UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGE

In the Matter of	)	
	)	**CPSC Docket No: 12-2**
	)	
ZEN MAGNETS, LLC	)	
	)	**HON. DEAN C. METRY**
	)	
Respondent.	)	
	)	

DECISION AND ORDER

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This case concerns whether the Consumer Product Safety Commission (Agency or CPSC) may require Zen Magnets, LLC (Respondent) to take certain remedial actions for selling and distributing Small Rare Earth Magnets (SREMs)—individual spherical-shaped magnets, approximately 5 mm in diameter—to U.S. consumers. Pursuant to Section 15 of the Consumer Product Safety Act (CPSA), the Agency asks the undersigned Administrative Law Judge (ALJ) to find SREMs are substantial product hazards, presenting a substantial risk of injury to consumers. In the alternative, the Agency asks the ALJ to find SREMs violate certain standards set forth in ASTM F963-11 and also create a substantial risk of injury to consumers. The Agency ultimately seeks an order directing Respondent to implement a corrective action plan that includes: 1) a stop sale of SREMs; 2) providing notice to the public regarding the alleged danger; and 3) issuing a refund. After considering the entire record, consisting of both documentary and testimonial evidence, the ALJ finds the Agency **DID NOT PROVE** *all* SREMs, as sold by Respondent, are substantial product hazards. As explained below, the Agency's request for relief is **GRANTED in PART and DENIED in PART**.

I. BACKGROUND

On August 6, 2012, the Agency issued a Complaint against Respondent, the second authorized by the Commission in fiscal year 2012. The Commission previously authorized a Complaint against Respondent Maxfield and Oberton Holdings, LLC, which was initially assigned to ALJ Bruce T. Smith. Because of the similarity of the allegations in the two separate Complaints, Acting Chief Judge Parlen L. McKenna consolidated the matters for adjudication to the undersigned over Respondent's objection. Later, the Agency filed an additional third case on December 17, 2012 against Star Networks USA,

LLC, alleging substantially the same allegations as were set forth in the first two Complaints. All three cases were joined and assigned to the undersigned ALJ.

After consolidation of all three cases, the undersigned ALJ permitted the Agency to add Craig Zucker as a defendant on May 3, 2013. Eventually, the Commission, by a divided vote, approved settlements in the actions against Maxfield and Oberton Holdings, LLC, Craig Zucker, and Star Networks USA, LLC, leaving the action against Respondent as the only remaining case.

In Count 1 of the Complaint against Respondent, the Agency alleges SREMs are a substantial product hazard under Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2) because its instructions, packaging, and warnings are inadequate for U.S. consumers. Count 1 also asserts the product contains defects that create a substantial risk of injury to the public. In Count 2, the Agency alleges SREMs do not comply with the "toy standard" defined in ASTM F963-11 section 3.1.81, because SREMs have a flux index[1] greater than 50. The Agency claims SREMs violate the toy standard and also create a substantial risk of injury to consumers, as contemplated under Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1).[2]

On May 28, 2013, Respondent filed an Answer to the Second Amended Complaint, denying the allegations relating to the dangers of SREMs and asserted their packaging, instructions, and warnings were adequate. Respondent also denied SREMs were subject to the toy standard and set forth various defenses.

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[1] *See* CC Exh 1A describing the flux index of a magnet as being used to "compare relative strengths between magnets."

[2] SREMs are generally described as individual, spherical-shaped magnets that are packaged as an aggregated mass in differing quantities ranging in numbers of seventy two (72), two-hundred sixteen (216) and one thousand seven hundred twenty eight (1728) small magnets. Each individual small rare earth magnet is approximately 5 mm in diameter with a variety of coatings, and a flux index greater than 50.

After resolving multiple discovery and pre-trial motions, the ALJ held a hearing in Bethesda, Maryland, commencing on December 1, 2014, and concluding on December 18, 2014. During the hearing, the parties called numerous experts and lay witnesses and offered numerous exhibits. After the hearing, the parties filed respective closing argument briefs pursuant to the ALJ's briefing order. The record is now closed and this case is ripe for decision.

II. FINDINGS OF FACT

1. Respondent became a duly licensed, limited liability corporation, properly conducting business in the state of Colorado, commencing on or about July 9, 2009. Admissions Attached to Complaint Counsel's Post Hearing Argument (CC Brief), Exhibit A, para 7.

2. For all times material hereto, Respondent imported to the United States for resale small rare earth magnets (SREMs) marketed as Zen Magnets and Neoballs. Id. at para 6.

3. Respondent distributes SREMs for sale to U.S. consumers for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise. Id. at para 9.

4. The small rare earth magnets have a flux index greater than 50kg^2mm^2. Id. at para 15.

5. SREMs are approximately 5 mm in diameter. CC Brief, Exhibit A, para 14.

6. Respondent sold some magnets suggesting the appropriate age to be twelve years old and above. See CC Brief, Exhibit A, para 44.

7. Respondent sold some magnets without warnings before May, 2010. Complaint Counsel Hearing Exhibit (CC Exh) 55, Tr. at 2350:16-21, 2351:17-2352:1.

8. Injuries have been reported as a result of small rare earth magnet ingestion. CC Exh 27A at 10-13.

9. Respondent distributed more than 50,000 sets of Zen Magnets since 2009. CC Brief, Exhibit A, para 33.

10. The magnets typically come in sets of seventy-two (72), two hundred-sixteen (216), or one thousand seven hundred twenty eight (1728) individual SREMs. Id. at 34.

11. Prior to this action, after May 2011, Respondent took measures that would have made ingestion dangers less prevalent, including but not limited to: 1) changing the warnings; 2) limiting the availability of SREMs to areas not frequented by children under the age of 14; 3) the creation of responsible seller's agreement; and 4) the promotion of an educational program which would inform consumers of the dangers of ingested magnets and others. Tr. at 1965-1967.

12. Injuries and deaths associated with swallowed SREMs were reported by the North American Society for Pediatric Gastroenterology (NASPGHAN) statistics. Tr. at 557:8-19.

13. Reports of injuries due to ingested SREMs were reported by the National Electronic Injury Surveillance System (NEISS). Tr. at 894-896:1-4; 902-906.

14. Injuries associated with swallowed SREMs may cause unique medical problems unlike injuries caused by other ingested objects. CC Exh 27A; Tr. at 735:10-736:2; Tr. at 742:14-743:12.

15. Because initial ingestion of SREMs may be hard to detect, proper medical intervention can be delayed, and this can complicate medical resolution. Id.

16. The number of SREM ingestions is relatively insignificant when compared to the number of SREMs in the market. Compare Tr. at 913:10-17; CC Exh 39 at 1 to Tr. at 265:3-11; CC Brief, Exhibit A, para 33.

17. SREMs can be formed to create many types of geometric shapes mimicking those found in nature as well at other artistic shapes and designs. Tr. at 2539-2540.

18. Respondent holds contests for shapes and creations made from SREMs and maintains a gallery of photos containing submissions from various subscribers and purchasers. Id. at 2497-2498.

19. Ingestion is never a proper use of SREMs. Tr. at 2208-2209:8-12.

20. Respondent primarily offers SREMs for sale through a direct marketing online forum. Tr. at 1543:8-17.

21. All brick-and-mortar establishments which sold Respondent's SREMs had responsible seller agreements executed with Respondent or required all customers to be at least eighteen (18) years of age. Tr. at 2552-2554:16-12; Tr. at 2554:13-22.

22. Some school teachers utilize SREMs as learning tools. Tr. at 1431-1432:12-5; Tr. at 1453:14-18; Joint Notice, Respondent's Exhibit O.

23. No product liability cases have been instituted against Respondent based on the sale of SREMs. Tr. at 2565:16-19.

III. DISCUSSION

As set forth above, the Agency's Complaint presents two main issues: 1) whether SREMs are a substantial product hazard under CPSA Section 15(a)(2) because they contain defects which create a substantial risk of injury to the public; and 2) SREMs are a substantial product hazard because it violates the toy standard, which creates a substantial risk of injury to the public. The ALJ addresses each issue in turn.

A. Whether SREMs Are a Substantial Product Hazard Under CPSA Because They Contain Defects Which Create a Substantial Risk of Injury to the Public

Pursuant to 16 C.F.R. § 1025.43(b)(1), the Agency bears the burden of proving the allegations in Count 1 by a preponderance of the evidence. See Stedman v. S.E.C., 450 U.S. 91, 104 (1981). To prevail on Count 1, the Agency must show SREMs are a substantial product hazard as defined by 15 U.S.C. § 2064(a)(2).

Title 15 U.S.C. § 2064(a)(2) describes a substantial product hazard as a defect which creates a substantial risk of injury to the public. A substantial risk of injury to the public may be caused by the pattern of the defect, the number of defective products in commerce, the severity of the risk or otherwise. Id. Ultimately, under section 2065(a)(2), the inquiry is twofold and a defective product does not automatically create a substantial risk to the public. Proving the product is defective, alone, is insufficient; the product must also create a substantial risk to the public. The converse is also true. Under CPSC regulations, a product creating a substantial risk of injury is not automatically defective.

1. Whether the Use and Operation of Zen Magnets and Neoballs Renders the Products Defective

Title 16 C.F.R. § 1115.4 describes a defect as:

> At a minimum, defect includes the dictionary or commonly accepted meaning of the word. Thus, a defect is a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function. A defect, for example, may be the result of a manufacturing or production error; that is, the consumer product as manufactured is not in the form intended by, or fails to perform in accordance with, its design. In addition, the design of and the materials used in a consumer product may also result in a defect. Thus, a product may contain a defect even if the product is manufactured exactly in accordance with its design and specifications, if the design presents a risk of injury to the public. A design defect may also be present if the risk of injury occurs as a result of **the operation or use** of the product or the failure of the product to operate as intended. A defect can also occur in a product's contents, construction, finish, packaging, warnings, and/or instructions. With respect to instructions, a consumer product may contain a defect if the instructions for assembly or use could allow the product, otherwise safely designed and manufactured, to present a risk of injury.

(emphasis added).

Relying on part of this definition, the Agency first asserts SREMs contain a design defect "because a risk of injury occurs as a result of [SREM] operation or use." In the Agency's view, SREMs are "designed to be separated" and when separated, the "liberated" SREMs create a condition that causes serious injury to children and teens who ingest them. The Agency argues this access is a design defect, "inherent in the product because the condition creating the risk—loose, separable, accessible SREMs that are easily lost or shared—constitute the basic character of [SREMs]." Tr. at 343:5-344:3; 385:19-386:2; CC Exh 10A at 7, 13-14. The ALJ disagrees.

