

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of
ZEN MAGNETS, LLC
STAR NETWORKS USA, LLC

CPSC DOCKET NO. 12-2
CPSC DOCKET NO. 13-2
(CONSOLIDATED)

Respondents.

**RESPONDENT ZEN MAGNETS, LLC'S AND STAR NETWORKS USA, LLC'S
UNOPPOSED APPLICATION FOR LEAVE TO TAKE DEPOSITIONS**

Respondents Zen Magnets, LLC and Star Networks USA, LLC, through counsel and pursuant to 16 C.F.R. §1025.35(a), and the Presiding Officer's Order dated June 19, 2014, together with an understanding that Complaint Counsel has no objection to Respondents taking the depositions of those named herein, request the Honorable Presiding Officer for leave to take depositions upon oral examination of the following individuals in the above consolidated matters:

- a. Jonathan Midgett, Ph.D., U.S. Consumer Product Safety Commission
- b. Kathleen Stralka, M.S., U.S. Consumer Product Safety Commission
- c. Gregory Rodgers, Economics Expert, U.S. Consumer Product Safety Commission
- d. Joseph J. Martyak, former employee, U.S. Consumer Product Safety Commission
- e. Expert witnesses identified by Complaint Counsel:
 1. Vincent J. Amodeo
 2. J. Paul Frantz, Ph.D., C.P.S.M., CPE
 3. Laurence Steinberg, Ph.D.
 4. R. Adam Noel, M.D.

1. Counsel for the Respondents has worked with Complaint Counsel to narrow the list and upon leave of the Presiding Officer to take depositions. This list includes individuals who Respondent sZen and Star believe are reasonable and necessary to their defenses and those who may have been previously endorsed by Respondent Zucker.

2. Respondents rely upon the Memoranda in support of their deposition requests previously filed with the Presiding Officer, most recently on June 13, 2014, and ask that the Presiding Officer take notice of those memoranda.

3. Attached hereto is an Appendix A setting forth the topics about which Respondents Zen and Star seek inquiry.

4. Upon leave of the Presiding Officer to take these depositions, counsel for Respondents Zen and Star will make the necessary efforts to serve notices of deposition, and for any non-parties will make application for the issuance of subpoenas, in accordance with the provisions of 16C.F.R. §1025.35(b).

WHEREFORE, the Respondents Zen Magnets, LLC and Star Networks USA, LLC request the Honorable Presiding Officer for leave to take depositions of the individuals and experts listed above in preparation of their defenses in these matters.

RESPECTFULLY SUBMITTED,

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



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of June, 2014, I served copies of **RESPONDENT ZEN MAGNETS, LLC'S AND STAR NETWORKS USA, LLC'S AMENDED APPLICATION FOR LEAVE TO TAKE DEPOSITIONS** by the service method indicated:

Original and three copies by U.S. mail, and one copy by electronic mail, to the Secretary of the U.S. Consumer Product Safety Commission:

Todd A. Stevenson
Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
tstevenson@cpsc.gov

One copy by U.S. mail and one copy by electronic mail to the Presiding Officer for *In the Matter of Maxfield and Oberton Holdings, LLC*, CPSC Docket No. 12-1; *In the Matter of Zen Magnets, LLC*, CPSC Docket No. 12-2, and *In the Matter Of Star Networks UA, LLC*, CPSC Docket No. 13-2:

The Honorable Dean C. Metry
U.S. Coast Guard
U.S. Courthouse
601 25th Street, Suite 508A
Galveston, TX 77550
Janice.M.Emig@uscg.mil

One copy by electronic mail (by agreement) to Complaint Counsel:

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David C. Japha

APPENDIX A

List of Topics for CPSC Witnesses

1. Warnings

- a. How CPSC determines/evaluates the role of product warnings in the area of product safety.
- b. Role of warnings under the Federal Hazardous Substances Act (FHSA), 15 USC Secs. 1261-1278..
- c. Analysis of adequacy of the warnings on packaging for Zen Magnet Rare Earth Magnetic Spheres (Zen Magnets), Magnicube Magnetic Balls and Magnetic Cubes and Neoballs
- d. The bases for allegations that no warnings could be devised that would effectively communicate the hazard associated with Zen Magnets, Magnicubes and Neoballs so that they could be heeded and understood by consumers to avoid ingestion.
- e. The effectiveness/role of choking warning labels for products for children 3-6 with small parts, marbles, and small balls.
- f. Analysis of the value of product warnings and education to warn/alert consumers, including parents, about hazards associated with consumer products such as small balls, marbles, balloons, corded baby monitors, laundry pods, window coverings and button batteries.
- g. Analysis of CPSC education and warning campaign for high powered small rare-earth magnets.
- h. Comparison of CPSC education campaign for high powered small rare-earth magnets with laundry pods, pencil erasers, window coverings, button batteries and corded baby monitors.

2. CPSC analysis of whether hazards associated with adult products that are dangerous for children can be warned against.

