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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO**

UNITED STATES OF AMERICA,  
Plaintiff,

Civ. No. CIV-04 577S-EJL

v.

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

Defendants.

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

Counter Claimants,

v.

UNITED STATES OF AMERICA,  
Counter Defendant.

**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”)<sup>1</sup>. As part of its regulatory authority, the CPSC also enforces the FHSA as it applies to household substances and children's products.<sup>2</sup>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"<sup>3</sup> into the stream of commerce for consumers.

The CPSC has alleged 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);

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<sup>1</sup> 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).

<sup>2</sup> "A Small Business Guide to the US Consumer Product Safety Commission"

[www.cpsc.gov/BUSINFO/smbusgde.html](http://www.cpsc.gov/BUSINFO/smbusgde.html)

<sup>3</sup> 15 USC §1261(q)(1).

- (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.)

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".<sup>4</sup> 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.S.C. 2057. Congress required the CPSC to promulgate a rule to declare a product a banned hazardous product. 15 U.S.C. 2057.

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.<sup>5</sup> These regulations declare certain types of fireworks to be banned

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<sup>4</sup> 15 USC §1261(q)(1)

<sup>5</sup> 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)

hazardous substances.<sup>6</sup> 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.<sup>7</sup>

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

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<sup>6</sup> 16 CFR §1500.17(a)(3)

<sup>7</sup> 16 CFR§1500.17(a)(3)

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.<sup>8</sup>

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<sup>8</sup> 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).

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 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 complaint state that the individuals that purchased the chemicals did not hold an Alcohol, Tobacco, Firearms

and Explosive (“ATFE”) permit to manufacture explosives.<sup>9</sup> 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 possess 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.<sup>10</sup>

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.<sup>11</sup> The ATFE regulations

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<sup>9</sup> 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).

<sup>10</sup> See 27 CFR §555.201.

<sup>11</sup> 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.



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 CPSC's claim 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,

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**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 \_\_\_\_\_ day of January, 2004, via First Class, U.S. Mail, postage prepaid upon:

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