

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
)	CPSC Docket No. 12-2
ZEN MAGNETS, LLC,)	
)	
Respondent.)	
)	

**JOINT STATEMENT REGARDING FACTUAL AND LEGAL ISSUES IN DISPUTE
REGARDING THE DRAFT ACTION PLAN AND DRAFT PUBLIC NOTIFICATION**

Pursuant to the Commission’s Final Decision and Order (“FDO”) issued October 26, 2017, the parties hereby submit this Joint Statement to the Commission Regarding Factual and Legal Issues in Dispute Regarding the Draft Action Plan and the Draft Public Notification.

BACKGROUND

On November 6, 2017, Complaint Counsel submitted draft Public Notifications to Respondent as required by the FDO. (Exhibit A). The draft Public Notifications contained the nine elements required by the FDO including:

- 1) A joint news release from the Commission and the Respondent;
- 2) A video news release;
- 3) A recall notice to be posted prominently and for an extended period of time on all of Respondent’s Internet websites;
- 4) A recall notice or similar communication to appear prominently and for an extended period of time on every social media platform used by Respondent, including but not limited to, Google+, YouTube, Twitter, Reddit, Flickr, Facebook, and Internet blogs;
- 5) Direct notice via first class mail and electronic mail to each third party Internet website on which Respondent placed the Subject Products for sale;
- 6) Direct notice via first-class mail and electronic mail to each manufacturer, distributor, and retailer, including, but not limited to, marijuana dispensaries and head shops, of the Subject Products;

- 7) Recall poster to be provided with each direct notice sent to retailers with instructions regarding posting;
- 8) Direct notice via first-class mail and electronic mail to each third party Internet platform on which the Subject Products may be sold by persons other than Respondent, including but not limited to eBay; and
- 9) Direct notice via first class mail and electronic mail to each person whom Respondent knows such product was delivered or sold.

On November 6, 2016, Respondent submitted a draft Action Plan to Complaint Counsel.

(Exhibit B.) The draft Action Plan contained Respondent's plan to provide for a refund of the purchase price of the Subject Products that considered:

- 1) The generally accepted useful life of the magnets;
- 2) The original cost paid by consumers;
- 3) Incentives to encourage returns;
- 4) Whether and how many magnets should be returned by consumers to qualify for a refund;
- 5) The timing and duration of any refund;
- 6) Shipping or other costs associated with returns; and
- 7) The limits, if any, of the refund.

On November 15, 2017, Complaint Counsel submitted to Zen written responses and objections to Zen's draft Action Plan. (Exhibit C).

On November 16, 2017, Respondent submitted to Complaint Counsel written responses and objections to the draft Public Notifications. (Exhibit D).

On November 21, 2017, the parties conferred in an effort to resolve Zen's objections to the draft Public Notifications and Complaint Counsel's objections to the draft Action Plan. The parties were able to resolve some, but not all of the issues. The points of disagreement are set forth below.

A. OUTSTANDING OBJECTIONS TO THE DRAFT NOTIFICATION DOCUMENTS

When the parties met and conferred on November 21, 2017, Complaint Counsel agreed to some of Zen's suggested edits to the draft Public Notifications. A copy of Complaint Counsel's proposed Public Notifications, included changes agreed to when the parties met and conferred, are attached at Exhibit E1-9. The Public Notifications attached at Exhibit E1-9 include notations stating where Zen continues to object to Complaint Counsel's proposed Public Notifications.

1. Joint press release (Exhibit E1)

Points of disagreement:

Manufacturer Name

Zen objects to stating the name of the foreign manufacturer, contending that the manufacturer's identity is not public information and is a trade secret. Zen states that it imported the Subject Products and then assembled them in their packaging, and that in addition there were several overseas manufacturers who manufactured the magnets and packaging.

Complaint Counsel submits that foreign manufacturers of the Subject Products must be identified in the press release. Identification of foreign manufacturers is required pursuant to 16 C.F.R. § 1115.27(h) ("a recall notice must identify the foreign manufacturer and the United States importer"). Complaint Counsel agrees that Zen should be identified as the importer in the press release, but that the foreign manufacturers must also be stated.

