# EXHIBIT A

# SECOND AMENDED COMPLAINT AGAINST MAXFIELD & OBERTON HOLDINGS, LLC AND CRAIG ZUCKER, AND LIST AND SUMMARY OF DOCUMENTARY EVIDENCE

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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| In the Matter of<br><br>MAXFIELD AND OBERTON HOLDINGS, LLC<br><br>and<br><br>CRAIG ZUCKER, individually, and as an officer of MAXFIELD AND OBERTON HOLDINGS LLC.<br><br>Respondents. | CPSC DOCKET NO. 12-1 |

SECOND 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 the "Firm") and Craig Zucker ("Zucker"), as Maxfield's Chief Executive Officer (collectively "Respondents").

2. This proceeding is governed by the Rules of Practice for Adjudicative Proceedings before the U.S. Consumer Product Safety Commission (the "Commission"), 16 C.F.R. § 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. Maxfield is a Delaware limited liability company with its principal place of business located at 180 Varick Street, Suite 212, New York, NY, 10014.

6. Zucker is the cofounder and Chief Executive Officer of Maxfield. As such, he controls the acts, practices and policies of the Firm.

7. Upon information and belief, at all relevant times Zucker was and is responsible for ensuring Maxfield's compliance with the requirements of the CPSA, ASTM-963-08 section 3.1.72 and its most recent version, ASTM 963-11 section 3.1.81 (the "Toy Standard"), and regulations issued thereunder.

8. Upon information and belief, Zucker resides in Brooklyn, NY.

9. Whenever this Complaint refers to any act of the Respondents, the reference shall be deemed to mean that the directors, officers, employees, or agents of the Firm, including Zucker, authorized such act while actively engaged in the management, direction, or control of the affairs of the Firm and while acting within the scope of their employment or official duties.

10. Whenever this Complaint refers to any act of the Respondents, the reference shall be deemed to mean the act of each Respondent, jointly and severally.

11. Respondents were importers and distributors of the Subject Products.

12. As importers and distributors of the Subject Products, Respondents were "manufacturers" and "distributors" 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).

13. Upon information and belief, Zucker, as Maxfield's authorized representative, filed a Certificate of Cancellation for Maxfield on December 27, 2012 with the Secretary of State of Delaware.

14. Upon information and belief, Maxfield has ceased business operations.

The Consumer Product

15. Respondents imported and distributed the Subject Products in U.S. commerce and offered the Subject Products 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.

16. 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.

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

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

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

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

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

22. Upon information and belief, Respondents discontinued sale of the Subject Products on December 27, 2012.

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

24. Upon information and belief, Respondents sold more than 2.5 million sets of Buckyballs to consumers in the United States.

25. Upon information and belief, Respondents sold more than 290,000 sets of Buckycubes to consumers in the United States.

26. Upon information and belief, Respondents refused staff's requests that Respondents stop sale of the Subject Products and submit a corrective action plan for both Buckyballs and Buckycubes.

27. Upon information and belief, the Subject Products continue to be sold online to consumers in the United States through various internet sites.

28. Upon information and belief, the Subject Products continue to be sold in retail stores 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

29. Paragraphs 1 through 28 are hereby realleged and incorporated by reference, as though fully set forth herein.

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

31. 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.

32. 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."

33. Upon information and belief, Respondents sold Buckyballs between March 2009 and October 2009 with no warning.

34. On 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+.**"

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

36. Upon information and belief, beginning on or around March 29, 2010, Maxfield began executing "Responsible Seller Agreements" with some of its retailers.

37. The "Responsible Seller Agreements" purported, in part, to restrict the sales of the Subject Products to stores that did not primarily sell toys, and and required the reseller to agree to display the Subject Products with products intended for consumers ages 14 and over.

38. On May 27, 2010, the Commission and the Firm 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.*

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

40. Upon information and belief, in connection with the recall of Buckyballs labeled for 13+, Respondents relabeled Buckyballs in an attempt to remove it from the scope of the mandatory provisions of ASTM International F963-8, *Standard Consumer Safety Specification for Toy Safety*.

41. Upon information and belief, Respondents changed the Buckyballs warning on 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+."

42. Upon information and belief, the Respondents 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."

43. Upon information and belief, these warnings were present on Buckyballs sold by the Respondents until December 27, 2012.

44. 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."

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

46. 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.

47. 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.

48. 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.

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

50. By November 2011, the Commission was aware of approximately 22 reports of ingestions of high-powered, small, spherically shaped magnets.

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

52. Ingestion incidents, however, continue to occur.

53. Since the safety alert, the Commission has received dozens of reports of children ingesting Buckyballs magnets. Many of these children required medical treatment, including surgical intervention.

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

55. 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.

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

57. Because the warnings on the Subject Products and/or the websites where the Subject Products were offered for sale are inadequate and defective, parents will continue to give children the Subject Products or allow children to have access to the Subject Products.

58. Upon information and belief, as Maxfield is no longer in business, retailers of the Subject Products are not bound by the Responsible Seller Agreements and are thus able to sell to children and in toy stores, making it even more likely that children will gain access to the Subject Products.

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

60. 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 review the warnings on the packaging prior to foreseeable uses of the Subject Products. These uses can and do result in injury.

61. 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.

62. 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 on the product. These uses can and do result in injury.

63. 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.

64. All warnings displayed on the carrying cases are inadequate and defective because consumers are unlikely after each use to disassemble configurations made with the Subject Products, 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.

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

66. In 2009, Respondents advertised Buckyballs as, *inter alia,* a "toy" and as an "amazing magnetic toy." The advertisements encouraged consumers to use Buckyballs 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 should not be "given to a [sic] children age 12 or below."

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

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

69. Upon information and belief, some Internet retailers that sold the Subject Products did not display any age recommendations or promoted erroneous age recommendations on their websites.

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

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

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

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

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

75. No warnings or instructions could be devised that would effectively communicate the hazard so that the warnings and instructions could be understood and heeded by consumers and reduce the number of magnet ingestion incidents.

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

The Subject Products Are Defective Because Substantial Risk of Injury Arises as a Result of the Magnet's Operation and Use and the Failure of the Subject Products to Operate as Intended

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

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

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

80. 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.

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

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

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

84. The Subject Products are intensely appealing to children due to the Subject Products' tactile features, small size, and highly reflective, shiny, and colorful metallic coatings.

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

86. 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.

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

88. Despite the Respondents' current age label, and irrespective of Respondents' assertions regarding the proper uses for the Subject Products, the Subject Products do not operate as intended because they are intensely appealing to, and often are played with, by children.

89. 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 the Subject Products.

The Type of Risk of Injury Renders the Subject Products Defective

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

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

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

93. 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.

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

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

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

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

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

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

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

100. 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.

101. 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.

102. 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.

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

104. 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.

105. 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.

106. Magnets that become affixed to each other through the gastrointestinal walls and are not removed surgically 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.

107. 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.

108. 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.

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

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

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

112. 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)

113. Paragraphs 1 through 112 are hereby realleged and incorporated by reference, as though fully set forth herein.

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

115. 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 the Toy Standard.

116. 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.

117. 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."

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

119. 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.

120. On May 27, 2010, the Commission, in cooperation with Respondents, 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.

121. 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.

122. 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 request 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).C.

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 Subject Products;

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

(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 websites operated by Respondents, and providing notice to any third party website on which Respondents 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 known 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 Respondents to:

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

(2) Make no charge to consumers and 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 Respondents' actions taken to comply with Paragraphs B(1) through (6) and C(1) through (5) 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 Respondents' business (such as incorporation, dissolution, assignment, sale, or petition for bankruptcy), which 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 Respondents 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 11 day of February, 2013

Kenneth R. Hinson

BY: Kenneth R. Hinson
Executive Director

U.S. Consumer Product Safety Commission
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CONSUMER PRODUCT SAFETY COMMISSION

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| In the Matter of<br><br>MAXFIELD AND OBERTON HOLDINGS, LLC<br><br>and<br><br>CRAIG ZUCKER, individually, and as an officer of Maxfield and Oberton Holdings, LLC.<br><br>Respondents. | ) | CPSC DOCKET NO. 12-1 |

LIST AND SUMMARY OF DOCUMENTARY EVIDENCE

Pursuant to 16 C.F.R. § 1025.11(b)(3) of the Commission's Rules of Practice for Adjudicative Proceedings, the following is a list and summary of documentary evidence supporting the charges in this matter. Complaint Counsel reserves the right to offer additional evidence during the course of the proceedings.

1. Claims, complaints, medical records, and reports concerning incidents involving Buckyballs® ("Buckyballs") and Buckycubes™ ("Buckycubes") (collectively, "the Subject Products").

2. Reports from consumers regarding their purchase of the Subject Products for children under the age of 14, including their attention to and understanding of the Subject Products' warnings, labeling, and instructions.

3. Documents evidencing the product warnings, labeling, and packaging since the introduction of Buckyballs® in 2009 and Buckycubes™ in 2011.

4. Advertisements, marketing, and promotional materials for Buckyballs® or Buckycubes™, including print and web media, since 2009.

5. Correspondence between Maxfield & Oberton Holdings LLC ("M&O") and Craig Zucker ("Zucker") (collectively, "Respondents") and CPSC staff regarding failure of the product to comply with ASTM 963, and negotiations of a Corrective Action Plan, including changes to marketing, warnings, packaging and instructions.