Upon review of the record, the ALJ finds the separation of SREMs does not create a risk of injury occurring as a result of "**the operation or use** of the product." The Agency presented absolutely no evidence that separation, alone, creates any threat to any

individual and that any consumer has ever been harmed by an un-ingested, liberated SREM. Therefore, the evidence is conclusive; an *un-ingested*, liberated SREM is harmless to the U.S. consumer.

The Agency did prove *ingesting* SREMs creates a real risk of injury and can result in severe injury or death. CC Exh 10A at 32-34; CC Exh 11 at 38-40; CC Exh 19A at 8, 11 and 17; CC Exh 27A at 8, 14. Indeed, if ingestion was part of the product's "use" or "operation," the Agency would prevail on this issue. But the record shows ingestion is not part of the "operation" or "use" of SREMs, but rather a misuse of the product. Therefore, under 16 C.F.R. § 1115.4, it cannot be said the risk of injury occurs as a result of SREM use or operation A review of the authority relied on by the Agency supports the ALJ's conclusion.

In In the Matter of Dye and Dye, 1989 WL 435534 (CPSC Docket No. 88-1 1991) (Worm Gett'r), the Commission considered whether the Worm Gett'r constituted a substantial product hazard. The Worm Gett'r consisted of 2, 6, or 12 un-insulated, electrically-chargeable rods designed for insertion into the ground. Upon insertion, the product would discharge 120 volts of electricity, driving worms to the surface for capture. Dye, 1989 WL 435534, at *1. There, the Agency argued the presence of the fully-charged, un-insulated metal rods created a risk of electrocution and other injuries related to electric shock or falls. Id. In that case, the record showed twenty-eight persons were known to have been electrocuted by worm probes substantially similar to the Worm Gett'r. Id.

In determining whether the Worm Gett'r contained a defect, the judge observed,

> Contact with the bare rods or charged earth at the same time a person is in contact with other conducting surfaces can occur in a number of ways, not

> all of which can be adequately prevented by the user. These include picking up worms, slipping or falling, tripping over the wires, probes, or other objects, ignorance of the electrical hazard, not realizing the probes are energized, not realizing a hazardous leakage current in the ground can emanate from the inserted probe, and being distracted by children, animals, or other causes. Tr. 67, 221-236. It is easy to trip over the wires, especially with the 12-probe model. Tr. 221. The protection potentially provided by rubber-soled shoes can be negated if the soles become wet or have cracks or holes. Tr. 274-75, 288. In addition, it is readily foreseeable that children or other persons can come into the area while the probes are being used. All of these factors are aggravated by the fact that the product's instructions state that the ground should be watered prior to using the worm probes so that the ground will be damp and by the fact that the product often is used at night.

Dye, 1989 WL 435534, at *2.

A review of Dye reveals a stark contrast to the case at bar. First, products substantially similar to the Worm Gett'r caused more than two dozen deaths, a fatality rate far exceeding that of the SREMs at issue here. But more importantly, the injuries and deaths resulting from Worm Gett'r use were caused by accidents or mistakes combined with the intended use of that product. Through proper use of the Worm Gett'r, a consumer would charge the rods and earth in order to flush worms to the surface. This proper use (as intended) exposed consumers to electrocution or shock; the products were designed to discharge electricity and the rods were un-insulated in order to function properly. The lack of insulation exposed consumers to the electrical current, and contact with the energized rods or earth could result from accident or negligence. This risk of accidental contact, which accompanied proper use, could cause injury or death which created a risk of injury constituting a defect in the product. In short, even proper use of the Worm Gett'r would expose a user or bystander to a substantial risk of harm.

Use and operation of Zen Magnets and Neoballs are markedly different. Here, the parties agree, absent ingestion, ZenMagnets and Neoballs are harmless. But as noted

above, the Agency argues the severability of the magnets creates the defect. However, separation alone creates no risk of injury comparable to simple exposure to electricity in the Worm Gett'r case. In other words, simply because two or more magnets become separated from the primary cluster does not result in any exposure to danger. Instead, it is the separation of two or more magnets, plus oral insertion, followed by swallowing of the magnets that creates the risk of injury. Contrary to Worm Gett'r, where proper use did not eliminate the exposure to the danger at all, proper use of Zen Magnets and Neoballs creates no exposure to danger whatsoever. Dye, 1989 WL 435534, at *2. (A consumer could not adequately prevent exposure to the danger even through proper use.)

Unlike the Worm Gett'r, day-to-day use of ZenMagnets and Neoballs, as intended, is harmless, even when magnets are separated from the primary cluster. Proper operation and use of SREMs do not expose any consumer to injury and the Agency showed no evidence to the contrary. As the record shows, SREMs are intended for manipulation (usually by hand) and Respondent in no way intended, designed, marketed, or manufactured the product for ingestion or oral insertion.[3] Without at least some type of initial oral or nasal insertion, there is no evidence of any consumer accidentally or unintentionally ingesting SREMs, which would make SREMs comparable to the Worm Gett'r. Because the only proven risk of injury results from ingestion, it cannot be said any consumer could accidentally or unintentionally become exposed to the risk of injury through proper use, and then followed by accident or inadvertence, similar to dangers found in the Worm Gett'r. Therefore, the analysis finding a defect in Dye is simply inapposite here.

[3] While it is true Buckeyballs marketed its product as oral jewelry, there is absolutely no evidence Respondent ever held his product out for oral insertion.

For similar reasons, the ALJ finds the holding In Re Francis Alonso, Jr. d/b/a Mylar Star Kites, CPSC Docket No. 75-16 (CPSC 1976) to be equally inapplicable. That case, like the Worm Gett'r, involved a product which presented a danger through normal use—flying the kite. And like the Worm Gett'r case, the proper use of the kites could result in injury through accident or negligence, flying into a power line. In other words, even proper use of the kite can lead to an injury. Therefore, Mylar Star is equally inapplicable here.

While the Commission reversed on other grounds not relevant to this hearing, the rationale given by the Commission is instructive when it upheld the factual determinations of the ALJ. In upholding the ALJ's reasoning, the Commission found compelling the fact that the aluminized coating which caused the greatest electrical shock concerns added nothing to the flying ability of the kite. Therefore, the aluminized, metallic coating was for sales only and not for performance. In the instant case, the attractiveness of the SREMs to each other is the sine qua non of their essence. Without the ability to attract to each other, the product is worthless. As the Commission did in its appeal decision in Mylar Star, and as the below signed has done here, I have balanced the risk of harm with the necessity of the magnetic pull. Utilizing the rationale of Mylar Star, the pull of the product is not for aesthetics, but for functionality. In the judicial opinion of the below signed, using the approved analysis of Mylar Star, there is no question that Mylar Star would dictate a different result if the magnetic coating improved functionality, not simply aesthetics.

Upon review of the evidence, the ALJ concludes the Agency has not shown a risk of injury occurs as a result of the normal operation or use of the product and is not defective in this regard.

2. SREMs Do Not Have Defective Warnings

The Agency next argues SREMs are defective because the warnings associated with SREMs "cannot mitigate the risk posed." Specifically, the Agency asserts, "[n]o warnings can attach to SREMs because of their small size . . . so children and caregivers who obtain lost or shared SREMs will not see any warning at all." CC Brief p. 11. The Agency's argument essentially asserts no warning could adequately address the risk caused by a lack of containment—the severability of SREMs.

Although inartfully stated, it appears the Agency is attempting to argue the existence of a defect in the warnings associated with SREMs. Again, 16 C.F.R § 1115.4 is the starting point for determining the existence of a defect. Section 1115.4 specifically defines a defect "[a]t a minimum" as "a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function." Within the confines of the Agency's argument, and upon review of the CPSC regulation defining a defect, it appears the Agency is arguing SREMs' warnings contain a "fault, flaw or irregularity" that causes a "weakness, failure, or inadequacy." A review of the evidence shows the Agency failed to prove the existence of a fault, flaw, or irregularity in the warnings associated with Zen Magnets or Neoballs.

To determine whether the warnings associated with SREMs contain a "fault, flaw or irregularity" that causes a "weakness, failure, or inadequacy" necessarily begins with a

review of the warnings associated with SREMs. Here, Respondent's products, as of at least 2012, included at least one of the following warnings:

> WARNING: These epic magnets are not childrens [sic] toys. Poison if swallowed. Keep these away from kids who don't understand the dangers of magnets. Keep away from face! Swallowed magnets can stick together across intestines causing serious injury or death.
>
> NOT A TOY FOR CHILDREN. READ WARNINGS!

Respondent's Exh 1.

> Warning: Swallowed magnets can stick together across intestines causing serious or fatal injury. Seek medical attention if magnets are swallowed or inhaled.
>
> Children should not be allowed to handle neodymium magnets as they can be dangerous. Small magnets pose an ingestion hazard and should never be close to the mouth or inserted into any part of the body.
>
> By opening this package, you understand the dangers of misuse, and take assumption of risk (sic). There is no lifeguard on duty.
>
> Magnets must be respected. But need not be feared.

Respondent's Exh 1D.

> OMFG READ ME
>
> This is serious! The grumpy CPSC is about to BAN magnet spheres in the US because they are an ingestion hazard. They don't trust that you are capable of understanding and following warnings. Prove them wrong, or we all can't have nice magnets. Zen Magnets LLC, the producer of Neoballs, has had no record of ingestion and we'd like to keep it that way. High powered magnets can cause potentially fatal intestinal pinching if swallowed. Keep magnet spheres away from all orfices (sic), especially the mouth and nose. High powered magnets are not a toy. Keep away from anybody who does not understand these dangers. SRSLY

CC Exh 5(2).

> GOVERNMENT WARNING
>
> This product contains hazardous small magnets. Swallowed magnets can stick together across intestines causing serious infections and death. Seek

> immediate medical attention if magnets are swallowed or inhaled. Keep away from all bodily orfices (sic) CPSC 14+ Age Recommendation.

CC Exh 5.

Respondent's website also included a warning, displayed when customers first visit the website, which reads:

> Warning: KEEP AWAY FROM MOUTH
>
> Practice responsible magnet usage! High power magnets may cause fatal intestinal pinching if swallowed. Keep away from all orfices (sic). RARE EARTH MAGNETS ARE NOT TOYS. Don't leave them around animals or children who don't understand the dangers. Always communicate these dangers when sharing magnets. If magnets are ingested or aspirated to the lungs, immediate medical attention is required.
>
> By continuing, you accept all Terms and Conditions below.

