IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ZEN MAGNETS, LLC Petitioner, v. CONSUMER PRODUCT SAFETY COMMISSION, Respondent.	CASE NO. 14-9610

MOTION FOR STAY

Petitioner Zen Magnets, LLC requests this Honorable Court for an Order Staying enforcement and effect of the Safety Standard for Magnet Sets to take effect on April 1, 2015, (hereafter "Magnet Rule") promulgated on October 3, 2014 by the Consumer Product Safety Commission (hereafter "Commission" or "CPSC") and as grounds therefor states:

I. STATEMENT OF JURISDICTION

The Tenth Circuit Court of Appeals has subject matter jurisdiction over this case pursuant to 15 U.S.C. § 2060(a) and (c), 15 U.S.C. § 2056), and 28 U.S.C. § 2112(a). This Court has jurisdiction to grant a stay pending the outcome of

Petitioner's challenge pursuant to 15 U.S.C. § 2060(a) and 28 U.S.C. § 2112(a); Rules 8, 15(a), and 18 F.R.A.P. and 5 U.S.C. §705. Reviewing courts may "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." *Id.*; Rule 18(a), F.R.A.P.; *Nken v. Holder*, 129 S.Ct. 1749, 1757 (2009) (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-10 (1942)).

II. STATEMENT OF FACTS ESTABLISHING JURISDICTION

The CPSC promulgated the Final Rule for Magnet Sets on October 3, 2014, 79 Fed. Reg. 59,962 (Oct. 3, 2014), (16 C.F.R. Part 1240). The Rule is a final agency action challengeable pursuant to 15 U.S.C. § 2060(a) by a party who is adversely affected by a final rule. The Final Rule applies to "aggregations of separable magnetic objects that are marketed or commonly used as a manipulative or construction item for entertainment, such as puzzle working, sculpture building, mental stimulation, or stress relief." 79 Fed. Reg. 59,962. The subject magnets are commonly known as Small Rare Earth Magnets, or "SREMs."

Zen Magnets, LLC, ("Zen") is adversely affected by the Final Rule because Zen is the only remaining U.S. distributor of the subject magnets (*see* 79 Fed. Reg. 59,978), and the rule prohibits Zen from manufacturing or importing its products (*see id.* at 59,985). Zen Magnets is a limited liability company organized in

Colorado, with its principal place of business in Colorado, in the 10th Circuit.

Pursuant to Fed. R. App. P. Rule 8, Petitioner previously sought a stay of enforcement of the Final Rule before the Commission by letters dated January 15, 2015 and February 5, 2015, which was denied on February 20, 2015. *See* Letter from Acting Sec'y Alberta E. Mills, filed herewith and incorporated herein as Petitioner's Motion for Stay Exhibit A. Counsel for Zen gave notice to Counsel for the Commission on February 27, 2015 of Zen's intent to file this motion.

III. REASONS FOR GRANTING ZEN'S MOTION TO STAY ENFORCEMENT AND EFFECT OF THE FINAL RULE

Pursuant to 10th Cir. R. 8.1 and Fed. R. App. P. Rule 8, the Court applies four factors in considering a motion to stay: (A) the likelihood of success on appeal; (B) the threat of irreparable harm if the stay or injunction is not granted; (C) the absence of harm to opposing parties if the stay or injunction is granted; and (D) any risk of harm to the public interest. *See also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). In Zen's case, all four factors weigh in favor of this Court granting Petitioner's motion to stay enforcement and effect of the Final Rule.

A. Petitioner is Likely to Succeed on the Merits

The CPSC cannot support its findings under 15 U.S.C. §§ 2058(f)(1) and (2058)(f)(3) by substantial evidence on the record taken as a whole. 15 U.S.C. § 2060(c). "While the ultimate question is whether the record contains 'such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion,' *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938), the inability of any court to weigh diverse technical data also demands an inquiry to determine whether the Commission 'carried out [its] essentially legislative task in a manner reasonable under the state of the record before [it].' [Citations Omitted]." *AquaSlide N' Dive Corp. v. Consumer Product Safety Commission*, 569 F.2d 831, 835 (5th Cir. 1978).

Zen will prevail in this matter because: (1) The Commission's data was fundamentally flawed; (2) the Commission did not accord proper weight to issues of utility, function, and availability; and (3) the Commission cannot show by substantial evidence that the Magnet Rule is reasonably necessary to eliminate or reduce an unreasonable risk of injury. *See* 15 U.S.C. § 2056(a) and 15 U.S.C. § 2058(f)(1) and (3).

