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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

GARY PURRINGTON; DIANE PURRINGTON; G. SKYLER PURRINGTON; and FIREFOX ENTERPRISES, INC.;

Defendants.

Case No. CV-04-577-S-BLW

UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

The defendants have filed a motion to dismiss on the grounds that the Consumer Product Safety Commission ("CPSC" or "Commission") allegedly lacks jurisdiction under the Consumer Product Safety Act ("CPSA"), 15 U.S.C. §§ 2051-2085, to regulate components intended to produce banned fireworks. The fatal flaw in the defendants' motion is that the Complaint for Injunction ("Complaint") is not based on the CPSA, but instead on their violations of the Federal

Hazardous Substances Act ("FHSA"), 15 U.S.C. §§ 1261-1278. The defendants do weave some FHSA terms, provisions, and regulations into their brief, conflating the two statutes,[1/] but their argument is ultimately premised on the CPSA, its terms and standards, and CPSA case law. "[T]he CPSA is a separate statute that has no application in this case. . . . [A]rguments with respect to the CPSA are irrelevant." Shelton v. CPSC, 277 F.3d 998, 1008 (8th Cir. 2002).

There can be no serious doubt that the CPSC has jurisdiction *under the FHSA* over the materials at issue here, and other courts have consistently found such jurisdiction in similar cases. Accordingly, the government urges the Court to summarily deny the motion and order the defendants to answer the complaint immediately. Indeed, given that defendants have grounded their motion upon the wrong statute and in light of the protracted pre-filing discussions between the parties about a possible consent decree premised on the FHSA (see Plaintiff's Motion for Reconsideration, Doc. No. 10), the government respectfully suggests that the motion can and should be decided without oral argument.[2/]

STATEMENT OF FACTS

As stated in the Complaint, this Court entered a Consent Decree of Permanent Injunction on November 7, 1986, against defendant Gary Purrington and Norstarr Products, Inc., a corporation doing business at 11612 North Nelson Lane in Pocatello, Idaho. United States v. Purrington, Civ. No. 86-4214 (D. Idaho) ("1986 Inj."). (Compl. ¶ 13.) The 1986 Injunction

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[1/] See, e.g., Defs.' Br. at 3 (mixing the terms "banned hazardous substance" and "banned hazardous product" and citing to both the CPSA and FHSA in the same paragraph).

[2/] An additional reason why the defendants' motion should be decided summarily and without oral argument is that the defendants have recently stated that they continue to conduct "business as usual" during the pendency of this action.

enjoined Gary Purrington and Norstarr Products, Inc. from violating the FHSA "by introducing or delivering for introduction into interstate commerce any banned hazardous substances under the Federal Hazardous Substances Act (FHSA), 15 U.S.C. §§ 1261-1267, and regulations at 16 C.F.R. §§ 1500.17(a)(3) and (a)(8) issued under the FHSA ('banned fireworks')." (1986 Inj. ¶ 3; Compl. ¶ 14.) Specifically, the 1986 Injunction prohibited Gary Purrington and Norstarr Products, Inc., from introducing or delivering for introduction into interstate commerce (except in certain limited circumstances involving sales to consumers with valid explosives permits or licenses issued by the Bureau of Alcohol, Tobacco & Firearms ("ATF")) "combinations of chemicals that could reasonably be expected to be used to make flash powder," a component of banned fireworks.[3/] (1986 Inj. ¶¶ 5, 11; Compl. ¶ 15.) The 1986 Injunction expired by its own terms on November 7, 1991. (1986 Inj. ¶ 19; Compl. ¶ 16.)

In the instant case, defendants Gary Purrington, Diane Purrington, G. Skyler Purrington, and Firefox Enterprises, Inc., still doing business at 11612 North Nelson Lane in Pocatello, Idaho, have repeatedly introduced or delivered for introduction into interstate commerce components intended to produce fireworks that are banned hazardous substances in violation of Section 4 of the FHSA. See 15 U.S.C. § 1263(a). On November 16, 2004, the United States, acting on behalf of the Commission, filed this action seeking to enjoin defendants under the FHSA from distributing banned hazardous substances.

