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	:	**Motion For Leave To Submit Reply**
	:	**Brief In Support Of Motion To Dismiss**
Central Sprinkler Co., a Corporation,	:	
451 North Cannon Avenue	:	
Lansdale, PA 19446,	:	
	:	
Respondents.	:	
	:	

MOTION FOR LEAVE TO SUBMIT REPLY BRIEF
IN SUPPORT OF THE MOTION TO DISMISS
OF RESPONDENTS CENTRAL SPRINKLER CORPORATION
AND CENTRAL SPRINKLER COMPANY

Respondents Central Sprinkler Corporation and Central Sprinkler Company (collectively, "Central") filed a Motion To Dismiss the administrative Complaint on March 26, 1998. Complaint Counsel filed its Response on April 6, 1998. Because Complaint Counsel's Response misstates or misapprehends respondents' arguments and the applicable caselaw, respondents hereby seek leave to file a Reply Brief. The Reply Brief is attached hereto as Exhibit "A."

WHEREFORE, Central respectfully requests that the Administrative Law Judge grant

this Motion for leave to submit reply brief.

Respectfully submitted,

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Attorneys for Central Sprinkler Corporation and Central Sprinkler Company

DATED: April 20, 1998

Exhibit A

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CONSUMER PRODUCT SAFETY COMMISSION

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

REPLY BRIEF IN SUPPORT OF THE MOTION TO DISMISS OF RESPONDENTS CENTRAL SPRINKLER CORPORATION AND CENTRAL SPRINKLER COMPANY

I. INTRODUCTION

Because the administrative Complaint in the above-referenced matter would expand jurisdiction far beyond the boundaries set by the Consumer Product Safety Act, respondents Central Sprinkler Corporation and Central Sprinkler Company (collectively, "Central") filed a Motion To Dismiss the administrative Complaint on March 26, 1998 (hereinafter "Mot. to Dismiss"). Complaint Counsel filed their Response on April 6, 1998. Complaint Counsel's Response embraces a distorted view of the Consumer Product Safety Commission's ("CPSC") jurisdiction -- essentially advocating a position that would set no limits to CPSC jurisdiction. Moreover, the Response does not properly construe or address the key case applicable to deciding this issue. Accordingly, Central hereby files its Reply to Complaint Counsel's Response.

II. LEGAL ARGUMENT

A. The CPSC Complaint Counsel's View Of CPSC Jurisdiction Is Overbroad, Incorrect And Not Supported By Law.

According to Complaint Counsel's view of jurisdiction under the Consumer Product Safety Act, 15 U.S.C. § 2051 et seq. ("the Act"), there are essentially no limits to CPSC jurisdiction. To Complaint Counsel, as long as an item is a "distinct article" -- even if fully integrated into, and an inherent part of, building construction -- it is subject to jurisdiction under the Act. Moreover, despite the express language of the Act and caselaw regarding industrial users, Complaint Counsel recognizes no limits to the types of buildings and usages covered by the Act. Because Complaint Counsel's view of CPSC jurisdiction is both incorrect and would dramatically expand jurisdiction under the Act, the Administrative Law Judge should reject Complaint Counsel's arguments and grant the respondents' Motion To Dismiss.

1. Complaint Counsel Does Not Properly Address Anaconda And Its Discussion Of Building Components.

Complaint Counsel's response focuses first on the fact that Omega sprinkler heads are distinct articles of commerce, as opposed to being items in an intermediate stage of production. (Compl. Counsel Response in Opposition to Mot. to Dism., pp. 5-6.) (hereinafter "Response"). Central does not dispute that point. That fact, however, is not dispositive in this matter. The issue here is whether a fundamental, integral component of a building's structure is a consumer product.