Respondent's Exh 193.

The ALJ finds these warnings do not contain a fault, flaw, or irregularity which causes a weakness, failure, or inadequacy, particularly as argued by the Agency. The Agency asserts these warnings are defective because they cannot and do not mitigate the risk of injury associated with SREMs. In the Agency's view, the risk of injury is containment of the SREMs, and the magnets' severability exposes some U.S. consumers to a risk of injury. The Agency argues because the warnings cannot accompany each SREM, given the small and severable nature, the warnings are inadequate and defective.

However, as explained above, the risk of injury associated with SREMs does not derive from the severability of the magnets, but emanates from ingestion. Therefore, even though it is true the warnings do not address the severability of the magnets, the severability does not create the risk of injury. The cause of any risk of injury is from

ingestion, an issue roundly, repeatedly, and expressly addressed by Respondent's warnings.

A review of each warning shows Respondent specifically notified consumers of the ingestion hazard and even noted intestinal pinching. The warnings instruct consumers to seek immediate medical attention if ingestion occurs, and informs consumers to keep SREMs away from orifices. The ALJ finds no evidence that these warnings contained a defect, no credible evidence consumers were harmed despite these warnings, and no evidence showing a fault, flaw, or irregularity caused a weakness, failure, or inadequacy in form or function.

The ALJ is also not persuaded by the Agency's argument that an inadequacy or defect arises because the warnings cannot accompany each individual separated SREM, given the small and severable nature. As set forth above, the regulations contemplate a fault, flaw or irregularity that causes the inadequacy. Here, the lack of warnings on each individual SREM does not result from a fault, flaw, or irregularity, but as a matter of practicality and possibility. It would be near absurdity to fault Respondent for not labeling each individual SREM with a warning. Assuming it would be possible to do so, no consumer could possibly be informed by such a warning, because it would be simply too small to see; SREMs are approximately 5 mm in diameter. Therefore, the ALJ finds a lack of warning associated with each individual SREM does not result from a fault, flaw or irregularity but from practicality.[4]

[4] As explained below, whether a fault, flaw, or irregularity causes inadequacy is a different inquiry than whether the warnings on the packaging are adequate at all. See section III(B)(1) below.

More importantly, the ALJ notes the Agency did not present any credible evidence linking any injury to Respondent's product.[5] The importance of this evidence, or the lack thereof, cannot be overstated when considering whether a defect exists in Respondent's warnings, particularly when couched in terms of inadequacy. While it is true the record is replete with evidence showing some consumers were harmed by ingesting products substantially similar to Respondent's products, it is equally unclear whether those consumers were injured by products containing warnings similar to those which Respondent included on his products. It is a more than reasonable inference that little evidence exists of injury resulting from use of Respondent's product because Respondent's warnings sufficiently deter ingestion. Because the Agency bears the burden of showing the defective nature of the warnings, and to show the warning's inadequacy, a dearth of evidence here precludes the ALJ from ruling in the Agency's favor on this issue.

3. Whether SREMs Are Defective Under the Factors in 16 C.F.R. § 1115.4[6]

The Agency next argues SREMs are defective under the factors in 16 C.F.R. § 1115.4. As noted in Section 1115.4, a risk of injury can be one that "will render the product defective." But per Section 1115.4, not all products which present a risk of injury are defective. Section 1115.4 sets forth several examples of products which, despite the danger presented, are not defective. In these examples, the regulations

[5] Joint Notice, Exh. J indicates the affiant came to realize the product which caused injury was by Zen Magnets, but the statement is little more than hearsay and does not explain how the affiant knew the product was from Respondent's company as opposed to a number of other products on the market. Accordingly, the ALJ accords Exh. J little weight.

[6] As discussed in section III(B)(2) below, not all of Respondent's products had warnings and some suggested the appropriate usage age to be 12 years and older. The below analysis does not apply to products sold without warnings and with age recommendations of 12 and above. Without warnings and improper age recommendations, Respondent's product is a substantial product hazard. Accordingly, the following analysis only applies to Respondent's product containing warnings and appropriate age recommendations.

suggest the ALJ should "weigh" the nature of the risk of injury of a product against the product's usefulness and advise a product will not be defective if "the risk of injury is outweighed by the usefulness of the product which is made possible by the same aspect which presents the risk of injury." 16 C.F.R. § 1115.4. In making the ultimate determination under Section 1115.4, the ALJ should consider all the factors below.

i. Nature of the risk of injury

Here, the parties do not dispute the risk of injury emanates from ingestion. The record is replete with evidence showing SREMs can cause intestinal pinching which results in severe injury and possibly death. Respondent's own warnings recognize as much. But evaluating the kind of injury associated with ingestion does not end the analysis of the nature of the risk of injury; it is only the starting part. When evaluating the nature of the risk of injury which the product presents, the ALJ should also consider proper use versus improper use. Moreover, because the parties recognize the products are only dangerous when ingested, the ALJ should consider how and why the products become ingested in the first place.

The record shows some consumers, tweens and teens, place SREMs in their mouth to mimic piercings and accidentally ingest the products because the products repel if the magnets contact at opposite poles. Tr. at 378:1-6; Joint Notice, Ex. B, D, F. When used as mouth jewelry, the nature of the risk of injury (because of accidental ingestion) is high. The evidence shows ingestion requires immediate medical attention and removal of the SREMs before the products pass through the digestive tract. If the products were marketed as mouth jewelry, or ingestion in any way, the ALJ would be forced to conclude the nature of the risk of injury which the product presents to be high. But that is

not this case. The record supports a finding these products are not intended for ingestion and the nature of the risk of injury from an un-ingested SREM is nil.

Respondent's products bear a patent warning against ingestion and there is no evidence Respondent advertised his products for ingestion whatsoever. In contrast, Buckeyballs, a former party to this litigation, specifically advertised its products as mouth jewelry. These advertisements may explain why some tweens and teens orally ingested the products, because Buckeyballs advertised the product for oral insertion. In so doing, the nature of the risk of injury with Buckeyballs is higher than those of Zen Magnets and Neoballs, despite the fact that the two products are nearly identical. Because Zen Magnets and Neoballs are not marketed for oral ingestion, the ALJ finds the nature of risk of injury is low.

The Agency provided evidence showing some toddlers ingest SREMs, and produced evidence of at least one death (hereinafter referred to as Child A) related to SREM ingestion. See Joint Notice, Ex. K at 11-12. But a review of the evidence shows the nature of the risk of injury resulted from more than simple misuse. Here, Child A's death resulted from SREM misuse combined with a lack of supervision, and a misdiagnosis from medical professionals. In other words, Child A did not die from SREM use alone.

The investigative reports show Child A ingested SREMs while living in an unsafe, unsanitary environment. As CC Exh 18.15 reveals, Child A's SREM ingestion resulted from a lack of proper supervision combined with a more than negligent parent. When local authorities arrived to investigate Child A's death, the mother informed investigators she placed Sevin dust around the home in an attempt to combat a flea

infestation. CC Exh 18.15. Detective Tallman's report indicates the Sevin dust was so pervasive in the home, once he entered Child A's residence, he ordered everyone out of the premises for their safety. CC Exh 18.15. Child A's mother informed investigators the child slept on a mattress on the floor near a Sevin container, further exposing the child to the Sevin dust, a fact Detective Tallman corroborates when he described the child as sleeping on an "unsafe sleep surface."

It is nonetheless true CC Exh 18.15 indicates Child A did not test positive for Sevin. However, the fact remains Child A's exposure to an insecticide demonstrates a lack of basic custodial supervision, which very likely could have prevented SREM ingestion in the first instance.

More importantly, misdiagnosis and improper medical care appear to be significant contributing factors to Child A's death. As CC Exh 18.15 also reveals, Child A was treated after she ingested SREMs and the medical professionals released her from the hospital based on a misdiagnosis. See Exh CC 27A (describing how Child A was released from the hospital based on a misdiagnosis). Dr. Adam Noel, an expert witness for the Agency, directly noted misdiagnosis is a problem with magnet ingestion. Id.

In conclusion, the ALJ finds the nature of the risk of injury of SREM ingestion is significant only when advertised for oral ingestion and/or when combined with a lack of parental supervision. Because there is no evidence Respondent's product was ever advertised for oral ingestion and because Respondent's product specifically warns consumers about ingestion, the nature of the risk of injury which the product presents is negligible when accompanied by proper warnings and appropriate age restrictions.

ii. Utility

The Agency admits SREMs have utility. CC Brief p. 12. The Agency specifically acknowledges the evidence demonstrating SREMs have an instructional purpose and artistic value. Id. Tr. at 1404:4-7; 1422:1-1423:18. However, the Agency argues utility is only one factor considered and the utility is far outweighed by the other factors set forth in 16 C.F.R. § 1115.4, which renders SREMs defective.

Respondent's counsel argues SREMs have significant utility and asserts the Agency (and its experts) failed to address any positive aspect associated with SREMs. Specifically, Respondent argues the Agency's expert, Dr. Paul Frantz, did not fairly assess the products "apart from reading litigation materials, and looking at YouTube and Buckyball sites." Respondent's Post-Hearing Argument p. 4. Respondent further asserts Dr. Frantz did not thoroughly evaluate SREMs by failing to consider any outside research on the utility or use of the magnets. Respondent argues the Agency's other expert, Dr. Steinberg, similarly performed an incomplete review of the subject products because he did not consider any benefits from the use of magnets in education, did not consider the benefits of the use of magnets by children and teens, and was not aware SREMs could be used in education.