In its Complaint, the government alleged that the defendants repeatedly violated the FHSA and its accompanying regulations by distributing banned fireworks components. As set

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[3/] "Flash powder" is a combination of chemical powders (such as aluminum and potassium perchlorate or potassium chlorate) that produces an explosion with an extremely loud bang. It is dangerous because it lights easily; a small spark may be enough to set it off.

forth in the Complaint, on several occasions from November 2001 to April 2004, defendants introduced or delivered for introduction into interstate commerce fireworks components – chemicals, fuse, paper tubes, and paper end caps – intended to make banned fireworks. (Compl. ¶¶ 20-24.) All of these purchases involved the sale of chemicals and/or supplies that are components used to make banned fireworks, and based on the type and quantity of materials the consumer ordered, defendants knew or had reason to know that their intended use was to produce banned fireworks. (Id.) Indeed, none of the consumers to whom defendants sold the fireworks components possessed a valid ATF license or permit authorizing the manufacture of explosives.[4/] (Id.) Therefore, on all of these occasions, defendants violated Section 4 of the FHSA, 15 U.S.C. § 1263(a), by introducing or delivering for introduction into interstate commerce components intended to produce banned hazardous substances. (Id. at ¶¶ 19-24.)

Defendants filed a Rule 12(b)(6) motion to dismiss on January 28, 2005. The government submits this brief in opposition to defendants' motion.

ARGUMENT

Motions to dismiss are disfavored, as there exists "'a powerful presumption against rejecting pleadings for failure to state a claim.'" Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (quoting Auster Oil & Gas, Inc. v. Stream, 764 F.2d 381, 386 (5th Cir. 1985)). "[A] complaint should not be dismissed for failure to state a claim unless it appears

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[4/] The chemical components used to make flash powder and banned fireworks can also be used to manufacture professional, or display, fireworks. Therefore, it is relevant that none of the purchasers involved in the transactions set forth in the Complaint possessed an ATF license to manufacture explosives. If a purchaser had possessed such a license and the defendants were aware of that fact, it would not necessarily be the case that the defendants knew or should have known that the components they sold were intended to be used to create banned fireworks.

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In considering a motion to dismiss, a district court must take as true all well-pleaded allegations of material fact and must construe them in the light most favorable to the plaintiff. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir. 2003). A court also must take into account all inferences supporting the complaint that a trier of fact reasonably could draw from the evidence. See id.

The defendants' motion to dismiss should be denied because the government has stated a claim under the FHSA upon which relief can be granted. Pursuant to the FHSA, the Commission has jurisdiction over the banned hazardous substances – in this case, fireworks components – that are the subject of this proceeding. To support their motion to dismiss, defendants have relied upon the CPSA, a statute not relevant to this proceeding. Defendants' arguments have no application to the FHSA, which is the statute underlying the Complaint here. (See Compl. ¶¶ 1, 2, 8-12, 19, 25.) For these reasons, the Court should deny defendants' motion to dismiss.

A. The CPSC Has Jurisdiction over the Fireworks Components Under the FHSA.

The Commission is an independent federal regulatory agency established by Congress. See 15 U.S.C. § 2053. The Commission enforces numerous statutes, including the Federal Hazardous Substances Act. The Commission also enforces the Consumer Product Safety Act. This is an action solely under the FHSA and not an action under the CPSA.

For more than thirty years, the Commission has enforced the provisions of the FHSA.[5/] Section 4 of the FHSA prohibits the introduction or delivery for introduction into interstate

[5/] Responsibility for enforcement of the FHSA was transferred to the Commission from the Food and Drug Administration ("FDA") in 1972. See 15 U.S.C. § 2079(a).

commerce of "banned hazardous substances." 15 U.S.C. §1263(a). Congress authorized the Commission in Section 2 of the FHSA to promulgate regulations to declare a hazardous substance (a term which is itself defined at § 1261(f)) a banned hazardous substance. 15 U.S.C. § 1261(q)(1)(B). Section 2 of the FHSA provides in pertinent part:

> The term "banned hazardous substance" means … any hazardous substance intended, or packaged in a form suitable, for use in the household, which the Secretary by regulation classifies as a "banned hazardous substance" on the basis of a finding that, notwithstanding such cautionary labeling as is or may be required under this Act for that substance, the degree or nature of the hazard involved in the presence or use of such substance in households is such that the objective of the protection of the public health and safety can be adequately served only by keeping such substance, when so intended or packaged, out of the channels of interstate commerce . . . .

Id.

