ATTACHMENT 1

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
MAXFIELD AND OBERTON HOLDINGS, LLC	)	CPSC DOCKET NO. 12-1
Respondent.	)	

MOTION FOR LEAVE
TO FILE AMENDED COMPLAINT

Pursuant to 16 C.F.R § 1025.13 of the Rules of Practice for Adjudicative Proceedings ("Rules"), Complaint Counsel moves this Court for leave to file an Amended Complaint in the instant matter. A copy of the Amended Complaint is attached as Attachment A. Under the Rules, the Presiding Officer "may allow appropriate amendments and supplemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay." 16 C.F.R. § 1025.13.

The proposed Amended Complaint revises the Complaint by (1) clarifying the count alleging that Buckyballs® and Buckycubes™ (the "Subject Products") present a substantial product hazard under Section 15(a)(2) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064(a)(2), because they contain defects that create a substantial risk of injury to the public; and (2) adding a count alleging that the Subject Products present a substantial product hazard under Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1), because they fail to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public. Complaint Counsel submits that

the filing of the Amended Complaint will neither unduly broaden the issues nor cause undue delay.

Wherefore, Counsel requests that the Presiding Officer grant this motion and allow Complaint Counsel leave to file the Amended Complaint.

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
MAXFIELD AND OBERTON HOLDINGS, LLC	)	CPSC DOCKET NO. 12-1
Respondent.	)	

MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

On July 25, 2012, Complaint Counsel issued a Complaint authorized by the U.S. Consumer Product Safety Commission pursuant to the Rules of Practice for Adjudicative Proceedings ("Rules"). 16 C.F.R. § 1025.11(a). The Complaint alleges that Buckyballs® and Buckycubes™ (the "Subject Products"), which are imported and distributed by Respondent, contain defects which create a substantial risk of injury to the public, thus posing a substantial product hazard under 15 U.S.C. § 2064(a)(2). On August 14, 2012, Respondent filed an "Answer of Respondent Maxfield and Oberton Holdings, LLC."

Complaint Counsel hereby requests that the Court grant it leave to file the Amended Complaint because the amendments "do not unduly broaden the issues in the proceedings or cause undue delay." 16 C.F.R. § 1025.13. [1]

[1] Although not controlling, federal case law provides that Rule 15(a) of the Federal Rules of Civil Procedure allow courts to "freely grant leave to amend when justice so requires." *Hurn v. Ret. Fund Trust*

Under the Consumer Product Safety Act ("CPSA"), Section 15(a)(2), a product is a substantial product hazard if it contains a defect which creates a substantial risk of injury to the public. The Complaint alleges that the Subject Products contain defects in the warnings, instructions and labeling, and are defective because they do not operate as intended. In the Amended Complaint, Counsel clarifies these allegations through organizational revisions and other similar editorial changes. The revisions do not unduly broaden the issues but instead provide greater clarity that will assist both the Presiding Officer and the parties as the proceeding moves forward.

Similarly, the addition of a second count will not unduly broaden the issues in this proceeding. Under the CPSA, Section 15(a)(1), a product is a substantial product hazard if it fails to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public. ASTM F963-08, *Standard Consumer Safety Specification for Toy Safety,* and its most recent version, ASTM F963-11, (collectively, the "Toy Standard") is a consumer product safety rule pursuant to Section 106 of the Consumer Product Safety Improvement Act of 2008. The Toy Standard prohibits toys from containing loose as-received hazardous magnets. Complaint Counsel alleges in the proposed Amended Complaint that the Subject Products that were imported and/or

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of the Plumbing, Heating and Piping Indus., 648 F.2d 1252, 1254 (9th Cir. 1981). In *Hurn*, the Court of Appeals found that the District Court had erred in not granting the plaintiff's motion to amend the complaint to add a count under the Taft-Hartley Act, when the original complaint contained a cause of action under ERISA, because the "operative facts remain the same." Similarly the Appellate Court found that there was not undue delay, even though the motion to amend was filed approximately two years after the original complaint because there was no prejudice to the other party, the amendment was not frivolous, nor was the amendment made in bad faith. Although this proceeding is governed by Commission Regulations and not the Federal Rules of Civil Procedure, "the Commission expects that interpretations of these Rules by the Presiding Officer will be guided by principles stated and developed in case law interpreting the Federal Rules of Civil Procedure." *See* Preamble to 16 C.F.R. § 1025, 45 Fed. Reg. 29206, 29207 (May 1, 1980).

distributed in commerce after August 16, 2009 are a substantial product hazard because the they are toys under the Toy Standard, violate the Toy Standard by consisiting of and containing loose as-received magnets, and create a substantial risk of injury to the public.