Upon review of the record, the ALJ finds SREMs' utility is indeed high. Dr. Boyd Edwards[7] opined SREMs are unique because they can be connected at almost any angle, "allowing the construction of beautiful sculptures and shapes that cannot be built with fixed-angle construction sets, such as Legos." Respondent's Exh 154A, p. 3 (received Dec. 9, 2014). The ALJ agrees SREMs are excellent instruments for teaching

[7] At the time of the hearing, Dr. Edwards was the dean, executive director, and physics professor at Utah State University, Uintah Basin. Respondent's Exh 154A. Dr. Edwards was a professor at West Virginia University for twenty-four years. Id.

physics and chemistry. Tr. at 1431:12-1432:5. Dr. Edwards testified to his personal experience and explained how he did not understand face-centered cubic lattices until using the SREMs to build them, and balls and sticks did not work to achieve the same end. Tr. at 1428:11-1429:14. Dr. Edwards specifically noted SREMs were useful when teaching Euclidian geometry (Tr. at 1453:14-18); helping students understand and appreciate lattices (Tr. at 1427:7-1428:1); demonstrating principles of magnetism (Tr. at 1419:3-7); and teaching about angle strain, lattice defects, platonic solids, slip mechanisms, and demonstrations that require dynamism (Tr. at 1432:12-1433:7). Dr. Edwards predicted a trend in utilizing SREMs, citing enthusiasm exhibited by some of Dr. Edwards' colleagues. Tr. at 1426:14-1427:6.[8]

In addition to Dr. Edwards, a number of other witnesses have testified to SREMs' utility. Maureen Bayless, a lay witness, explained how Zen Magnets have fueled her four sons' interests in careers in math and science and the many learning opportunities SREMs offer outside a classroom setting, as well. Joint Notice, Respondent's Ex. L. One extra-scholastic example came from David Nicholaeff, a physicist at Los Alamos National Laboratory, who uses "magnet spheres in [his] research in computational meshes, [by] constructing lower-dimensional meshes out of magnet spheres and using these to help [him] visualize higher-dimensional meshes, including meshes with dimensionalities greater than three." Joint Notice, Respondent's Ex. R.

Steven Niezgoda uses Zen Magnets to teach crystalline structures and defects to his students at Ohio State University. Joint Notice, Respondent's Ex. S. According to

[8] The ALJ agrees simply because SREMs are not yet in widespread use in academia does not decrease utility, or their viability for use in teaching. Tr. at 1435:5-14. (SREMs did not enter the market in the U.S. until 2009, and it can take a year or two to change a syllabus for a general physics course, so there is a clear lag in integrating new teaching techniques into the curricula.)

Mr. Niezgoda, the exercises he employs "could not be accomplished with standard ball-and-stick molecular models because of the dynamic and imperfect nature of the simulated crystal growth process." Id. Ph.D. candidate Lee Walsh similarly noted how "[m]agnets are easier to manipulate than ball-and-stick molecular models, and magnets allow you to feel the energetics that mimic molecular bonds." Joint Notice, Respondent's Ex. U. Michele LaForge is a high-school teacher that uses SREMs to demonstrate geometry concepts in her classroom. Joint Notice, Respondent's Ex. O. Ms. LaForge has seen that her high school students prefer SREMs to other construction materials. Id.

Similarly, Adam Love, a math and science tutor, found SREMs to be more effective in teaching concepts such as polarity, magnetic induction, molecular structures, and lattice packings, than non-tactile methods, and also help his students retain the information better than simply looking at diagrams in a book. Joint Notice, Respondent's Ex. P.

Mr. McClive testified he "[has] never known a better medium in which to explore so many different geometrical relationships." He also sees great utility in SREMs to teach mathematical concepts, structures, material strengths, art, and ultimately curiosity. Joint Notice, Respondent's Ex. Q. The ALJ agrees with Respondent, "no other medium can replicate the unique spherical and magnetic properties of [SREMs], and therefore no other alternative can be used to demonstrate the same concepts with the same effectiveness." Accordingly, the ALJ finds SREMs have a high utility.

iii. The population exposed to the product and its risk of injury

The population exposed to the product and the population exposed to the product's risk of injury are substantially different. As repeatedly stated in this decision,

the product is not dangerous unless ingested. The record shows the product does no harm unless first ingested. Therefore, the ALJ finds the population exposed to the product is individuals who purchased SREMs and those that might encounter SREMs through the purchaser.

The population exposed to the product's risk of injury is more difficult to identify. Only individuals that might first put SREMs in their mouth are subjected to any real danger from the product, usually through accidental swallowing. Although the evidence shows toddlers are apt to swallow SREMs, it is axiomatic that toddlers will swallow just about anything. But it is equally true that while toddlers are inclined to swallow small objects, they do not swallow everything they encounter. Because risk of injury can only happen by first inserting SREMs into the consumer's mouth, the ALJ finds the population exposed to the product's risk of injury too amorphous due to extraneous, particularized factors, i.e., age, intelligence, carelessness, and education. There is no single individual or group of individuals constantly subjected to the product's risk of injury simply because not all individuals, no matter the age, will ingest the product.

The record shows out of tens of thousands of sets and millions of magnets, the Agency projects roughly five-hundred eighty individuals were treated for SREM ingestion each year, over a span of five years--totaling about two thousand nine hundred reported incidents. Tr. at 913:10-17; CC-Exh 39 at 1; see CC Brief pg. 16 noting " [t]he projection showed that, from 2009 to 2013, an estimated 2,900 SREM nationwide ingestion incidents were treated in hospital ERs." These numbers are insignificant to show any specific, identifiable population, particularly given the mass amount of magnets purchased and already on the market. Accordingly, the ALJ concludes the numbers of

individuals exposed to the risk of injury is small in comparison with the amount of individuals exposed to the product itself. Therefore, this factor militates against finding the product defective.

iv. The obviousness of such risk

Overall, the risk of injury associated with SREMs is low. Absent ingestion, there is no evidence the product poses a risk at all. However, ingesting the product is dangerous and a consumer is not likely to appreciate the full magnitude of the risk associated with SREM ingestion if the product is separated from its packaging and warnings. It goes without saying that while most consumers understand and realize small objects may present choking risks for small children (and potentially for adults), the experts recognize toddlers will swallow just about anything. But the evidence also shows magnets are not mere choking hazards (if at all), but become dangerous when ingested because of their propensity to cause intestinal pinching, something medical professionals, let alone the average consumer, would not realize. As explained below, the ALJ agrees warnings adequately address the issue with consumers. Without warnings, however, the obviousness of the risk is low.

Therefore, this factor militates toward the conclusion SREMs are substantial product hazards, but as noted above, no single factor is dispositive. The ALJ should consider all the factors before determining whether the product presents a substantial product hazard.

v. The adequacy of warnings and instructions to mitigate such risk

CPSC demonstrated SREMs are substantially similar to other products, specifically Buckeyballs. The Agency was also able to link certain injuries to

Buckeyballs (particularly ingestion-causing injuries) due to specific advertisments advaned by Buckeyballs marketing their products as mouth jewelry. See Joint Notice, Exhs A, B, C, D, G, H, I. Importantly, however, the Agency was unable to sufficiently and credibly correlate any SREM injuries directly to Zen Magnets or Neoballs. The lack of credible evidence here is telling.

Buckeyballs did not contain specific warnings addressing ingestion and intestinal pinching, and Zen Magnets and Neoballs do. Therefore, it is easy to conclude Respondent's warnings adequately deterred consumer ingestion, and deterred purchases by consumers with children that might ingest SREMs. Unlike Buckeyballs, Zen Magnets and Neoballs were not marketed as mouth jewelry. Again, the Agency's inability to provide credible evidence linking injuries to Respondent's products as compared to the plethora of evidence linking injuries to Buckeyballs (which advertised its product as mouth jewelry) shows Respondent's warnings were effective.

Even a cursory review of the product's warnings show Respondent acted "tongue in cheek" with his warnings, but the warnings are nonetheless clear—the products are dangerous if swallowed and require immediate medical attention. Therefore, given the lack of credible evidence showing Respondent's products ever caused any injury coupled with the explicit warnings accompanying Respondent's product, website, and literature, the ALJ concludes warnings adequately address any risk of injury associated with the products.

vi. The role of consumer, misuse of the product and the foreseeability of such misuse

The record reveals SREMs are only dangerous when ingested. Given Respondent's blatant warnings on the product's packaging and website, ingestion

certainly constitutes misuse. Thus, misuse is the sole cause of injuries concerning SREMs and misuse's role is significant in that it is the only real source of injury associated with SREMs.

The Agency insists, however, Respondent encourages misuse (oral ingestion) by marketing the product as "self-adornment." The ALJ disagrees. Self-adornment may give rise to body jewelry, but a plain meaning of the phrase in no way lends itself to encouraging oral insertion or ingestion. In contrast, the evidence shows Respondent never marketed the product for ingestion, and none of the product's advertisements indicate the product is for ingestion. Respondent's warnings specifically instruct consumers "[k]eep magnet spheres away from all orfices (sic), especially the mouth and nose." The ALJ finds while the role of misuse is the sole source of injury, Respondent does not encourage ingestion.

On the other hand, the ALJ does agree the misuse is foreseeable even where the warnings are present. Respondent was on specific notice the products were ingestion hazards, he warned consumers CPSC intended to "ban magnet spheres" for this reason. See CC Brief, Exh A. The record shows Respondent knew the products were ingestion hazards, and this knowledge supports a finding that future users might ingest the products. With this notice, foreseeability of misuse is a foregone conclusion.

Again, however, it appears Respondent's warnings sufficiently deter misuse. Therefore, while misuse is foreseeable, the danger SREMs (as marketed by Respondent) pose is sufficiently mitigated by the warnings, as outlined above.

vii. The case law interpreting Federal and State public health and safety statutes

Neither party provided the ALJ with any relevant federal or state public health and safety statutes. Accordingly, the ALJ provides no weight to this factor and finds it does not militate for or against finding SREMs substantial product hazards.

viii. The case law in the area of products liability

While the parties rely on two decisions from the Commission, In Re Francis Alonso, Jr. d/b/a Mylar Star Kites and In the Matter of Dye and Dye, neither party provides the ALJ with any applicable case law outside of these two precedents. Given the ALJ's analysis above in Section A(1), finding these two decisions inapposite to this case, the ALJ need not rehash that analysis here. Given that both parties neglected this factor, the ALJ provides it no weight when determining whether SREMs are a substantial product hazard.

ix. The Agency's judgment and expertise

The ALJ agrees the Agency, within its jurisdiction, has expertise in determining the risks and hazards posed by products in commerce. However, the deference owed to the Agency's positions, particularly in an adjudication procedure, is akin to the deference set forth by the Supreme Court's decision in Skidmore v. Swift & Co., 323 U.S. 134 (1944). As later described by the Supreme Court, Skidmore deference refers to:

> The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

323 U.S., at 140.

Here, the Agency's judgment is the product is a substantial product hazard under Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2) because its instructions, packaging, and warnings are inadequate for U.S. consumers. As set forth above, the ALJ remains unpersuaded by the Agency's position that the product's warnings and packaging are inadequate.

