

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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)	
In the matter of)	
MAXFIELD AND OBERTON HOLDINGS, LLC)	CPSC DOCKET NO. 12-1
ZEN MAGNETS, LLC)	CPSC DOCKET NO. 12-2
STAR NETWORKS, LLC)	CPSC DOCKET NO. 13-1
CRAIG ZUCKER,)	(CONSOLIDATED)
)	
)	
Respondents.)	
)	

RESPONDENT ZEN MAGNETS, LLC'S ANSWER TO
SECOND AMENDED COMPLAINT

Respondent, Zen Magnets, LLC, (hereafter “Zen”), through counsel, answers the numbered paragraphs of the Second Amended Complaint as follows, seriatim:

1. Zen admits that it imports and distributes Zen Magnets® Rare Earth Magnet Spheres and Neoballs™ (together the “Subject Products”), but denies all explicit and implicit allegations in ¶1. Zen specifically denies that Zen Magnets® and Neoballs™ 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. ¶2 is not an allegation, but is a procedural statement to which no response is required. To the extent a response may be required, Zen denies the allegation in ¶2.

3. The allegations in ¶3 state legal conclusions 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 conclusions to which no response is required. To the extent responses may be required, Zen denies the allegations in ¶4.

5. Zen admits the allegation set forth in ¶5.

6. Zen admits that it is an importer and distributor of Zen Magnets® and Neoballs™.

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.

8. ¶8 contains four separate allegations. Zen denies all explicit and implicit allegations contained in ¶8 that are not specifically admitted in ¶¶8a and 8b below.

8a. As to the first allegation in ¶8, Zen admits that it offers Zen Magnets® and Neoballs™ for sale to consumers for their personal use, and has sold Zen Magnets® and Neoballs™ to teachers for controlled use in their classrooms. Otherwise, Zen denies any implicit or explicit allegation contained in the remainder of the first allegation. Zen specifically asserts that it does not market and has not marketed Zen Magnets® nor Neoballs™ as toys to children.

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

9. Zen denies the allegations in ¶9.

10. Zen denies the allegations in ¶10.

11. Zen admits the allegations in ¶11.

12. Zen admits the allegations in ¶12.

13. Zen admits the allegations in ¶13.

14. Zen admits the allegations in ¶14.

15. Zen admits the allegations in ¶15.

16. Zen admits the allegations in ¶16.

17. Zen admits the allegations in ¶17.

18. Zen admits the allegations in ¶18.

19. Zen admits the allegations in ¶19.

20. Zen admits that Neoballs™ are sold individually on neoballs.com, but denies the remainder of the allegations in ¶20 in so far as it alleges that Zen sells sets of Neoballs™. Zen sells only individual Neoballs™; if the consumer chooses to buy more than one magnet, the consumer creates the sets.

21. Zen denies the allegations in ¶21.

22. Zen admits the allegations in ¶22.
23. Zen admits the allegations in ¶23.
24. Zen admits the allegations in ¶24.
25. Zen admits the allegations in ¶25.
26. Zen denies the allegations in ¶26.
27. Zen denies the allegations in ¶27.
28. Zen admits the allegations in ¶28.
29. Zen admits the allegations in ¶29.
30. Zen admits the allegations in ¶30.

COUNT 1

The Subject Products are not a Substantial Product Hazard Under Section (15)(a)(2) of the CPSA, 15 U.S.C. §2064(a)(2), They do not Contain Product Defects That Create a Substantial Risk of Injury to the Public

The Subject Products Are Not Defective; Their Instructions, Packaging, and Warnings Are Adequate

31. Zen incorporates its answers to ¶¶1 through 30 of the Second Amended Complaint as if set forth fully herein. ¶31 is an incorporation paragraph and requires no response. To the degree that any response may be required, Zen denies any and all incorporated and realleged allegations not previously admitted.

32. The allegation in ¶32 states a legal conclusion to which no response is required. To the extent a response may be required, Zen denies the allegation in ¶32.

33. The allegations in ¶33 state legal conclusions to which no responses are required. To the extent any responses may be required, Zen denies the allegations in ¶33.

34. Zen admits the allegation in ¶34.

35. Zen admits that it warned users as alleged in ¶35.

36. Zen admits ¶36.

37. Zen denies any implied allegations of ¶37. Zen states that the warning included with Zen Magnets® contained, inter alia, the alleged text, but denies that the concluding sentence of the warning as alleged in ¶39 was “But really, it’s whatever age at which a person stops swallowing non-foods.” The warning text referred to in ¶36 and ¶37 are continuous, and have been arbitrarily separated.