Approximately thirty years ago,[6/] the CPSC issued regulations pursuant to Section 2 of the FHSA declaring that certain fireworks devices, including components intended to produce such devices, are "banned hazardous substances." The Commission made the findings required by 15 U.S.C. § 1261(q)(1)(B) that such fireworks could not be made safe through labeling and that the public health and safety could be served only by keeping such articles out of interstate commerce, see 16 C.F.R. § 1500.17(a), and declared as "banned hazardous substances":

> Fireworks devices intended to produce audible effects (including but not limited to cherry bombs, M-80 salutes, silver salutes, and

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[6/] As noted above, the FDA was originally charged with enforcing the FHSA. In 1970, FDA had banned certain fireworks devices, including the kits and components that could be used to make such devices. See 21 C.F.R. § 191.9(a)(3) (1970). In 1974, the CPSC adopted that regulation, and recodified it at 16 C.F.R. § 1500.17(a)(3). 38 Fed. Reg. 27,012, 27,017 (Sept. 27, 1973). In 1976, the CPSC enacted a similar ban on firecrackers including, again, the kits and components that could be used to make such devices. That regulation was codified at 16 C.F.R. § 1500.17(a)(8). 41 Fed. Reg. 22,931, 22,935 (June 8, 1976).

> other large firecrackers, aerial bombs, and other fireworks designed to produce audible effects, and *including kits and components intended to produce such fireworks*) if the audible effect is produced by a charge of more than 2 grains of pyrotechnic composition . . . .

16 C.F.R. § 1500.17(a)(3) (emphasis added).

> Firecrackers designed to produce audible effects, if the audible effect is produced by a charge of more than 50 milligrams (.772 grains) of pyrotechnic composition (not including firecrackers included as components of a rocket), aerial bombs, and devices that may be confused with candy or other foods, such as "dragon eggs," and "cracker balls" (also known as "ball-type caps"), and *including kits and components intended to produce such fireworks* . . . .

16 C.F.R. § 1500.17(a)(8) (emphasis added).

Accordingly, the referenced fireworks regulations[7/] specify that "components" that are "intended to produce" certain banned fireworks devices are banned hazardous substances under Section 2 of the FHSA, 15 U.S.C. § 1261(q)(1)(B). In this action, the government seeks an injunction (and other equitable relief) preventing the defendants from introducing or delivering for introduction into interstate commerce banned hazardous substances, namely, components intended to produce banned fireworks, in violation of Section 4 of the FHSA, 15 U.S.C. § 1263(a).

B. Courts Have Upheld the Commission's Jurisdiction Over Fireworks and Components Intended To Produce Banned Fireworks Under the FHSA.

Courts have upheld the Commission's jurisdiction pursuant to the FHSA over fireworks and the components of banned fireworks. In U.S. v. Focht, 882 F.2d 55 (3rd Cir. 1989), a case

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[7/] Throughout this Opposition, "fireworks regulations" means the regulations found at 16 C.F.R. § 1500.17(a)(3) and (a)(8).

factually similar to this action, the Third Circuit upheld the Commission's jurisdiction under the FHSA to pursue cases involving the sale of components intended to produce banned fireworks.

In Focht, the government sought to enjoin defendants from selling fireworks components – tubes, end plugs, and fuse – that violated the fireworks regulations in 16 C.F.R. §§ 1500.17(a)(3) and (a)(8). Id. at 57 & n.6. The court concluded that subsections (a)(3) and (a)(8) each ban components when their intended use is to produce banned fireworks. Id. at 59. Although the defendants argued "that their harmless paper and plastic products could not be deemed hazardous under any test," id., the Third Circuit disagreed, stating that "even the most innocuous items may be converted into dangerous instrumentalities." Id. The key, according to the court, was the "intended use" of the items, and this use is determined by application of an objective seller standard at the time of the shipment. Id.

Here, as in Focht, the government seeks to enjoin the defendants from selling fireworks components – tubes, end caps/plugs, fuse, and, in the instant case, chemicals – intended to produce banned fireworks. Notably, the defendants in Focht challenged whether their products met the statutory definition of banned hazardous substances, based on their belief that the components "neither are intended for children, nor for use in the household." Id. at 59 n.9. The court rejected both arguments, noting the strong connection between the products at issue and both children and household use (the latter particularly because the defendants shipped their products to households, as do the defendants in the instant case). See id. The court also emphasized that the ban on sales of components intended to produce illegal fireworks was enacted pursuant to the portion of the FHSA, § 1261(q)(1)(B), that permits the Commission to

ban items "deemed a threat to society at large," id., which finding the Commission made at 16 C.F.R. § 1500.17(a). In analyzing the statutory and regulatory scheme, the Focht court stated:

