UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of:	)	
	)	
MAXFIELD AND OBERTON HOLDINGS, LLC	)	**CPSC DOCKET NOS. 12-1 & 12-2**
	)	
and	)	
	)	**HON PARLEN L. MCKENNA**
ZEN MAGNETS, LLC	)	
	)	
Respondents.	)	

ORDER GRANTING CPSC'S MOTION TO CONSOLIDATE PROCEEDINGS

On September 20, 2012, counsel for the Consumer Product Safety Commission ("CPSC" or "Agency") filed a Motion to Consolidate CPSC Docket No. 12-1 (In re Maxfield and Oberton Holdings, LLC) with CPSC Docket No. 12-2 (In re Zen Magnets, LLC).[1]

On September 28, 2012, Maxfield and Oberton Holdings, LLC ("M&O") filed a response to the Motion to Consolidate stating that it did not object to the Agency's Motion to consolidate.[2] On October 5, 2012, I issued a Notice requesting that Respondent Zen Magnets' file a response to the Agency's Motion to Consolidate CPSC

[1] M&O and Zen Magnets are collectively referred to in this Order as "Respondents".

[2] M&O expressed some confusion regarding what Agency counsel was requesting concerning consolidation of "further matters" but stated that it "does not oppose consolidation of the two proceedings." Response at 1. M&O did however reserve its right to move for severance of specific matters, including but not limited to, the final hearing should consolidation present concerns of undue burden, prejudice or confusion of the issues. Id.

Docket Numbers 12-1 and 12-2.[3] That Notice informed the parties that I, acting in the capacity of Chief Administrative Law Judge, would render the decision on the Motion to Consolidate.

On October 15, 2012, counsel for Zen Magnets, LLC ("Zen Magnets") filed an Objection to the Motion to Consolidate. For the reasons explained below, CPSC's Motion to Consolidate is **GRANTED** and the consolidated case will be heard by the Hon. Dean C. Metry.

Complaint against M&O

On July 25, 2012, CPSC counsel filed a Complaint against M&O, the alleged importer and distributor of high-powered, small rare earth magnets knows as Buckyballs® and Buckycubes™ ("M&O Subject Products"). The Complaint asserted that the M&O Subject Products pose a risk of magnet ingestion by young children, adolescents and teens, with a result of serious medical consequences. Complaint against M&O at 4-5.

The Complaint contained three separate counts. Count I alleged the warnings and labeling are defective as they do not effectively communicate the hazards associated with ingestion of the Subject Products as outlined in 15 U.S.C. § 2064(a)(2).[4] Count II alleged that the Subject Products, as designed, are defective and pose a substantial risk of injury. Count III alleged that the Subject Products are a substantial product hazard under 15 U.S.C. § 2064(a)(2).

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[3] The United States Coast Guard Administrative Law Judge Program is performing adjudication services for the CPSC under the terms of an interagency agreement and under Office of Personnel Management regulations concerning the loan of Administrative Law Judges from one agency to another. I issued the Notice in my capacity as Acting Chief Administrative Law Judge for the United States Coast Guard because the two cases had been assigned to different Coast Guard judges prior to the filing of the Motion to Consolidate.

[4] The Complaint alleged that M&O changed its packaging, warnings, instructions, and labeling in response to CPSC concerns. Complaint against M&O at 6.

CPSC counsel sought the following relief: (1) a determination that the M&O Subject Products present a "substantial product hazard" within the meaning of 15 U.S.C. § 2064(a)(2); (2) a determination that extensive and effective public notification under 15 U.S.C. § 2064(c) is required to adequately protect children from risks of injury presented by rare earth magnet products; (3) an order under 15 U.S.C. § 2064(c) requiring M&O to cease importation and distribution of the Subject Products and provide various notices about the Subject Products; and (4) a determination and order under 15 U.S.C. § 2064(d) finding that it is in the public interest for M&O to refund consumers the purchase price of the Subject Products without charge to consumers and reimburse retailers for any expenses in carrying out the order, among other relief. Complaint against M&O at 10-11.[5]

Currently, the Agency's Motion for Leave to File an Amended Complaint is pending the decision on its Motion to Consolidate.

