.6	Waste and linen chutes and termination and incinerator rooms
2808.4	Refuse vaults

SECTION 905.0 SUPPRESSION SYSTEM AGENT COMPATIBILITY

905.1 Agent compatibility: The extinguishing agent for each *suppression system* shall be compatible with the type of hazard and fire. Each fixed *fire suppression system* shall be of an approved type and shall be designed and installed in accordance with the requirements of this code.

905.1.1 Special hazards: In rooms or buildings containing combustibles (such as aluminum powder, calcium carbide, calcium phosphide, metallic sodium and potassium, quicklime, magnesium powder or sodium peroxide) that are incompatible with water as an extinguishing agent, other extinguishing agents shall be utilized.

SECTION 906.0 FIRE SPRINKLER SYSTEM

906.1 General: *Automatic sprinkler systems* shall be approved and shall be designed and installed in accordance with the provisions of this code.

906.2 Equipped throughout: Where the provisions of this code require that a building or portion thereof be equipped throughout with an *automatic sprinkler system*, the system shall be designed and installed in accordance with Section 906.2.1, 906.2.2 or 906.2.3.

Exception: Where water as an extinguishing agent is not compatible with the fire hazard (see Section 905.1) or is prohibited by a law, statute or ordinance, the affected area shall be equipped with an approved *automatic fire suppression system* utilizing a suppression agent that is compatible with the fire hazard.

906.2.1 NFiPA 13 systems: The system shall be designed and installed in accordance with NFiPA 13 listed in Chapter 35.

Exceptions

1. In Use Group R *fire areas*, *sprinklers* shall not be required in bathrooms that do not exceed 55 square feet (5.12 m^2) in area and are located within individual *dwelling units* or guestrooms.
2. In occupancies in Use Group R-1, *sprinklers* shall not be required in guestroom closets that do not exceed 24 square feet (2.23 m^2) in area.

906.2.2 NFiPA 13R systems: In buildings four stories or less in *height*, systems designed and installed in accordance with NFiPA 13R listed in Chapter 35 shall be permitted in Use Group I-1 *fire areas* in buildings with not more than 16 occupants and in Use Group R *fire areas.*

Exception: *Sprinklers* shall not be required in bathrooms that do not exceed 55 square feet (5.12 m^2) in area and are located within individual *dwelling units* or guestrooms.

906.2.3 NFiPA 13D systems: In Use Group R-3 *fire areas* with at least 2-hour fireresistance rated *fire separation assemblies* between each pair of *dwelling units*, or in Use Group I-1 *fire areas* in buildings with not more than eight occupants, systems designed and installed in accordance with NFiPA 13D listed in Chapter 35 shall be permitted.

Exceptions

1. *Sprinklers* shall not be required in bathrooms that do not exceed 55 feet (5.12 m^2) in area.
2. A single fire protection *water supply* shall be permitted to serve not more than eight *dwelling units* provided that the *water supply* is increased by 5 gpm (0.00032 m^3/s) for each *dwelling unit* served where a common supply serves both the domestic and *sprinkler systems* in more than one *dwelling unit.*

906.3 Design: The details of the system indicated on the *construction documents* shall include calculations and information on the *sprinkler* spacing and arrangement, *water supply* and discharge requirements, size and equivalent lengths of pipe and fittings and *water supply* source. Sufficient information shall be included to identify the apparatus and devices used.

906.4 Actuation: Water *sprinkler systems* shall be automatically actuated unless otherwise specifically provided for in this code.

906.5 Sprinkler alarms: Approved audible or visual alarm devices shall be connected to every water *sprinkler system.* Such alarm devices shall be activated by water flow and shall be located in an approved location on the exterior of the building and an additional audible or visual alarm device shall be installed within the building.

Exceptions

1. Alarms and alarm attachments shall not be required for *limited area sprinkler systems* (see Section 907.5).
2. Audible or visual alarm devices shall not be required on the exterior of the building for fire *sprinkler systems* supervised by method 1 or 2 of Section 923.1.

906.6 Water-control valve identification: All valves controlling water to *fire protection systems* shall be provided with permanently attached identification tags indicating the valves' function and what is controlled.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
BLACK & DECKER, CO.	)	CPSC DOCKET NO. 98- 1

List and Summary of Documentary Evidence Supporting the Complaint

Pursuant to 16 C.F.R. § 1025.11(b)(3) of the Commission's Rules of Practice for Adjudicative Proceedings, the following is a list and summary of documentary evidence supporting the Complaint in this matter. Complaint Counsel reserves the right to offer additional evidence during the course of the proceedings.

1. A photograph of a Spacemaker Optima Horizontal Toaster, Model T1000, Type 1.

2. A Consumer Product Safety Commission (CPSC) report dated September 21, 1995. by Terry Van Houten, Division of Human Factors. This report analyzes how consumers may engage in normal use of the Spacemaker Toaster in a manner that increases the risk of fire.

3. CPSC memorandum dated January 23, 1997 from Julie Ayers, Electrical Engineer, Office of Hazard Identification and Reduction to Renae Rauchschwalbe, Office of Corrective Actions. This memorandum explains the fire hazard posed by the Spacemaker Toaster.

4. Photographs and videotape of testing conducted by CPSC Office of Hazard Identification and Reduction on April 9, 1997. These tests show that the spread of a fire originating from food in a Spacemaker Toaster mounted underneath an open kitchen cabinet

can result in a catastrophic household fire.

5. Photographs of testing conducted by CPSC Office of Hazard Identification and Reduction on June 18, 1997. These tests show that the spread of a fire originating from food in a Spacemaker Toaster mounted underneath a closed kitchen cabinet can result in a catastrophic household fire.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	:	
	:	
Central Sprinkler Corp., a Corporation,	:	
451 North Cannon Avenue	:	
Lansdale, PA 19446	:	**CPSC Docket No. 98-2**
	:	
and	:	
	:	
Central Sprinkler Co., a Corporation,	:	
451 North Cannon Avenue	:	
Lansdale, PA 19446,	:	
	:	
Respondents.	:	
	:	

ORDER

AND NOW, this _____ day of _____, 1998, it is hereby ORDERED that the Motion To Dismiss of Respondents Central Sprinkler Corporation and Central Sprinkler Company is GRANTED.

_____

Administrative Law Judge

CERTIFICATE OF SERVICE

I, Michael F. Healy, hereby certify that I have served the attached document, the Motion To Dismiss Of Respondents Central Sprinkler Corporation And Central Sprinkler Company, with Memorandum Of Law and accompanying exhibits, upon all parties and participants of record in these proceedings by hand, a copy to each on March 26, 1998.

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Michael F. Healy

Michael F. Healy

For: Respondents Central Sprinkler Corporation and
Central Sprinkler Company

DATED: March 26, 1998