Accordingly, because the Agency has not persuaded the ALJ with its positions on law and fact, its expertise on the subject is given less weight.

x. Weighing the risk of injury against the product's usefulness

Having described the risk of injury presented by the product, fully described the product's utility, and considered the other factors, the ALJ finds the usefulness outweighs the risk of injury associated with the product. SREMs' magnetic attraction is the source of the product's usefulness. The magnetic attraction is also the source of injury when ingested, given that magnetism is what causes SREMs to pinch the intestines. This magnetic force, however, is not a defect because the usefulness of the product is made possible by the same aspect which presents the risk of injury and that usefulness outweighs the risk of injury. By example, the regulations agree.

In 16 C.F.R. § 1115.4, the regulations provide:

> [N]ot all products which present a risk of injury are defective. For example, a knife has a sharp blade and is capable of seriously injuring someone. This very sharpness, however, is necessary if the knife is to function adequately. The knife does not contain a defect insofar as the sharpness of its blade is concerned, despite its potential for causing injury, because the risk of injury is outweighed by the usefulness of the product which is made possible by the same aspect which presents the risk of injury.

Here, it is clear a knife's sharp blade is necessary to the knife's function. This same sharpness is also the source of the risk of injury. However, the knife would not function adequately without a sharp blade, the same aspect which renders the product dangerous.

Similarly, SREMs' magnetic properties are what renders it dangerous and at the same time renders it useful. The ALJ believes its powerful magnetism outweighs the danger presented, particularly given the expert witness testimony above. Therefore, upon review of all the factors set forth above, the ALJ finds SREMs, as marketed and sold by Respondent, are not defective under the factors set forth in 16 C.F.R. § 1115.4. Respondent's warnings sufficiently address and mitigate any exposure to injury consumers might face due to oral insertion and ingestion. Moreover, the exposure of the risk of injury to small children is lessened by the restrictive means Respondent employed when marketing and distributing the products.

B. Count 2 – Whether SREMs Violate ASTM F963-11

As an alternative argument, the Agency also asserts SREMs do not comply with the Standard for Consumer Safety Specification for Toy Safety, ASTM F963-11, commonly referred to as the "toy standard." See CC Exh 2; see also Section 106 of the Consumer Product Safety Commission Improvement Act of 2008. In the Agency's view, because SREMs do not comply with the toy standard, and because they constitute a substantial product hazard, the Agency is entitled to an order directing Respondent to implement a corrective action plan that includes: 1) a stop sale of SREMs; 2) providing notice to the public regarding the alleged danger; and 3) issuing a refund.

Respondent argues the toy standard does not apply because SREMs are not toys. Respondent has repeatedly repudiated claims that the product constituted a toy as defined, and Zen Magnets never designed, manufactured, or marketed the magnets as a plaything for a child less than the age of 14.

As explained below, some of Respondent's products constitute toys due to Respondent's marketing tactics and lack of warnings. See Section III below. However, not all SREMs are toys, specifically those that include warnings and products that lack inappropriate age recommendations and marketing.

1. ASTM F963-11

The toy standard establishes mandatory requirements for toys intended for use as a plaything by children under the age of 14. ASTM F963 § 1.3. Section 4.38.1 provides "[t]oys must not contain a loose as-received hazardous magnet or a loose as-received hazardous magnet component." Id. The toy standard also specifically describes a toy as "any object designed, manufactured, or marketed as a plaything for children under 14 years of age." ASTM F963 § 3.1.81. It goes without saying Section 4.38.1 does not apply to products that are not toys under this definition.

In this action, the Agency bears the burden to show any one of the three criteria applied to Respondent's products (that the product is designed, manufactured, or marketed as a plaything for children under 14 years of age). A review of the evidence shows the Agency did not entirely meet its burden.

As argued in the Agency's final brief, Respondent designed, advertised, and marketed SREMs "to appeal to children under 14." See Complaint Counsel's Post-Hearing Argument – in Camera pg. 3. In support of its position, the Agency argues

Respondent advertised SREMs as a "fun toy," promoted the product as play jewelry by stating the SREMs "looks hot on girls" and "looks good on cute people" and promoted the product as "terrific for refrigerator art." Id. The Agency further relies on Respondent's testimony at the hearing where Respondent stated Zen Magnets are appropriate for a "wrist worthy chain" and may be used as jewelry and "self-adornment." Tr. at 2410:15-21, CC Exh 63 at 2, 4. The Agency asserts Respondent's website, emails and his sponsorship of contests all support a finding that SREMs are advertised, marketed, and/or designed as a plaything for children under 14 years of age. Agency counsel also argues Respondent's warnings demonstrate SREMs were marketed to children under the age of 14, by indicating Zen Magnets may be used by individuals at "whatever age at which a person stops swallowing non-foods." CC Exh 44.

The ALJ disagrees that any of this evidence shows Respondent advertised, marketed, and/or designed all of the SREMs as a plaything for children under 14 years of age. The above examples cited by the Agency only support the conclusion that Respondent classified the product as a toy and that he recognized the product might be used by children under the age of 14. Recognition of a possible user is wholly distinguishable from being marketed, designed or manufactured for a particular user.

For example, it is true Respondent acknowledged through contests that some children under the age of 14 used SREMs. However, under the toy standard, the product is not a toy simply when there is knowledge the product is used by children under the age of 14, nor even when that company acknowledges its use. Instead, the toy standard only applies if the product is advertised, marketed, or designed as a plaything for children under the age of 14.

Moreover, simply calling a product a "toy" does not necessarily lead to the conclusion that the product falls within the toy standard, i.e., for use as a plaything for children under the age of 14. Adults and children over the age of 14 may buy and use "toys" that are not for children 14 and under; the term toy does not automatically lend itself to an age restriction.

Respondent also took specific steps to ensure the sale of his product was restricted to "adult hobby stores" and "marijuana dispensaries." Tr. at 2552:10-15, 2553:16-2554:2. This is a strong indicator of Respondent's mens rea, or intent. The regulation implicitly requires intentional activity, i.e., intentional marketing, designing or manufacturing. In other words, a product is a toy because it is intentionally manufactured, marketed, or designed as a plaything for a child who is under the age of 14. Without the required intent to do one of those three things, an object is not a toy.

Respondent's testimony confounds any notion that he intentionally marketed, designed or manufactured his product as a toy. But see Section III below. Retailers of his product must follow a rigorous protocol including: (1) obtaining identification from buyers to ensure the consumer is over 18 and (2) verbally warning buyers the product should not be given to children under 14. Tr. at 1737:17-1738:4; 1754:20-1755:8. This is the strongest evidence the undersigned has as to the intended end user of the magnets. While there may exist circumstantial evidence offered by the Agency as to the knowledge by Respondent of who may use the product, the expressed intent of Respondent in only offering his products to adults on-line or, through restrictive access brick and mortar locations is far more compelling.

In conclusion, the undersigned cannot say the Agency has established by a preponderance of the evidence that the intent of Respondent was to manufacture, market, or design all SREMs as a child's plaything under the age of 14. Respondent sold his product on the internet, and while such sales prevent the purchaser from being able to agree to the restrictions in a brick-in-mortar, it is also true that purchasers under the age of 14 are unlikely to have the means to order these products, usually through use of a credit card. This conclusion is most pointedly supported by the Agency's inability to present even a scintilla of evidence that any child under the age of 14 was ever able to purchase SREMs from Respondent's website or in any of the abovementioned stores.

Lastly, it is necessary to note even where Respondent's products (with adequate warnings and without inappropriate age suggestions) are within the ambit of the toy standard, the Agency would still not prevail under Standard for Consumer Safety Specification for Toy Safety. For the toy standard to apply, not only must the product be advertised, marketed or designed as a plaything for children under the age of 14, it must also be a substantial product hazard. As detailed above, the ALJ concludes the product does not creates a substantial risk of injury to the public (rendering the product a substantial product hazard), a conclusion which would preclude the application of the toy standard in and of itself. There is no need to restate the rational cited above, but the warnings, utility and proper use demonstrate why the product is not a substantial product hazard.

Accordingly, upon review of the record, the ALJ finds Respondent did not design, manufacture, or market all SREMs as a plaything for children under 14 years of age. See ASTM F963 § 3.1.81. The ALJ reiterates the products are not substantial product

hazards when accompanied with proper warnings and age restrictions. Accordingly, the toy standard does not apply to the SREMs which had proper age restrictions and warnings and cannot be used as grounds to order a recall for all the products Respondent sold and/or distributed.

2. SREMs Sold Without Warnings and/or to Children Under the Age of 14

As discussed above, the ALJ's determination that all SREMs are not a substantial product hazard turns on two primary analyses: 1) misuse is the primary cause of injury; and 2) Respondent curtails misuse through explicit warnings and by marketing its product to adults. Similarly, because of the warnings and manner in which Respondent marketed some of the products, the ALJ concludes they are not toys under ASTM F963 § 3.1.81.

However, the record shows Respondent sold some magnets without warnings before May, 2010. CC Exh 55, Tr. at 2350:16-21, 2351:17-2352:1. The record also shows Respondent sold some magnets suggesting the appropriate age to be twelve years old and above. See CC Brief, Exhibit A, para 44. Without warnings, and when the product suggests appropriate usage by children under the age of 14, SREMs are substantial product hazards and are considered toys under ASTM F963 § 3.1.81, particularly since some of Respondent's product suggested and marketed (in the Question and Answer section of his website)[9] the appropriate usage age as 12 years and older.[10] Accordingly, the Agency is entitled to partial relief requested in its Complaint as to these magnets. Therefore, the ALJ **ORDERS** Respondent to:

1.) Compile a list of all known SREM purchasers who purchased Respondent's SREMs without warnings (before May 2010);

[9] Tr. at 2570:15-17; CC Exh 48 and CC Exh 50.
[10] The parties agree the magnets have a flux index greater than 50 and are a small object.

2.) Compile a list of all known SREM purchasers that bought Respondent's product with any information suggesting the appropriate age of use to be twelve years and older;

3.) Provide the Agency with a copy of these compiled lists within ninety (90) days of this Order;

4.) Within one-hundred fifty (150) days of this Order, contact by electronic mail or by U.S. Postal Service First Class Mail, all known consumers and retailers identified in the compiled lists and:

a) provide specific warnings about SREM ingestion hazards;

b) provide the purchaser an opportunity to return the product to Respondent for a full refund, at the consumer's option, within two-hundred forty (240) days of this Order. In order to avail themselves of a full or partial refund pursuant to 15 U.S.C.A. § 2064, the consumer shall provide a substantially complete set of the purchased product, in substantially the same condition as it was when it was purchased, to the Respondent for any refund ordered herein. Any refund shall be limited by 15 U.S.C.A. § 2064;[11]

c) provide the Agency with information concerning all responses Respondent receives to the notifications within three-hundred thirty (330) days of this Order.