Similarly, Complaint Counsel's attempt to distinguish Consumer Product Safety Commission v. Anaconda Company, 593 F.2d 1314 (D.C. Cir. 1979), from Kaiser Aluminum and Chemical Corporation v. Consumer Product Safety Commission, 574 F.2d 178 (3d Cir.),

cert. denied, 439 U.S. 881 (1978), and to ignore the former while adopting the latter, is unavailing. Complaint Counsel asserts that because Kaiser involved wiring and Anaconda involved wiring systems, and because Complaint Counsel is attempting to recall only Omega sprinkler heads rather than the entire sprinkler system of which the sprinkler heads are an integral, fundamental part, then Kaiser is controlling. This argument fails on several counts.

First, the District of Columbia Circuit did not base its decision in Anaconda on the "system versus article" distinction that Complaint Counsel attempts to draw. To the contrary, the crux of the Court's decision focused on the fact that housing is not a consumer product, as housing itself is not be used "in or around" a household or residence, as required by the Act. Anaconda, 593 F.2d at 1320, 1321. The court noted that the CPSC

> 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.

Id. at 1320 (emphasis added).

Contrary to Complaint Counsel's argument in the instant matter, the Anaconda court did not base its opinion on the distinction between systems and distinct components of systems. Rather, as noted above, the Court recognized that Complaint Counsel was arguing that the CPSC had jurisdiction over both systems and system components in building construction. The Anaconda court rejected that argument in toto, observing that even the CPSC's counsel "had obvious difficulty" defending the position at oral argument. Id. In a telling colloquy cited by

the Anaconda court, the CPSC's counsel was unable to identify a single component of a house that would not be subject to CPSC regulation under the CPSC's view of its jurisdiction.

> COUNSEL FOR THE COMMISSION: No, Your Honor, what I am trying to say is that there may be many products within the household environment that are not consumer products within the definition.
>
> THE COURT: Such as what?
>
> COUNSEL FOR THE COMMISSION: Well.
>
> THE COURT: Under your theory.
>
> COUNSEL FOR THE COMMISSION: Your Honor, there may be a brick.
>
> THE COURT: Pardon?
>
> COUNSEL FOR THE COMMISSION: A brick, which is not transported in interstate commerce made in a local jurisdiction. Now, that brick may not present any case for federal jurisdiction.
>
> THE COURT: Suppose you conclude it does?
>
> COUNSEL FOR THE COMMISSION: Well, if we conclude that it does, it possibly would be a consumer product.

Id. at 1321 n.20. Complaint Counsel here takes the same position, that if it concludes an item is a consumer product, then it is.

Second, although the Anaconda court observed that Kaiser had involved aluminum wiring, while Anaconda concerned aluminum wiring systems, that difference did not drive the Anaconda decision, as discussed above. To the contrary, the Anaconda court merely observed that the two products were different from a collateral estoppel perspective, and hence the issues before the two courts was not the same. Anaconda, 593 F.2d at 1322.

Complaint Counsel's Response ignores the basic meaning of Anaconda -- fundamental, key products and integral product components used in building construction are not consumer products because the building itself is not a consumer product under the Act's "in or around" language. Thus, even if Omega sprinkler heads are distinct articles, they are available to building owners only as an integral component part of a sprinkler system, which system is an integral component part of the building structure. (Aff. of Carmine Schiavone, attached to Mot. to Dismiss as Exhibit "A," ¶¶ 6, 8).[1/]

As Central established, sprinkler systems and the attendant sprinkler heads are a fixed and integral part of a building's basic structure and are incorporated into the building's fundamental structure as constructed. (Mot. to Dismiss, pp. 14-15; Aff. of Frank Hill, attached to Mot. to Dismiss as Exhibit "B," ¶¶ 3, 10, 11.) As discussed in the affidavits, sprinkler heads have no use as a free standing item, but are designed to be integrated into a building's overall sprinkler system. (Schiavone Aff. ¶ 6.) Hence, they are not marketed or sold to building owners. (Schiavone Aff. ¶¶ 8-10.) Indeed, sprinkler systems as a whole also are not marketed or sold to building owners, who acquire sprinkler systems and sprinkler heads only as part of the overall building after an installation contractor has designed, selected and installed the sprinkler system