6. Correspondence between Respondents and CSPC staff regarding the issuance of a 2011 safety alert.

7. CPSC In-Depth Epidemiological Investigation Reports of near-ingestion, ingestion, and injury incidents involving the Subject Products.

8. CPSC Product Safety Assessments from the Directorates for Engineering Sciences, Health Sciences, Human Factors, and Economic Analysis concerning the Subject Products.

9. Documentary evidence regarding changes to the packaging, warnings, labeling, and instructions of the Subject Product since 2009.

10. Technical records, technical analyses, and evaluations of the Subject Products conducted by or for Respondent.

11. Technical records, technical analyses, and evaluations of the Subject Products from outside consultants retained by CPSC staff for the purposes of litigation.

12. Information provided by Respondents to the Commission's staff pertaining to the Subject Products.

13. Public notices issued by the Commission regarding the Subject Products.

14. Standards regarding high-powered magnets, including, but not limited to, ASTM F963-08.

15. Reports and publications from medical professionals regarding the hazards of

ingestion of magnets, including how the injuries occur, the difficulty in diagnosing and treating such ingestion incidents, and the long term health consequences attendant to such injuries.

16. Information provided by consumers pertaining to any products liability, personal injury, or other lawsuits filed against Respondents in connection with the Subject Products.

17. Documentary evidence and information pertaining to Respondent Zucker's job description, responsibilities, authority, and actions with respect to M&O's acts, practices, policies and procedures.

18. Documentary evidence and information pertaining to Respondent Zucker's authority and actions with respect to M&O's efforts to comply with the requirements of the Consumer Product Safety Act, ASTM standards, and the regulations issued thereunder.

19. Documentary evidence and information reflecting M&O's founding, formation, structure, management, governance, dissolution, and cancellation.

Dated this 11 day of February, 2013.

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# EXHIBIT B

# SECOND AMENDED COMPLAINT AGAINST ZEN MAGNETS, LLC, AND LIST AND SUMMARY OF DOCUMENTARY EVIDENCE

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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| In the Matter of<br><br>ZEN MAGNETS, LLC<br><br>Respondent. | CPSC DOCKET NO. 12-2 |

SECOND 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 Zen Magnets® Rare Earth Magnetic Balls ("Zen Magnets") and Neoballs (together, the "Subject Products"), imported and distributed by Zen Magnets, LLC ("Zen" or the "Firm" 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 is a Colorado limited liability company with its principal place of business located at 4155 E. Jewell Avenue, Suite 908, Denver, CO 80222.

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

7. As an 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.

9. Zen Magnets consist of small, individual, spherical-shaped magnets, approximately 5.03mm in diameter with a flux index greater than 50, that are packaged as aggregated masses in different size containers holding 72, 216, or 1,728 small magnets,

10. Neoballs consist of small, individual, spherical-shaped magnets, ranging in size from 4.98mm to 5.11mm in diameter, with a variety of coatings and a flux index greater than 50, that the Firm offers for sale in quantities of aggregated masses, ranging from 18 balls to 216 to 21,600 spheres.

11. Upon information and belief, the flux of the Zen Magnets ranges from approximately 577.1 to 581.4kg²mm² Surface Flux Index.

12. Upon information and belief, the flux of the Neoballs ranges from approximately 438.8 to 565.0 kg²mm² Surface Flux Index.

13. Upon information and belief, Respondent introduced Zen Magnets in U.S. commerce in September 2009.

14. Upon information and belief, Respondent continues to sell Zen Magnets in U.S. Commerce through the website: www.zenmagnets.com, designed and operated by Respondent.

15. Upon information and belief, Respondent introduced Neoballs into U.S. commerce in September 2011.

16. Upon information and belief, Respondent sold Neoballs in sets of 216 magnets until September 13, 2012.

17. Upon information and belief, Respondent voluntarily agreed to stop sale of Neoballs on September 12, 2012.

18. On October 2, 2012, Respondent advised Commission staff that Respondent intended to begin sales of the individual Neoballs magnets through the website: www.neoballs.com.

19. Upon information and belief, in November 2012, Respondent began selling individual Neoballs magnets through the website: www.neoballs.com, designed and operated by Respondent.

20. Upon information and belief, Respondent began distributing individual

magnets packaged in sets, through the website: www.neoballs.com, designed and operated by Respondent.

21. Upon information and belief, Respondent refused staff's requests that Respondent stop sale of the products and submit a corrective action plan for both Zen Magnets and Neoballs.

22. Upon information and belief, the Subject Products are manufactured by Bestway Magnet Corp., in the Northern Section of Huangcheng Westroad, Ningbo, China.

23. Zen Magnets are sold in sets of 72 and 216 magnets and are packaged in a velvet sack or an MDF hard case. The sets range in retail price from approximately $12.65 to $50.00.

24. Zen Magnets are also sold in a set of 1,728 magnets, which are packaged in a velvet-lined, wooden teak box and retail for approximately $250.00.

25. Upon information and belief, more than 50,000 sets of Zen Magnets have been sold to consumers in the United States.

26. Neoball orders for fewer than 18 individual magnets are packaged together and distributed in a plastic baggie. Neoball magnets are individually priced at 8 to 10 cents per magnet.

27. When a consumer purchases 18 or more Neoball magnets through the Firm's website, Respondent packages all of the magnets together in a square tin with a sliding lid and charge a flat shipping fee, regardless of the number of magnets ordered.

28. Upon information and belief, an order placed on the Neoballs website

automatically defaults to the quantity 18; users must specifically enter a separate figure if they desire to purchase a different number of magnets.

29. Upon information and belief, Respondent has sold more than 908 units of sets of 216 aggregated Neoballs to consumers in the United States.

30. Upon information and belief, Respondent also sold an unknown number of individual Neoball magnets to consumers in the United States.

COUNT 1

The Subject Products Are a Substantial Product Hazard 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

31. Paragraphs 1 through 30 are hereby realleged and incorporated by reference, as though fully set forth herein.

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

33. 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.

34. Upon information and belief, from 2009 through mid-2011, Respondent's U.S. direct sales website: www.zenmagnets.com, contained the following warning regarding Zen Magnets:

> Warnings: Try not to drop them. Ever play with magnets in sand? Ferric dirt particles are hard to get off super-magnets, and will quickly erode the

poles. Zen Magnets can destroy or disrupt magnetically sensitive technology. Be cautious with the open chains. Can cause serious problems if swallowed. Do not give to kids under the age of 12, and keep them away from pets. Call poison control if more than 1 magnet is swallowed.

35. Upon information and belief, in or about October 2011, Respondent began including the following warning on the "buy" page of www.zenmagnets.com: "Magnets cause fatal intestinal pinching if swallowed. Keep from animals and children who don't understand this."

36. Upon information and belief, in October 2011, Respondent requested that retailers who sold Zen Magnets through the Amazon LLC website include a "14+ age limit."

37. Upon information and belief, in October 2011, Respondent began including the following warning on the "FAQ" page of www.zenmagnets.com:

**Q: How old do you have to be to play with these?**

**A:** According to the Consumer Product Safety Commission, 14 years old in the US for a strong magnetic toy. Unless it's not a toy, then no age limit. Unless it's a "Science Kit," then the age regulation is 8+. Zen Magnets are classified as a science kit, so the minimum age as recommended by the U.S. government is 8. Our common sense recommendation is 12.

38. Upon information and belief, as of January 9, 2013, Respondent's home page displays, in a faint and nearly undecipherable font size, this warning language:

Try not to drop them. Even drop magnets in sand? Ferric dirt particles are hard to get off super magnets, and will quickly erode the poles. Zen magnets can destroy or disrupt magnetically sensitive technology. Be cautious with the open chains. Can cause serious problems if swallowed. CPSC recommends minimum age of 14, and keep them away from pets. Call poison control if more than 1 magnet is swallowed.

39. Upon information and belief, sets of Zen Magnets currently are sold with packaging that contain the following warning on a 2" x 2" slip of paper:

Warning: **DO NOT SWALLOW MAGNETS**. How old do you have to be to play with these? Dunno. 14 years old in the U.S for a strong magnetic toy, unless it's not a toy, then no age limit, but they're fun magnet spheres, aren't they a toy? Unless it's a "science kit" then the government age recommendation is 8+. But really, it's whatever age at which a person stops swallowing non-foods. Strong magnets can cause fatal intestinal pinching. Place swallowing magnets on your don't do list along with breathing water, drinking poison, and running into traffic. Call poison control if more than one is swallowed. And keep these away from kids (and pets) who don't understand these dangers. BTW, this is a "science kit" for sure.

40. Upon information and belief, as of August 2012, the lower portion of the opposite side of the 2" x2" sheet that accompanies the magnets contains the following warning:

"Government Warning": This product contains small magnets. Swallowed magnets can stick together across intestines causing serious infections. Seek immediate medical attention if magnets are swallowed or inhaled. Keep away from all bodily orifices. CPSC 14+ Age Recommendation.

41. Upon information and belief, Respondent sells some sets of the Zen Magnets in packaging without this warning.

42. Upon information and belief, the 2" x 2" sheet of paper also refers users to the Respondent's website, which makes comments that challenge the credibility of the government's position regarding the safety of the products.

43. Upon information and belief, as of January 9, 2013, Respondent's home page contains the following statement regarding the Complainant: "Busy Federal CPSC says magnets should not be allowed: guns entrenched to knees. Uncompromising stance, mean sting, and no mind for democracy that disagrees." The statement is followed by a link to SaveMagnets.com.