[11] Per 15 U.S.C. § 2064(d)(1)(C), the refund may be "(less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (i) at the time of public notice under subsection (c) of this section, or (ii) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs)."

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent did not design, manufacture, or market SREMs as a plaything for children under 14 years of age. See ASTM F963 § 3.1.81.

2. Upon review of all the factors set forth above, the ALJ finds SREMs, as sold by Respondent, are not defective under the factors set forth in 16 C.F.R. § 1115.4.

3. Lack of warnings associated with each individual SREM does not result from a fault, flaw, or irregularity.

4. The warnings placed on SREMs' packaging do not contain a fault, flaw, or irregularity which causes a weakness, failure, or inadequacy.

5. A review of the evidence shows the Agency failed to prove the existence of a fault, flaw, or irregularity in the warnings associated with Zen Magnets or Neoballs.

6. The Agency has not shown a risk of injury occurs as a result of the operation or use of the product and is not defective in this regard.

7. Proper use of Zen Magnets and Neoballs creates no exposure to danger whatsoever.

8. Un-ingested, liberated SREMs are harmless to U.S. consumers.

9. The Agency did prove *ingesting* SREMs creates a real risk of injury and can result in severe injury or death.

10. The Agency **DID NOT PROVE** SREMs, when sold with appropriate warnings, including proper age recommendations, are substantial product hazards.

11. SREMs do constitute a product hazard when sold without warnings and/or when the marketing advises children under the age of 14 may appropriately use the product.

ORDER

IT IS HEREBY ORDERED, within ninety (90) days of this Order, Respondent shall:

1.) Compile a list of all known SREM purchasers who purchased Respondent's SREMs without warnings (before May 2010).

2.) Compile a list of all known SREM purchasers that bought Respondent's product with a warning suggesting the appropriate age of use to be twelve years and older.

3.) Provide the Agency with a copy of these compiled lists.

IT IS FURTHER ORDERED, within one-hundred fifty (150) days of this Order, Respondent shall:

1.) Contact all known consumers and retailers identified in the compiled lists and:

a) provide specific warnings about SREM ingestion hazards; and

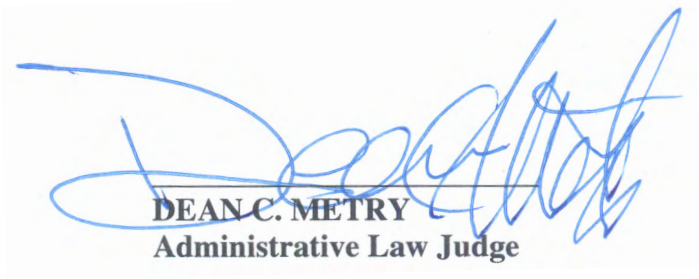
b) provide the purchaser an opportunity to return the product to Respondent for a full refund, as set forth above, provided that such action taken by the consumer to avail themselves of this remedy be completed within an additional ninety (90) days after notification. Notice provided as set forth in this order shall constitute real, actual and sufficient notice so that the time limits set herein are applicable. Any notice returned as an addressee having moved or unknown shall not serve to toll the time limit as the Agency is also Ordered and Adjudged to publish this Order of Recall on their official web site to inform consumers of the terms of this Decision. Further, Respondent shall post this Order of Recall on Zen Magnets and Neoballs web site. Any refund shall be limited by 15 U.S.C.A. § 2064.[12]

[12] Per 15 U.S.C. § 2064(d)(1)(C), the refund may be "(less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (i) at the time of public notice under

IT IS FURTHER ORDERED, within three-hundred thirty (330) days of this Order, Respondent shall provide the Agency with information concerning all responses Respondent receives to the notifications

IT IS SO ORDERED.

Done and dated this 25th day of March 2016, at Galveston, TX



DEAN C. METRY
Administrative Law Judge

subsection (c) of this section, or (ii) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs)."

ATTACHMENT A

WITNESS LIST

CPSC'S WITNESSES

1. Mr. Vincent Amodeo
2. Dr. James Paul Frantz
3. Dr. Laurence Steinberg
4. Dr. Robert Adam Noel
5. Ms. Kathleen Stralka
6. Ms. Christina Frederick

RESPONDENT'S WITNESSES

1. Dr. Boyd Farrell Edwards
2. Mr. Shihan Qu

ATTACHMENT B

EXHIBIT LIST

CPSC'S EXHIBITS

CC-1	Vincent J. Amodeo's Curriculum Vitae
CC-1A	Direct Testimony of Vincent Amodeo
CC-2	ASTM F-963-11, Standard Consumer Safety Specification for Toy Safety
CC-3	Small Parts Cylinder
CC-4	Various Samples of Zen Magnets
CC-4A	Sample of Spare Zen Magnets
CC-5	Sample of Green Neoballs
CC-5(2)	Sample of Neoballs in a Tin
CC-5A	Sample of Individual Neoballs Magnets
CC-6	Sample of Buckyballs
CC-6A	Sample of Spare Buckyballs Magnets
CC-7	CPSC Draft Product Safety Assessment Report of Zen Magnets 0665.12, Dated July 5, 2012 [ZENSTAR000008-000012]
CC-8	CPSC Draft Product Safety Assessment Report of Neoballs 0881.12, Dated 8/21/12 with Addendum Dated 12/20/12
CC-9	CPSC Draft Product Safety Assessment Report of Buckyballs 0668.12, Dated 6/21/12
CC-10	J. Paul Frantz's Curriculum Vitae
CC-10A	Direct Testimony of Dr. J. Paul Frantz
CC-11	Applied Safety + Ergonomics Expert Report of J. Paul Frantz, Ph.D., C.P.S.M., CPE, Dated 7/16/14

CC-11A	Box of Zen Magnets
CC-12	Screen Capture of a Twitter Feed Depicting Zen Magnets Being Used as Jewelry
CC-13	Screen Capture of www.zenmagnets.com Depicting Zen Magnets Being Used as Refrigerator Art
CC-14	Dr. Frantz's Magnet Drop Video
CC-15A	Still Frame from Magnet Drop Video
CC-15B	Still Frame from Magnet Drop Video
CC-16	Electronic Spreadsheet of Zen Magnet's Customer List
CC-17	Screen Capture of www.zenmagnets.com Depicting an Award of $25 Zen Credit to a 7-Year Old Named Little Kev
CC-18	Compilation of 95 Incident Reports of Ingestion of Magnet Balls, Including In-depth Investigations
CC-18.1	Andelin Incident Report and In-depth Investigation
CC-18.2	Becerra Incident Report and In-depth Investigation
CC-18.3	Becnel Incident Report
CC-18.4	Belilovsky Incident Report and In-depth Investigation
CC-18.5	Bell Incident Report
CC-18.6	Bjarnason Incident Report and In-depth Investigation
CC-18.7	Bruski Incident Report
CC-18.8	Bushnell In-depth Investigation
CC-18.9	Bustamante Incident Report and In-depth Investigation
CC-18.10	Calomarde Incident Report
CC-18.11	Cano Incident Report and In-depth Investigation
CC-18.12	Cantrell Incident Report and In-depth Investigation

CC-18.13	Cardenas Incident Report and In-depth Investigation
CC-18.14	Casteneda Incident Report
CC-18.15	Chaffin In-depth Investigation
CC-18.16	Clark Incident Report and In-depth Investigation
CC-18.17	Cornell Incident Report
CC-18.18	Cox Incident Report
CC-18.19	DelPrete In-depth Investigation
CC-18-20	Engle Incident Report and In-depth Investigation
CC-18.21	Garcia In-depth Investigation
CC-18.22	Gold Incident Report and In-depth Investigation
CC-18.23	Gutman Incident Report and In-depth Investigation
CC-18.24	Hinkamp In-depth Investigation
CC-18.25	Hoeft Incident Report and In-depth Investigation
CC-18.26	Jones Incident Report and In-depth Investigation
CC-18.27.1 & 18.27.2	Jordan Incident Report and In-depth Investigation
CC-18.28	Julian In-depth Investigation
CC-18.29	Lee Incident Report
CC-18.30	Leonard In-depth Investigation
CC-18.31	Levy Incident Report and In-depth Investigation
CC-18.32	Lewis In-depth Investigation
CC-18.33	Licata In-depth Investigation
CC-18.34	Lopez In-depth Investigation

CC-18.35	Marcusen In-depth Investigation
CC-18.36	Miner In-depth Investigation
CC-18.37	Mokhtar Incident Report and In-depth Investigation
CC-18.38	Moore Incident Report
CC-18.39	Moroes Incident Report
CC-18.40	Muller In-depth Investigation
CC-18.41	Norris-Calderon Incident Report and In-depth Investigation
CC-18.42	Plante In-depth Investigation
CC-18.43	Potts Incident Report
CC-18.44	Raff Incident Report and In-depth Investigation
CC-18.45	Robinson In-depth Investigation
CC-18.46	Roderman Incident Report
CC-18.47	Snagel In-depth Investigation
CC-18.48.1 - 18.48.6	Rivas In-depth Investigation
CC-18.49	Stinnett Incident Report and In-depth Investigation
CC-18.50	Strickland Incident Report and In-depth Investigation
CC-18.51	Tock Incident Report and In-depth Investigation
CC-18.52	Turner Incident Report
CC-18.53	Van Wyk Incident Report
CC-18.54	Vlahovich Incident Report and In-depth Investigation
CC-18.55	Wirth Incident Report
CC-18.56	Zgoda Incident Report and In-depth Investigation
CC-18.57	Incident Report I12A0103A