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1/ Complaint Counsel attempts to avoid the affidavits attached to respondents' Motion To Dismiss on the ground that they were not sworn before a notary. (Response, p. 12, n.5). As provided in 28 U.S.C. § 1746, any matter permitted to be supported by an affidavit in writing of a person may, "with like force and effect, be supported, evidenced, established or proved by the unsworn declaration . . ., in writing of such person which is subscribed by him as true under penalty of perjury, and dated, in substantially the following form . . . ." 28 U.S.C. § 1746. The affidavits of Carmine Schiavone and Frank Hill, signed under penalty of perjury and dated, comport with the statutory form. Complaint Counsel's attempt to exclude the affidavits must be rejected.

and sprinkler heads. (Hill Aff. ¶¶ 3, 6, 7.) Sprinkler systems and sprinkler heads are installed in buildings even before the ceilings and walls are built. (Hill Aff. ¶¶ 10, 11.)

Nowhere in its Response does Complaint Counsel refute Central's evidence regarding sprinkler system design, sprinkler system and sprinkler head installation, or their incorporation into the fundamental structure of a building. Because Central's unrefuted affidavits establish that a sprinkler system, including the sprinkler heads, is designed and constructed as part of a building's fundamental construction, it is clear that, despite Complaint Counsel's attempt artificially to separate the two, the sprinkler system and sprinkler heads cannot be divorced from one another.[2/]

Complaint Counsel attempts to denigrate Central's argument by asserting that "[r]espondents claim that because 'housing' is not within the Commission's jurisdiction, anything 'incorporated' therein is also outside the Commission's reach." (Response, p. 14.) Complaint Counsel implies that Central's position, therefore, is that any item installed in a residence is not a consumer product. Central's argument, to the contrary, goes far beyond "installation" or the law regarding fixtures. As Central's Motion and supporting affidavits make clear, a sprinkler system and sprinkler heads are more than mere fixtures. They are not simply attached to a building. Rather, they become part of the basic building structure itself, built into the internal structure with drywall, ceiling materials, flooring and walls built around them at a later stage of construction. (Hill Aff. ¶¶ 10, 11.) Thus, Central's argument did not rely on the

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2/ Although Complaint Counsel appears to concede that sprinkler systems are not within the CPSC's jurisdiction, (Response, p. 7), it is unclear how Complaint Counsel can then distinguish sprinkler heads from sprinkler piping, sprinkler valves or any other "distinct" items that are incorporated into a sprinkler system as system components.

law of fixtures to support its position that sprinkler systems and sprinkler heads, like bricks, roof trusses, and the wiring system in Anaconda, are a fundamental part of a building's structure and therefore, like a building itself, are not consumer products.

2. Complaint Counsel's Interpretation Of The Act Eliminates The "Use" Requirement.

In its discussion of "use" of consumer products, Complaint Counsel argues that Central is creating a new statutory requirement. (Response, pp. 12-13.) To the contrary, it is Complaint Counsel's interpretation of "use" that would read the requirement out of the Act. As Central argued on pages 10-11 of its Motion To Dismiss, although the Act requires that a consumer product be one produced or distributed for consumers' "use in or around a permanent or temporary household or residence . . . .," the Act does not define "use." The requirement, however, can only be understood as requiring some sort of consumer interaction with the product – even if, as in Kaiser, the interaction is one step removed from direct use, i.e., plugging an electric razor into branch circuit wiring. Kaiser, 574 F.2d at 180. Contrary to Complaint Counsel's insinuation, Central does not suggest that a consumer must have control over a product in order for it to be used. There must, however, be some sort of enjoyment, holding, occupation, or availment of the product. See Consumer Product Safety Comm'n v. Chance Mnfg. Co., 441 F. Supp. 228, 233 (D.D.C. 1977) (although riders of amusement park "Zipper" do not control, own or possess ride, their occupancy of its cars satisfies the "personal use, consumption or enjoyment" clause).