44. Upon information and belief, individuals who want to purchase Zen magnets in different colors are directed through the FAQ section of www.zenmagnets.com to a hyperlink that connects the user to: www.neoballs.com.

45. Upon information and belief, www.neoballs.com is Zen's U.S. direct sales website for Neoballs.

46. Upon information and belief, beginning in November 2012, www.neoballs.com, contained the following warning regarding Neoballs:

Practice responsible magnet usage! High power magnets may cause fatal intestinal pinching if swallowed. Keep away from all orfices.[sic] RARE EARTH MAGNETS ARE NOT TOYS. Don't leave them around animals, or children who don't understand the dangers. Always communicate these dangers when sharing magnets. If magnets are ingested or aspirated to the lungs, immediate medical attention is required.

47. Upon information and belief, the majority of the warning above is displayed in smaller than 12-point font.

48. Upon information and belief, as of January 9, 2013, no warning about the danger of magnet ingestion appears on the homepage of the website: www.neoballs.com. Rather, the site declares: "Don't let CPSC bypass Democracy. If magnets are outlawed, only outlaws will have magnets."

49. Upon information and belief, users who attempt to purchase Neoballs from the website encounter a pop-up window that contains, in part, the following language: "Warning: Keep Away From Mouth. Practice responsible magnet usage!"

50. Upon information and belief, when a consumer purchases 18 or more Neoballs, the magnets are sold in a box that contains the following warning printed on a 4 ½" x 1 ½" paper insert:

OMFG

READ ME

This is serious. The grumpy CPSC is about to BAN magnet spheres in the US because they are an ingestion hazard. They don't trust that you are capable of understanding and following warnings. Prove them wrong, or we all can't have nice magnets. Zen Magnets LLC, the producer of Neoballs, has had no record of ingestion and we'd like to keep it that way. High powered magnets can cause potentially fatal intestinal pinching if swallowed. Keep magnet spheres away from all orifices, especially the mouth and nose. High powered magnets are not a toy. Keep away from anybody who does not understand these dangers. SRSLY.

Sorry about the lecture. We had to. Hope you understand.

51. Upon information and belief, with the exception of the heading "OMFG" and "READ ME," the majority of the warning is in less than 10-point font.

52. Upon information and belief, if a consumer purchases fewer than 18 Neoballs, no warning accompanies the magnets.

53. Since Zen Magnets were introduced in commerce in 2009, many children under the age of 14 have ingested products ("Ingested Products") that are almost identical in form, substance, and content to the Subject Products.

54. Upon information and belief, the Ingested Products are marketed and used in substantially similar ways to the Subject Products.

55. Upon information and belief, on or about January 28, 2010, a 9-year-old boy used small, high-powered, spherically-shaped magnets, almost identical in form, substance, and content to the Subject Products, to mimic tongue and lip piercings. In doing so, the boy accidentally ingested seven magnets. He was treated at an emergency room.

56. Upon information and belief, on or about September 5, 2010, a 12-year-old girl accidentally swallowed two small, high-powered, spherically-shaped magnets almost identical in form, substance, and content to the Subject Products. She sought medical treatment at a hospital, including x-rays and monitoring for infection and damage to her gastrointestinal tract.

57. Upon information and belief, on or about December 23, 2010, a 3-year-old girl ingested eight high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Products, which she had found on a refrigerator in her home. She required surgery to remove the magnets. The magnets caused intestinal and stomach perforations and had become embedded in the girl's trachea and esophagus.

58. Upon information and belief, on or about January 6, 2011, a 4-year-old boy suffered intestinal perforations after ingesting three high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Products that he thought were chocolate candy because they looked like the decorations on his mother's wedding cake.

59. By November 2011, the Commission was aware of approximately 22

reports of ingestions of high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Products.

60. On November 11, 2011, the Commission issued a public safety alert, warning the public of the dangers of the ingestion of rare earth magnets like the Subject Products.

61. Ingestion incidents, however, continue to occur.

62. Since the safety alert, the Commission has received dozens of reports of children ingesting high-powered, small, spherically-shaped magnets that are almost identical in form, substance, and content to the Subject Products but may be manufactured and/or sold by firms other than the Respondent.

63. Upon information and belief, on or about January 17, 2012, a 10-year-old girl accidentally ingested two high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Products, 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 the magnets for her at the local mall.

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

65. Because the warnings on the Subject Products and the websites where the Subject Products are, or were, offered for sale, are inadequate and defective, parents will

continue to give children the Subject Products or allow children to have access to the Subject Products.

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

67. All warnings on the packaging of the Subject Products are inadequate and defective because the small size of the paper bearing the warnings, as well as the font size used in the warning, hinders legibility and may discourage consumers from reading the text, making it less likely that consumers will review the warnings on the packaging prior to foreseeable uses of the Subject Products. These uses can and do result in injury.

68. All warnings on the packaging and/or carrying cases of the Subject Products are inadequate and defective because they are undermined by derogatory language contained on the Firm's website that questions the credibility of the source of those warnings and may encourage consumers to disregard the warnings.

69. All warnings on the packaging and/or carrying cases of the Subject Products are inadequate and defective because the placement of the warnings on the underside of the packaging and/or inside the carrying case only, renders the warnings inconspicuous, such that consumers likely will not review the warnings prior to foreseeable uses of the Subject Products. These uses can and do result in injury.

70. All warnings on the packaging of the Subject Products are inadequate and defective because the packaging on which the warnings are written often is 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.

71. 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 Subject Products and often are 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.

72. 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.

73. 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 Subject Products will have no exposure to any warnings prior to using the Subject Products. These uses can and do result in injury.

74. All warnings displayed on the carrying cases, if any, are inadequate and defective because consumers are unlikely after each use to disassemble configurations made with the Subject Products, 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.

75. Upon information and belief, some sets of Zen Magnets come with a "laser etched stainless steel building platform." The use of this platform makes it unlikely that a consumer will return the Zen Magnets to the carrying case and put the magnets out of reach of children, but it is more likely that he or she will display the creation.

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

77. Upon information and belief, as late as October 2011, Respondent was aware that Zen Magnets were displayed with other toys on the Amazon LLC website.

78. Upon information and belief, Respondent only recently changed Zen Magnet's marketing to comply with ASTM Standard F963. Zen's website now states: "CPSC recommends minimum age of 14" and "U.S. Government age recommendation is 14 years."

79. Respondent has advertised Zen Magnets as, *inter alia,* "fun to play with" and as items that "look good on cute people." The advertising suggests that the product "may have health benefits" and encourages consumers to use the product to "relieve boredom."

80. Upon information and belief, despite making no significant design or other physical changes to Zen Magnets since their introduction in 2009, Respondent has attempted subsequently to rebrand Zen Magnets as, *inter alia,* an educational "science kit," suitable for 8 year olds, although the Firm has provided no educational material with

the Subject Product.

81. Upon information and belief, Neoballs are color-coated magnet balls, making the product even more appealing to children.

82. Upon information and belief, Neoballs are sold at a price point of between eight to 10 cents per magnet. This low price point makes it more likely that caregivers will purchase the product for children as a starter set or novelty item.

83. Upon information and belief, Respondent markets Neoballs for the product's ability to make simple constructions, including action figures, soccer balls with a goalie, and simple jewelry.

84. The advertising and marketing of the Zen Magnets conflict with the claimed 14+ age label on Zen Magnets.

85. Because the advertising and marketing of the Zen Magnets conflict with the age label, the effectiveness of the age label is diminished.

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

87. Although the websites and some of the products bear a warning that purports to be a "Government" warning regarding magnet ingestion, other text, *e.g.*, "the grumpy . . . CPSC . . . [t]hey don't trust . . . you" on the websites undermines the credibility and effectiveness of those warnings, which, in turn, may cause consumers to disregard the warnings.

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

89. No warnings or instructions could be devised that would effectively communicate the hazard so that the warnings and instructions could be understood and heeded by consumers and reduce the number of magnet ingestion incidents.

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

The Subject Products Are Defective Because a Substantial Risk of Injury Arises as a Result of The Magnets' Operation and Use and the Failure of the Subject Products to Operate as Intended

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

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

93. Upon information and belief, 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 currently are, used by both children and adults.

94. 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.

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

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

97. Upon information and belief, Respondent contend that the Subject Products are a manipulative that provides stress relief and/or other benefits to adults only.

98. The Subject Products are intensely appealing to children due to the Subject Products' tactile features, small size, and highly reflective, shiny, and colorful metallic coatings.

99. Neoballs can be purchased in bright color combinations that are likely to add to the perception that the magnets are intended to appeal to children because they offer creative value as puzzles, models, or art, by combining magnetism with color.

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

101. 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.

102. Despite the current age label suggested by Respondent on Zen Magnets and irrespective of Respondent's assertions regarding the proper uses for Zen Magnets, Zen Magnets do not operate as intended because they are intensely appealing to, and often are played with, by children.

103. This 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 the Subject Products.

The Type of Risk of Injury Renders the Subject Products Defective

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

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

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

107. 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.

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

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

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

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

112. Respondent promoted the use of the Subject Products for body art, including mimicking tongue piercings. Such use by children is foreseeable.

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

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

114. 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.

115. 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.

116. 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.

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

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

119. 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.

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

121. 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.

122. 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.

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

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

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

126. 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 a Substantial Product Hazard Under Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1)

127. Paragraphs 1 through 126 are hereby realleged and incorporated by reference, as though fully set forth herein.

128. 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 F963-08, *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").