Zen has not provided Complaint Counsel with the names of all foreign manufacturers of the Subject Products, but states that it will provide the names of those manufacturers if the Commission so orders.

Hazard Description

In the Hazard section of the press release, Zen proposes inserting the word “perhaps” in the last line before the word “death.” Complaint Counsel disagrees, because the Subject Products present a risk of death. *See* FDO at 3; 16 C.F.R. § 1115.27(f)(2) (recall notice must clearly and concisely state the type of hazard or risk, including the risk of “death”).

Incidents/Injuries

In the Incidents/Injuries section, Zen proposes inserting the following bolded words in the last line of that section: “a 19-month old girl died after ingesting high powered magnets, **though a direct causal link is not certain.**” Complaint Counsel disagrees, because the Commission found that the girl’s death was caused by SREM ingestion. FDO at 24 (“a 19-month-old girl died as a result of ischemic bowel from SREMs located in the small intestine,” citing “conclusion by medical examiner who performed the autopsy on Patient A that “the cause of death was ischemic bowel due to magnet ingestion”).

Dates of Sale

Zen proposes changing the sale dates to “between 2009 and 2011.” Complaint Counsel objects because the Subject Products are defined as all Zen Magnets and Neoballs sold *since* “2009 and 2011, respectively.” FDO at 1. This includes all Subject Products sold through the date that the recall is announced. All Zen Magnets and Neoballs create the same risk of harm regardless of packaging and warnings, and the FDO requires all Subject Products be recalled. FDO at 30-34, 46, 49.

2. Video news release (Exhibit E2)

Complaint Counsel sent Zen a video news release prepared by the Office of Communications. A CD containing the new release is attached to this pleading.

Zen objects to the content of the video release, and proposes an alternate youtube video that will educate the public on the hazard of magnets. *See Zen Magnets' Objections to CPSC Draft Action Plan, Exhibit 2 (attached here as Exh. D).* Complaint Counsel does not agree with Zen's proposal, because the purpose of the video news release is to inform the public that they should return the Subject Products, not an educational announcement about how to use the Subject Products. *See 16 C.F.R. § 1115.27(m)* (recall notice "must contain a clear and concise statement" of the remedy).

3. Recall Notice for Internet Websites (Exhibit E3)

Zen proposed to insert the words "genuine" in the first line before Zen Magnets and to insert "sold by Zen Magnets LLC" after Neoballs in the first line. Complaint Counsel does not agree to the edits proposed by Zen because consumers may have purchased Subject Products through retailers, not directly from Respondent. Zen's proposed language suggests that some consumers may be denied a remedy if they did not purchase directly sold by Respondent. Complaint Counsel objects to the term "genuine" because it is extraneous language that suggests that consumers bear a burden of proof beyond the requirements of other typical recalls announced by the Commission. *See 16 C.F.R. § 1115.27(c)* (description should be limited to a "clear and concise" statement). Respondent maintains a database of the vast majority of sales of the Subject Products that will allow it to confirm whether a consumer purchased the Subject Products directly from Respondent.

4. Recall Notice—Social Media (Exhibit E4)

No objections.

5. Direct Notice to Third Party Retailers (Exhibit E5)

Zen proposes changing “sometime in the past few years” to “between 2009 and 2011.” Complaint Counsel objects because the Subject Products are defined as all Zen Magnets and Neoballs sold *since* “2009 and 2011, respectively.” FDO at 1. This includes all Subject Products sold through the date that the recall is announced. All Zen Magnets and Neoballs create the same risk of harm regardless of packaging and warnings, and the FDO requires all Subject Products be recalled. FDO at 30-34, 46, 49.

In the paragraph entitled Reason for the Recall, Zen proposes that the sentence that states: “The magnets create a risk of injury or death to younger children and teens when swallowed, either accidentally or intentionally,” should instead read: “The magnets present a substantial risk of injury to children if swallowed, either accidentally or intentionally.” Complaint Counsel disagrees with Zen’s proposed edits. The hazard description should clearly state the risk of death. *See* FDO at 3; 16 C.F.R. § 1115.27(f)(2) (recall notice must clearly and concisely state the type of hazard or risk, including the risk of “death”). Consumers also should be informed that this risk applies to teenagers, who consumers might not expect to be at risk from the hazard. *See* FDO at 32 (caregivers of older children may not realize the hidden hazard, believing “their tween or teen is old enough to know not to intentionally swallow SREMs”).