> The starting point of our analysis must be the regulatory language itself. Pursuant to 15 U.S.C. § 1261(q)(1)(B)[,] Section 1500.17 bans certain hazardous substances because they are so dangerous that adequate labeling cannot be devised, and therefore "the public health and safety can be served only by keeping such articles out of interstate commerce." 16 C.F.R. § 1500.17(a) (1988)[.] The regulation borrows this quoted material almost verbatim from section 1261(q)(1)(B).
>
> This language tells us three things. First, it tells us the regulation prohibits certain substances from entry into interstate commerce. Second[,] it tells us that an extreme problem, justifying an extreme response, exists. Third, it tells us that Congress expressly authorized such a response.
>
> Subsections (a)(3) and (a)(8) each bans a particular type of firework, "including kits and components intended to produce such fireworks." 16 C.F.R. § 1500.17(a)(3), (8) (1988). Taken in context, this language calls for application of an objective seller standard. Congress intended the ban to keep certain items out of commerce; it intended the ban to prevent such goods from ever entering American homes. 15 C.F.R. § 1261(q)(1)(B) (1982). The regulations adopt the statutory language and attempt to effectuate its purpose. See 16 C.F.R. § 1500.17(a) (1988). They identify an item posing a certain type of danger, and then insert catch-all language to trap components or kits that will have the same effect.

Id. at 58-59 (citations and footnote omitted) (emphasis added).

The government has enforced other fireworks cases under the FHSA as well. In Shelton v. CPSC, 277 F.3d 998 (8th Cir. 2002), cert. denied, 537 U.S. 1000 (2002), the defendants alleged that the CPSC lacked jurisdiction to regulate certain fireworks, arguing that those fireworks did not meet the definition of "banned hazardous substances" under 15 U.S.C. § 1261(q)(1)(B) ("Clause B") because they were exempted by 15 U.S.C. § 1261(q)(1)(A)

("Clause A") and its proviso. The district court upheld CPSC's jurisdiction to develop rules banning the fireworks at issue pursuant to Clause B, and the court of appeals affirmed,[8/] explaining:

> Clause B [of § 1261(q)(1)] does not provide a list of banned products. Instead, the clause requires the CPSC to develop rules governing the banning of hazardous substances, which the CPSC did in developing the fireworks regulations. Accord Chevron, 467 U.S. at 843-44, 104 S. Ct. 2778 ("If the Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.") The fireworks regulations were promulgated to fill the gap in Clause B – not Clause A – in order to determined which products cannot be made safe even with cautionary labeling.

Id. at 1005-06. The court then relied upon the introductory language to 16 C.F.R. § 1500.17(a) – *the same regulation at issue in this case* – in concluding that the CPSC appropriately made the finding required by the FHSA in enacting the regulation and that the district court correctly held that the defendants' fireworks were subject to the CPSC's jurisdiction. See id. at 1006-07; see also U.S. v. Midwest Fireworks Co., 248 F.3d 563, 567-68 (6th Cir. 2001) (in case involving "overloaded" fireworks in violation of FHSA and its regulations, rejecting defendants due process challenge and finding 16 C.F.R. § 1500.17(a)(3) to be constitutionally valid).

[8/] The Eighth Circuit explained that Clauses A and B of § 1261(q)(1) serve two different purposes. Clause A and subsection (ii), upon which the Shelton defendants relied, expressly ban hazardous products that are intended solely for use by children unless they can be adequately labeled. Clause B bans hazardous substances without regard to whether they are intended for children or adults notwithstanding cautionary labeling.

C. The CPSA and Case Law Arising From CPSA Actions Are Not Relevant.

Defendants' brief in support of its motion to dismiss asserts that the fireworks components sold by the defendants in this case must be "consumer products" under the CPSA in order for the Commission to assert jurisdiction over them. (Defs.' Br. at 3-5.) This assertion entirely misconstrues the Complaint and this case as a whole. The government does not have to show that the fireworks components are consumer products under the CPSA because this is not a proceeding under the CPSA. As explained above, this is a proceeding under the *FHSA*. (See Compl. ¶¶ 1, 2, 8-12, 19, 25.)

To support their contention that the Commission must prove that components are consumer products and that this is an action under the CPSA, defendants have commingled the terms "*banned hazardous substance*" under the FHSA, with "*banned hazardous product*" under the CPSA. (Defs.' Br. at 3-4.); compare 15 U.S.C. § 1261(q)(1)(B) with 15 U.S.C. § 2057 (emphasis added). Each is a defined term under the relevant statute and can only be read in the context of that statute.