Notwithstanding the addition of a second count, the statutory basis of the Complaint remains essentially the same—that the Subject Products are a substantial product hazard under 15 U.S.C. §2064(a). Adding this count does not unduly broaden the issue. Instead, it merely alleges an alternative legal basis under the same statute that supports our contention that the Subject Products constitute a substantial product hazard. As such, the operative facts underlying the original Complaint and the Amended Complaint remain constant and do not therefore unduly broaden the issues or prejudice Respondent in any way.

Finally, the issuance of an Amended Complaint will not cause undue delay. These proceedings have been pending for less than two months. Discovery has not been propounded by either party and a prehearing conference, which has been scheduled for September 19, 2012, has not yet occurred. Complaint Counsel notified counsel for the Respondent on September 14, 2012, that we intended to file an Amended Complaint, and provided a brief summary of the contents of the Amended Complaint. The Amended Complaint is a timely submission that will not materially affect the schedule of this proceeding.

Conclusion

Wherefore, for the foregoing reasons, Complaint Counsel respectfully requests

that the Court grant leave to file the Amended Complaint.

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
MAXFIELD AND OBERTON HOLDINGS, LLC	)	
	)	CPSC DOCKET NO. 12-1
Respondent.	)	

ORDER

This matter having come before the Court on Complaint Counsel's Motion for Leave to File Amended Complaint, and upon consideration of the Motion and other pleadings of record herein, it is by this Court, this ____ day of _____, 2012,

ORDERED, that leave to file the Amended Complaint attached to Complaint Counsel's Motion is GRANTED, and it is further

ORDERED that the Amended Complaint attached to the Complaint Counsel's Motion is hereby accepted for filing as of the _____day of _____, 2012.

_____
The Honorable Bruce T. Smith
Presiding Officer

CERTIFICATE OF SERVICE

I hereby certify that I have served that attached Motion, Memorandum, Proposed Order and Amended Complaint upon all parties and participants of record in these proceedings by mailing, postage prepaid a copy to each on September 18, 2012.

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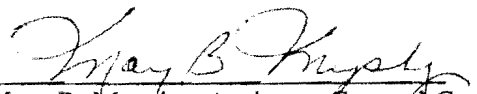

Mary B. Murphy, Assistant General Counsel
Complaint Counsel for
U.S. Consumer Product Safety Commission

Attachment A

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of MAXFIELD AND OBERTON HOLDINGS, LLC Respondent.	CPSC DOCKET NO. 12-1

AMENDED COMPLAINT

Nature of Proceedings

1. This is an administrative enforcement proceeding pursuant to Section 15 of the Consumer Product Safety Act ("CPSA"), as amended, 15 U.S.C. § 2064, for public notification and remedial action to protect the public from the substantial risks of injury presented by aggregated masses of high-powered, small rare earth magnets known as Buckyballs® ("Buckyballs") and Buckycubes™ ("Buckycubes") (collectively, the "Subject Products"), imported and distributed by Maxfield and Oberton Holdings, LLC ("Maxfield" or "Respondent").

2. This proceeding is governed by the Rules of Practice for Adjudicative Proceedings before the Consumer Product Safety Commission (the "Commission"), 16 C.F.R. Part 1025.

Jurisdiction

3. This proceeding is instituted pursuant to the authority contained in Sections 15(c), (d) and (f) of the CPSA, 15 U.S.C § 2064 (c), (d) and (f).

Parties

4. Complaint Counsel is the staff of the Division of Compliance within the Office of the General Counsel of the Commission ("Complaint Counsel"). The Commission is an independent federal regulatory agency established pursuant to Section 4 of the CPSA, 15 U.S.C. § 2053.