3. Risk Assessment

- a. CPSC procedures for conducting risk assessment.
- b. Analysis of difference in risks associated with Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs and those of Buckyballs and Buckycubes.
- c. Basis for determining preliminarily that Zen Magnets, Magnicube Spheres, Magnicube cubes and Neoballs are defective and a substantial product hazard.
- d. Basis for determining preliminarily that Zen Magnets, Magnicube Spheres cubes and

Neoballs are defective and a substantial product hazard.

e. Basis for allegation that Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs fail to operate as intended (i.e., for adults and not children).

f. Analysis of NEISS data with regard to high powered small rare-earth magnets.

4. Whether adult products that present a risk of injury to children render the product defective, and the basis for any conclusions.

5. Human Factors

a. Criteria used to determine whether Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs are children's products and the weight given to each of the statutory factors.

b. Basis for the allegation that Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs are intensely appealing to children due to their tactile features, small size and highly reflective, shiny, and colorful metallic coatings.

c. Basis for the allegation that Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs move in unexpected, incongruous ways.

d. Basis for allegation that Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs can evoke awe and amusement among children, enticing them to play with the products.

e. Basis for allegation that the smoothness, uniqueness and soft snapping sound made by Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs makes them appealing to children.

f. Basis for allegation that design is defective because some parents and caregivers give or allow children to play with the products.

g. Basis for allegation that risk is neither obvious nor intuitive.

6. Bases for CPSC's allegations relating to gender and harm to women in the complaints against Respondents Zen and Star

7. Bases for CPSC's allegations relating to utility in the marketplace in the complaints against Respondents Zen and Star.

a. Evaluation of the products' utility.

b. Evaluation of the necessity of the products for consumers.

8. Education

- a. CPSC procedures for conducting and evaluating safety/education programs.
- b. What components create an effective education and warning outreach program.
- c. Responsibility of CPSC to educate consumers about product hazards.
- d. Evaluation of the efficacy of M&O's safety program and Responsible Seller Agreement and Notices.
- e. Evaluation of CPSC and Juvenile Products Manufacturers Association's education program for baby monitors.
- f. Video news release and education program launched in November 2011.

9. Incidents

- a. CPSC analysis of incidents and/or ingestion directly related to Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs
- b. Relation of number of products in the marketplace to incidents.

10. Consumer Responsibility

- a. CPSC analysis of the role of adults in supervising children to minimize/prevent access to dangerous adult products.

11. Enforcement Efforts

- a. Efforts by CPSC to prevent the sale of aggregated masses of high-powered, small rare earth magnets since the filing of the complaints against Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs including enforcement efforts involving Amazon and competitors of Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs.
- b. Basis for the settlement with Strong Force (Neocubes) where consumers merely were told to discard their high powered magnets.
- c. Decision not to promote the Strong Force (Neocube) settlement on cpsc.gov or to issue a press release.
- d. Basis for settlement with Baby Matters LLC (Nap Nanny) in June 2013 resulting in warnings to consumers to discard product.

e. Whether there has been any enforcement effort against dynaflexpro.com (<http://www.dynaflexpro.com/store/magnalinx-gunmetal-magnetic-bracelet.html>) regarding any recalls or “stop sales” of their products.

f. Whether there has been any enforcement effort against Nanodots.com and the subject products identified in the Complaints in these consolidated actions.

g. Whether the CPSC has requested voluntary corrective action or a recall or stopping the sale of the products sold at Nanodots.com.

h. Whether the CPSC has requested corrective action or a recall or stopping the sale of products sold at http://www.amazon.com/Neodymium-Magnets-inch-Cube-N48/dp/B003VWST5C/ref=sr_1_1?ie=UTF8&qid=1380395740&sr=8-1&keywords=buckycubes.

i. Whether the CPSC has engaged in any enforcement actions against the companies or individuals that sell products at the following websites:

a. S C S c o l l e c t i b l e s “ M a g n e t B a l l s ” : http://www.newegg.com/Product/Product.aspx?Item=9SIA0PA06G4124&nm_mc=KNC-GoogleMKP&cm_mmc=KNC-GoogleMKP-_-pla-_-Learning+%26+Educational-_-9SIA0PA06G4124

b. The company Neocube: http://www.boxytech.com/neocube-buckyball-magnetic-toy-puzzle-gold?__store=us.

c. <http://creativewhack.com>.

12. Children’s Products

a. Criteria for determining whether a product is a children’s product.

b. Application of criteria for determining whether a product is a children’s product to Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs

c. Application of criteria for determining whether a product is a toy to Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs

d. Analysis of whether Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs are children’s products subject to ASTM F963.

e. Analysis of why CPSC would not consider any repackaging or modification of the warnings done by Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs.

f. Person with knowledge of the ASTM exception for magnets in hobby, craft and science kits.

13. Marketing and Advertising

a. Basis for the allegation of effect of early advertising of Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs on purchasing decisions or use by children diminishing warnings.

b. Analysis of number of consumers who viewed/saw/heard of early advertising.

c. Impact of any conflict with age grading of Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs with early advertising.

14. Complaint

a. The Commission vote (or lack thereof) to authorize amended complaints against Zen Magnets, Magnicubes Spheres and Magnicube Cubes, and Neoballs

15. Public Statements

a. Inquiries into public statements made by the CPSC regarding high powered small rare-earth magnets on its web site and in press releases.