1. The Commission Did not Accord Proper Weight to the Required Factors

Pursuant to 15 U.S.C. § 2058(f)(1), the Commission is required to make a number of findings for the rule to be properly promulgated under 15 U.S.C. § 1056(a). The issues to be addressed are: (1) The degree and nature of the risk of injury that the rule is designed to eliminate or reduce; (2) the approximate number of consumer products subject to the rule; (3) the public's need for the products

subject to the rule, and the probable effect the rule will have on utility, cost, or availability of such products; and (4) the means to achieve the objective of the rule while minimizing adverse effects on competition, manufacturing, and commercial practices. *Id*. at § 2058(f)(1).

Pursuant to §2058(f)(3), the Commission must also find that issuing the rule is in the public interest. These findings must be supported by substantial evidence on the record taken as a whole. *Id*. at § 2060(c). The §2058 factors determine whether an unreasonable risk exists. The D.C. Circuit has explained that this requires a balancing test similar to that in tort law. *See, Forester v. Consumer Product Safety Commission*, 559 F.2d 774, 789 (D.C. Cir. 1977) (footnote omitted). The Commission failed to properly balance relevant factors in finding the Final Rule reasonably necessary to eliminate or reduce an unreasonable risk of injury, and that it is in the public interest based on the four factors listed above.

a. The Epidemiological Methodology Relied Upon by the Commission was Fundamentally Flawed Undermining Proper Support for the Final Rule And The Commission Improperly Calculated the Degree of Risk of Injury that the Magnet Rule is Designed to Eliminate

The Final Rule is based on a statistically- and scientifically-flawed analysis of injury data, and the CPSC has failed to address an obvious lack of statistical support for its assertions in the Magnet Rule. National injury data is a foundational requirement for safety standards, and the Commission's injury analysis is arbitrary

and unsupported by substantial evidence. *See* 15 U.S.C. § 2056(a). The Final Rule states that, from "January 1, 2009 to December 31, 2013, [there were] an average of about 580 ingestion incidents [of SREMs] per year." 79 Fed. Reg. 59,987. In the three years prior to 2009, based on the observed methodology of the Commission's Epidemiology Staff, the Commission's data show that there was an average of 650 emergency room visits annually from the ingestion of products matching the description of SREMs. Many descriptions of ingested magnets are nearly identical among years before and after 2009. *See* CPSC National Electronic Injury Surveillance System ("NEISS") Database, available at http://www.cpsc.gov/en/Research--Statistics/NEISS-Injury-Data/ (hereinafter "NEISS database"). Despite the prevalence of magnets that were either round or small (or both) prior to 2009, the Commission simply assumed that small and round magnets did not exist prior to 2009, and since January 2009, that all "round magnet" ingestions are from ingestions of spherical rare earth magnet sets.[1] Of critical importance is that the injuries blamed on the SREMs include ingestions of

[1] For example, ingestions of magnets described as "magnet marbles" are counted as SREM ingestions, despite the fact that the SREMs subject to the Final Rule are commonly known to be a small fraction of the size of marbles, and magnetic marbles have been on the market before 2009. During discovery in a related administrative proceeding, CPSC Associate Executive Director for Epidemiology, Kathleen Stralka, was asked why, after 2009, ingestions of magnets that were simply described as "round" could be counted towards an ingestion estimate. She responded that before 2009 the subject magnets had not yet entered the marketplace and the Commission was therefore not interested in addressing historical characterizations of magnet ingestions. *See* Deposition Kathleen Stralka, pp. 58-59 (8/12/2014), filed herewith and incorporated as Exh. B.

magnets that are "strong" *or* "round," despite the magnets, as defined in 16 C.F.R. § 1240.2, being both strong *and* round. Therefore, the Commission's finding that an estimated 2,900 ingestions of magnets were treated in emergency departments between January 1, 2009 and December 31, 2013 (16 C.F.R. § 1240.5; 79 Fed. Reg. 59,987) cannot be relied upon to provide an estimated risk of the magnets subject to the Final Rule.

The Commission's injury estimate is further controverted because the same data and search methodology[2] show a substantially equal number of ingestions during 2006-2009 and 2009-2014. *See* NEISS Database; *see also* Oral Presentation Comment from Shihan Qu (CPSC-2012-0050-2594). Logic dictates that if the Commission's injury findings were valid, the number of ingestions from magnets matching the description of the subject magnets would be fewer from 2006-2009 (when the subject magnets did not exist), rather than larger or substantially equal to the number of ingestions from 2009-2014.