5. Respondent Maxfield is a domestic corporation with its principal place of business located at 180 Varick Street, Suite 212, New York, New York, 20014.

6. Respondent is an importer and distributor of the Subject Products.

7. As importer and distributor of the Subject Products, Respondent is a "manufacturer" and "distributor" of a "consumer product" that is "distributed in commerce," as those terms are defined in CPSA Sections 3(a)(5), (7), (8) and (11) of the CPSA, 15 U.S.C. §§ 2052(a)(5), (7), (8) and (11).

The Consumer Product

8. Respondent imported and distributed the Subject Products in U.S. commerce and offered them for sale to consumers for their personal use in or around a permanent or temporary household or residence, a school, and in recreation or otherwise. The Subject Products consist of small, individual magnets that are packaged as aggregated masses in different sized containers holding 10, 125, and 216 small magnets, ranging in size from approximately 4.01 mm to 5.03 mm, with a variety of coatings, and a flux index greater than 50.

9. Upon information and belief, the flux of Buckyballs ranges from approximately 414 to 556kg²mm² Surface Flux Index.

10. Upon information and belief, the flux of Buckycubes ranges from approximately 204 to 288kg²mm² Surface Flux Index.

11. Upon information and belief, Buckyballs, which are small spherically-shaped magnets, were introduced in U.S. commerce in March 2009.

12. Upon information and belief, Buckycubes, which are small cube-shaped magnets, were introduced in U.S. commerce in October 2011.

13. Upon information and belief, the Subject Products are manufactured by Ningo Prosperous Imp. & Exp. Co. Ltd., of Ningbo City, in China.

14. The Subject Products are sold with a carrying case and range in retail price from approximately $19.95 to $100.00. Upon information and belief, the Subject Products can also be purchased in sets of 10 for $3.50.

15. Upon information and belief, more than 2,500,000 sets of Buckyballs have been sold to consumers in the United States.

16. Upon information and belief, approximately 290,000 sets of Buckycubes have been sold to consumers in the United States.

COUNT 1

The Subject Products are Substantial Product Hazards Under Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2), Because They Contain Product Defects That Create a Substantial Risk of Injury to the Public

The Subject Products Are Defective Because Their Instructions, Packaging, and Warnings Are Inadequate

17. Paragraphs 1 through 16 are hereby realleged and incorporated by reference as though fully set forth herein.

18. A defect can occur in a product's contents, construction, finish, packaging, warnings and/or instructions. 16 C.F.R. §1115.4.

19. A defect can occur when reasonably foreseeable consumer use or misuse, based in part on the lack of adequate instructions and safety warnings, could result in injury, even where there are no reports of injury. 16 C.F.R. §1115.4.

20. Upon information and belief, from approximately March 2009 through October 2009, Buckyballs' packaging contained the following warning: "WARNING: Ages 13+ only. Do not swallow or ingest. Should one end up inside you, contact the proper authorities immediately. Discontinue use of any ball that has broken or that is in any other way damaged."

21. Upon information and belief, the bottle containing Buckyballs that Respondent sold between March 2009 and October 2009 displayed no warning.

22. In or about February 2010 Buckyballs contained the following warnings: "**Warning**: Not intended for children. Swallowing of magnets may cause serious injury and require immediate medical care. **Ages 13+.**"

23. On or about March 11, 2010, the Respondent changed its packaging, warnings, instructions, and labeling on Buckyballs and later conducted a recall of the products that were labeled as 13+.

24. On May 27, 2010, the Commission and the Respondent jointly issued a press release announcing the recall: *Buckyballs® High Powered Magnets Sets Recalled by Maxfield and Oberton Due to Violation of Federal Toy Standard.*

25. At the time of the recall, the Respondents knew of at least two incidents involving ingestions of Buckyballs.

26. Upon information and belief, in connection with the recall of Buckyballs labeled for 13+, Respondent relabeled the product in an attempt to remove it from the scope of the mandatory provisions of ASTM International F963-08, *Standard Consumer Safety Specification for Toy Safety*.

27. Upon information and belief, Respondent changed the Buckyballs warning in or about March 2010 to state: "**Warning**: Not intended for children. Swallowing of magnets may cause serious injury and require immediate medical care. Ages 14+."