Complaint against Zen Magnets

On August 6, 2012, CPSC counsel filed a Complaint against Zen Magnets, the alleged importer and distributor of Zen Magents™ ("Zen Magnets Subject Products"). The Complaint asserted that Zen Magnets advertised and marketed the Zen Magnets Subject Products in 2009 and 2010 as "fun to play with" and that the products "look good on people". Also, in 2011 Zen Magnets marketed the Subject Products as a "magnetic

[5] On August 14, 2012, M&O filed an Answer, which, in part, admitted some factual allegations and denied others; asserted as a defense that its products do not create a substantial risk of injury to the public; stated there is no applicable rule, regulation, standard or ban with which the products fail to comply; claimed the Complaint is arbitrary and capricious and not based on any reasonable assessment of risk and is inconsistent with CPSC's own mandatory standards; argued that CPSC has contributed to the alleged incidence of magnet ingestion and ineffectiveness of warnings by failing to take remedial action against major retailers known to advertise, market, and/or offer for sale high powered magnet sets as appropriate for children under the age of 14; and that CPSC staff failed to fairly and adequately consider a comprehensive voluntary corrective action plan, which M&O submitted at CPSC's request. See M&O Answer.

science kit". Complaint against Zen Magnets at 3. The Complaint further alleged that the Zen Magnets Subject Products create a substantial risk of injury to the public. Specifically, the Complaint claimed that these products pose a risk of magnet ingestion by children under age 14, adolescents and teens, with a result of serious medical consequences. Id. at 3-5.

The Complaint contained three separate counts. Count I alleged the warnings and labeling are defective as they do not effectively communicate the hazards associated with ingestion of the items that are almost identical in form, content and substance to Zen Magnet Subject Products (termed "Ingested Products") as outlined under 15 U.S.C. § 2064(a)(2).[6] Count II alleged that the Subject Products as designed are defective and pose a substantial risk of injury. Count III alleged that the Subject Products are a substantial product hazard under 15 U.S.C. § 2064(a)(2).

CPSC counsel sought the following relief: (1) a determination that the Subject Products present a "substantial product hazard" within the meaning of 15 U.S.C. § 2064(a)(2); (2) a determination that extensive and effective public notification under 15 U.S.C. § 2064(c) is required to adequately protect children from risk of injury presented by rare earth magnet products; (3) an order under 15 U.S.C. § 2064(c) requiring Zen Magnets to cease importation and distribution of the Subject Products and provide various notices about the Subject Products that have already been sold; and (4) a determination and order under 15 U.S.C. § 2064(d) finding that it is in the public interest for Zen Magnets to refund consumers the purchase price of the Subject Products without

[6] The Complaint alleged that Zen Magnets only recently changed its product's marketing to comply with ATSM Standard F963-08. Complaint against Zen Magnets at 6.

charge and reimburse retailers for any expenses incurred in carrying out the order, among other relief. Complaint against Zen Magnets at 10-12.[7]

On September 20, 2012, counsel for the Agency filed a Motion for Leave to File an Amended Complaint, which sought to revise the Complaint clarifying the count alleging the Zen Magnets Subject Products present a substantial product hazard under 15 U.S.C. § 2064(a)(2) (which in effect collapsed the original charges in the Complaint to a single Count I) and adding a count alleging that the Zen Magnets Subject Products present a substantial product hazard under 15 U.S.C. § 2064(a)(1) because they fail to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public. On October 15, 2012, Judge Metry granted the Motion to File an Amended Complaint and a Supplemental Motion on the same subject as Zen Magnets indicated it did not oppose those motions.

CPSC's Motion to Consolidate

Agency counsel argued that consolidation was proper under CPSC regulations at 16 C.F.R. § 1025.19 because the two proceedings involve similar issues that can be resolved more consistently and efficiently in consolidated proceedings than in separate adjudications. The Motion to Consolidate argued that both proceedings involve CSPC's efforts to determine whether high-powered, small rare earth magnets imported and distributed by Respondents present a substantial product hazard as defined by the Consumer Product Safety Act at 15 U.S.C. § 2064(a)(2).