Consumers in no way interact with sprinkler systems or sprinkler heads. Unlike a fire extinguisher, they do not pick up a sprinkler head and spray it onto a localized fire. Unlike a

smoke detector, consumers do not purchase sprinkler heads off the shelf for self-installation. Under Complaint Counsel's interpretation, mere exposure to a product would be "use" -- a definition that Congress eschewed when it rejected the Senate's definition of "use" as including "exposure to" a product. (See Mot. to Dism., pp. 10-11.) Indeed, under Complaint Counsel's definition of "use," a building's roof trusses or foundation would be consumer products because consumers are "exposed to the risk caused by their failure to function," (Response, p. 13); to wit, exposed to harm if the roof collapses or the foundation fails to support the building. Such a definition of "use" would eliminate a key requirement of the Act and is therefore incorrect.

3. Complaint Counsel's Reliance on Kaiser Is Misplaced.

Not only does Complaint Counsel fail to address the rationale of Anaconda or the "use" discussion in Kaiser, but Complaint Counsel's heavy reliance on other aspects of Kaiser is misplaced. First, the Kaiser decision is, simply, poorly-reasoned. It fails to address the important issues raised and properly considered in Anaconda, the better-reasoned decision. The Kaiser court focused on whether branch circuit wiring is an "article." Kaiser, 574 F.2d at 180. In so doing, the Court did not discuss the textual requirement in the Act that a consumer product be an article used "in or around" a household, residence or school. 15 U.S.C. § 2052(a)(1).[3/]

Moreover, the Kaiser court also considered that branch circuit wiring is used and enjoyed by consumers "whenever they turn on an electric switch." Kaiser, 574 F.2d at 180. The Court

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3/ Indeed, although Complaint Counsel argues that Kaiser rejected the "in or around" discussion and the argument that fundamental components of housing, like housing itself, are not consumer products, Complaint Counsel admits that Kaiser referred to such arguments only within the context of the manufacturer's argument that branch circuit wiring was not an "article." (Response, p. 14.) Central does not assert that sprinkler heads are not "articles."

noted that the wiring made it possible for consumers to use other consumer products, stating, "it would be impossible for a consumer to enjoy the use of an electric razor without also enjoying the use of the branch circuit wiring to which it connected." Id. In contrast, consumers use neither sprinkler systems nor sprinkler heads to enjoy other consumer products, and they do not use or control the sprinkler heads themselves. (Hill Aff., Ex. B, ¶ 24.) In ignoring that the Kaiser court relied, in part, on consumers' use of branch wiring in order to use and enjoy other consumer products in determining that branch wiring is a consumer product, Complaint Counsel thus ignores a key distinction between sprinkler heads and consumer products.

Further, to the extent that Kaiser holds that fundamental components of building structures -- as opposed to mere fixtures -- are consumer products, it is incorrect. In reaching its conclusion, the Kaiser court stated that if the CPSC lacked jurisdiction over wiring, "then many consumer products in common use such as furnaces, water heaters, dishwashers, and lighting fixtures would be excluded from coverage." Kaiser, 574 F.2d at 180. One does not necessarily follow the other, particularly where the fixtures are marketed to, purchased by or distributed to, and actively used by, consumers. Thus, while the listed items may be fixtures, and also consumer products, sprinkler heads, in contrast, are not consumer products because they are not merely fixtures. Rather, they are fundamental components of the building itself, incorporated into the inherent structure during construction, and, further, are neither marketed nor sold to consumers. In contrast, furnaces, water heaters, dishwashers and lighting fixtures are marketed and sold to consumers, are not part of the internal building structure itself, and are readily used directly by consumers. Thus, whereas Kaiser is correct in providing that the examples it lists are consumer products, it is incorrect to extend that rationale from mere fixtures to inherent

components of the building structure itself. The Anaconda court recognized the distinction, and its holding thus has the stronger basis.

4. Without A Clear Statement Of Congressional Intent, The Act Cannot Be Construed To Displace An Area Closely Regulated By State And Local Authorities.