129. 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.

130. 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."

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

132. 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.

133. 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.

134. 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 a substantial product hazard 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 Respondent under Section 15(c) of the CPSA, 15 U.S.C. § 2064(c) to:

(1) Cease importation and distribution of the Subject Products;

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

(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 (5) above, and supply these records to the Commission for the purpose of monitoring compliance with the Final Order;

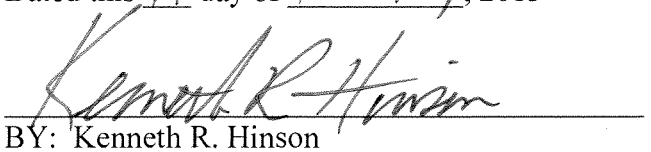
(7) For a period of five (5) years after issuance of the Final Order in this matter, to notify the Commission at least sixty (60) days prior to any change in its business (such as incorporation, dissolution, assignment, sale, or petition for bankruptcy) that results in, or is intended to result in, the 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 11 day of February, 2013



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Tel: (301) 504-7809

Jennifer Argabright, Trial Attorney
Richa Dasgupta, Trial Attorney
Leah Wade, Trial Attorney

Complaint Counsel
Division of Compliance
Office of the General Counsel
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7808

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

| | |
|---|---|
| In the Matter of<br><br>ZEN MAGNETS, LLC<br><br>Respondent. | CPSC DOCKET NO. 12-2 |

LIST AND SUMMARY OF DOCUMENTARY EVIDENCE

Pursuant to 16 C.F.R. § 1025.11(b)(3) of the Commission's Rules of Practice for Adjudicative Proceedings, the following is a list and summary of documentary evidence supporting the charges in this matter. Complaint Counsel reserves the right to offer additional evidence during the course of the proceedings.

1. Claims, complaints, medical records, and reports concerning incidents involving the Zen Magnet® Rare Earth Magnetic Balls and Neoballs (together, the "Subject Products") and similar products.

2. Communications from consumers regarding their purchase of the Subject Products and similar products for children under the age of 14, including their attention to, and understanding of, the Subject Products' and similar products' warnings, labeling, and instructions.

3. Documents evidencing the product warnings, labeling, and packaging since the introduction of Zen Magnets® products in 2009 and Neoballs in 2011.

4. Advertisements, marketing, and promotional materials for Zen Magnets® and Neoballs products, including print and Web media, since 2009.

5. Correspondence between Respondent and CPSC staff regarding failure of the Subject Products to comply with ASTM 963 and subsequent changes by Respondent to marketing, warnings, and instructions regarding the Subject Products.

6. CPSC's In-Depth Epidemiological Investigation Reports of near-ingestion, ingestion, and injury incidents involving the Subject Products and similar products.

7. CPSC Product Safety Assessments from the Directorate for Engineering Sciences, the Directorate of Economic Analysis, the Division of Health Sciences, and the Division of Human Factors concerning the Subject Products.

8. Documentary evidence regarding the development of and changes to the packaging, labeling, and instructions of the Subject Products since 2009.

9. Technical records, technical analyses, and evaluations of the Subject Products conducted by or for Respondent.

10. Technical records, technical analyses, and evaluations of the Subject Products and similar products, and summaries thereof, from outside expert witnesses retained by CPSC staff for the purposes of litigation.

11. Information provided by Respondent and/or its representatives to Commission staff pertaining to the Subject Products.

12. Public notices issued by the Commission regarding the Subject Products and similar products.

13. Standards regarding high-powered magnets, including, but not limited to, ASTM F963-08.

14. Reports and publications from medical professionals regarding the hazards of ingestion of magnets, including how the injuries occur, the difficulty in diagnosing and treating

such ingestion incidents, and the long-term health consequences attendant to such injuries.

15. Information provided by consumers pertaining to any products liability, personal injury, or other lawsuits filed against Respondent in connection with the Subject Products.

Dated this 11 day of February 2013

Mary B. Murphy
Assistant General Counsel
Divisions of Compliance, Office of General Counsel
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7809

Jennifer Argabright, Trial Attorney
Richa Shyam Dasgupta, Trial Attorney
Leah Wade, Trial Attorney

Complaint Counsel for
U.S. Consumer Product Safety Commission
Bethesda, Maryland 20814

# EXHIBIT C

# SCREEN SHOT OF WWW.GETBUCKYBALLS.COM

On December 27, 2012 Maxfield & Oberton Holdings, LLC (the "Company") stopped doing business and filed a Certificate of Cancellation with the Secretary of State of Delaware, thereby ceasing to exist pursuant to applicable Delaware law. The MOH Liquidating Trust has been established to deal with and, to the extent they are valid, pay, to the extent assets are available, certain claims which have been, and may later be, asserted against the Company. If you believe you have a claim against the Company, please click on link below to obtain the Proof of Claim form which you must complete and submit to the Trustee of the MOH Liquidating Trust. If the Trustee determines that a claim is valid, the Trustee will pay that claim, to the extent assets are available, in accordance with the terms of the MOH Liquidating Trust.

If you have a claim for an online order previously placed on this site that never arrived, please email: missingbuckyorder@gmail.com

Click here to obtain a Proof of Claim form

For safety information on using products sold by Maxfield & Oberton, click here.

This site is not owned or operated by Maxfield & Oberton Holdings, LLC. In order to make reasonable provision for payment of certain claims that had been, or in the future might be, asserted against it, among other things, Maxfield & Oberton arranged for the creation and maintenance of this site before December 27, 2012, the date on which the Company ceased to exist pursuant to applicable Delaware law.

# EXHIBIT D

# E-MAIL FROM TRUSTEE STATING THAT MOH LIQUIDATING TRUST WILL NOT APPEAR ON BEHALF OF M&O

**From:** Julie Teicher [redacted]
**Sent:** Wednesday, January 23, 2013 10:38 AM
**To:** Dasgupta, Richa
**Cc:** [redacted]; Murphy, Mary; Argabright, Jennifer; [redacted]
**Subject:** RE: In re Maxfield & Oberton Holdings LLC (CPSC No. 12-1)

Dear Ms. Dasgupta,

I have reviewed the correspondence attached to your email. The MOH Liquidating Trust is not a party to the CPSC action and will not be appearing in CPSC NO. 12-1.

Julie Teicher

Julie Beth Teicher
Erman, Teicher, Miller, Zucker & Freedman, P.C.
400 Galleria Officentre, Suite 444
Southfield, MI 48034
[redacted] (phone)
(fax)
[redacted]

# EXHIBIT E

# COMMUNICATIONS BETWEEN MR. ZUCKER AND CPSC COMMISSIONERS AND STAFF

# CPSC PUBLIC CALENDAR

Vol. XXXIX, No. 26 U.S. Consumer Product Safety Commission – Bethesda, Maryland 20814 April 4, 2012
CPSC Hotline: 1-800-638-CPSC (2772) ★ CPSC's Web Site: http://www.cpsc.gov

## Commission Agendas

Listed below are agendas of Commission Meetings scheduled for the week of April 9, 2012. For a recorded message concerning the latest agenda information call (301) 504-7948.

Commission Meeting
Wednesday, April 11, 2012
10:00 a.m. – 11:00 a.m.
Hearing Room 420

**Open to the Public**

Matter to be Discussed

*Decisional Matter*: §1112 Lab Withdrawal, Codification & Audit Provisions – Notice of Proposed Rulemaking

A live webcast of the Meeting can be viewed at http://www.cpsc.gov/webcast

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Commission Meeting
Wednesday, April 11, 2012
11:00 a.m. – 12:00 p.m.
Hearing Room 420

**Closed to the Public**

Matter to be Discussed

Compliance Status Report

The Commission staff will brief the Commission on the status of compliance matters.

## Meetings Between Commission Staff and Outside Parties

All meetings listed below are open to the public unless otherwise stated. For information on a specific meeting or to attend a meeting, please call the contact person listed for that meeting. Individuals requiring reasonable accommodation for a meeting should contact the Office of the Secretary, 301-504-7923 or by email, cpsc-os@cpsc.gov. Determinations on requests for reasonable accommodation will be made on a case-by-case basis. Abbreviations: we use asterisks (*) to identify meetings for the current week which have not appeared before in the printed Public Calendar. If the meeting involves discussion of a "substantial interest matter," defined by CPSC's Meetings Policy, we show the date when we posted notice of the meeting on the Master Calendar. The Master Calendar is on the CPSC Web site at www.cpsc.gov/calendarmast.html. We indicate whether a meeting is of substantial interest by the symbol (S); we use the symbol (N) to indicate non-substantial interest meetings. The Commission offices are located in the Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

Under the Meetings Policy, a staff person holding or attending a substantial interest meeting must file a log of the meeting with the Office of the Secretary within 20 days.