[7] On August 14, 2012, Zen Magnets filed an Answer, which, in part, admitted some factual allegations and denied others; asserted as a defense that the products do not create a substantial risk of injury to the public; denied the basis for all three Counts alleged; and asserted various affirmative defenses, which overlap in part with M&O's defenses but also contain numerous other defenses specific to Zen Magnets. See Zen Magnets Answer.

Specifically, Agency counsel asserted that the two cases contain similar issues in that both the M&O and Zen Magnets Subject Products: (1) are nearly identical in terms of physical size, appearance, magnetic properties, and metallic composition; (2) exhibit nearly identical behavior when manipulated; (3) have potential to cause severe intestinal injuries if ingested; (4) are likely to be interacted with by children in a way that puts the children at risk of ingesting the magnets; and (5) consist of a hidden hazard because parents and caregivers often cannot determine that the magnets have been swallowed until intestinal injuries have already occurred. Motion to Consolidate Memorandum at 3. Furthermore, Agency counsel argued that many of the legal issues to be litigated in both cases will apply equally. Id.

Further arguments offered in support of consolidation included: (1) the Agency anticipates some of its expert witnesses will be used in both proceedings; (2) Respondents likely will seek to depose the same Agency fact witnesses; (3) discovery will be more efficiently accomplished and possible streamlining of hearings and trial proceedings may be facilitated; (4) duplication of effort could be avoided and effectively expedite the resolution of the proceedings; (5) avoiding possible inconsistent adjudications of common factual and legal issues; and (6) lowering the expenditure of time and resources for the parties. Motion to Consolidate Memorandum at 3-4.[8] Agency counsel also claimed that consolidation would benefit both Respondents and neither would suffer prejudice as a result. Id. at 4.

Agency counsel further recognized that CPSC regulations give the Court broad latitude to consolidate the proceedings and that the Presiding Officer is given broad

[8] For these latter points, Agency counsel cited the standard set forth in Arnold v. Eastern Airlines, Inc., 682 F.2d 186, 193 (4th Cir. 1982). See id. at 4, fn 2.

discretion throughout the rules governing these proceedings to manage Agency cases on the docket. Id. at 2 (citing the Preamble to 16 C.F.R. Part 1025, 45 Fed. Reg. 29206, 29207 (May 1, 1980)).[9]

Zen Magnets' Opposition

In its opposition to the Motion to Consolidate, Zen Magnets argued that the two cases do not have similar factual issues; that there are differences between the packaging of the products in question; and that the "potential for danger in Zen Magnets is significantly less than that for Buckyballs". Zen Magnets Objection at 2.

Zen Magnets further claimed that there are differences in the magnets, with Zen Magnets having "much higher precision" and that Zen Magnets has "worked hard to gain the reputation of having magnets that have greater precision." Id.[10] Furthermore, the opposition argued that there are significant marketing and distribution differences between each Respondent's products; that Zen Magnets having never been sold as toys; that its product is safe; that it does not have any record of injury from the use of its product; that any benefits of consolidation were outweighed by the risk of prejudice to Zen Magnets; and that with consolidation there is a risk of confusion by allowing the Agency to present the same evidence and witnesses for both products. Id. at 2-3 (citing Arnold v. Eastern Airlines, Inc., 681 F.2d 186, 193 (4th Cir. 1982)).

[9] The Motion to Consolidate also stated that "[a]though not controlling, federal case law gives this Court broad discretion to consolidate the proceedings" and "the Commission expects that interpretation of these Rules by the Presiding Officer will be guided by principles stated and developed in case law interpreting the Federal Rules of Civil Procedure [FRCP]." Motion to Consolidate Memorandum at 2, fn 1.

[10] See also id. at 3 (claiming the magnets distributed and marketed by Zen Magnets are substantially different than the magnets distributed and by marketed by M&O) (citing In re: Consolidated Parlodel Litigation, 182 F.R.D. 441, 447 (D.N.J. 1988).

