

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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In the matter of)
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ZEN MAGNETS, LLC)
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Respondent.)
_____)

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CPSC DOCKET NO. 12-12

ANSWER

Respondent, Zen Magnets, LLC, (hereafter “Zen”), through counsel, and pursuant to 16 C.F.R. Part 1025.12, answers the numbered paragraphs of the Complaint seriatim, as follows:

1. Zen admits that it imports and distributes Zen Magnets®, but denies all explicit and implicit allegations in ¶1. Zen specifically denies that Zen Magnets® present a substantial risk of injury. The allegations relating to 15 U.S.C. § 2064 state legal conclusions to which no response is required. To the extent a response may be required, Zen denies the allegations relating to 15 U.S.C. § 2064.

2. The allegation in ¶2 states a legal conclusion to which no response is required. To the extent a response may be required, Zen denies the allegation in ¶2. Further Respondent Zen is without knowledge or information sufficient to form a

belief as to the truth of the allegation in ¶2, and therefore denies same.

3. The allegations in ¶3 state legal conclusion to which no response is required. To the extent a response may be required, Zen denies the allegations in ¶3. Further, Respondent Zen is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶3, and therefore denies same.

4. The allegations in ¶4 state legal conclusion to which no response is required. To the extent responses may be required, Zen denies the allegations in ¶4.

5. Zen denies that it is a corporation. Zen is a Colorado Limited Liability Company, organized pursuant to the laws of Colorado. Zen admits the other allegations set forth in ¶5.

6. Zen admits that it is an importer and distributor of Zen Magnets®, but asserts that Zen Magnets is a registered trademark, not an unregistered trademark as implicitly alleged in ¶¶1 and 6 and throughout the Complaint.

7. The allegations in ¶7 state legal conclusions to which no response is required. To the extent responses may be required, Zen denies the allegations in ¶7. Further Zen is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶7, and therefore denies same.

8. ¶8 contains four separate allegations contained in four sentences. Zen denies all explicit and implicit allegations contained in ¶8 that are not specifically

admitted in ¶¶8a through 8d below.

8a. As to the first sentence in ¶8, Zen admits that it offers Zen Magnets® for sale to consumers for their personal use, and has sold Zen Magnets® to teachers for controlled use in their classrooms. Otherwise, Zen denies any implicit or explicit allegation contained in the remainder of the first sentence. Zen specifically and affirmatively asserts that it does not market and has not marketed Zen Magnets® as toys to children.

8b. Zen admits that Zen Magnets® consist of small, individual magnets that are packaged as aggregated masses in containers of varying size.

8c. Zen admits that these containers hold anywhere from 72 to 1,728 small magnets.

8d. Zen denies that the size of Zen Magnets® range in size from 5.03 mm to an unspecified diameter, and asserts that Zen Magnets® range in size from 4.99 mm to 5.01 mm.

9. Zen admits the allegations in ¶9.

10. Zen admits the allegations in ¶10.

11. Zen admits the allegations in ¶11.

12. In response to the allegations in ¶12, Zen admits that advertising of Zen Magnets® has contained, inter alia, the statements, “fun to play with” and “look

good on cute people,” but denies that Zen Magnets® were advertised and marketed as toys to children. At no time were Zen Magnets® designed for or marketed as toys to children.

13. Zen denies the allegations in ¶13. Zen Magnets® have always been marketed as a science kit, not only beginning in 2011.

14. Zen admits the allegations in ¶14.

15. Zen admits the allegations in ¶15.

16. Zen denies the allegations in ¶16, and specifically denies that Zen Magnets® poses any risk when used as intended. The events described in ¶16 are speculation and are not properly foreseeable uses of Zen Magnets®.

17. Zen denies the allegations in ¶17. The allegations do not reference any particular incident, but are a speculative list of the potential harms that allegedly could occur if two or more magnets are swallowed.

18. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegation in ¶18 and therefore denies those allegations. The allegations in ¶18 are speculative, replete with hearsay from unidentified “medical professionals,” and fail to describe any actual incident involving Zen Magnets, LLC.

19. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegation in ¶19 and therefore denies those allegations. The

allegations in ¶19 are speculative and replete with hearsay from unidentified “medical professionals”.