The relevant phrase here, "banned hazardous substance," is limited to the FHSA. See 15 U.S.C. § 1261(q)(1)(B). In contrast, the CPSA regulates "consumer products" and "banned hazardous *products*." See 15 U.S.C. §§ 2052, 2057 (emphasis added). In this action, the government has neither sought to regulate fireworks or fireworks components as "consumer products" under the "banned hazardous products" provision of the CPSA, nor sought to pursue these violations using any other provision of the CPSA. As the Eighth Circuit explained in Shelton, 277 F.3d 998, proceedings under the CPSA contemplate an entirely separate and distinct enforcement scheme. Like the defendants in this case, the defendants in Shelton also advanced

an argument that commingled and confused the CPSA and the FHSA. They argued that they were entitled to a full administrative hearing before an administrative law judge pursuant to 15 U.S.C. § 2066, a CPSA provision. The Eighth Circuit flatly rejected this argument, stating:

> [T]he CPSA is a separate statute that has no application in this case. The United States brought this action against the [defendants] pursuant to the FHSA and the fireworks regulations promulgated pursuant to the FHSA. Thus, the [defendants'] arguments with respect to the CPSA are irrelevant.

Id. at 1008 (footnotes omitted).

Likewise, the defendants' commingling of the provisions of FHSA and CPSA results in a flawed legal argument that fails to support their motion to dismiss. In this same vein, defendants' lengthy analysis of the factors set forth in CPSC v. Anaconda Co., 593 F.2d 1314 (D.C. Cir. 1979), has no relevance to the Commission's claim against the defendants under the FHSA. The Anaconda factors are limited to specific proceedings that arise under the *CPSA* and that involve *consumer products* as defined in the CPSA. Because this action neither seeks relief under the CPSA, nor seeks to regulate fireworks as consumer products under the CPSA, the Court should not apply the factors established by Anaconda. Defendants' reliance on Anaconda is entirely misplaced. This is an action under the FHSA, and the Commission's jurisdiction is clear.

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss should be summarily denied.

Dated: February 16, 2005

Respectfully submitted,

THOMAS E. MOSS
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By: /s/ Jennifer E. Grishkin
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I hereby certify that I caused a copy of United States' Opposition to Defendants' Motion To Dismiss to be served by facsimile and first-class mail on February 16, 2005, upon:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,
Plaintiff,

v.

GARY PURRINGTON, an individual;
DIANE PURRINGTON, an individual;
G. SKYLER PURRINGTON, an individual;
and FIREFOX ENTERPRISES, INC.,
a corporation,
Defendants.

Civ. No. CIV-04 577S-EJL

Defendant's Motion to Dismiss

DEFENDANT'S MOTION TO DISMISS

Comes now the Defendants, Gary Purrington, Diane Purrington, G. Skyler Purrington and Firefox Enterprises, Inc., ("Purringtons"), by counsel, Steven J Wright and Aaron J. Tolson, of Wright, Wright & Johnson, and file their motion to dismiss the Consumer Safety Product Commission ("CPSC") complaint for injunction. In support of their Motion to Dismiss, the Purringtons would show the Court:

1. That on November 16, 2004, the CPSC filed its complaint for injunction (Complaint) against the Purringtons.
2. The Purringtons were served on or about November 29, 2004.

3. This Court granted a Motion for Extension of Time to respond to the Complaint allowing the defendants to respond to the complaint on or before January 28, 2005.
4. Pursuant to FRCP 12(B)(6), the complaint filed by the CPSC has failed to state a claim upon which relief can be granted.
5. The CPSC is unable to be given the relief it has requested in the Complaint because it does not have the authority to regulate the chemicals sold by the Purringtons.
6. The chemicals sold by the Purringtons are neither consumer products nor are they manufactured finished goods.
7. The facts alleged in the complaint fail to state any violations of the Federal Hazardous Substance Act ("FHSA") and of CPSC regulations ("Regulations").
8. Filed separately and contemporaneously with this motion is a brief in support of this Motion to Dismiss, which should be considered part of this motion.

Wherefore, the Defendants, Gary Purrington, Diane Purrington, G. Skyler Purrington and Firefox Enterprises, Inc., pray this Court grant their motion to dismiss the complaint for injunction filed by the Plaintiff, Consumer Safety Product Commissioner.