28. Upon information and belief, the Respondent implemented a second change to the warnings on Buckyballs in 2010 so that the warnings read: "Warning: Keep Away from All Children! Do not put in nose or mouth. Swallowed magnets can stick to intestines causing serious injury or death. Seek immediate medical attention if magnets are swallowed or inhaled."

29. Upon information and belief, these warnings are present on Buckyballs currently sold by the Respondent.

30. Upon information and belief, since their introduction into commerce in October 2011, Buckycubes have displayed a warning on their packaging that states: "Warning: Keep Away from All Children! Do not put in nose or mouth. Swallowed magnets can stick to intestines causing serious injury or death. Seek immediate medical attention if magnets are swallowed or inhaled."

31. Since Buckyballs were introduced into commerce in 2009, numerous incidents involving ingestions by children under the age of 14 have occurred.

32. Upon information and belief, on or about January 28, 2010, a 9-year-old boy used Buckyballs to mimic tongue and lip piercings, and accidentally ingested seven magnets. He was treated at an emergency room.

33. Upon information and belief, on or about September 5, 2010, a 12-year-old girl accidentally swallowed two Buckyballs magnets. She sought medical treatment at a hospital, including x-rays and monitoring for infection and damage to her gastrointestinal tract.

34. Upon information and belief, on or about December 23, 2010, a 3-year-old girl ingested eight Buckyballs magnets she found on a refrigerator in her home, and required surgery to remove the magnets. The magnets had caused intestinal and stomach perforations, and had also become embedded in the girl's trachea and esophagus.

35. Upon information and belief, on or about January 6, 2011, a 4-year-old boy suffered intestinal perforations after ingesting three Buckyballs magnets he thought were chocolate candy because they looked like the decorations on his mother's wedding cake.

36. By November 2011, the Commission was aware of approximately 22 reports of ingestions of high-powered magnets.

37. On November 11, 2011, the Commission, in conjunction with Respondent, issued a public safety alert to further warn of the dangers of the ingestion of rare earth magnets like the Subject Products.

38. Ingestion incidents, however, continue to occur.

39. Since the safety alert, the Commission has received over one dozen reports of children ingesting Buckyballs. Many of these children required medical treatment, including surgical intervention.

40. The Commission has received dozens more reports of children ingesting products that are substantially similar to Buckyballs but may be manufactured and/or sold by firms other than the Respondent.

41. Upon information and belief, on or about January 17, 2012, a 10-year-old girl accidentally ingested two Buckyballs magnets after using them to mimic a tongue piercing. The magnets became embedded in her large intestine, and she underwent x-rays, CT scans, endoscopy, and an appendectomy to remove them. The girl's father had purchased Buckyballs for her at the local mall.

42. All warnings on the Subject Products are inadequate and defective because they do not and cannot effectively communicate to consumers, including parents and caregivers, the hazard associated with the Subject Products and magnet ingestions.

43. Because the warnings on the Subject Products are inadequate and defective, parents will continue to give children the Subject Products or allow children to have access to the Subject Products.

44. Children cannot and do not appreciate the hazard, and it is foreseeable that they will mouth the items, swallow them, or, in the case of adolescents and teens, use them to mimic body piercings. These uses can and do result in injury.

45. All warnings on the packaging of the Subject Products are inadequate and defective because the packaging on which the warnings are written is often discarded such that consumers will be unable to review the warnings on the packaging prior to foreseeable uses of the Subject Products. These uses can and do result in injury.

46. All warnings in the instructions included with the Subject Products are inadequate and defective because the instructions are not necessary for the use of the product and are often discarded. Because the instructions are unnecessary and are often discarded, consumers likely will not review the warnings contained in the instructions prior to foreseeable uses of the Subject Products. These uses can and do result in injury.

47. All warnings on the Subject Products are inadequate and defective because once the Subject Products are removed from the packaging and/or the carrying case prior to foreseeable uses of the Subject Products, the magnets themselves display no warnings, and the small size of the individual magnets precludes the addition of warnings. These uses can and do result in injury.