20. Zen denies the allegations in ¶20. The allegations do not reference any particular incident, but are speculative list of the potential harms that allegedly could occur if two or more magnets are swallowed.

21. Zen denies the allegations in ¶21. The allegations do not reference any particular incident, but rather appear to be a speculative list of the potential harms that allegedly could occur if two or more magnets are swallowed.

COUNT 1

22. Zen hereby incorporates by reference, as if fully set forth herein, its responses to ¶¶1 through 21 of the Complaint. ¶22 of the Complaint is an incorporation paragraph and to the degree it incorporates allegations not heretofore denied, those allegations are denied.

23. Zen denies the allegations in ¶23.

24. Zen denies the allegations in ¶24.

25. Zen denies the allegations in ¶25.

26. Zen denies any implied allegations of ¶26. Zen states that the warning included with Zen Magnets® contained, inter alia, the alleged text, but denies that the concluding sentence of the warning was “But really, it’s whatever age at which a

person stops swallowing non-foods.” The warning text referred to in ¶26 and ¶27 are continuous, and have been arbitrarily separated.

27. Zen denies the implied allegations set forth in ¶27. Zen states that the warning included with Zen Magnets® contained, inter alia, the language quoted. However, Zen denies that the text was the entire warning. The warning text referred to in ¶26 and ¶27 are continuous, and have been arbitrarily separated.

28. Zen admits ¶28 in so far that the CPSC issued a Notice of Noncompliance in October 2011. However, Zen denies that Zen Magnets® failed to comply with any alleged requirements.

29. Zen admits ¶29 in so far as the CPSC issued a public safety alert warning in November 2011. Zen states that the public safety alert warning speaks for itself.

30. Zen denies the allegations in ¶30. Zen’s website did contain the necessary warnings.

31. Zen denies the allegations in ¶31. There is no recorded case of Zen’s product being ingested.

32. Zen denies the allegations in ¶32. The allegations are speculative and do not reflect any evidence of actual cases involving Zen Magnets®.

33. In response to the allegations in ¶33, Zen admits that it is not feasible to attach a warning to each individual magnet, but denies the remaining allegations in

¶33.

34. Zen denies the allegations in ¶34.

35. Zen denies the allegations in ¶35.

36. Zen denies the allegations in ¶36.

COUNT II

37. Zen hereby incorporates by reference, as if fully set forth herein, its responses to ¶¶1 through 36 of the Complaint. ¶37 of the Complaint is an incorporation paragraph and to the degree it incorporates allegations not heretofore denied, those allegations are denied.

38. Zen denies the allegations in ¶38 and further responds that the allegation that the Subject Products “do not operate exclusively as intended” is unintelligible.

39. Zen denies the allegations in ¶39 and affirmatively asserts that there is no causal relationship between the attractiveness of the magnets to children and any desire to ingest them.

40. Zen denies the allegations in ¶40.

41. Zen denies the allegations in ¶41 and affirmatively asserts that ¶41 fails to draw a causal link between any attraction of the magnets to a desire to ingest them.

42. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegation in ¶42. Zen further responds that any risk of ingestion can

only occur if clear, conspicuous warnings prior to purchase are ignored and the products are misused. Further, there is no allegation of causation between the attraction of the magnet and the risk of ingestion.

43. Zen denies the allegations in ¶43. Zen further responds that the allegation that the Subject Products “do not act solely as adult products or manipulatives,” is unintelligible.

44. Zen denies the allegations in ¶44.

45. In response to the allegations in ¶45, Zen admits that Zen Magnets® marketing contained, inter alia, the statements “fun to play with” and “look good on cute people,” but denies that either of these statements read out of context or even standing alone suggests Zen Magnets® should be used as toys.

46. Zen admits the allegations in ¶46.

47. Zen denies all of the allegations in ¶47.

48. Zen denies the allegations in ¶48.

Count III

49. Zen hereby incorporates by reference, as if fully set forth herein, its responses to ¶¶1 through 48 of the Complaint. ¶49 of the Complaint is an incorporation paragraph and to the degree it incorporates allegations not heretofore denied, those allegations are denied.

50. Zen denies the allegations in ¶50. Zen further responds that the allegation that the Subject Products fail “to operate as intended” is unintelligible.