## Week of April 9 thru April 15, 2012

Tuesday, April 10

*Cheryl Falvey, General Counsel, meeting with Suzanne Echevarrio of ExxonMobil, William Rawson and Ann Claassen of Latham & Watkins LLP to discuss the CHAP and OMB peer review rules; 8:30 a.m., Bethesda Towers. For additional information contact Cheryl Falvey, (301) 504-7642; e-mail: cfalvey@cpsc.gov. Transmitted to the Office of the Secretary 4/2/12. Posted on Master Calendar 4/3/12. (S)

Tuesday, April 10

*Andrew Trotta, Directorate for Engineering Sciences (ES), attending a meeting of the Fire Protection Research Foundation (FPRF) Research Advisory Committee to discuss activities and direction of future activities of the Foundation; 11:00 a.m., BWI Marriott, 1743 West Nursery Road, Baltimore MD, 21090. The meeting is being coordinated by Kathleen Almand, Executive Director, FPRF. For additional information contact Andrew Trotta, (301) 987-2057. Transmitted to the Office of the Secretary 4/2/12. Posted on Master Calendar 4/2/12. (N)

Tuesday, April 10

*Vince Amodeo, Directorate for Engineering Sciences, attending phone conference meeting with ASTM F15.22 Magnet Toy Working Group to discuss F963 Toy Safety draft revisions. 2:00 p.m. The meeting was requested by the ASTM Working group. For additional information/meeting access, contact Vince Amodeo, (301) 934-2301; email: vamodeo@cpsc.gov Transmitted to the Office of the Secretary 4/3/12. Posted on Master Calendar 4/3/12. (S)

Tuesday, April 10

The Chronic Advisory Panel (CHAP) on Phthalates and Phthalate Substitutes will have a teleconference on Tuesday, April 10, 2012. The teleconference will take place from 11:00 a.m. to 1:00 p.m. EDT (15:00 to 17:00 GMT/UTC). The CHAP will discuss its progress toward completing its analysis of potential risks from phthalates and phthalate substitutes. Members of the public who wish to listen to the teleconference should contact Michael Babich at mbabich@cpsc.gov for call-in instructions by Friday April 6, 2012. Members of the public will not have the opportunity to ask questions or comment during the teleconference. For additional information contact Michael Babich at 301-504-7253 or mbabich@cpsc.gov. Transmitted to the Office of the Secretary 3/22/12. Posted in the Public Calendar 3/28/12. (S)

Wednesday, April 11

*Scott Heh, Office of Hazard Identification and Reduction, attending a National Institute of Standards and Technology (NIST) workshop - Conformity Assessment: Approaches and Best Practices. The workshop is sponsored by NIST at their Gaithersburg, MD facility. For additional information contact Scott Heh, (301) 504-7646. Transmitted to the Office of the Secretary 4/3/12. Posted on Master Calendar 4/3/12. (N)

Wednesday, April 11

*Gregory K. Rea, Directorate for Laboratory Sciences, will be participating in a teleconference as a member of the ASTM F15.18 Baby Changing Table Subcommittee Task Group. Proposed language for ASTM F 2388 regarding add-on changing tables for cribs will be discussed. Time: 10:00 a.m. – 11:00 a.m. EST. This teleconference was requested by C. Campbell, Task Group Leader, of DECA, Inc. For additional information (including call-in number) contact Gregory K. Rea via e-mail: grea@cpsc.gov. Transmitted to the Office of the Secretary 4/3/12. Posted on Master Calendar 4/3/12. (S)

Wednesday, April 11

*Gregory K. Rea, Directorate for Laboratory Sciences, will be participating in a teleconference as a member of the ASTM F15.18 Soft Infant Carrier Subcommittee Task Group. Proposed language for ASTM F 2236 including a new fastener strength test and new warning language will be discussed. Time: 1:00 p.m. – 2:00 p.m. EST. This teleconference was requested by J. Taft, Subcommittee Chair, of Fisher-Price. For additional information (including call-in number) contact Gregory K. Rea via e-mail: grea@cpsc.gov. Transmitted to the Office of the Secretary 4/2/12. Posted on Master Calendar 4/2/12. (S)

Thursday, April 12

*DeWane Ray, Office of Hazard Identification and Reduction, George Borlase, Directorate for Engineering Sciences, and Vince Amodeo, Directorate for Engineering Sciences, meeting with Erika Z. Jones, Mayer Brown LLP and representatives of the Bicycle Product Suppliers Association to discuss revisions to 16 C.F.R. Part 1512 – Requirements for Bicycles; 9:00 a.m., Bethesda Towers, room 410B/C. The meeting was requested by Erika Z. Jones. For additional information contact DeWane Ray, (301) 504-7547. Transmitted to the Office of the Secretary 4/3/12. Posted on Master Calendar 4/3/12. (S)

Thursday, April 12

*Rik Khanna, Office of Hazard Identification and Reduction, and other CPSC staff participating in the Public-Private Fire Safety Council Quarterly Meeting, at the National Product Testing and Evaluation Center, Room 103, 5 Research Place, Rockville, MD 20850. The meeting will begin at 10:00 a.m. For additional information contact Rik Khanna, (301) 987-2508. Transmitted to the Office of the Secretary 4/2/12. Posted on Master Calendar 4/2/12. (S)

## Future

Monday and Tuesday, April 16-17

Dean W. Woodard, Director, Office of Education, Global Outreach, and Small Business Ombudsman, will deliver the keynote address and speak to students at St. Louis University's Product Safety Management Course at St. Louis University. The presentation was requested by Dr. Ik-Whan Kwon of St. Louis University. You may contact Dean W. Woodard at dwoodard@cpsc.gov for further questions. Transmitted to the Office of the Secretary 3/12/2012. Posted on Master Calendar 3/12/12. (N)

Monday, April 16 thru Thursday, April 19

Scott Ayers Directorate for Engineering Sciences, Division of Combustion and Fire Sciences will be attending the National Candle Association 38th Annual Meeting in Las Vegas, NV. Included in this trip will be Scott Ayers's attendance at the ASTM F 15.45 Candle Products Subcommittee Meeting on April 17, 2012 from 8:30 a.m. to 12:00 p.m. For additional information contact Scott Ayers, (301) 987-2030. Transmitted to the Office of the Secretary 4/2/12. Posted on Master Calendar 4/2/12. (S)

Tuesday, April 17

Tim Smith, Engineering Psychologist (Human Factors); meeting with ASTM F15.30 Bunk Bed Subcommittee; 1:30 p.m. EST. The meeting was requested by ASTM International. For additional information about this meeting, contact Tim Smith, (301) 504-7691, tsmith@cpsc.gov. For information about how to access this meeting via conference call, contact Len Morrissey, (610) 832-9719, lmorriss@astm.org. Transmitted to the Office of the Secretary 3/26/12. Posted on Master Calendar 3/26/12. (S)

Wednesday, April 25 thru Friday, April 27

Neal S. Cohen (Small Business Ombudsman) speaking and participating on panel discussions at the All Baby & Child Spring Educational Conference in Las Vegas, NV. The presentations were requested by Neal Cohen in order to ensure that the juvenile product business community is up to date on CPSC's regulatory activities in the area of juvenile products, durable infant and toddler products, and other children's product safety rules. Exact details and sessions will be posted as they are made available at: http://allbabyandchildsec.com/schedule.asp. You may contact Neal S. Cohen at ncohen@cpsc.gov for further questions. Transmitted to the Office of the Secretary 3/6/12. Posted on Master Calendar 3/6/12. (S)

## Addendum

Meeting notices printed in this section did not reach the Office of the Secretary in time to meet the Tuesday noon deadline for the previously printed Public Calendar. Under the CPSC Meetings Policy, however, staff persons, including Commissioners, can meet the seven-day notice requirement by placing notice of meeting on the Master Calendar at least seven days before the meeting. The Master Calendar can be found on the CPSC Web Site at www.cpsc.gov/calendarmast.html.

In addition, the policy allows the Office of the General Counsel to waive the seven-day notice requirement of meetings of the staff personnel, and individual Commissioners can waive the requirement for themselves and their personal staff.

Wednesday, April 4

Commissioner Anne M. Northup will be meeting with representatives from Buckyballs and Buckycubes to discuss the safety program he has in place for the promotion of their products; 2:00 p.m., Bethesda Towers, room 720. The meeting was requested by Alan Schoem. For additional information contact Mark Fellin, (301) 504-7780. Transmitted to the Office of the Secretary 4/3/12. Posted on Master Calendar 4/3/12. (S)

Wednesday, April 4

Commissioner Nancy Nord, Joe Martyak, Senior Counsel, Nathan Cardon, Legal Counsel, and Tim Reggev, Staff Assistant, meeting with Craig Zucker, Maxfield & Oberton Holdings, LLC and Allen Schoem to discuss safety program of Buckyballs; 3:00 p.m. Bethesda Towers, room 811. The meeting was requested by Maxfield & Oberton Holdings, LLC. For additional information contact Timothy Reggev, (301) 504-7040 or treggev@cpsc.gov. Transmitted to the Office of the Secretary 4/2/12. Posted on Master Calendar 4/2/12. (S)

Wednesday, April 4

Scott Ayers, Directorate for Engineering Sciences, Division of Combustion and Fire Safety Sciences, will be attending the ASTM Candle Safety Teleconference from 10:00 a.m. to 12:00 p.m. EST. This meeting was originally scheduled for March 28 but was postponed by the meeting organizer. For more information on this ASTM meeting contact Jim Becker of Candle Solutions (606-523-0994). (OGC approved waiver of seven-day notice.) Transmitted to the Office of the Secretary 4/3/12. Posted on Master Calendar 4/3/12. (S)

Thursday, April 5

Jake Miller, Directorate for Engineering Sciences, and Greg Rea, Directorate for Laboratory Sciences, meeting with ASTM F15 Stroller Subcommittee Task Group via teleconference to discuss stroller product safety standards; 11:00 a.m. The meeting was requested by ASTM. Teleconference information available upon request to Len Morrissey at 610-832-9719. For additional information contact Jake Miller, (301) 987-2338. (OGC approved waiver of seven-day notice.) Transmitted to the Office of the Secretary 4/2/12. Posted on Master Calendar 4/3/12. (S)

# CPSC PUBLIC CALENDAR

Vol. XXXIX, No. 27 U.S. Consumer Product Safety Commission – Bethesda, Maryland 20814 April 11, 2012
CPSC Hotline: 1-800-638-CPSC (2772) ★ CPSC's Web Site: http://www.cpsc.gov

## Commission Agendas

Listed below is an agenda of a Commission Meeting scheduled for the week of April 16, 2012. For a recorded message concerning the latest agenda information call (301) 504-7948.