The Commission's conclusions are unreliable because its data is unreliable. Ms. Stralka (*see,* fn.1) testified that the data collection and analyses are necessarily

[2] Zen's observed method was to count (or bin as "yes/possible") all NEISS ingestions and aspirations with a description that mentioned magnets in the narrative, as well as any of the following: power, rare, marb*, ball, bb, bearing, bead, spher*, or round. The narrative would then be manually examined for language that would otherwise include or exclude it as a magnet sphere ingestion. For further explanation of the CPSC's methodology, *see generally*, CPSC Briefing Package, Tab A, for CPSC NEISS search methodology, listed at #16 of Respondent's Certified Index of Administrative Record.

subjective. *See* Tr. Trans. Dec. 9, 2014, pp. 1096-1097, lines 15-9 (regarding the "yes/possible" binning of certain types of jewelry: "Q: So in this case it was a complete judgment call by the staff member to call it a possible yes, was it not? A: They are all subjective, yes"); Tr. Trans. Dec. 8, 2014, p. 936, lines 16-19 ("Possible" indicates that, "from the narrative, it was subjectively determined to be possibly from a magnet set."). Ms. Stralka further explained that, "[b]ecause these narratives are abstracted from medical records from an emergency department case and the healthcare professionals, physicians are not going to know what a high-powered or strong magnet is other than subjective[ly]." Tr. Trans. Dec. 8, 2014, p. 1033, lines 18-22. Further, Ms. Stralka testified that she could not say within a reasonable degree of statistical certainty that the ingestions counted as "yes/possible" SREM ingestions in the NEISS database were indeed SREMs, or some other product. Trans., *In re Zen Magnets*, CPSC Docket No. 12-2, at 1094-1095 (Dec. 9, 2014). All of the above quotes are included in and incorporated as Exhibit C, filed herewith.

The data show that the Commission's figure of 2,900 injuries was based on incomplete and unreliable data, and is mere speculation and conjecture. *See* 79 Fed. Reg. 59,964, citing the NEISS data. "[S]peculation and conjecture may not substitute for substantial evidence." *Wang v. INS*, 352 F.3d 1250, 1258 (9th Cir.

2003). The Commission's evaluation demonstrates a failure to completely examine relevant data and a failure to articulate a satisfactory explanation for promulgation of the Rule, such that a reasonable mind might accept it as adequate. *See Consolidated Edison*, 305 U.S., at 229. Furthermore, the Commission's apparent method of making assumptions to fit a predetermined conclusion is not only exactly contrary to the scientific method, but would also be in contravention of the less searching standards of the APA. *See e.g.*, 5 U.S.C. § 706(2)(A), (E); *Motor Vehicle Mfrs. Assn. of the United States, Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42-43 (1983). Therefore, the Commission's findings of potential risk cannot survive the substantial evidence test.

b. The Commission did not Accord Proper Weight to the Public's Need for the Products Subject to the Rule, and the Probable Effects the Rule Will Have on Utility, Cost, and Availability

Chief among the factors that the CPSC failed to adequately consider in promulgating the Final Rule is the magnets' utility to consumers. The Final Rule conspicuously glosses over beneficial uses of the magnets because the CPSC accepted without meaningful consideration an assumption that alternative products can substitute satisfactorily for SREMs. *See* 79 Fed. Reg. 59,967. The CPSC is sorely mistaken. The Rule seeks to ban all magnets used for these purposes because the physical properties of the magnets that make them potentially

hazardous if ingested are precisely those that make the magnets beneficial.

The Commission explains that, although there is a form of art that has been developed using the subject magnets, non-subject magnets could still be used for such art. However, conforming magnets would have to be made with a flux index of 50 kG^2mm^2 or less, making them useless for nearly any type of manipulation, including art forms. *See* Tr. Trans. Dec. 9, 2014 (1323-1324). The Commission's apparent ignorance about how the magnets function and are used is strong evidence that it did not seriously consider these factors in promulgating the Final Rule. This is borne out in the CPSC's misguided view that the rule "has a limited scope" and will not affect the use of the magnets in education and biology. CPSC, Final Rule for Magnet Sets Briefing Memorandum, p. 12 (Sept. 3, 2014).