Respectfully submitted,

_____/S/_____
Aaron J. Tolson

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Motion to Dismiss* has been served this _____ day of January, 2004, via E-mail upon:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. GARY PURRINGTON, an individual; DIANE PURRINGTON, an individual; G. SKYLER PURRINGTON, an individual; and FIREFOX ENTERPRISES, INC., a corporation, Defendants.	Civ. No. CIV-04 577S-EJL Brief In Support of Defendant's Motion to Dismiss

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

The Consumer Product Safety Commission ("CPSC") has alleged in its complaint that on five separate occasions that Gary Purrington, Diane Purrington, G. Skyler Purrington and Firefox Enterprises, Inc., ("Purringtons") violated the Federal Hazardous Substance Act, 15 U.S.C. § 1261 ("FHSA") and/or the regulations promulgated by the CPSC and found starting at 16 CFR § 1500. The CPSC alleges that the violations occurred because the chemicals and other items sold by the Purringtons are alleged "banned hazardous substances" as determined by the CPSC.

The CPSC derives its authority to protect "consumers" from allegedly the Consumer Product Safety Act, 15 U.S.C. § 2051 ("CPSA")[1]. As part of its regulatory authority, the CPSC also enforces the FHSA as it applies to household substances and children's products[2] to keep hazardous materials out of the consumer's purview. It is contrary to the FHSA and its attendant regulations to place "banned hazardous substances"[3] into the stream of commerce for consumers.

The CPSC has alleged in the Complaint that:

> (1) "On or about November 8, 2001 they sent one or more packages to a customer in Wisconsin that contained five (5) pounds of sulfur, ten (10) feet of fuse, 1000 paper tubes and 2000 end plugs"(¶20 of Complaint);
> (2) "On or about January 15, 2002 they sent one or more packages to a customer in Illinois that contained five (5) pounds of potassium chlorate and 500 paper tubes"(¶21 of Complaint);
> (3) "On or about July 22, 2002 they sent one or more packages to a customer in Illinois that contained one (1) pound of aluminum powder and 300 paper tubes"(¶22 of Complaint);
> (4) "On or about March 17, 2004 and March 26, 2004 they sent one or more packages o a customer in Illinois that contained five (5) pounds of potassium chlorate, one (1) pound of aluminum powder, 250 cardboard tubes and 500 end caps"(¶23 of Complaint); and
> (5) "On or about April 13, 2004 they sent one or more packages to a customer in Illinois that contained 250 feet of fuse." (¶24 of Complaint.)

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[1] The purposes of this Act are--
(1) to protect the public against unreasonable risks of injury associated with consumer products;
(2) to assist consumers in evaluating the comparative safety of consumer products;
(3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and
(4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries. 15 USC §2051(b).

[2] "A Small Business Guide to the US Consumer Product Safety Commission" www.cpsc.gov/BUSINFO/smbusgde.html

[3] 15 USC §1261(q)(1).

Based upon the facts alleged in the Complaint, the Purrington's did not place banned hazardous substances into the stream of commerce. The chemicals sold by the Purringtons have not been declared banned hazardous substances by the CPSC. Nor did the Purringtons have any reason to know that their chemicals were to be used to produce banned hazardous substances. The chemicals sold by the Purringtons are exempt from CPSC regulations. The CPSC only has the authority to regulate finished consumer products that are intended to be used in or around households. The chemicals sold by the Purringtons are not finished goods, are not consumer goods, and are not intended to be used in or around households.

STATUTORY AND REGULATORY AUTHORITY

Congress authorized the CPSC to regulate consumer products to protect consumers against unreasonable risks of injury associated with consumer products. 15 U.S.C. § 2051 ("CPSA"). Congress defined the term "consumer product" in the CPSA. A consumer product is:

> any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise. 15 U.S.C. § 2052(a)(1).

Congress also limited the definition of a "consumer product". If an article or item is not, "customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer," it is not a consumer product. 15 U.S.C. §2052 (a)(1)(A).

Congress also defined the term "banned hazardous substance".[4] A consumer product is a banned hazardous substance when the CPSC finds that a consumer product presents an "unreasonable risk of injury; and no reasonable safety standard would adequately protect the public from risk of injury associated with such product." 15 U.SC. 2057. Congress required the CPSC to promulgate a rule to declare a product a banned hazardous product. 15 U.S.C. 2057.