38. Zen denies the allegations set forth in ¶38.

39. Zen denies the implied allegations set forth in ¶39. Zen states that the warning included with Zen Magnets® contained, inter alia, the language quoted.

40. Zen denies the implied allegations set forth in ¶40. Zen states that the warning included with Zen Magnets® contained, inter alia, the language quoted.

41. Zen denies ¶41.

42. Zen denies that the allegations in ¶42 is accurate and denies that the allegation is at all relevant to the relief sought.

43. Zen denies the implied allegations set forth in ¶43. The allegation is not relevant to the relief sought.

44. Zen admits the allegations set forth in ¶44.

45. Zen admits the allegation set forth in ¶45.

46. Zen admits the allegation in ¶46.

47. Zen denies the allegation set forth in ¶47.

48. Zen denies the allegation set forth in ¶48.

49. Zen admits the allegation set forth in ¶49.

50. Zen admits the allegation set forth in ¶50.

51. Zen denies the allegation set forth in ¶51.

52. Zen denies the allegation set forth in ¶52.

53. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶53 and therefore denies those allegations. Those allegations fail to describe any actual incident involving Zen Magnets, LLC.

54. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶54 and therefore denies those allegations. The allegations fail to describe any actual incident involving Zen Magnets, LLC.

55. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶55 and therefore denies those allegations. The allegations fail to describe any actual incident involving Zen Magnets, LLC.

56. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶56 and therefore denies those allegations. The allegations fail to describe any actual incident involving Zen Magnets, LLC.

57. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶57 and therefore denies those allegations. The allegations fail to describe any actual incident involving Zen Magnets, LLC. Further, The allegations do not reference any particular incident, but alleges a list of incidents based on hearsay.

58. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶58 and therefore denies those allegations. The allegations fail to describe any actual incident involving Zen Magnets, LLC. Further, The allegations do not reference any particular incident, but alleges a list of incidents based on hearsay.

59. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶59 and therefore denies those allegations.

60. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶60 and therefore denies those allegations.

61. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶61 and therefore denies those allegations. The allegations fail to describe any actual incident involving Zen Magnets, LLC.

62. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶62 and therefore denies those allegations.

63. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶63 and therefore denies those allegations. The allegations fail to describe any actual incident involving Zen Magnets, LLC.

64. Zen denies the allegations in ¶64.

65. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶65 and therefore denies those allegations. The allegations in ¶36 are speculative and without foundation.

66. Zen denies the allegations in ¶66. There is no recorded case of Zen's product being ingested.

67. Zen denies the allegations in ¶67. The allegations are speculative and do not reflect any evidence of actual cases involving Zen Magnets® or Neoballs™.

68. Zen denies the allegations in ¶68.

69. Zen denies the allegations in ¶69.

70. Zen denies the allegations in ¶70. The allegations are speculative and do not reflect any evidence of actual cases involving Zen Magnets® or Neoballs™.

71. Zen denies the allegations in ¶71.

72. Zen denies the allegations in ¶72.

73. Zen denies the allegations in ¶73.

74. Zen denies the allegations in ¶74.

75. Zen denies the allegations in ¶75.

76. Zen denies the allegations in ¶76.

77. Zen denies the allegations in ¶77. Neither Zen Magnets, LLC nor Neoballs™ have ever been marketed as toys.

78. Zen denies the allegations in ¶78. Zen's website did and does contain the necessary warnings.

79. In response to the allegations in ¶79, 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 to and as toys for children. At no time were Zen Magnets® designed for or marketed as toys to children. In addition, Zen denies that the statements "fun to play with" and

“look good on cute people,” when read out of context or even standing alone suggest Zen Magnets® should be used as toys.

80. Zen admits that the magnets are sold as a science kit, but denies the implications in ¶80 that the magnets were sold to eight year olds or as toys.

81. Zen denies the allegations ¶81.

82. Zen denies the allegations ¶82.

83. Zen denies the allegations ¶83.

84. Zen denies the allegations ¶84.

85. Zen denies the allegations ¶85.

86. Zen denies the allegations ¶86.

87. Zen denies the allegations ¶87.

88. Zen denies the allegations ¶88.

89. Zen denies the allegations ¶89.

90. Zen denies the allegations ¶90.

The Subject Products Are Not Defective Because there is no Substantial Risk of Injury Arises as a Result of The Magnets’ Operation and Use and there is no Failure of the Subject Products to Operate as Intended

91. ¶91 states a conclusion of law and requires no response. To the degree a response is necessary, Zen denies the allegations in ¶91.