CC-18.58	Incident Report I12A0115A
CC-18.59	Incident Report I12B0056A
CC-18.60	Incident Report I1240361A
CC-18.61	Incident Report I12C0007A
CC-18.62	Incident Report I12C0067A
CC-18.63	Incident Report I1240384A
CC-18.64	Incident Report I1250121A
CC-18.65	Incident Report I1250277A
CC-18.66	Incident Report I1270520A
CC-18.67	Incident Report I1270520A (2)
CC-18.68	Incident Report I1270535A
CC-18.69	Incident Report I1280259A
CC-18.70	Incident Report I1280260A
CC-18.71	Incident Report I1280261A
CC-18.72	Incident Report I1280262A
CC-18.73	Incident Report I1280263A
CC-18.74	Incident Report I1280264A
CC-18.75	Incident Report I1280265A
CC-18.76	Incident Report I1280267A
CC-18.77	Incident Report I1280323A
CC-18.78	Incident Report I1280345A
CC-18.79	Incident Report I1280345A (2)
CC-18.80	Incident Report I1250577A

CC-18.81	Incident Report I1280509A
CC-18.82	Incident Report I1280581A
CC-18.83	Incident Report I1290011A
CC-18.84	Incident Report I1290532A
CC-18.85	Incident Report I13A0218A
CC-18.86	Incident Report I13A0219A
CC-18.87	Incident Report I13A0229A
CC-18.88	Incident Report I13A0230A
CC-18.89	Incident Report I13B0121A
CC-18.90	Incident Report I1390238A
CC-18.91	Incident Report I1440063A
CC-18.92	Incident Report I1440064A
CC-18.93	Incident Report X1270522A
CC-18.94	Incident Report Y1338550A
CC-18.95	Incident Report 120723CBB1859
CC-19	Lawrence Steinberg's Curriculum Vitae
CC-19A	Direct Expert Testimony of Dr. Laurence Steinberg
CC-20	Screen Capture of www.amazon.com Silver Dragees
CC-21	Piercing Magnets Video: http://www.youtube.com/watch?v=HbQ-BJHMPoQ
CC-22	YouTube Video, Willow Creates a Stir Fake Tongue Ring: http://www.youtube.com/watch?v=wLIUOrL15hE
CC-23	Preliminary NASPGHAN Rare Earth Magnet Ingestion Algorithm

CC-24	NASPGHAN Paper "Protecting Children from Magnet Ingestions"
CC-25	American Academy of Pediatrics News June 2012 Article: "Fatal Attraction: Small Magnets Causing Serious Injuries, Deaths in Children."
CC-26	Pamphlet, Neodymium Magnet Adult Desk Toys Are Associated with an Increase Rate of Magnet Ingestions in Children. A New Risk Factor for Ingestions in Older Children and Teenagers
CC-27	R. Adam Noel, M.D.'s Curriculum Vitae
CC-27A	Direct Expert Testimony of R. Adam Noel, M.D.
CC-28	"NASPGHAN Neodymium Magnet Ball Ingestion Survey Results" PowerPoint Presentation
CC-29	PowerPoint Slides of Graphs Summarizing Results for NASPGHAN Study on Magnet Ingestions
CC-30A–30E	Medical Records for Patient M
CC-31A-31C	Medical Records for Patient B
CC-32	Medical Records for Jozelyn Bustamante
CC-33	Email Exchange Dated 8/11/13 and 8/12/13
CC-34	Email Exchange Dated 1/15/11 and 1/18/11
CC-35	Email Exchange Dated 5/17/10 and 5/18/10
CC-36	Exhibit 7 from Dr. Noel's Deposition, Epidemiologic Investigation Report
CC-37	Pages 227-230 of Dr. Noel's Deposition
CC-38	Kathleen Stralka's Curriculum Vitae
CC-39	Memorandum from Sarah Garland, Ph.D. to Jonathan Midgett, Ph.D. Dated 6/25/14, "Update on NEISS Estimates and Reported Incidents Related to Ingestion of Magnets from High-powered Magnet Sets*"

CC-40	Spreadsheet Compilation of NEISS Records from 2009 Through 2013
CC-41	NEISS Coding Manual, January 2014
CC-42	NEISS Product Code Comparability Table, Updated January 2014
CC-43	Exploding Top Video url:https://www.youtube.com/watch?v-1xRoPmwlyCy
CC-44	Two-page Document "A Stroll through Possibilities" and Attached Warnings
CC-45	Screenshot - August 30, 2009 Website http://web.archive.org/web/20090830092449/http://zenmagnets.com
CC-46	Screenshot - October 8, 2011 Website http://web.archive.org/web/20111008184417/http://zenmagnets.com
CC-47	FAQ from Zen Website October 8, 2011 (Way Back Machine)
CC-48	FAQ from Zen Website November 3, 2011 (Way Back Machine)
CC-49	Capture of Zen Website Home Page October 11, 2012 (Way Back Machine)
CC-50	Capture of Zen FAQ October 11, 2012 (Way Back Machine)
CC-51	Capture of Zen Home Page November 7, 2013 (Way Back Machine)
CC-52	Capture of Zen Website FAQ December 12, 2013 (Way Back Machine)
CC-53	Responses to Interrogatories, Dated October 11, 2013 Marked, but Not Admitted into Evidence
CC-54	CPSC Notice of Non-Compliance to Zen Magnets, Dated October 11, 2011

CC-55	Affidavit of Shihan Qu, Dated May 16, 2012
CC-56	Affidavit of Shihan Qu, Dated May 24, 2011 Marked, but Not Admitted into Evidence
CC-57	Zen Full Report to Commission Dated May 29, 2012
CC-58	Capture of Super Smash Sculptures Contest (Zen Magnets Website Dated 9/11/14)
CC-59	Capture of Submission for Contest 41 (Zen Magnets Website Dated 9/11/14)
CC-60	Capture of Contest 14, Page 1 of 4 (Zen Site), Mini Sphere Race, 12/16/14
CC-61	Video of Zen Magnets Contest 14: Sphere Race Entry: Found at https://www.youtube.com/watch?v=ImhZNPplGSc
CC-62	Capture of Contest 14.5 (Zen Web Site) Sphere Race Results
CC-63	Capture of Zen Web Page for Gift Set, Taken 7/3/14 (Exhibit 8 from Deposition of Shihan Qu)
CC-64	Email from William Chen to Zen Magnets Dated 2/17/10
CC-65	Email Exchange between J. Fernando to Shihan Qu Dated June 13, 2010 and June 15, 2010
CC-66	Pages 188 and 189 from the Transcript of Shihan Qu's July 8, 2014 Deposition Marked, but Not Admitted into Evidence; Remarked as R-199
CC-67	Capture of Amazon Advertisement for Zen Magnets, Dated 6/1/12; Admitted for Limited Purpose to Show Only They Were Available
CC-68	Photo of Soldis Kiosk
CC-69	Photo of Products in Case at Soldis Kiosk
CC-70	Receipt for Undercover Purchase of Zen Magnets at Hobby Town

RESPONDENT'S EXHIBITS

R-1	Zen Magnet Gift Set
R-1A	Zen Magnet Gift Set
R-1B	Zen Magnet Booster Set
R-1C	Mailing Case, Armor, and the New Warning from the Zen Magnets Mandala Set
R-1D	Neoballs
R-2	Photograph of a Caged Bubble Star (Fig 1 in Edwards' Report)
R-3	Photograph of Angle Range Demonstration (Fig 2 in Edwards' Report)
R-4	Stable Configurations Diagram (Fig 3 in Edwards' Report)
R-5	Stable Configurations Photograph (Fig 4 in Edwards' Report)
R-6	Magnetic Field Diagram (Fig 5 in Edwards' Report)
R-7	Photograph of Simple Cubic Lattice (Fig 6 in Edwards' Report)
R-8	Photograph of the Simple Cubic Crystal Structure of Pyrite (Fig 7 in Edwards' Report)
R-9	Photograph of Hexagonal Lattice Built Using Zen Magnets (Fig 8 in Edwards' Report)
R-10	Photograph of the Hexagonal Crystal Structure of Red Beryl (Fig 9 in Edwards' Report)
R-11	Lattice Packings Diagram (Fig 10 in Edwards' Report)
R-12	Photograph of Hexagonally Close-Packed Lattice Made from Zen Magnets and Colored Neoballs (Fig 11 in Edwards' Report)

R-13	Photograph of the Hexagonal Close-Packed Crystal Structure of Titanium (Fig 12 in Edwards' Report)
R-14	Photograph of Face-Centered Cubic Lattice Made from Zen Magnets and Colored Neoballs (Fig 13 in Edwards' Report)
R-15	Photograph of the Face-Centered Cubic Crystal Structure of Halite, or Rock Salt (Fig 14 in Edwards' Report)
R-16	Photograph of the Face-Centered Cubic Crystal Structure of Gold (Fig 15 in Edwards' Report)
R-17	Side-View (a) and Top-View (b) Photographs of a Family of Diagonal Cubes (Fig 16 in Edwards' Report)
R-18	Photograph of Two Diagonal Cubes (Fig 17 in Edwards' Report)
R-19	Photograph of Platonic Solid Frames (Fig 18 in Edwards' Report)
R-20	Photograph of an Icosahedral Cluster Made with Zen Magnets (Fig 19 in Edwards' Report)
R-21	Photograph of Strain Reactivity Demonstration I (Fig 20 in Edwards' Report)
R-22	Photograph of Strain Reactivity Demonstration II (Fig 21 in Edwards' Report)
R-23	Photograph of a Motor Built Out of Magnet Spheres (Fig 22 in Edwards' Report)
R-24	Photograph of Amorphous Blob of Magnets (Fig 23 in Edwards' Report)
R-25	Photograph of Slip Mechanism Demonstration, Using Neoballs and Zen Magnets (Fig 24 in Edwards' Report)
R-26	Photograph of a Large 4,416-Magnet Cuboctahedron Frame and a Small 912-Magnet Cuboctahedron Frame (Fig 25 in Edwards' Report)
R-27	Photograph of a Demonstration of Cell Division Using Zen Magnets (Fig 26 in Edwards' Report)

R-28	Photograph of a Base-Pair DNA Model (Fig 27 in Edwards' Report)
R-29	Photograph of a Double Helix DNA Model (Fig 28 in Edwards' Report)
R-30	Photograph of a Small Icosahedron Frame (Fig 29 in Edwards' Report)
R-31	Photograph of a Large Rhombicosidodecahedron Frame (Fig 30 in Edwards' Report)
R-32	Photograph of a Tessellating Rhombic Dodecahedra (Fig 31 in Edwards' Report)
R-33	Photograph of Filled 2D Shapes (Fig 32 in Edwards' Report)
R-34	Photograph of Families of Filled 2D Shapes (Fig 33 in Edwards' Report)
R-35	Photograph of a Hollow Cube (Fig 34 in Edwards' Report)
R-36	Photograph of Platonic Solids Constructed Using Zometool (Fig 35 in Edwards' Report)
R-37	Photograph of a Hexagonal Lattice Constructed Using Zometool (Fig 36 in Edwards' Report)
R-38	Photograph of a Snub Dodecahedron Ball (Fig 37 in Edwards' Report)
R-39	Photograph of Train Constructed Using Zen Magnets (Fig 38 in Edwards' Report)
R-40	Photograph of a Rhombicosidodecahedron Constructed Using Zometool (Fig 39 in Edwards' Report)
R-41	Photograph of a Tetrahedron Constructed Using Zometool (Fig 40 in Edwards' Report)
R-42	Photograph of a Cube Constructed Using Zometool (Fig 41 in Edwards' Report)
R-43	Photograph of an Octahedron Constructed Using Zometool