[4] 15 USC §1261(q)(1)

Congress has also declared certain items to be hazardous substances by promulgating the FHSA. Pursuant to the FHSA and relevant to this litigation, the term "hazardous substance" means:

> Any substance or mixture of substances which (i) is toxic, (ii) is corrosive, (iii) is an irritant, (iv) is a strong sensitizer, (v) is flammable or combustible, or (vi) generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.
> 15 U.S.C. 1261(f)(1)(A)

Congress also granted to the CPSC the opportunity to declare items to be hazardous substances by the regulation as part of the rule making process. 15 U.S.C. 1261(f)(1)(B).

With the authority granted to it by Congress, the CPSC has promulgated regulations which declare certain consumer products to be banned hazardous products.[5] These regulations declare certain types of fireworks to be banned hazardous substances.[6] The regulations also declare that "kits and components" are banned hazardous substances if the kits and components are intended to be used to make these same types of banned fireworks.[7]

ARGUMENT

In order for the CPSC to have jurisdiction over the articles sold by the Purringtons, the articles must be "consumer products" as defined in the enabling legislation. There are a long line of cases which have discussed the definition of a "consumer product". *Consumer Safety Product Commission vs. Anaconda Company,* 593 F.2d 1314 (D.C.Cir. 1978). See also *ASG Industries vs. Consumer Safety Product*

[5] 16 C.F.R. 1500.17(a)(3), 16 C.F.R. 1500.17(a)(8) and 16 C.F.R. 1500.17(a)(9)
[6] 16 CFR §1500.17(a)(3)
[7] 16 CFR§1500.17(a)(3)

Commission, 593 F.2d 1323 (D.C.Cir. 1979) and *Robert K. Bell Enterprises, Inc. vs. Consumer Product Safety Commission*, 645 F.2d 26 (10th. Cir. 1980).

In *Anaconda,* the Court analyzed the definition of a "consumer product" in order to it to determine if a certain type of aluminum wiring system was a consumer product and within the jurisdiction of the CPSC. The Court held that in order for the CPSC to have jurisdiction over the aluminum wiring system, it must meet the definition of a consumer product. *Consumer Safety Product Commission vs. Anaconda Company,* 593 F.2d 1314, 1317 (D.C.Cir. 1978).

In its analysis, the *Anaconda* Court found that an "article" must meet the intent and definition in the statute in order for it to be a "consumer product". An article must be a distinct "article of commerce, rather than any physical entity that might exist only at an intermediate stage of production." *Id* at 1319. Component parts may be considered "only if such regulation is warranted." *Id* at 1319.

The second key element the *Anaconda* Court relied upon was the distribution of the article. Clause (i) of the definition contemplates direct sale of the article to the consumer, whereas clause (ii) was designed to include those articles which were not directly sold to the consumer. *Id* at 1320. Clause (ii) was not intended to expand the definition of a "consumer product", but merely to complement clause (i) and cover the situations where consumers obtain use of an article other through a direct sale. *Id.* The *Anaconda* Court held that:

> Clauses (i) and (ii) were designed to ensure that the definition of consumer product would encompass the various modes of distribution through which consumers acquire products and are exposed to the risks of injury associated with those products. *Id.*

Clauses (i) and (ii) are not designed to expand the term "consumer product" to include the manner in which a consumer uses a product, only the manner in which the consumer obtains the product.

The third key element the *Anaconda* Court considered was the requirement that a product be "customarily" sold to consumers as a distinct article. In reviewing the legislative history of the CPSA, the *Anaconda* Court found that if a consumer buys all of the component parts of an item and then puts them together himself, for his own personal use, the resulting finished product is not within the definition of a "consumer product". *Id* at 1321. If the finished product is not a consumer product, then the component part(s) of the finished product can not be a consumer product. The legislative history stated that:

> The definition (of a consumer product) does not include products produced solely by an individual for his own personal use, consumption or enjoyment.

Id at 1321.[8]

Applying the statutes, regulations and case law to the facts alleged in the Complaint, the CPSC has failed to state claim upon which relief can be granted. When a party files a motion to dismiss based upon a Rule 12(b), the court must assume that the general allegations in the complaint encompass the specific facts necessary to support those allegations. *Lujan* v. *National Wildlife Federation,* 497 U.S. 871, 889 (1990). Therefore, this Court must look the enumerated facts in the Complaint and determine if they support the allegations.