6. Direct Notice—Manufacturer and Retailer Notice (Exhibit E6)

Zen proposes that no notice be given to foreign manufacturers, stating that Zen is the manufacturer because it imports the Subject Products and then puts them into the product packaging. Complaint Counsel disagrees, because the Commission ordered that Zen notify

“each manufacturer.” FDO at 50. While Zen is the importer, the products are manufactured by manufacturers in China and those manufacturers should be notified of the recall.

Zen also raises the same concerns to the sale dates and Reason for the Recall as stated for the Direct Notice to Third Party Retailers (Exhibit E5) and Complaint Counsel interposes the same objections.

7. Recall Poster (Exhibit E7)

Zen proposes to state “medical treatment” rather than surgery in the second paragraph of the Hazard section. Zen states that the trial transcripts reflect that in 21% of cases, no medical intervention was required. Other cases require noninvasive treatment, and invasive treatment in yet other circumstances. The distinction between surgery and other forms of medical intervention is something that Zen feels is important and is clearly reflected in the administrative record. Complaint Counsel disagrees, because “surgery” more accurately conveys the severe risk poses by the Subject Products. In fact, the Commission made specific findings that “if SREMs become lodged in the digestive tract, intervention, usually through endoscopy, colonoscopy or abdominal surgery, is necessary. FDO at 26.

8. Direct Notice to Third Party Platformers (Exhibit E8)

Zen raises the same objections as it raised with regard to Direct Notice to Third Party Retailers and Complaint Counsel has the same objections.

9. Direct Notice to Consumers (Exhibit E9)

Zen proposes changing the sale dates to “between 2009 and 2011.” Complaint Counsel objects because the Subject Products are defined as all Zen Magnets and Neoballs sold *since* “2009 and 2011, respectively.” FDO at 1. This includes all Subject Products sold through the date that the recall is announced. All Zen Magnets and Neoballs create the same risk of harm

regardless of packaging and warnings, and the FDO requires all Subject Products be recalled. FDO at 30-34, 46, 49.

Zen has withdrawn the poster it initially proposed to be sent with this notice.

B. OUTSTANDING OBJECTIONS TO THE DRAFT ACTION PLAN (Exhibit F)

1. Who shall receive the refund.

Respondent proposed that: “The refund shall apply to all customers who purchased Zen Magnets or Neoballs on Respondent’s websites, Neoballs.com and ZenMagnets.com, through third party internet retailers, and at retail outlets.”

Complaint Counsel proposed that: “The refund shall apply to all customers who purchased Zen Magnets or Neoballs on Respondent’s websites (neoballs.com, and zenmagnets.com and any other sites Zen has operated, if any), through third party internet retailers, and at retail outlets. In addition, all current owners of the Subject Products should receive a refund even if they are not the original purchasers (for example, if they received the item as a gift).

Respondent does not agree to Complaint Counsel’s proposed terms.

2. The amount of the refund.

a. Useful life. Respondent proposed terms and conditions of the refund that would include a refund for magnets returned within the generally accepted useful life of the magnets, which Zen proposes is 6 months for Zen Magnets and 4 weeks to 3 months for Neoballs.

Complaint Counsel proposed that a full refund is appropriate in this case, and based on a recent assessment by CPSC technical staff, disputes the factual predicate underpinning the calculation of the useful life of the Subject Products put forth by Zen. The useful life of the magnets is not conditioned upon the integrity of the coatings but rather the strength of the

magnets. Zen has stated on its website that the magnets will retain their strong magnetism for many years and that “demagnetization due to time alone is about 5% in a human lifetime.” Zen further stated on its website that it would require extreme conditions such as “bak[ing] them” or “shoot[ing] them out of a BB gun” to “weaken[.]” this magnetism. Complaint Counsel believes that it is unlikely that consumers will subject the Subject Products to such extreme conditions. Zen’s statements about the substantial longevity of its magnets comport with the expected longevity of rare-earth magnets in general. Rare earth magnets are among the strongest available and hold their magnetism for many years, with estimated loss of magnetism on the order of only a few percent over the course of several decades or longer. Accordingly, Complaint Counsel submits that the Subject Products will retain their magnetism for many years, and will continue to pose a hazard to children even if their magnetism is reduced or their coatings are less shiny or if the color coating shows wear. Complaint Counsel proposed a full refund of the Subject Products.