Analysis

These proceedings are governed by Agency regulations found at 16 C.F.R. § Part 1025. Agency regulations provide that "[t]wo or more matters which have been scheduled for adjudicative proceedings and which involve similar issues may be consolidated for the purpose of hearing or Commission review." 16 C.F.R. § 1025.19.[11]

As a general rule, the Court should consider the risks of prejudice and possible confusion with respect to consolidated proceedings versus "the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives." Arnold v. Eastern Air Lines, Inc., 681 F.2d at 193.

Here, one party strongly opposes consolidation but such opposition by itself does not control the outcome. See, e.g., Gonzalez-Quiles v. Cooperativa De Ahorro Y Credito De Isabella, 250 F.R.D. 91, 93 (D.P.R. 2007). Rather, the specific arguments proposed for and against consolidation, as well as the nature of the cases, must be analyzed to arrive at the appropriate resolution.

One of Zen Magnets' primary bases of opposition to consolidation was the claimed differences between the magnets, with Zen Magnets stating that its products are more precise. However, Zen Magnets failed to articulate how such differences in the products related to the underlying charges CPSC brought. The pleadings indicate that the magnets from both Respondents are rare earth magnets of approximately the same size

[11] The parties did not cite, and the Court did not find, any Agency case law or precedent dealing specifically with the grant or denial of consolidation under this section. Therefore, the Court was guided by the plain language of the regulation and federal case law under FRCP Rule 42.

and appearance. It is difficult to see how any greater precision (either, e.g., in magnetism or consistency of shape/size) has anything to do with the alleged harm or risk such products might represent to consumers. The Complaints, as read, do not indicate there should be any differences between the Subject Products themselves as magnets that would significantly mitigate the alleged problems with such rare earth magnets generally.[12]

Of more relevance is Zen Magnets' claim that its packaging, warnings, distribution and marketing efforts differ from M&Os. The pleadings indicate that there likely are specific factual differences between the two cases in this area. Furthermore, there might have been more significant interactions between M&O and the CPSC regarding particular warnings and packaging.

However, even if true, this fact would be most relevant for Charge I in each of the original Complaints – i.e., the specific Count dealing with the adequacy of warnings and associated marketing and promotion – and would seemingly have less to do with the other charges asserted in the respective Complaints.[13] Consolidation under Agency rules does not require exact similarity with all facts and issues, but rather is broadly worded to contemplate possible consolidation where there are "similar issues." See 16 C.F.R. § 1025.19. Nothing mandates the exact same result with respect to any of the charges in a consolidated case if the facts and the law warrant divergent findings and conclusions by the judge.

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[12] Zen Magnets' assertion that their products have not been associated with any of the particular incidents CSPC cites also is potentially less relevant if the products are essentially the same. Clearly, the Agency would have the burden to establish the similarity of the products with respect to the harm or risk alleged.

[13] As noted above, the case against Zen Magnets has an operative Amended Complaint; whereas the Motion to Amend the Complaint against M&O is pending this Order. It appears that the Agency is seeking to amend the Complaint against M&O in substantially the same fashion it amended the Zen Magnets Complaint. The amendment and proposed amendment do not alter this analysis as what was previously Charge I now seems clarified (or is being sought to be clarified) as described above.

Respondents have raised some similar defenses to the charges, but each has asserted defenses unique to their particular circumstances. Consolidation does not force the parties to litigate the cases together or mandate that the parties present a unified or consistent defense. The Agency's case must stand or fall with respect to each Respondent independently. Each Respondent will have the full opportunity to litigate its respective case and defend itself in a consolidated proceeding as compared to separate adjudications. See Cole v. Schenley Industries, Inc., 563 F.2d 35, 38 (2d Cir. 1977 ("Consolidation . . . is a procedural device designed to promote judicial economy, and consolidation cannot effect a merger of the actions or the defenses of the separate parties." (citation omitted)).