The rule would indeed ban the magnets in uses for which they are currently employed in high schools and universities to teach concepts such as physics, chemistry, mathematics, biology, metallurgy, and geometry. Moreover, the lack of cogent explanations about product use and availability do not pass the substantial evidence test. *See AquaSlide*, 569 F.2d at 840. The CPSC also ignored other positive social benefits associated with the magnets, including their educational utility. Numerous commenters made it clear that the magnets are important and irreplaceable educational tools. *See*, for example: Stephen Niezgoda, a physicist at

Los Alamos National Laboratory, ("magnet sets are of tremendous educational values, and [has] used them in the classroom as well as at scientific community outreach events"); CPSC-2012-0050-0515; Michele LaForge (magnets have "been a remarkable teaching and learning tool in [her] home and in the classroom"); CPSC-2012-0050-2138; and Dr. Anthony Pelletier, a high school biology teacher, (considers the magnets to be "an invaluable teaching tool," and uses them to teach protein structure and formation); CPSC-2012-0050-1092.

Further, the Commission's position that the Magnet Rule is limited in scope and will not harm academic and scientific research (CPSC, Final Rule for Magnet Sets Briefing Memorandum, p. 12 (Sept. 3, 2014)) is belied by the record. For instance, David Nicholaeff commented on how he conducted research into geometric lattice theory with the magnets and considers them a "powerful tool." CPSC-2012-0050-1137. Similarly, Lee Walsh explained that, "[a]s a practicing physicist, [he has] used these magnets for experimental and demonstrative purposes," and considers them to be "very effective tools." CPSC-2012-0050-0938. Magnet sets that meet the new standard could not be used to create the necessary structures that would be of educational, scientific, and artistic utility. *See* Tr. Trans. Dec. 9, 2014, pp. 1322-1325 (Ex. C). In effect, the Rule bans SREMs that have any utility outside of the industrial sector, especially considering

the expansive scope of the Commission's definition of the magnets based on their "common use." 16 C.F.R. § 1240.2; 79 Fed. Reg. 59,973. The Final Rule is indeed a functional ban on an entire product category. The lack of availability is a factor that must be considered by the Commission for its rule to withstand review for substantial evidence. *See* H.R. Rep. No. 1153, 92d Cong., 2d Sess. 33 (1972). The Commission's biased analysis and lack of consideration for educational and artistic utility, and other societal benefits, underscore the lack of substantial evidence to support its promulgation of the Final Rule.

2. On Balance, the Commission Cannot Show by Substantial Evidence that the Magnet Rule is Reasonably Necessary to Eliminate or Reduce an Unreasonable Risk of Injury

"In evaluating the 'reasonable necessity' for a standard, the Commission has a duty to take a hard look, not only at the nature and severity of the risk, but also at the potential the standard has for reducing the severity or frequency of the injury, and the effect the standard would have on the utility, cost or availability of the product." *AquaSlide*, 569 F.2d at 844; *see also* 15 U.S.C. § 2058(f)(3). As discussed above, the Commission failed to undertake a scientific, reliable, and accurate assessment of the risk of the magnets. Nor did it give proper consideration to factors such as the rule's effects on product utility and availability. The ingestion of SREMs has the potential to cause serious injuries. But the

magnets at issue here are only hazardous when misused, unlike other products that can cause injury in their normal and intended use, such as ATVs and worm probes (*see In re P&M Enterprises*, CPSC Docket No. 88-1 (1991)). The fact that serious injury can occur from misuse of the magnets does not support the Commission's decision to effectively remove them from the market. When used properly, the magnets pose no risk of injury. Consequently, the Commission has failed to produce substantial evidence to support the effective ban on all small rare earth magnets outside of industrial or commercial settings.

3. The Commission Made an improper Cost-Benefit Analysis Based on Obsolete Data, Severely Misrepresenting Current Market Conditions

In addition to the flawed injury estimates and analyses that were fed into the cost-benefit regulatory analysis, the Commission made an additional assumption that is equally unsound: The CPSC Staff conducted the regulatory analysis based on the assumption that all magnet firms are still distributing at 2012 rates when, in fact, 96% of the of the magnet set market no longer exists.

The CPSC found that most firms selling SREMs no longer exist, yet the regulatory analysis assumes that 800,000 sets of magnets will be sold every year. *See* 79 Fed. Reg. at 59,988. Consequently, the cost-benefit analysis conducted by the CPSC is unrealistic. The number of sets currently being sold by Zen is about 30,000, which is less than four percent of the 800,000-set -per-year estimate used

by the CPSC. The Commission did not take this into consideration when it conducted its cost-benefit analysis and need determination for the Final Rule. Therefore, the Commission's required cost-benefit analysis and need determination for the Final Rule cannot be supported by substantial evidence.