48. All warnings on the Subject Products are inadequate and defective because the magnets are shared and used among various consumers, including children, after the packaging and instructions are discarded; thus, many consumers of the products will have no exposure to any warnings prior to using the Subject Products. These uses can and do result in injury.

49. All warnings displayed on the carrying cases are inadequate and defective because consumers are unlikely to disassemble configurations made with the Subject Products after each use, many of which are elaborate and time-consuming to create, to return the Subject Products to the carrying case or to put the Subject Products out of the reach of children.

50. The effectiveness of the warnings on the Subject Products is further diminished by the advertising and marketing of the Subject Products.

51. In 2009, Respondent advertised Buckyballs as, *inter alia*, a "toy" and as an "amazing magnetic toy." The advertisement encouraged consumers to use them for games, use

them to hold items to a refrigerator, and "[w]ear them as jewelry," stating "the fun never ends with Buckyballs." In small print, the advertisement cautioned that the products not be "given to a [sic] children age 12 or below."

52. Upon information and belief, a video appearing in Respondent's 2009 advertisement shows a consumer using Buckyballs magnets to simulate a tongue piercing.

53. Upon information and belief, Respondent advertised and marketed Buckyballs by comparing its appeal to that of other children's products such as Erector sets, Hula Hoops, the Slinky, and Silly Putty.

54. Upon information and belief, some internet retailers that sell the Subject Products do not display any age recommendations, or promote erroneous age recommendations on their websites.

55. Upon information and belief, despite making no significant design or other physical changes to Buckyballs since their introduction in 2009, Respondent attempted to subsequently rebrand Buckyballs as, *inter alia,* an adult "executive" desk toy and/or stress reliever, among other things, and Respondents marketed and advertised it as such.

56. The advertising and marketing of the Subject Products conflict with the claimed 14+ age grade label on Subject Products.

57. Because the advertising and marketing of the Subject Products conflict with the age label, the effectiveness of the age label is diminished.

58. The advertising and marketing of Subject Products conflict with the stated warnings on the Subject Products.

59. Because the advertising and marketing conflict with the stated warnings, the effectiveness of the warnings is diminished.

60. No warnings or instructions could be devised that would effectively communicate the hazard in a way that would be understood and heeded by consumers and would reduce the incidences of magnet ingestions.

61. Because of the lack of adequate instructions and safety warnings, a substantial risk of injury occurs as a result of the foreseeable use and misuse of the Subject Products.

The Subject Products Are Defective Because the Risk of Injury Occurs as a Result of their Operation and Use and the Failure of the Subject Products to Operate as Intended

62. A design defect can be present if the risk of injury occurs as a result of the operation or use of the product or a failure of the product to operate as intended. 16 C.F.R. § 1115.4.

63. The Subject Products contain a design defect because they present a risk of injury as a result of their operation and/or use.

64. Upon information and belief, certain of the Subject Products have been advertised and marketed by the Respondent to both children and adults. As a direct result of such marketing and promotion, the Subject Products have been, and are currently used by, both children and adults.

65. The risk of injury occurs as a result of the use of the Subject Products by adults who give the Subject Products to children or allow children to have access to the Subject Products.

66. The risk of injury occurs as a result of the foreseeable use and/or misuse of the Subject Products by children.

67. The Subject Products contain a design defect because they fail to operate as intended and present a substantial risk of injury to the public.

68. Upon information and belief, Respondent contends that the Subject Products are "desktoys" or manipulatives that provides stress relief and other benefits to adults only.

69. The Subject Products are intensely appealing to children due to their tactile features, their small size, and their highly reflective, shiny metallic coatings.

70. The Subject Products are also appealing to children because they are smooth, unique, and make a soft snapping sound as they are manipulated.

71. The Subject Products also move in unexpected, incongruous ways as the poles on the magnets move to align properly, which can evoke a degree of awe and amusement among children enticing them to play with the Subject Products.

72. Upon information and belief, Respondent's independent tester reported that the "appropriate age grade" for Buckyballs is "over 8 years of age."

73. Despite the Respondent's current age label and intended use of the Subject Products, they do not operate as intended because they are intensely appealing to and are often played with by children.

74. The defective design of the Subject Products poses a risk of injury because parents and caregivers buy the Subject Products for children and/or allow children to play with Subject Products.