Commission Meeting
Wednesday, April 18, 2012
10:00 a.m. – 11:00 a.m.
Hearing Room 420

**Open to the Public**

Matter to be Discussed

*Decisional Matter*: §1112 Lab Withdrawal, Codification & Audit Provisions – Notice of Proposed Rulemaking

A live webcast of the Meeting can be viewed at http://www.cpsc.gov/webcast

## Meetings Between Commission Staff and Outside Parties

All meetings listed below are open to the public unless otherwise stated. For information on a specific meeting or to attend a meeting, please call the contact person listed for that meeting. Individuals requiring reasonable accommodation for a meeting should contact the Office of the Secretary, 301-504-7923 or by email, cpsc-os@cpsc.gov. Determinations on requests for reasonable accommodation will be made on a case-by-case basis. Abbreviations: we use asterisks (*) to identify meetings for the current week which have not appeared before in the printed Public Calendar. If the meeting involves discussion of a "substantial interest matter," defined by CPSC's Meetings Policy, we show the date when we posted notice of the meeting on the Master Calendar. The Master Calendar is on the CPSC Web site at www.cpsc.gov/calendarmast.html. We indicate whether a meeting is of substantial interest by the symbol (S); we use the symbol (N) to indicate non-substantial interest meetings. The Commission offices are located in the Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

Under the Meetings Policy, a staff person holding or attending a substantial interest meeting must file a log of the meeting with the Office of the Secretary within 20 days.

## Week of April 16 thru April 22, 2012

Monday and Tuesday, April 16-17

Dean W. Woodard, Director, Office of Education, Global Outreach, and Small Business Ombudsman, will deliver the keynote address and speak to students at St. Louis University's Product Safety Management Course at St. Louis University. The presentation was requested by Dr. Ik-Whan Kwon of St. Louis University. You may contact Dean W. Woodard at dwoodard@cpsc.gov for further questions. Transmitted to the Office of the Secretary 3/12/2012. Posted on Master Calendar 3/12/12. (N)

Monday, April 16 thru Thursday, April 19 (Meeting Update)

Scott Ayers Directorate for Engineering Sciences, Division of Combustion and Fire Sciences will be attending the National Candle Association 38th Annual Meeting in Las Vegas, NV. Included in this trip will be Scott Ayers's attendance at the ASTM F 15.45 Candle Products Subcommittee Meetings on April 16, 2012 from 4:00 p.m. to 6:00 p.m. regarding labeling and on April 17, 2012 from 8:30 a.m. to 12:00 p.m. regarding fire safety. For additional information contact Scott Ayers, (301) 987-2030. Transmitted to the Office of the Secretary 4/6/12. Updated 4/6/12. (S)

Monday, April 16 thru Friday, April 20

*Patricia Edwards and other CPSC staff will be attending meetings with the ASTM F15 subcommittee on Juvenile Products at ASTM Headquarters in West Conshohocken, PA. These meetings were requested by ASTM. Contact Patricia Edwards for more information, 301-987-2224. Transmitted to the Office of the Secretary 4/10/12. Posted on Master Calendar 4/10/12. (S)

Tuesday, April 17

Tim Smith, Engineering Psychologist (Human Factors); meeting with ASTM F15.30 Bunk Bed Subcommittee; 1:30 p.m. EST. The meeting was requested by ASTM International. For additional information about this meeting, contact Tim Smith, (301) 504-7691, tsmith@cpsc.gov. For information about how to access this meeting via conference call, contact Len Morrissey, (610) 832-9719, lmorriss@astm.org. Transmitted to the Office of the Secretary 3/26/12. Posted on Master Calendar 3/26/12. (S)

Thursday, April 19

*Caroleene Paul, Directorate for Engineering Sciences, will attend the Underwriters Laboratories (UL) Table Saw Safety Working Group meeting for observing performance testing of table saws; 9:30 a.m. to 3:00 p.m., UL facilities at 333 Pfingsten Road, Northbrook, Illinois 60062. The meeting was requested by Mahmood Tabaddor of UL. For additional information contact Caroleene Paul (301) 987-2225, email cpaul@cpsc.gov. Transmitted to the Office of the Secretary 4/10/12. Posted on Master Calendar 4/10/12. (S)

## Future

Wednesday, April 25 thru Friday, April 27

Neal S. Cohen (Small Business Ombudsman) speaking and participating on panel discussions at the All Baby & Child Spring Educational Conference in Las Vegas, NV. The presentations were requested by Neal Cohen in order to ensure that the juvenile product business community is up to date on CPSC's regulatory activities in the area of juvenile products, durable infant and toddler products, and other children's product safety rules. Exact details and sessions will be posted as they are made available at: http://allbabyandchildsec.com/schedule.asp. You may contact Neal S. Cohen at ncohen@cpsc.gov for further questions. Transmitted to the Office of the Secretary 3/6/12. Posted on Master Calendar 3/6/12. (S)

Tuesday and Wednesday, May 8-9

Marc J. Schoem, Office of Compliance and Field Operations attending and participating in the ASTM F15 playground and IPEMA meetings in Phoenix, AZ.. The meeting was requested by ASTM International and IPEMA. For additional information about this meeting, contact Marc Schoem, (301) 504-7520. Transmitted to the Office of the Secretary 4/10/12. Posted on Master Calendar 4/10/12. (S)

## Addendum

Meeting notices printed in this section did not reach the Office of the Secretary in time to meet the Tuesday noon deadline for the previously printed Public Calendar. Under the CPSC Meetings Policy, however, staff persons, including Commissioners, can meet the seven-day notice requirement by placing notice of meeting on the Master Calendar at least seven days before the meeting. The Master Calendar can be found on the CPSC Web Site at www.cpsc.gov/calendarmast.html.

In addition, the policy allows the Office of the General Counsel to waive the seven-day notice requirement of meetings of the staff personnel, and individual Commissioners can waive the requirement for themselves and their personal staff.

Tuesday, April 10

Commissioner Robert Adler, Jason Levine and Jan Fong-Swamidoss, Counsel to Commissioner Adler met with Alan Schoem and the CEO of Buckyballs to discuss CPSC's safety program regarding these products; 1:00 p.m., Bethesda Towers, room 723. The meeting was requested by Alan Schoem. For additional information contact Ophelia McCardell, (301) 504-7731. Transmitted to the Office of the Secretary 4/5/12. Posted on Master Calendar 4/6/12. (S)

Tuesday, April 10

The counsel for the firm Maxfield and Oberton, maker of Buckyballs, requested a meeting on Tuesday, April 10, 2012, at 2:30 p.m. to 3:30 p.m., at CPSC headquarters in Bethesda in room 834. The meeting was requested to discuss age grading and injury prevention strategies for magnetic desk toys. Agency staff included Andy Kameros, Mary Toro, Howard Tarnoff, Jonathan Midgett, Celestine Kiss, Khalisa Phillips, Sharon White, and Bob Ochsman and other staff within the Office of the General Counsel attended. Attendees included Alan Schoem, Craig Zucker, CEO of Maxfield and Oberton. For more information please contact, Jonathan Midgett (EXHR) at 301-504-7692 or jmidgett@cpsc.gov. Transmitted to the Office of the Secretary 4/9/12. Posted on Master Calendar 4/9/12. (N)

Thursday, April 12

Gregory K. Rea, Directorate for Laboratory Sciences, will be participating in a teleconference as a member of the ASTM F15.18 Play Yard Subcommittee Task Group. Proposed language for ASTM F 406 regarding missing components of play yard bassinets will be discussed. Time: 2:00 p.m. – 3:00 p.m. EST. This teleconference was requested by K. Pilarz, Subcommittee Chair, of Fisher-Price, Inc. For additional information (including call-in number) contact Gregory K. Rea via e-mail: grea@cpsc.gov. Transmitted to the Office of the Secretary 4/5/12. Posted on Master Calendar 4/5/12. (S)

**From:** [redacted] **On Behalf Of** Craig Zucker
**Sent:** Tuesday, June 19, 2012 1:58 PM
**To:** Lee, Thomas
**Cc:** Alan Schoem
**Subject:** Industry Update

Dear Mike,

I want to inform you of several recent industry activities involving high-powered magnets intended for adult use. On Wednesday June 6, 2012, five manufacturers of high-powered magnets intended for adults sent a letter to Len Morrisey of ASTM (copy enclosed) requesting "the formation of a voluntary standard for the labeling and marketing of loose as received magnets with a flux index greater than 50 that are small objects as defined in F963-08, Section 4.6, and that are intended for adults, i.e., those persons 14 years of age and older."