b. Cost of each magnets. Respondent proposed that the magnets price range from 10 to 18 cents per magnet. Complaint Counsel objected to that calculation, noting that in the FDO the Commission found that the Subject Products were sold at prices of \$12.65 for a 72 piece set, \$32.98 to \$38.24 for the 216 piece set, and up to \$263.85 for the 1728 piece set, and that they could be purchased individually for 20 cents per magnet.

After a conference call on November 21, 2017, Respondent agreed with Complaint Counsel’s position on this issue.

c. Incentives to encourage returns.

Zen proposes to offer a full refund to consumers who purchased the Subject Products within the past 180 days, excluding original shipping costs. Zen further offers to provide

consumers with coupons for twenty percent off of other products to incentivize customers to return the Subject Products, and will offer customers the opportunity to enter a contest to win a poster.

Complaint Counsel objected to these terms, noting that consumers are more likely to participate in a recall if they receive a substantial refund. Consumers are more likely to participate in a recall if they are compensated for the full purchase price of the product. Complaint Counsel also disagrees that a full refund should be limited to consumers who purchased the Subject Products within the last 180 days. Zen has provided no justification to unduly restrict the refund to consumers who purchased within that time frame. Complaint Counsel submits that all consumers should be afforded the same incentive to participate in the recall given that the Subject Products retain their strong magnetism for many years and thus present the same hazard to children. Therefore, this factor weighs in favor of a full refund for all consumers.

The parties have been unable to reach agreement on this issue.

d. Whether and how many magnets should be returned by consumers to qualify for a refund

Zen proposed offering a refund to consumers who return at least 50 percent of the magnets.

Complaint Counsel agreed with Respondent that Subject Products owners who return at least 50% of a set should be entitled to a return of the full purchase price of the products. Consumers who return less than a full set, however, should be entitled to a prorated refund based on the percentage of magnets returned (for example, a return of 54 magnets from a set of 216 magnets would result in a refund of 25% of the full purchase price of the set).

Respondent agreed with Complaint Counsel's proposal, so the parties have reached an agreement on this issue.

e. The Timing and Duration of any refund

Zen offers to provide a refund to consumers for 6 months after the recall is announced.

Complaint Counsel submits that such a limited time frame is unacceptable. Instead, consumers should be allowed 2 years to return the magnets for a full or partial refund. At the conclusion of the 2 years, Zen should consult with the Office of Compliance at which time staff will determine (based on the rate of return, number of recalled products still in circulation, and other relevant factors), whether Zen should continue to offer refunds to consumers, and how long the refund program should continue.

The parties have been unable to reach agreement on this issue.

f. Shipping and other costs associated with the returns.

Zen offered to reimburse consumers for first class package service only. Complaint Counsel disagreed: some returns may be too heavy to qualify for first class shipping and would thus disincentivize some consumers from participating in the recall. *See* U.S.P.S. website, <https://www.usps.com/ship/first-class-mail.htm> (maximum first class parcel weight is 13 ounces).

At a conference call on November 21, 2017, Zen agreed with Complaint Counsel's position on this matter. The parties have thus reached agreement on this issue.

g. The limits of the refund.

Zen has proposed a refund program that provides that consumers who purchased the magnets more than 180 days ago or who return less than 50 percent of a set will only be entitled to a refund if Zen determines that the magnets are returned in "like new condition and in proper

working order.” Zen also requires that consumers provide “the original order information or packaging for proof of purchase.”