The Type of the Risk of Injury Renders the Subject Products Defective

75. The risk of injury associated with a product may render the product defective. 16 C.F.R. § 1115.4.

76. Upon information and belief, the Subject Products have low utility to consumers.

77. Upon information and belief, the Subject Products are not necessary to consumers.

78. The nature of the risk of injury includes serious, life-threatening, and long-term health conditions that can result when magnets attract to each other through intestinal walls, causing harmful tissue compression that can lead to perforations, fistulas and other gastrointestinal injuries.

79. Children, a vulnerable population protected by the CPSA, are exposed to risk of injury by the Subject Products.

80. The risk of injury associated with the ingestion of the Subject Products is neither obvious nor intuitive.

81. Warnings and instructions cannot adequately mitigate the risk of injury associated with ingesting the Subject Products.

82. Children mouthing and ingesting the Subject Products is foreseeable.

83. Respondent promoted the use of the Subject Products to mimic tongue piercings. Such use by children is foreseeable.

84. The type of the risk of injury renders the Subject Products defective.

The Subject Products Create a Substantial Risk of Injury to the Public

85. The Subject Products pose a risk of magnet ingestion by children below the age of 14, who may, consistent with developmentally appropriate behavior, place a single magnet or numerous magnets in their mouth.

86. The risk of ingestion also exists when adolescents and teens use the product to mimic piercings of the mouth, tongue, and cheek and accidentally swallow the magnets.

87. If two or more of the magnets are ingested and the magnetic forces of the magnets pull them together, the magnets can pinch or trap the intestinal walls or other digestive tissue between them, resulting in acute and long-term health consequences. Magnets that attract through the walls of the intestines result in progressive tissue injury, beginning with local inflammation and ulceration, progressing to tissue death, then perforation or fistula formation. Such conditions can lead to infection, sepsis, and death.

88. Ingestion of more than one magnet often requires medical intervention, including endoscopic or surgical procedures.

89. Because the initial symptoms of injury from magnet ingestion are nonspecific and may include nausea, vomiting, and abdominal pain, caretakers, parents, and medical professionals may easily mistake these nonspecific symptoms for other common gastrointestinal upsets, and erroneously believe that medical treatment is not immediately required, thereby delaying potentially critical treatment.

90. Medical professionals may not be aware of the dangers posed by ingestion of the Subject Products and the corresponding need for immediate evaluation and monitoring. A delay of surgical intervention or other medical treatment due to the patient's presentation with

nonspecific symptoms and/or a lack of awareness by medical personnel of the dangers posed by multiple magnet ingestion can exacerbate life-threatening internal injuries.

91. Magnets that become affixed through the gastrointestinal walls and are not surgically removed may result in intestinal perforations that can lead to necrosis, the formation of fistulas, or ultimately, perforation of the bowel and leakage of toxic bowel contents into the abdominal cavity. These conditions can lead to serious injury and possibly even death.

92. Endoscopic and surgical procedures may also be complicated in cases of multiple magnet ingestion due to the attraction of the magnets to the metal equipment used to retrieve the magnets.

93. Children who undergo surgery to remove multiple magnets from their gastrointestinal tract are also at risk for long-term health consequences, including intestinal scarring, nutritional deficiencies due to loss of portions of the bowel, and, in the case of girls, fertility problems.

94. The Subject Products contain defects in packaging, warnings, and instructions that create a substantial risk of injury to the public.

95. The Subject Products contain defects in design that pose a substantial risk of injury.

96. The type of the risk of injury posed by the Subject Products creates a substantial risk of injury.

97. Therefore, because the Subject Products are defective and create a substantial risk of injury, the Subject Products present a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. §2064(a)(2).

Count 2

The Subject Products Are Substantial Product Hazards Under Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1)

98. Paragraphs 1 through 97 are hereby realleged and incorporated by reference as though fully set forth herein.

99. Upon information and belief, each of the Subject Products is an object designed, manufactured, and/or marketed as a plaything for children under 14 years of age, and, therefore, each of the Subject Products that was imported and/or otherwise distributed in commerce after August 16, 2009, is a "toy" as that term is defined in ASTM International Standard 963-08, *Standard Consumer Safety Specification for Toy Safety,* section 3.1.72 and its most recent version, ASTM 963-11 section 3.1.81 ("the Toy Standard").