	(Fig 42 in Edwards' Report)
R-44	Photograph of Face-Centered Cubic Lattice Constructed Using Zometool (Fig 43 in Edwards' Report)
R-45	Photograph of a Large Icosahedron Using 1260 Zen Magnets (Fig 44 in Edwards' Report)
R-46	Photograph of a Small Rhombicosidodecahedron (Fig 45 in Edwards' Report)
R-47	Photograph of Weak Magnet Structures (Fig 46 in Edwards' Report)
R-48	Not Offered
R-49	Picture of Fractal Progression (Fig 47 in Edwards' Report)
R-50	Photograph of a Tiling Pattern (Fig 48 in Edwards' Report)
R-51	Photograph of Tetrahedrons (Fig 49 in Edwards' Report)
R-52	Photograph of a Family of Icosahedra (Fig 50 in Edwards' Report)
R-53	Photograph of Group Theory Subunits (Fig 52 in Edwards' Report)
R-54	Popular Photographs from Zen Magnets Gallery, July 5, 2014 (Appendix B in Edwards' Report)
R-55	Education Guide Insert in Sets of Zen Magnets (Appendix C in Edwards' Report)
R-56	Video – Angle Strain 100 Trials Weak
R-57	Video – Angle Strain 100 Trials Zen
R-58	Video – Angle Strain Weak
R-59	Video – Angle Strain Zen
R-60	Video – Connections Weak

R-61	Video – Connections Zen
R-62	Video – Icosahedron Zen
R-63	Video – Lattice Defects Weak
R-64	Video – Lattice Defects Zen
R-65	Video – Lattices Weak
R-66	Video – Lattices Zen
R-67	Video – Playing with Plato
R-68	Video – Rhombicosidodecahedron Zen.
R-69	Video – Rhombicosidodecahedron Zometool
R-70	List of Popular YouTube Videos on Magnet Spheres, July 18, 2014 (Appendix D to Edwards' Report)
R-70A	Appendix E, Statements about Educational Utility, August 22, 2014 Admitted with Respect to the 14 Cooperative People Identified in Edwards' Report
R-71	Not Offered
R-72	Not Offered
R-73	Not Offered
R-74	Not Offered
R-75	July 10-11, 2013 Public Policy Polling National Survey Results
R-76	Not Offered
R-77	Not Offered
R-78	Not Offered
R-79	Pilot Study of Fatal ATV-Related Incidents Involving Passengers, dated August 2014 Marked, but Not Admitted into Evidence

R-80	Not Offered
R-81	CPSC Analysis: Toy-Related Deaths and Injuries Calendar Year 2012 Offered, but Not Admitted into Evidence
R-82	Not Offered
R-83	Not Offered
R-84	Not Offered
R-85	List of Incidents from NEISS, from 2009-2011 Offered/Withdrawn
R-86	Not Offered
R-87	CPSC Document, "FAQs: Children's Products," Printed from CPSC Website
R-88	CPSC Final Interpretive Rule: Interpretation of Children's Product Offered, but Not Admitted into Evidence
R-89	Not Offered
R-90	Not Offered
R-91	Not Offered
R-92	Not Offered
R-93	Not Offered
R-94	Not Offered
R-95	Not Offered
R-96	Not Offered
R-97	Not Offered
R-98	Not Offered
R-99	Not Offered

R-100	Not Offered
R-101	Not Offered
R-102	Not Offered
R-103	Not Offered
R-104	2014 Zen Measurement Audits
R-105	Contract for Magnet Production by and between Zen Magnets and Ningbo Bestway Magnet Company, in Written Chinese, Not Translated Marked, but Not Admitted into Evidence
R-106	Zen – Diameter Report for Bestway
R-107	Not Offered
R-108	Not Offered
R-109	Not Offered
R-110	Not Offered
R-111	CPSC Epidemiology NEISS Data from 2006 to 2013; Admitted Only as to 2009 – 2013
R-112	Not Offered
R-113	Not Offered
R-114	Not Offered
R-115	Not Offered
R-116	Not Offered
R-117	Summary Chart of CPSC Magnet Ingestion Incidents (Non NEISS)
R-117A	Readable Version of CPSC Magnet Ingestion Incidents
R-118	Not Offered

R-119	Not Offered
R-120	Not Offered
R-121	Not Offered
R-122	Not Offered
R-123	Not Offered
R-124	Readability-Score.com Screenshot of Flesch-Kincaid Grade Level of Zen Magnets Content vs. Buckyballs Admitted for Limited Purpose
R-125	Not Offered
R-126	Not Offered
R-127	Not Offered
R-128	Not Offered
R-129	Not Offered
R-130	CPSC Log of June 5, 2012 Meeting, Agenda, Sign-in Sheets, NASPGHAN Presentation of "High-powered Magnet Ingestions by Children" and Attachments
R-131	Not Offered
R-132	Zen Magnets CBS Outdoor Billboard Advertising Only Sheets 5 and 6 Admitted
R-133	Zen Magnets Internal Warning Sent to Marijuana Dispensaries and Head Shops
R-134	Not Offered
R-135	Not Offered
R-136	Not Offered
R-137	Video Called "Zen Magnets Gyroid" Offered, but Not Admitted into Evidence

R-138	Video of Contest between Buckyballs and Zen Magnets https://www.youtube.com/watch?v=Y_LPhHbMN4U
R-139	Video Called "Never Let Go of Childhood Wonder" [ZenMagnets.com] http://www.youtube.com/watch?v=wOv0AkphLhE
R-140	Memo from Greg Rogers Indicating Information Concerning Market Shares Offered, but Not Admitted into Evidence
R-141	Not Offered
R-142	Not Offered
R-143	Not Offered
R-144	Not Offered
R-145	Not Offered
R-146	Not Offered
R-147	Not Offered
R-148	Not Offered
R-149	Not Offered
R-150	Paper Insert Warning with Booster Sets Offered, but Not Admitted into Evidence
R-151	Not Offered
R-152	Not Offered
R-153	Not Offered
R-154	Dr. Boyd F. Edwards' Curriculum Vitae
R-154A	Direct Expert Testimony of Dr. Boyd Edwards
R-155	Expert Report: Education Value of Neodymium Magnet Spheres, by Dr. Boyd Edwards, Dated August 28, 2014; Appendix A of Report, Taking Shape with Zen Magnets,

	Dated December 31, 2012; and Appendix F of Report, List of Changes
R-156	Not Offered
R-157	Not Offered
R-158	Not Offered
R-159	Not Offered
R-160	Not Offered
R-161	Not Offered
R-162	Not Offered
R-163	Not Offered
R-164	Not Offered
R-165	Incident Report I1280509A
R-166	Not Offered
R-167	Not Offered
R-168	Not Offered
R-169	Not Offered
R-170	Not Offered
R-171	Not Offered
R-172	Not Offered
R-173	Not Offered
R-174	Not Offered
R-175	Not Offered
R-176	Not Offered

R-177	Spreadsheet Compiled by Dr. Qu Regarding the Number of Incidents Marked, but Not Admitted into Evidence
R-178	Not Offered
R-179	Not Offered
R-180	Not Offered
R-181	Not Offered
R-182	Not Offered
R-183	Not Offered
R-184	Not Offered
R-185	Not Offered
R-186	Not Offered
R-187	Not Offered
R-188	Deposition Excerpts from Dr. Noel
R-189	Not Offered
R-190	Google Consumer Surveys Poll Offered, but Not Admitted into Evidence
R-191	E-Filed Articles of Organization for Zen Magnets LLC
R-192	Copy of the Neoballs Warning
R-193	Zen Magnets Screen Shot Warning
R-194	Enhancing Private YouTube Video http://youtu.be/H3o7yqleqv8 Admitted Without Audio
R-195	Selected Pictures of the Zen Gallery
R-196	Selected Pictures from Zen Contests

R-197	Merchandise Sale and Purchase Contract between Zen Magnets LLC and Lightshade
R-198	Merchandise Sale and Purchase Contract between Zen Magnets LLC and Colpar's Hobby Town
R-199	Pages 188 and 189 from the Transcript of Shihan Qu's July 8, 2014 Deposition
R-200	$43.60 Receipt from Soldis LLC, Time Stamped 12:53:27, Dated 12/12/2014 and a Business Card from Soldis Brand Products

JOINT NOTICE, STIPULATED EXHIBITS

CPSC'S EXHIBITS

A	Stipulated Testimony of Soulafa Amer
B	Stipulated Testimony of Dr. Lisa Andelin
C	Stipulated Testimony of Kelly E. Bruski
D	Stipulated Testimony of Gloria Bustamante
E	Stipulated Testimony of Amber Chaffin
F	Stipulated Testimony of Hunter Gold
G	Stipulated Testimony of Jason Hoeft
H	Stipulated Testimony of Meaghin Jordan
I	Stipulated Testimony of Kim Licata
J	Stipulated Testimony of Barbara Rivas
K	Stipulated Testimony of Dr. J. Scott Somerset

RESPONDENT'S EXHIBITS

L	Stipulated Testimony of Maureen Colclough Bayless
M	Stipulated Testimony of Cale Gibbard
N	Stipulated Testimony of Abdul Ibrahim
O	Stipulated Testimony of Michele LaForge
P	Stipulated Testimony of Adam Love
Q	Stipulated Testimony of Curtis McClive
R	Stipulated Testimony of David Nicholaeff
S	Stipulated Testimony of Stephen Niezgoda
T	Stipulated Testimony of Dr. Anthony Pelletier
U	Stipulated Testimony of Lee Walsh
V	Stipulated Foundation for and Authenticity of Respondent's Public Policy Poll
W	Stipulated Authenticity of Respondent's Google Consumer Survey