The enumerated facts must show that the chemicals the Purringtons sell are in fact consumer products. There are three criteria the facts of the Complaint must show that the chemicals sold by the Purringtons meet in order for the chemicals to be consumer products. The facts must show that the chemicals sold are distinct articles of commerce or components of articles of commerce. The facts must show that the chemicals are distributed to consumers. Finally, the facts must show that the

[8] The *Anaconda* court cited to the legislative history found at Report of the Senate Commerce Committee on CPSA, S.Rep.No.92-749, 92d Cong., 2d Sess. 12 91972).

chemicals are customarily sold to consumers as a distinct article. The facts alleged in the complaint fail to show all three criteria.

The facts alleged in the Complaint merely state that the chemicals sold by the Purringtons are banned hazardous substances because they could be used to make illegal fireworks and other explosives. If it were as simple as the CPSC claims in their complaint, then many more items could fall within the penumbra of the CPSA.

The facts alleged in the complaint state that the Purringtons knew or should have known by the chemicals ordered that the purchaser intended to make banned fireworks. Finally, the facts as alleged by the CPSC in their complain state that the individuals that purchased the chemicals did not hold an Alcohol, Tobacco, Firearms and Explosives ("ATFE") permit to manufacture explosives.[9] These facts are insufficient to support the CPSC's claim it has jurisdiction over the chemicals sold by the Purringtons.

The regulations promulgated by the CPSC allow for the manufacture of fireworks and/or explosives made from the chemicals sold by the Purringtons. A person may manufacture for commerce items that contain up to 130 milligrams or two (2) grains of pyrotechnic composition. 16 C.F.R. § 1500.17 (a)(3). Nowhere in the regulations of the CPSC is a determination that fireworks that contain less than 130 mg of pyrotechnic composition are "banned hazardous substances". There is no requirement in the ATFE regulations that a person must posses a permit or license issued by the ATFE to manufacture explosives for their own use. 27 CFR §555.41. A permit or license is not required to store materials, but the storage regulations apply to any person that intends to store a regulated explosive.[10]

[9] ATFE jurisdiction over the manufacture of fireworks is found in 18 USC §842, 843 and 27 CFR §555.1 *et. seq.* The ATF regulations only concern the commercial application of manufacture of fireworks and not the individual hobbyist manufacture and use. See 27 CFR §555.41(a).

[10] See 27 CFR §555.201.

The ATFE regulations only relate to the commerce of explosives. 27 C.F.R. 555.1(a). There is no need to have an ATFE permit or license to manufacture explosives for your own personal use. The only ATFE regulations that apply to a person manufacturing explosives for their own personal use concerns the storage of the finished product as explosives or the pyrotechnic composition created in the manufacturing process, but not used at the end of the day.[11] The ATFE regulations for the storage of explosives any explosive material stored by any person. The storage of the explosive material must be in compliance with both the statute, 18 U.S.C §842(j), and with the regulations. 27 C.F.R. 555.201(a). Therefore, the CPSC's reliance upon a person having either a permit or license issued by the CPSC to legally manufacture fireworks for their own personal use is unfounded.

If a person is in fact purchasing chemicals for the manufacture of fireworks for their own personal use, both the chemicals and the fireworks should not be considered consumer products. Pursuant to the finding of the court in *Anaconda* and the legislative history of the CPSA, the definition of a consumer product does not include chemicals purchased, used by the purchaser to manufacture fireworks and the use of the fireworks by the purchaser. Only if the purchaser/manufacturer were to distribute or otherwise place the finished fireworks into the stream of commerce would the fireworks lose their non-consumer product status. The CPSC has not alleged any facts that would support this interpretation of the Complaint.

The CPSC has failed to state a claim upon which the relief it has requested in its Complaint can be granted. The facts alleged in the complaint fail to support the

[11] The ATFE is required to annually create a "list of explosives" for the purpose of identifying those compositions which are regulated. 27 CFR §555.23. Pyrotechnic composition was added as a part of the List of Explosives in approximately 1996. "Storage" has been interpreted by the AFTE to mean any holding of an explosive device overnight. [This definition is not a part of the AFTE regulations, but has been used by the ATFE for a number of years and is well accepted in the industry]. Therefore any pyrotechnic composition not used in the days processing and that remains must be stored in the appropriate type magazine until the next processing date.

CPSC's claim is that it has jurisdiction over chemicals and fireworks which are not consumer products. The jurisdiction of the CPSC is specifically limited to those items which are consumer products. 15 U.S.C. 2051(b), 16 C.F.R. § 1500.2.

Respectfully submitted,

_____/S/_____
Aaron J. Tolson

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Brief in Support of the Motion to Dismiss* has been served this 28th day of January, 2004, via E-Mail upon:

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