The Executive Committee of ASTM unanimously approved the request for formation of a standard on June 7, 2012. The five firms that submitted the request to ASTM are Maxfield and Oberton, the manufacturer of Buckyballs® and Buckycubes™, Zen Magnets LLC, the manufacturer of Zen Magnets™, Star Networks USA LLC, the manufacturer of Magnicube™, Strong Force Inc., the manufacturer of Neocube™, and SCS Collectibles, Inc., the manufacturer of Magnet Balls. A copy of the request is enclosed.

I also want to inform you that working through Association Headquarters, Inc, an association management company accredited by the AMC Institute (to ANSI standard), six manufacturers of high powered magnets formed the "Coalition for Magnet Safety" with a mission "To protect the public through responsible labeling, promotion, distribution, and sales of high-powered, Rare Earth magnets intended for adult use." The founding members of the Coalition are:

- Craig Zucker, Maxfield and Oberton Holdings, LLC, the manufacturer of Buckyballs® and Buckycubes™,
- Shihan Qu, Zen Magnets LLC, , the manufacturer of Zen Magnets™,
- Daniel Peykar, Star Network USA LLC, the manufacturer of Magnicube™,
- Christopher Reda, Strong Force Inc., the manufacturer of Neocube™,
- Howard Greenspan, SCS Collectibles, the manufacturer of Magnet Balls,
- Nicholas Powell, Neodox LLC, the manufacturer of CyberCube.

The roster and mission statement are attached.

Please let me know if you have any questions about these industry taken actions.

Thank you,

Craig Zucker

President

Maxfield and Oberton

--

maxfield and oberton
www.getbuckyballs.com
[redacted]

**From:** [redacted] **On Behalf Of** Craig Zucker
**Sent:** Monday, June 25, 2012 9:54 AM
**To:** Lee, Thomas
**Cc:** Alan Schoem
**Subject:** Maxfield and Oberton New Products

Mike:

I wanted to inform you of two new products released by Maxfield and Oberton this morning. You can product find information at:

- https://www.getbuckyballs.com/products/#!/buckybars
- https://www.getbuckyballs.com/products/#!/buckybigs

Please let me know if you would like us to send samples of these new items for your investigation.

Thank you,
Craig

--

maxfield and oberton
www.getbuckyballs.com
[redacted]

**From:** Craig Zucker [redacted] **On Behalf Of** Craig Zucker
**Sent:** Tuesday, September 11, 2012 1:06 PM
**To:** Wolfson, Scott
**Subject:** A Special Thanks from Buckyballs' CEO

Hey :

Thanks so much for making Thursday's "SaveOnBalls" promo our biggest ever and for helping us continue the fight to Save Our Balls.

Just wanted to let you know that Buckybars and Bucky Bigs are now back in stock and that I've extened the **60% OFF everything** promo through Sunday Sept. 16th at www.getbuckyballs.com.

Thanks,

Craig

Sent from my iPhone

# EXHIBIT F

# COMMENT FROM MR. ZUCKER ON PROPOSED SAFETY STANDARD FOR MAGNET SETS

# Comment from Craig Zucker

Document ID: CPSC-2012-0050-0023

Document Type: Public Submission

This is comment on Proposed Rule: Safety Standard for Magnet Sets
Docket ID:
CPSC-2012-0050

RIN: Not Assigned

Topics: No Topics associated with this document

View Document:

Less

| | |
|---|---|
| Document Subtype: | Public Comment |
| Status: | Posted |
| Received Date: | September 12 2012, at 12:00 AM Eastern Daylight Time |
| Date Posted: | September 12 2012, at 12:00 AM Eastern Daylight Time |
| Comment Start Date: | September 04 2012, at 12:00 AM Eastern Daylight Time |
| Comment Due Date: | November 19 2012, at 11:59 PM Eastern Standard Time |
| Tracking Number: | 81112f91 |
| First Name: | Craig |
| Last Name: | Zucker |
| Organization Name: | Maxfield and Oberton Holdings, LLC |

**Comment:**

See Attached

**Attachments:**

Title:
Comment from Craig Zucker
Authors:
Craig Zucker

Maxfield and Oberton Holdings, LLC
180 Varick Street | Suite 212 | New York | NY | 10014
Ph: 347.772.8259 | Fax 917.591.7924

Todd Stevenson, Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Submitted electronically

**Re: Comment on Staff Briefing Package on Magnet Rulemaking**

Dear Mr. Stevenson:

I am writing to urge the Commission to reject the CPSC staff's rulemaking proposal to ban high-powered magnets. The Commission instead should propose a rule under section 7 of the Consumer Product Safety Act to require uniform and consistent warnings and labeling on high-powered magnets marketed for adults, coupled with a public education campaign, much like the Commission has done with other products that are intended for adults but present a risk if children access the products. It seems clear from the Notice of Proposed Rulemaking and draft Federal Register notice being considered by the Commission that the Commission staff is not giving serious consideration to any alternatives to a ban and is merely going through the motions to satisfy legal requirements in the Consumer Product Safety Act.

The staff briefing package is replete with misstatements, speculation and innuendo. Conjecture and supposition appear to substitute for any substantive empirical analysis. Moreover, to the extent warning messages are deemed to be ineffective with respect to high powered magnets intended for adults, the Commission staff itself has undermined effectiveness through its failure to pursue corrective action against firms that marketed and promoted their high powered magnets for children and through major retailers that: 1) allowed high-powered magnets to be listed under toys and games; 2) allowed such magnets to be listed for children ranging in age from 2-14; and 3) and allowed choking warning labels on its site implying high-powered magnets were appropriate for children 3 and older. Not surprisingly, however, this subject is not addressed at all in the staff's briefing package, although Maxfield and Oberton raised it repeatedly - and unsuccessfully - with the staff. Such a deficient and potentially misleading briefing package should not be the subject of a Commission vote to accept the proposal. Moreover, Commission acceptance of the staff's banning proposal would open the Commission to fair criticism based on selective application of its regulatory authority.
Recently, the CPSC announced an educational campaign with the Juvenile Products Manufacturers Association (JPMA) to warn of the dangers of strangulation with corded baby monitors, a product that has been involved in seven deaths since 2002. CPSC's Chairman, Inez Tenenbaum, has repeatedly threatened action against window covering manufacturers if they failed to act to eliminate the risks associated with corded window coverings that result in strangulation of young children. But

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ultimately it appears she decided the window cord industry was too powerful to take on, and agreed to an educational campaign and warnings. In an answer to questions at a recent oversight hearing, Chairman Tenenbaum stated:

> [The window covering industry] can make the cord where it's not accessible to children, and there are all kinds of technologies that they share with us, but they don't want to eliminate the cord entirely. However, I'm very optimistic meeting with retailers and with the association that everyone wants to do a massive education campaign so that if you are buying shades you—and you have children at home, then you would go cordless. You would go cordless or have no shades. You could have shutters, or draperies, but you remove the hazard if there are children in home [sic].
>
> * * *
>
> We also want to work with major retailers so that they can train employees at the point of sale so that their kiosk is online that have baby registries can also bring to attention of people that if you have a child in the home, you don't—you need to go cordless. But see if we can address some of the fatalities, and reduce the number of fatalities by an educational program that was robust.

*(CQ Congressional Transcripts, Congressional Hearings August 2, 2012, House Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade Holds Hearing on Oversight of the Consumer Product Safety Commission.)*

The approach to the more powerful window covering industry is in sharp contrast to the potential action against the small magnet industry where the CPSC staff takes the position that warnings will not work, that public education will not work, that the hazard is "hidden" and nothing will work but a ban. Yet for the window covering industry where numerous strangulations and near strangulations occur each year due to a hidden hazard for which a remedy apparently is available, the CPSC somehow deems warnings and public education to be a perfectly acceptable approach to the safety of our nation's youngest children.

**Summary**

CPSC has not given warning labels, a safety program and an educational campaign an opportunity to show their efficacy in preventing injuries associated with high-powered magnets. Rather, the CPSC staff is now prematurely proposing a complete, rush-to-judgment ban of these products based on a briefing package almost entirely lacking in empirical support and which fails to recognize the CPSC staff's own inaction against improper advertising and marketing of these products to or for use by children under 14. Contrary to its approach in addressing serious risks to children presented by other products including all-terrain vehicles, corded baby monitors and window coverings, the CPSC staff has refused to give warning labels, safety programs and consumer education an opportunity to work. If CPSC would specify consistent warnings and

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safety programs to be used by all manufacturers of high powered magnets, similar to that used for Buckyballs® and Buckycubes®, there is much less likelihood that there will be confusion and misuse in the marketplace.

I urge the Commission to reject the staff recommended proposed ban of high-powered magnets intended for adults and instead to propose a rule under section 7 of the CPSA to require, among other measures, uniform warnings, labeling and packaging on all sets of high-powered magnets intended for adults. This effort should be coupled with an education and warning program in cooperation with magnet manufacturers making clear that high-powered magnets are not for children.