51. Zen denies the allegations in ¶51.

52. In response to the allegations in ¶52, Zen admits that it has not agreed to voluntarily stop selling and to recall Zen Magnets®. Zen further responds that, prior to the issuance of the Complaint or any order of the Commission or court, the CPSC staff, without prior notice to Zen, contacted major retailers whom the staff knew, based on confidential information provided by Zen, were sellers of Zen Magnets®, and requested that they stop selling these products immediately.

53. Zen denies the allegations in the unnumbered paragraph immediately following ¶52, and denies that the CPSC is entitled to any of the relief sought.

54. Zen denies any and all allegations of the Complaint not specifically admitted herein.

AFFIRMATIVE DEFENSES

1. Zen incorporates ¶¶1 through 54 above as if set forth fully herein.
2. The Complaint fails to allege any claims for which relief may be granted.
3. The CPSC and its Complaint Counsel have failed to adhere to the rule-making procedures and have not found sufficient evidence to find that Zen Magnets® actually create a substantial risk of injury to the public.

4. The CPSC is basing its Complaint entirely on findings and evidence from a completely different company.

5. Zen Magnets, LLC has not had one incident or complaint against it of the kind alleged in the Complaint.

6. At all material times, Zen has marketed Zen Magnets® to adults and young adults as a science kit in compliance with FR ASTM F963. In a recent CPSC webcast, the CPSC itself states that CPSC staff lists the recommended age for magnet spheres as 9+. Prior to October, 2011, Zen's age recommendation was 12+, which is more conservative than the CPSC itself. Since October, 2011, Zen's marketing tracks the language of the federal regulations. At no time were Zen Magnets® marketed as toys to children.

7. The allegations in the Complaint fail to establish that either Zen Magnets® contains any defect or constitutes a substantial product hazard within the meaning of Section 15(a)(2) of the Consumer Product Safety Act (15 U.S.C. § 2064(a)(2)). More specifically, there is no fault, flaw, or irregularity that causes weakness, failure or inadequacy in the form or function of Zen Magnets®, nor is there any inadequacy or flaw in the contents, construction, finish, packaging, warnings or instructions of Zen Magnets®. Moreover, Zen Magnets® do not create a substantial risk of injury to the public.

8. There is no applicable rule, regulation, standard or ban with which Zen Magnets® fails to comply.

9. The Complaint is arbitrary and capricious as it is not based on any reasonable assessment of risk and is facially inconsistent with the CPSC's own mandatory standards.

10. The Complaint fails to allege any causal link between the alleged hazard to children (ingesting the magnets), ignoring that Zen Magnets® are not marketed as toys to children, and the attraction of the magnets to children.

11. Any alleged risk of ingestion can occur only if clear, conspicuous warnings, made available to any consumer prior to purchase, are ignored and the products are misused.

12. The procedure employed by the CPSC in determining whether to file the Complaint against Zen violated the CPSC's own regulations and resulted in a violation of Zen's rights to due process.

13. The allegations in the Complaint are speculative, do not relate to actual incidents involving Zen or the Zen Magnets®, and distort the commercial purpose of the product in question.

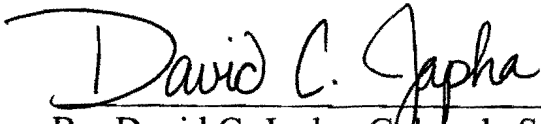
14. The CPSC failed to exhaust its own administrative remedies prior to filing the Complaint against Zen.

WHEREFORE Zen Magnets, LLC respectfully requests that the Complaint be dismissed.

Date August 28, 2012

Respectfully Submitted,

THE LAW OFFICES OF DAVID C. JAPHA, P.C.



By: David C. Japha, Colorado State Bar #14434
950 S. Cherry Street, Ste. 912
Denver, CO 80246
(303) 964-9500
Fax: 1-866-260-7454

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Answer on the following via email on this 28th day of August, 2012:

Ms. Mary Murphy, Assistant General Counsel
Ms. Jennifer Argarbight, Trial Attorney
Ms. Sarah Wang, Trial Attorney
Complaint Counsel
Division of Compliance
Office of the General Counsel
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
via email to: Mmurphy@cpsc.gov
Jargabright@cpsc.gov
Swang@cpsc.gov