Even if, *arguendo*, the SREM industry were to return to its pre-enforcement-action size and the Magnet Rule were not in effect, it is unreasonable to assume that the magnet set market would return to retail sales methods and levels of 2012: The stop sale requests made to internet sellers (*e.g.*, Amazon and ebay), to brick-and-mortar stores (*e.g.*, Brookstone and Urban Outfitters), and to SREM manufacturers would still be in effect and would foreclose the widespread sale of SREMs. Ultimately, the cost-benefit analysis is impermissibly based on a marketplace that no longer exists, one tailored to suit the Commission's goals without regard to market realities. As such, there is not substantial evidence in support of the Commission's findings in support of the Final Rule.

4. The Final Rule was Impermissibly Promulgated Because it was Substantially Altered Without Opportunity for Public Notice and Comment

The Final Rule was promulgated pursuant to the Administrative Procedure Act, 5 U.S.C. § 553(b) and (c) (*see* 79 Fed. Reg. 59,966), which provides, generally, for public notice and comment prior to the issuance of a final decision. Although the proposed rule went through the required notice and comment procedures, the final

rule was unjustifiably and impermissibly modified without additional notice and opportunity for public comment.

The final rule must be a "'logical outgrowth' of the rulemaking proceeding." *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985) (citations omitted). The rulemaking process must also "alter[t] the reader to the stakes" of the proposed rule, *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988), and, critically, must provide notice of important changes between the proposed and final rule. *See AFL-CIO v. Donovan*, 757 F.2d at 339 (holding rule invalid where no notice given of an important change between proposed and final rule).

The most significant modification of the rule was that the ban on SREMs would now affect magnets based on how they are "commonly used," instead of only on how they are marketed and intended for use. *See* 79 Fed. Reg. at 59,962. Not only does this distinction greatly expand the number of products that fall under the scope of the ban, there are also no precise, delineating factors, let alone intelligible standards, that would allow for an objective understanding of which products are "commonly used" for certain purposes (*i.e.*, for manipulation or construction for entertainment), and in turn which products violate the Rule.

The Final Rule effectively bans an entire shape of high powered magnets. Such a capacious and amorphous definition of a product not only altered the scope

of the proposed rule without providing the opportunity for notice and comment pursuant to 15 U.S.C. § 2058(a) and APA § 553, it resulted in a rule that is impermissibly vague and exceeds the Commission's authority under 15 U.S.C. § 2052(a). The Commission may not regulate a product without regard to how the product is produced, distributed, or intended to be used. Therefore, approval of final rule without § 553 notice and comment was an abuse of discretion, was in excess of statutory jurisdiction under APA § 553 and 15 U.S.C. § 2058(a), and, ultimately, resulted in the Final Rule not being promulgated pursuant to law.

IV. ABSENT A STAY OF ENFORCEMENT AND EFFECT, PETITIONER FACES IRREPARABLE HARM

Zen Magnets is the only remaining U.S. distributor of products subject to the Final Rule. The Commission acknowledged in the Final Rule that current sales of the magnet sets are dramatically smaller than at the time of enforcement actions, and that Zen Magnets will be the primary entity affected by this rule. *See* 79 Fed. Reg. 59,978; and *id*. at 59,985. The Commission has additionally acknowledged that as a result of the Final Rule, Zen will no longer be able to manufacture or import its products, "and might go out of business." *See id.* at 59,985.

Currently, Zen is awaiting a decision from the Commission in a separate but related matter, *In re Zen Magnets, LLC*, CPSC Docket No. 12-2. That case is not likely to be decided until May 2015; however, the Final Rule is set to take effect on

April 1, 2015, well before this Court will be able to address the merits of Zen's challenge to the Final Rule. Within a short time after the rule takes effect, and before the Commission rules on the nature of Zen's products, Zen will be prohibited from conducting its business.