92. Zen denies ¶92.

93. Zen denies ¶93.

94. Zen denies ¶94.

95. Zen denies ¶95; Neither Zen Magnets® nor Neoballs™ are marketed to children and are not available to children unless given to them by their parents or other adults contrary to common sense and to the explicit and adequate warnings on the marketing and packaging of Zen Magnets® and Neoballs™.

96. Zen denies ¶96.

97. Zen admits ¶97 in so far as Zen Magnets® and Neoballs™ do provide stress relief, but that is not their only benefit and so Zen denies that stress relief is the only benefit of owning Zen Magnets® and Neoballs™.

98. Zen denies the allegations in ¶98. There appear no relationship to the attractiveness of the magnets to children and placing the object in one's mouth. The Complaint fails to link the attraction of the magnet to a desire to ingest it.

99. Zen admits that Neoballs™ can be purchased in bright color combinations, but denies the remainder of the allegations in Zen denies the allegations ¶99.

100. Zen denies the allegations in ¶100.

101. Zen denies the allegations in ¶101. The second amended complaint fails to draw a causal link between any attraction of the magnets to children and a desire they may have to use the magnets in any harmful manner.

102. Zen denies the allegations in ¶102. The second amended complaint fails to draw a causal link between any attraction of the magnets to children and a desire they may have to use the magnets in any harmful manner.

103. Zen denies the allegations in ¶103. The second amended complaint fails to draw a causal link between parents's and care givers's failure to adhere to common sense principles of child safety as identified in the proper packaging and marketing of Zen Magnets, LLC and Neoballs™.

104. Zen denies the allegation in ¶104.

105. Zen denies the allegation in ¶105.

106. Zen denies the allegation in ¶107. It is not within the purview of the CPSC to determine what is of necessity to consumers in a free market.

107. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegation in ¶107 and therefore denies those allegations. The allegations in ¶107 are speculative, replete with hearsay from unidentified "medical professionals," and fail to describe any actual incident involving Zen Magnets, LLC and/or Neoballs™

108. Zen denies the allegation in ¶108.

109. Zen denies the allegation in ¶109.

110. Zen denies the allegation in ¶110.

111. Zen denies the allegation in ¶111 though it is not clear from the context of the allegation what it means that “children mouthing” the magnets is foreseeable.

112. Zen denies the allegation in ¶112.

113. Zen denies the allegation in ¶113.

The Subject Products Do Not Create a Substantial Risk of Injury to the Public

114 Zen denies the allegation in ¶114. The allegations in ¶114 are speculative and fail to describe any actual incident involving Zen Magnets, LLC or Neoballs™.

115. Zen denies the allegations in paragraph 115, and specifically denies that Zen Magnets® or Neoballs™ poses any risk when used as intended. The events described in ¶115 are speculation and are not properly foreseeable uses of Zen Magnets® or Neoballs™.

116. Zen denies the allegations in ¶116. 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.

117. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegation in ¶117 and therefore denies those allegations. The

allegations in ¶117 are speculative, replete with hearsay from unidentified “medical professionals,” and fail to describe any actual incident involving Zen Magnets, LLC or Neoballs™.

118. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegation in ¶118 and therefore denies those allegations. The allegations in ¶118 are speculative, replete with hearsay from unidentified “medical professionals,” and fail to describe any actual incident involving Zen Magnets, LLC or Neoballs™.

119. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegation in ¶119 and therefore denies those allegations. The allegations in ¶82 are speculative, replete with hearsay from unidentified “medical professionals,” and fail to describe any actual incident involving Zen Magnets, LLC or Neoballs™.

120. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegation in ¶120 and therefore denies those allegations. The allegations in ¶120 are speculative, replete with hearsay from unidentified “medical professionals,” and fail to describe any actual incident involving Zen Magnets, LLC or Neoballs™.

121. Zen is without knowledge or information sufficient to form a belief as to the truth of the allegation in ¶121 and therefore denies those allegations. The allegations in ¶121 are speculative, replete with hearsay from unidentified “medical professionals,” and fail to describe any actual incident involving Zen Magnets, LLC or Neoballs™.