100. Upon information and belief, Respondent's independent tester reported that the "appropriate age grade" for Buckyballs is "over 8 years of age."

101. As toys, and as toys intended for use by children under 14 years of age as addressed in the Toy Standard, the Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, were and are covered by the Toy Standard.

102. Pursuant to the Toy Standard, a magnet that has a flux index greater than 50 and that is a small object as determined by the Toy Standard is a "hazardous magnet."

103. The Toy Standard prohibits toys from containing a loose as-received hazardous magnet.

104. The Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, consist of and contain loose as-received hazardous magnets. As a result, the Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, fail to comply with the Toy Standard.

105. On May 27, 2010, the Commission, in cooperation with Respondent, and in conjunction with corrective action, announced that Buckyballs failed to comply with the Toy Standard because they were sold for children under the age of 14.

106. The Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, create a substantial risk of injury to the public.

107. Because the Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, fail to comply with the Toy Standard and create a substantial risk of injury to the public, they are substantial product hazards as the term "substantial product hazard" is defined in Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1).

Relief Sought

Wherefore, in the public interest, Complaint Counsel requests that the Commission:

A. Determine that the Subject Products present a "substantial product hazard" within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2), and/or present a "substantial product hazard" within the meaning of Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1).

B. Determine that extensive and effective public notification under Section 15(c) of the CPSA, 15 U.S.C. § 2064(c), is required to adequately protect children from the substantial

product hazard presented by the Subject Products, and order Respondents under Section 15(c) of the CPSA, 15 U.S.C. § 2064(c) to:

(1) Cease importation and distribution of the product;

(2) Notify all persons that transport, store, distribute or otherwise handle the Subject Products, or to whom such products have been transported, sold, distributed or otherwise handled, to immediately cease distribution of the products;

(3) Notify appropriate state and local public health officials;

(4) Give prompt public notice of the defects in the Subject Products, including the incidents and injuries associated with ingestion including posting clear and conspicuous notice on Respondent's website, and providing notice to any third party website on which Respondent has placed the Subject Products for sale, and provide further announcements in languages other than English and on radio and television;

(5) Mail notice to each distributor or retailer of the Subject Products; and

(6) Mail notice to every person to whom the Subject Products were delivered or sold;

C. Determine that action under Section 15(d) of the CPSA, 15 U.S.C. § 2064(d), is in the public interest and additionally order Respondent to:

(1) Refund consumers the purchase price of the Subject Products;

(2) Make no charge to consumers and to reimburse consumers for any reasonable and foreseeable expenses incurred in availing themselves of any remedy provided under any Commission Order issued in this matter, as provided by Section 15 U.S.C. § 2064(e)(1);

(3) Reimburse retailers for expenses in connection with carrying out any Commission Order issued in this matter, including the costs of returns, refunds and/or replacements, as provided by Section 15(e)(2) of the CPSA, 15 U.S.C. § 2064(e)(2);

(4) Submit a plan satisfactory to the Commission, within ten (10) days of service of the Final Order, directing that actions specified in Paragraphs B(1) through (6) and C(1) through (3) above be taken in a timely manner;

(5) To submit monthly reports, in a format satisfactory to the Commission, documenting the progress of the corrective action program;

(6) For a period of five (5) years after issuance of the Final Order in this matter, to keep records of its actions taken to comply with Paragraphs B(1) through (6) and C(1) through (4) above, and supply these records to the Commission for the purpose of monitoring compliance with the Final Order;

(7) For a period of five (5) years after issuance of the Final Order in this matter, to notify the Commission at least sixty (60) days prior to any change in its business (such as incorporation, dissolution, assignment, sale, or petition for bankruptcy) that results in, or is intended to result in, the emergence of a successor corporation, going out of business, or any other change that might affect compliance obligations under a Final Order issued by the Commission in this matter; and

D. Order that Respondent shall take other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA.

ISSUED BY ORDER OF THE COMMISSION:

Dated this 18 day of September, 2012

BY: Kenneth Hinson
Executive Director

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