Complaint Counsel misapprehends Central's discussion of the extensive state and local codes that already exist to regulate building construction. Central does not suggest that if the CPSC had the authority to regulate sprinkler systems and sprinkler heads, then such regulations could not displace state and local regulations. Rather, Central's argument is that in construing the Act, the Administrative Law Judge must look to Congress' intent to ascertain what types of products the Act was meant to address and what perceived regulatory gaps the Act was intended to fill. As Anaconda recognized, building construction is already extensively regulated by local jurisdictions. Anaconda, 593 F.2d at 1320. Thus, without a clear statement that Congress intended the Act to displace that entire body of regulatory codes, the Act cannot, and should not, be so broadly construed.

Further, Complaint Counsel seriously misstates the extent to which sprinkler systems and sprinkler heads are regulated by local building codes. Complaint Counsel states that local codes require only that sprinklers be approved, and that Central "provides no evidence that the safety or efficacy of the sprinklers themselves . . . are regulated by state or local authorities." (Response, pp. 19-20.) That statement illustrates precisely why the CPSC, in contrast to the experienced fire safety professionals who write and enforce building and fire codes, regulations and standards, is ill-equipped to regulate the fire sprinkler industry. Were Complaint Counsel more experienced in building codes and sprinkler regulations, it would recognize that all three building codes cited

by Central incorporate by reference the standards of the National Fire Protection Association ("NFPA"), and that NFPA standards detail virtually every aspect of implementing the codes' fire safety provisions. For example, although the BOCA Code attached to Central's Motion To Dismiss as Exhibit "C," says only that a sprinkler system "shall be designed and installed in accordance with NfiPA [NFPA] 13," that simple reference to NFPA 13 incorporates an entire volume over 130 pages long of specific instructions, technical requirements and specifications governing all aspects of sprinkler system installation, including the sprinkler heads themselves. (See NFPA 13, attached hereto as Exhibit "B.") Thus, Complaint Counsel's assertion that sprinklers are not sufficiently regulated by local codes, which incorporate NFPA 13, evidences how dangerously ignorant Complaint Counsel is about the very products it demands to regulate. Moreover, even a brief examination of NFPA 13 indicates the extensive, detailed, technical standards that would be displaced by an exercise of CPSC's rulemaking authority. As Anaconda wisely recognized, Congress, in passing the Act, did not intend to impose federal regulation on an area closely and effectively regulated by knowledgeable and experienced local jurisdictions. Anaconda, 593 F.2d at 1320.

5. In Ignoring The Statutory Exclusion For Industrial Products, Complaint Counsel Recognizes No Limit On CPSC's Regulatory Authority.

Accepting Complaint Counsel's interpretation of the Act and pertinent caselaw means accepting the proposition that there are no jurisdictional limits to the CPSC's authority, and that the CPSC can recall items from any location and from any kind of use, as long as the item is used somewhere by consumers in a consumer setting. Given that the Act expressly excludes, inter

alia, industrial products and products associated with risks that can be addressed by OSHA, Complaint Counsel's view of jurisdiction as limitless and unbounded is incorrect.

As argued in Central's Motion To Dismiss, the Act expressly excludes from CPSC authority articles "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). (Mot. To Dismiss, pp. 9, n.3; 19-21.) Complaint Counsel, despite its reliance on Kaiser, ignores both the text of the Act and the Kaiser court's recognition that the Act "undoubtedly intended to exclude industrial products, on the theory that industrial purchasers are better able to protect themselves . . . ." Kaiser, 574 F.2d at 180-81. Further, as the Court stated, citing the legislative history of the Act, the "occasional use of industrial products by consumers would not be sufficient to bring the product under the Commission's jurisdiction."[4/] Id. at 181. By Complaint Counsel's logic, once an item is identified as a consumer product in one setting, it can be recalled by the CPSC no matter where it is located and regardless of the commercial or industrial nature of the product. Such "logic" disregards the statutory exception, ignores courts' recognition that industrial users are well-poised to protect themselves, and means the CPSC's jurisdiction would be virtually limitless.