122. Zen denies the allegations in ¶122. 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

123. Zen denies ¶123.

124. Zen denies ¶124.

125. Zen denies ¶125.

126. Zen denies ¶126.

Count 2

The Subject Products Are Not a Substantial Product Hazard Under Section 15(a)(1) of the CPSA, 15 U.S.C. §2064(a)(1)

127. Zen incorporates paragraphs 1 through 126 of its Answer to the Second Amended Complaint as if set forth fully herein. ¶127 is an incorporation paragraph. To the degree it may call for a response, any allegations contained therein and not previously admitted are hereby denied.

128. Zen denies ¶128.

129. Zen denies ¶129.

130. Zen denies ¶130. ¶130 states a legal conclusion to which no response is required, however to the degree that facts are alleged in this paragraph they and any legal inferences drawn therefrom are denied.

131. ¶131 states a legal conclusion and to the extent such conclusion incorporates facts, Zen denies those facts and any legal inferences drawn therefrom in ¶131.

132. Zen denies ¶132.

133. Zen denies ¶133.

134. Zen denies ¶134.

135. Zen denies the allegations in the unnumbered paragraph immediately following ¶134 of the Second Amended Complaint, and denies that the CPSC is entitled to any of the relief sought.

AFFIRMATIVE DEFENSES

1. The Second Amended Complaint fails to allege any claims for which relief may be granted.

2. 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® or Neoballs™ actually create a substantial risk of injury to the public.

3. The CPSC is basing its Second Amended Complaint entirely on findings and evidence from a completely different company and inadequate sources.

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

5. At all material times, Zen has marketed Zen Magnets® and Neoballs™ 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® or Neoballs™ marketed as toys to children.

6. The allegations in the Second Amended Complaint fail to establish that either Zen Magnets® or Neoballs™ contain any defect or constitute 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® or Neoballs™, nor is there any inadequacy or flaw in the contents, construction, finish, packaging, warnings or instructions of Zen Magnets® or Neoballs™. Moreover, neither Zen Magnets® nor Neoballs™ create a substantial risk of injury to the public.

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

8. The Second Amended 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.

9. The Second Amended Complaint alleges that the alleged hazard to children (though neither Zen Magnets® nor Neoballs™ are marketed as toys to children) is that upon swallowing two or more magnets will cause severe physical problems. This is based, according to the Second Amended Complaint, on an implied assumption and explicit allegation that Zen Magnets® or Neoballs™ are attractive nuisances as that term was once understood in tort law. However, completely missing from the Second Amended Complaint is any allegation showing a causal connection between the attraction of the magnets and the act of putting the magnets in one's mouth.

10. 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.

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

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

13. In reference to paragraphs 55 through 63 of the Second Amended Complaint, Zen states affirmatively that the products marketed, packaged and sold by Zen are magnet spheres and Zen Magnets are very different from those magnets that Complaint Counsel alleges have been swallowed.

14. The CPSC mistakenly refers to the products sold by Zen as Magnetic Balls. They should be referred to as magnet spheres which is the more accurate term.

15. Packaging of Zen Magnets and Neoballs™ is completely different from other magnet or magnetic balls and the potential for danger in Zen Magnets and Neoballs™ is significantly less than that for Buckyballs, or other magnets or magnetic balls.

16. Zen Magnets and Neoballs TM have much higher precision than the magnetic or magnet balls alleged to cause injury in the Second Amended Complaint.

17. There are significant marketing and distribution differences between Zen Magnets and other companies distributing magnets or magnetic balls.

18. Neither Zen Magnets nor Neoballs TM have ever been sold as toys on shelves, nor have they ever been referred to as any sort of toy.

19. Zen Magnets and Neoballs TM are only available online, and must be sought out by an adult buyer with a credit card or Paypal account. There is no possibility for an underage person to purchase Zen Magnets or Neoballs TM without adult supervision or permission.

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

Dated May 28, 2013

Respectfully Submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Answer to Complaint Counsel's Second Amended Complaint in 12-2, on the following via email and US Mail on this 28th day of May, 2013:

Mr. Todd Stevenson, via email to: tstephenson@scsc.gov
an original + 3 copies via US Mail to: The Secretariat – office of the Secretary
Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814-4408

The Honorable Dean C. Metry
U.S. Coast Guard
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A handwritten signature in black ink, appearing to read "David C. Japha", written over a horizontal line.

David C. Japha