Granting a stay of enforcement will also help protect Zen's due process rights. The problematic procedure employed by the Commission was summed up by Commissioner Buerkle who explained that she did not vote on the Final Rule because "[t]here is a close identity between the products affected by the rule and those potentially affected by the adjudication." *See,* http://www.cpsc.gov/en/About-CPSC/Commissioners/Ann-Marie-Buerkle/Ann-Marie-Buerkle-Statements/Statement-on-the-Final-Rule-for-Magnet-Sets/. Commissioned Buerkle went on to explain:

> To the best of my knowledge, this Commission has never before promulgated a mandatory standard addressing a hazard that is the subject of a pending adjudication. Indeed, I have not found any judicial decision that addresses any agency promulgating a mandatory standard under these circumstances. Even if such a precedent exists, the situation at hand calls for special treatment, at least to avoid the appearance of prejudgment.

Id. (Emphasis in original.)

Therefore, to ensure that Zen's interests are protected, the Final Rule should be stayed, at minimum, until there is a decision rendered in the administrative

adjudication involving Zen Magnets. As Commissioner Buerkle noted, "[t]o issue a final rule outlawing the very same product that is the subject of the adjudication would seem to be the ultimate prejudgment." *Id*.

V. A STAY WILL NOT SUBSTANTIALLY INJURE THE GOVERNMENT

If this Court issues a stay of the Final Rule, the government would not suffer substantial injury. Zen Magnets is currently the only U.S. Firm that is manufacturing and importing products subject to the Final Rule. The Commission could enjoin Zen from selling its products under 15 U.S.C. § 2061 by designating the products as "imminent hazards." As noted in footnote 1, and other text above, the Commission is already pursuing an enforcement action against Zen. If the Commission prevails in that action, it would effectively prevent Zen from selling its products, even without the Final Rule being in effect. The government would, therefore, not be required to undertake any additional action to stop the sale of SREMs by Zen until this case is resolved on the merits. Any additional delay would have only a de minimis adverse impact on the government and the public.

VI.THE PUBLIC CAN BENEFIT FROM A STAY

The issuance of a stay weighs in favor the public interest. The SREMs produced and sold by Zen never presented a serious risk of injury to the public and the public will be deprived of a useful and valuable educational tool and art form if the ban becomes effective prior to the resolution of both this case and the CPSC

enforcement action, *In re Zen Magnets*, CPSC Docket No. 12-2.

The Commission has not shown that Zen's products have ever been a substantial threat to the public, and there is no reason to think that Zen's products will pose any greater risk if the Final Rule is stayed, pending the outcome of this litigation. (In addition, if the Commission believed that the products subject to the Final Rule presented an imminent harm to the public, the Commission could have so designated them under 15 U.S.C. § 2061.)

Additionally, Zen has been committed to ensuring that its products are used responsibly by selling them online and where 18-and-up identification is required. *See* Testimony of Shihan Qu, *In re Zen Magnets*, at 1734-1738 (Dec. 11, 2014). Zen also sought to differentiate its products from those being sold to the public in toy stores and to children, en masse. For instance, Zen created a system of auditing its products and creating tighter tolerances, and producing a consistent, high-quality product (*id.* at 1643-1644), so that Zen's products could be used for additional purposes, such as demonstrating principles of physics and chemistry (*see* Testimony of Dr. Edwards, *In re Zen Magnets*, at 1431 (Dec. 10, 2014)); comments identified in Section III(A)(1)(b).

Zen Magnets represent a unique medium of art, which, by their very nature, teach principles of physical science and mathematics through their use. Public consensus provides evidence of the value that consumers place on the utility of the

product. *See* Oral Presentation Comment of Shihan Qu, CPSC-2012-0050-2595, REF_15 PPP NationalSurveyResults (posted Feb. 12, 2014). The public interest will be best served by staying enforcement of the Final Rule until this Court can resolve Zen's challenge on the merits, and until the Commission has determined whether or not Zen's products present substantial product hazards.

VII. CONCLUSION

The requested stay would give the Commission an opportunity to take meaningful account of Zen Magnets' ability to safely put into commerce products that have much more to offer the public than what the Commission has previously considered.

WHEREFORE, Petitioner requests an Order Staying enforcement and effect of the Safety Standard for Magnet Sets Promulgated on October 3, 2014.

Respectfully submitted,

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

s/David C. Japha

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion has been served via the Court's electronic system to counsel for the Respondent on this 1st day of April, 2015, by sending it to:

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s/David C. Japha

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FURTHER CERTIFICATIONS

I hereby certify that all redactions have been made pursuant to 10th Cir. Rule 25.5; no paper copies needed to be filed and the document has been scanned for viruses, using a commercial virus scanner.

s/David C. Japha