In the same vein, while conceding that the CPSC lacks authority to regulate where potential risks in the workplace can be addressed under OSHA, Complaint Counsel asserts nonetheless that it can recall sprinkler heads from workplaces as long as OSHA has not sufficiently regulated risks associated with a particular product. (Response, p. 17.) Sprinkler

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4/ Thus, despite Complaint Counsel's affidavit from Francis Teevan alleging that he has seen certain industrial/commercial Omega models in a nursing home and hospital, even under Kaiser, such occasional "crossover" use would not bring the commercial/industrial models within the CPSC's jurisdiction. Kaiser, 574 F.2d at 181.

systems and sprinkler heads are specifically addressed in OSHA standards, which regulate the overall fire safety of workplaces. Again, by Complaint Counsel's logic, as long as OSHA has not taken the precise action that Complaint Counsel wants the CPSC to take, then the CPSC can step into the breach. As above, this "logic" overstates and oversteps the authority granted to the CPSC by the Act, and it must be rejected.

B. The Complaint And List Of Documents Do Not Comply With CPSC Regulations.

Although purporting to rely on the pleading rules of the Federal Rules of Civil Procedure, Complaint Counsel does not address the numerous cases cited by Central in which parties were ordered under the Federal Rules to plead more specifically their allegations of, e.g., product defects, misappropriation, conspiracy and negligence. (Mot. To Dismiss, pp. 23-24.) The Complaint alleges only that Omega sprinklers could fail to function as a result of a failure to operate. Such circular reasoning does not comply with 16 C.F.R. § 1025.11(b)(3) because it does not inform Central with "reasonable definiteness of the factual basis or bases" of Complaint Counsel's charges of violation or hazard. Further, Complaint Counsel's Response purports to have evidence of "thousands of failures of Omega sprinklers," (Response, p. 2), yet admits that it is aware of only eight alleged failures during fires out of approximately 10 million Omega sprinklers manufactured since 1982. (Id., pp. 1, 2.) Complaint Counsel's statistics alone -- eight fires out of 10 million sprinklers sold over a 15-year period-- make clear that this is not an instance where a substantial number of products do not work.[5]

5/ In its original brief in support of the Motion to Dismiss, Central addressed the number of reported fires allegedly concerning Omegas. (See Mot. to Dismiss, pp. 5-6 and n.2.)

Moreover, Complaint Counsel's view of what constitutes a sufficient list of documents makes a mockery of the regulations' requirement that a complaint attach a list and summary of documentary evidence. Given the serious allegations of the Complaint and the complex technical issue underlying those allegations, a mere recitation of : "Data compilations depicting over 40% failure rates in testing of Central's Omega brand fire sprinklers" and "Documents evidencing failure of Omega fire sprinklers in actual fire situations" hardly satisfies the requirement that a "list and summary of documentary evidence supporting the charges shall be attached" to the Complaint. 16 C.F.R. § 1025.11(b)(3). Moreover, it is difficult to believe that Complaint Counsel purports to base this action solely on documents relating to a small number of fires and laboratory test results. The regulations were promulgated, inter alia, to permit respondents to understand the allegations and documentary bases supporting them. Complaint Counsel has not complied with these requirements and their hide-the-ball tactics should not be condoned.

Because the administrative Complaint does not comply with the pleading requirements of the CPSC's own regulations, it must be dismissed or, at a minimum, repleaded with greater specificity.

III. CONCLUSION

For all of the foregoing reasons, in addition to those argued in Central's Motion To Dismiss, Central respectfully requests that the Administrative Law Judge grant Central's Motion To Dismiss.

Respectfully submitted,

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Attorneys for Central Sprinkler Corporation and Central Sprinkler Company

DATED: April 20, 1998

Exhibit B

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CONSUMER PRODUCT SAFETY COMMISSION

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Lansdale, PA 19446,	:	
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Respondents.	:	
	:	

ORDER

AND NOW, this _____ day of _____, 1998, it is hereby ORDERED that respondents' Motion For Leave To Submit Reply Brief is GRANTED.

_____
Hon. William P. Moran
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Michael F. Healy, hereby certify that I have served the attached document, the Motion For Leave To Submit Attached Reply Brief, upon all parties and participants of record in these proceedings by hand, a copy to each on April 20, 1998.

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For: Respondents Central Sprinkler Corporation and Central Sprinkler Company

DATED: April 20, 1998