Complaint Counsel objected to this proposal, noting that the restrictions will discourage consumers from taking advantage of the recall and unfairly exclude the majority of consumers from eligibility. The Subject Products maintain their strong magnetism for decades, continuing to pose a hazard whether or not Zen deems them “like-new” or “proper.” The Subject Products pose a risk due to their magnetic strength, whether or not a magnet retains a uniformly “proper” color or “like-new” shiny coating.

Zen also proposed a condition on its refund that would entitle consumers who return less than 50 percent of the magnets purchased to a prorated refund. Complaint Counsel agrees with Zen that anyone who returns less than 50% of a set may receive a prorated refund based on the amount returned. However, this refund shall be based on the full purchase price of the product. This will encourage consumers to return as many magnets as they can, even if some have been lost. It will also encourage consumers to return additional Subject Product magnets if they later find magnets that have become separated from sets.

However, Complaint Counsel strongly disagrees that consumers must present the original packaging or original order information to receive a refund. Many consumers do not retain a product’s original packaging, and it is unlikely that consumers of a product sold as far back as 2009 would have retained such materials. In addition, Zen maintains an electronic database of online sales and is able to confirm a product’s purchaser without the original order form. Zen’s restrictions on returns could very likely preclude consumers who purchased the Subject Products at a retailer or who received the item as a gift from participating in the recall.

Complaint Counsel suggested that instead of requiring original order documentation, Zen may request a written statement from consumers affirming that they are returning the Subject Products, as long as that does not place an undue burden on the consumer (for example, consumers should not be required to obtain or pay for the services of a notary).

Following a conference call on November 21, 2017, Zen proposed that all claims be made in writing and accompanied by proof of purchase, which shall consist of a receipt showing that the purchase was made in the United States or an affidavit showing the same executed under 18 U.S.C. § 1001, acknowledging the purchase of the Subject Products in the United States, the place of purchase, and the purchase price. Complaint Counsel does not agree that those conditions are acceptable. In particular, consumers should be permitted to affirm that they are returning the Subject Products without having to submit a notarized affidavit, which would burden consumers by requiring them to find and pay for the services of a notary to submit an affidavit.

The parties have not reached agreement on these specific issues relating to the limits of the refund.

3. Additional Elements in the Action Plan

Complaint Counsel proposed additional terms to be included in the Action Plan, based on elements contained in corrective action plans regularly accepted by Compliance staff.

Zen agreed to add the following three provisions:

- Zen shall submit monthly progress reports to the Office of Compliance and Field Operations (“Compliance”) as directed by Compliance Staff;
- Zen shall contact Compliance staff if there are any issues with adherence to the Action Plan by Zen or third parties; and
- Zen shall maintain all records relating to the Action Plan for 5 years:

In addition, Zen will agree to permit Compliance staff to monitor Zen's implementation of the Action Plan, does not agree to monitoring as provided in 16 C.F.R. 1118.2.

In addition, Zen objects to the following terms proposed by Complaint Counsel for inclusion in the Action Plan, so the parties have not reach agreement on these terms:

- Prior to disposal or destruction of the Subject Products in the distribution chain and in Zen's inventory (including transfer for disposal or destruction to third party), Zen shall ensure that all Subject Products that are in the distribution chain and in Zen's inventory and returned pursuant to the recall are properly quarantined, and
- Prior to disposal or destruction of the Subject Products in the distribution chain and in Zen's inventory (including transfer for disposal or destruction to third party) Zen shall notify the Office of Compliance and Field Operations so that Compliance staff may approve and witness such disposal, destruction or transfer of the Subject Products. Zen must ensure that Subject product destruction will destroy the units completely so that they cannot be reused and that Zen's method of destruction complies with all state and local regulations.

Respectfully Submitted,

David C. Japha
Evan House
Counsel for Zen Magnets, LLC

Mary B. Murphy
Daniel Vice
Complaint Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 27, 2017, a copy of the foregoing Joint Statement Regarding Factual and Legal Issues in Dispute Regarding the Draft Action Plan and Draft Public Notification was emailed (with digital exhibits attached) to counsel for Zen Magnets LLC at Davidjapha@japhalaw.com, and a copy with all exhibits was mailed, postage prepaid to counsel for Zen Magnets, LLC, at 950 South Cherry Street, Suite 912, Denver Colorado 80246.

Complaint Counsel