Judicial efficiency and economy of resources favor consolidation. Having a single judge hear and decide two cases that share similar legal and factual issues relating to the alleged hazards posed by these rare earth magnets under the same statute, with virtually the same counts alleged and same relief sought, is preferable to having two proceedings in separate venues. C.f., EPA v. City of Green Forest, 921 F.2d 1394 (8th Cir. 1990) (district court properly exercised its discretion in denying motion to consolidate a Clean Water Act action with EPA's action since the claims and relief sought were vastly different).[14]

Significantly, the degree to which similar issues will be considered in these proceedings is indicated by the Agency's List and Summary of Documentary Evidence filed with each Complaint. While the first five or so items in each List pertain to a

[14] Zen Magnets' case cited in support of its opposition (i.e., In re Consolidated Parlodel Litigation, 182 F.R.D. 441, 447 (D.N.J. 1998)) is inapposite as that case involved the application of the laws of various state jurisdictions to multiple cases having their own, distinct medical histories and alleged injuries and the case was a jury trial where the possibility of confusion was greater than in administrative law cases where the judge serves as fact finder.

respective Respondent (but nevertheless are similar in nature), the remaining ten or so items are identical. The Agency is thus clearly contemplating pursuing the same legal theories based largely on the same evidence in each case. Forcing the Agency to conduct two separate proceedings on such similar subjects represents a clear waste of taxpayer resources.

Additionally, discovery related to common witnesses and documents will be facilitated by consolidation. Judge Metry has entered a discovery order in the Zen Magnets case, but nether case has proceeded beyond the very initial stages of adjudication. Coordination of discovery concerning common witnesses and documents can do nothing but ease the timely resolution of both cases. For example, Agency counsel in a consolidated case will have to coordinate a single deposition of CPSC's witnesses and expert(s), if any, with counsel for both Respondents; rather than track two separate discovery processes in distinct venues before two judges.[15]

While the venue of consolidated proceedings might differ from what would have been the case in separate proceedings, no existing hearing scheduling order is in place needing modification. Indeed, the Agency's regulations do not contemplate where the hearing shall take place but merely state that adjudicative proceedings "shall be conducted expeditiously and with due regard to the rights and interests of all persons affected and in locations chosen with due regard to the convenience of all parties". 16 C.F.R. § 1025.2.

Finally, Judge Metry can take various measures to mitigate any risk of confusion or possible contamination from having two separate Respondents in the same proceeding.

[15] Frankly, Respondents can only benefit from such joint depositions if ordered – each will gain the benefit of the other's approach, questions and responses, which otherwise might not be the case if these proceedings remain separate.

For example, he may have common witnesses for each case present testimony and be subject to cross-examination by both Respondents. This testimony would be used in both cases. The judge could then conduct separate hearing sessions for that witness to deal with particular aspects of the case, specific only to a given Respondent. See 16 C.F.R. § 1025.19 ("the proceedings may be consolidated to such extent and upon such terms as may be proper."). As to the admission of documentary evidence, such exhibits would be clearly marked as to which case such exhibit is applicable. Importantly, however, these examples are only suggestions, since the presiding judge (after consultation with the parties) will direct the development of the record in accordance with his sound discretion.

Accordingly, Zen Magnets has failed to articulate any persuasive basis for prejudice as a result of consolidation of these two cases.

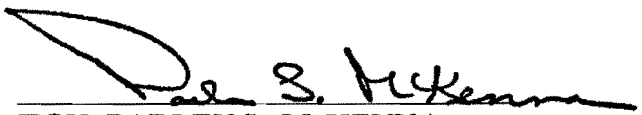
WHEREFORE:

Order

IT IS HEREBY ORDERED that the CPSC's Motion to Consolidate is **GRANTED.**

IT IS HEREBY FURTHER ORDERED that the subject cases (CPSC Docket Nos. 12-1 and 12-2) are **CONSOLIDATED** and will be adjudicated by the Hon. Dean C. Metry.

Done and dated this the 30th day of October, 2012,
at Alameda, California.



HON. PARLEN L. McKENNA
Acting Chief Administrative Law Judge

Certificate of Service

I hereby certify that I have this day served the foregoing document(s) (CPS Docket No. 12-1 & No. 12-2) upon the following parties and limited participants (or designated representatives) in this proceeding at the listed facsimile in the following order:

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Dated on this 30th day of October 2012
Alameda, California

Cindy J. Melendres

Cindy J. Melendres, Paralegal Specialist
to the Hon. Parlen L. McKenna
Alameda, California