Sincerely,

Craig Zucker
CEO
Maxfield and Oberton

# EXHIBIT G

# EXAMPLES OF WRITTEN COMMUNICATIONS FROM MR. ZUCKER TO U.S. LAWMAKERS

**From:** [redacted] on behalf of Craig Zucker
**To:** Williams, Joseph
**Cc:** [redacted]@[redacted].senate.gov; [redacted]@commerce.senate.gov; [redacted]@[redacted].senate.gov; [redacted]@[redacted].senate.gov; [redacted]@mail.house.gov; [redacted]@[redacted]senate.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; [redacted]@mail.house.gov; Hinson, Kenneth; Tarnoff, Howard; Wang, Sarah; Argabright, Jennifer; Howsare, Matt; Levine, Jason; Murphy, Mary; Tenenbaum, Inez; Adler, Robert; Nord, Nancy; Northup, Anne; Martyak, Joseph; Cardon, Nathan; Avitabile, Gregg; Falvey, Cheryl; Lee, Thomas; Alan Schoem; FBLocker; Laurenza, Paul; Andrew Frank; Frank Clarke
**Subject:** Maxfield and Oberton (Buckyballs & Buckycubes) Follow Up
**Date:** Friday, July 20, 2012 10:38:27 AM
**Attachments:** Bloomburg Businessweek - July 23-29.pdf
New York Magazine - July16 -23.pdf
Washington Post - July 13.pdf

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Mr. Joseph F. Williams

U.S. Consumer Product Safety Commission

Compliance Officer

Office of Compliance and Field Operations

Defect Investigations Division

4330 East West Highway

Bethesda, MD 20814

Mr. Williams:

Since Maxfield and Oberton's founding in 2009, we have always supported and endorsed responsible selling of our products and share the same concern for the safety of children as does CPSC, as evidenced by the cooperative work we have done together.

In spite of this, the Compliance Staff at CPSC has not communicated with us concerning its recent actions. It has neither provided any written response to our request for reconsideration of the staff's Preliminary Determination, nor provided us with written technical evidence of any product defect, since this determination was made. This morning in a phone conversation, the Executive Director of the agency summarily dismissed our request for reconsideration. Rather than

reconsider your actions or communicate directly with us, you have instead reached out to and negatively influenced our retailers, effectively shutting down our third-party retail sales without giving us a chance to defend our products or the safety program behind them (see www.magnetsafety.com.)

Please find three attachments for your files:

A full-page story showing the success of our company in Bloomberg *BusinessWeek* from **today**, describing our products as "Rated R" and not for children, (2) A full page review in *NY Magazine* about our products dated July 16-23, and (3) a *Washington Post* review from July 13 calling Buckyballs "everyone's fave accessory."

This is the USA born and raised company you are putting out of business.

On behalf of:

- 2.5 million adult users of our products,
- Our full New York staff and 200 nation-wide sales reps in jeopardy of losing their jobs,
- 5,000 independent and chain retailers,
- Hundreds of thousands of social media followers,
- Hundreds of blogs, news publications and sites that consistently review and love our products,
- And both House and Senatorial supporters of what we do;

We look forward to working cooperatively with you over the next few weeks and hope you will see your way clear to do the same.

Sincerely,

Craig Zucker

[redacted]

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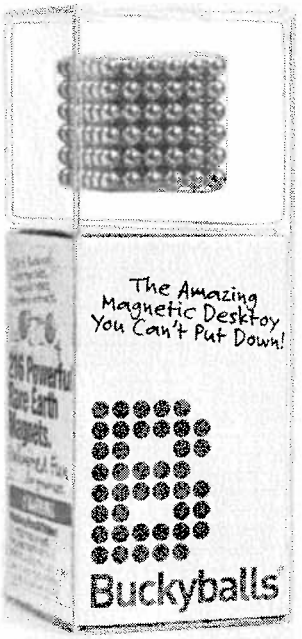
# Open Letter to President Obama:

## Help Our Small Business Be Treated Fairly




**⚠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.

**"This year's go-to workplace distraction"**
People

**"Everyone's fave desk accessory"**
The Washington Post

**"There's no better desktoy"**
Esquire

**SAVE OUR BALLS**
Buckyballs

GetBuckyballs.com
SaveOurBalls.net

# Dear President Obama:

## I know that you support small business.

And now I need your help to save ours from being shut down by the Consumer Product Safety Commission (CPSC).

In 2009, I started our business, creating a product called Buckyballs®, a stress-relieving product marketed online to adults. The national media raved about Buckyballs® and from a two-man startup **we became the most popular adult gift brand in just three years.** Our business exceeded every expectation an American entrepreneur could have had.

**Now, the CPSC has sued us,** alleging our products are defective because sadly a handful of children, out of millions of units sold, have found and misused them.

What is particularly unfair is that the CPSC preemptively contacted our retailers and intimidated them by asking them to "volunteer" to stop selling our products, effectively dismantling our retail business in just a few days. The CPSC issued a press release that most retailers and the general public interpreted as saying that our products had been banned, when in fact they are still perfectly legal to sell. And the CPSC did this all before even legally serving us with their lawsuit.

## We never had a fair opportunity to defend our products, company, or safety program.

Over the past two years, the CPSC didn't dispute that our products had the proper warnings or safety program in place and even acknowledged that our products are safe for adults and should not be given to children. In fact, they have commended us for our warnings, safety program, and educational website: www.magnetsafety.com. **But suddenly, the CPSC says that warnings aren't good enough** anymore and they simply want us to go out of business, thereby eliminating the jobs of our employees, sales reps and some retailers.

The same agency that relies on reasonable warnings for many other products in the marketplace now believes the American public can't be relied upon to heed the warnings on our products.

## The CPSC can't have it both ways.

Our products have **five warnings repeated on the packaging** and instructions.

This absurd contradiction would seem to undermine the CPSC's reliance on warnings for numerous other products that cause far more injuries and even deaths every year. Products such as balloons, button batteries, ATVs, fireworks, drain cleaners, detergent pods and many, many others that are potentially harmful yet remain for sale with warning labels.

### Not only does our vigorous safety program work, but it surpasses that of many other products and industries.

We do not understand why our products, marketed exclusively for adults and with so few injuries, have suddenly been raised to the very top of the CPSC's action list to become the target of the first litigation of this type filed in 11 years.

### It feels unfair, unjust, and, well, un-American. We will fight back vigorously. But we sure could use your help.

Our adult customers and online community of hundreds of thousands of supporters love our products and don't want them taken away by the CPSC.

We ask for your help in ensuring that our products are treated just like any of the thousands of others regulated by the CPSC that are potentially harmful if misused and yet are allowed to be marketed, so long as they bear a proper warning label.

### It's just not right, Mr. President.

Thank you in advance for anything you can do to ensure we are treated fairly.

Respectfully,

Craig Zucker
Co-Founder & CEO, Maxfield & Oberton
craig@getbuckyballs.com

# EXHIBIT H

# EXAMPLES OF MR. ZUCKER'S MEDIA APPEARANCES ON BEHALF OF M&O

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# Buckyballs' CEO Craig Zucker on CNBC with CFA's Rachel Weintraub

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**Published on Aug 20, 2012**

Craig Zucker debated the Consumer Federation of America's Rachel Weintraub on CNBC as the battle to save Buckyballs continues

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**Published on Aug 3, 2012**

Fox News' "Your World with Neil Cavuto" got airtime with our CEO Craig Zucker to discuss taking our battle with the CPSC to Capital Hill.

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# Is Proposed Recall on Magnet Toys Unfair?

Proposed Ban on Magnet Toys Has Buckyballs Crying Foul

abc NIGHTLINE

By SHARYN ALFONSI, NICK CAPOTE and CHRIS JAMES

Sept. 12, 2012

# Is Proposed Recall on Magnet Toys Unfair?

*By SHARYN ALFONSI, NICK CAPOTE and CHRIS JAMES*
*Sept. 12, 2012—*

abcnews.go.com

## Who's at Fault When Products Are Misused?

Buckyballs, a toy made up of small magnetic beads that can be molded into different shapes, is one of the most popular office toys on the market.

Marketed to adults as a stress reliever and a cure for cubicle boredom, more than two million Buckyballs have been sold in the United States. The beads are shiny, sculptural and irresistible to play with, but they can also be dangerous.

At just 20 months old, Presley Bjarnson was hospitalized after he swallowed 18 Buckyball beads last month. His mother, Laura Bjarnson, who said she never saw the warning labels on the toy's packaging, had accidentally left the toy out where Presley could reach it.

When she discovered Presley with the toy, Bjarnson said she didn't know at the time if her son had swallowed the magnets. But Bjarnson, who is a registered nurse, took Presley to the pediatrician the following day as a precaution. An x-ray showed a ring of 18 Buckyballs lodged in his stomach.

"When I first saw that x-ray and saw that it was not one magnet, that it was 18, I panicked," Bjarnson said. "I knew that if they had passed from his stomach into his intestine that he could die. The ultimate, the highest risk was that he could die."

As these high-power magnetic beads travel through the body, doctors say they can stick together, pinching tissue and ultimately puncturing holes in the thin intestinal lining.

The U.S. Consumer Product Safety Commission said Presley is just one of an estimated 1,700 people who have been hospitalized in the past three years after ingesting these kinds of magnets. As a result, the CPSC is demanding that Buckyballs and several high-power magnetic toys from other companies be recalled immediately.

But Buckyballs CEO Craig Zucker is not willing to give in.

"This is the first time in 11 years a company has said to the commission, 'we don't agree a recall is necessary,'" he said.

The company is challenging the proposed ban because, Zucker argues, Buckyballs are not defective and they are marketed as an office toy, clearly not intended for or marketed to children.

"We're not in Happy Meals. We're not on Saturday morning cartoons. We're in adult stores … places you would go to find something for your dad on Father's Day," Zucker said.

By demanding he stop selling his product, Zucker believes the CPSC has gone too far. In the wake of the proposed ban, he launched an online campaign called "Save Our Balls," which has sparked a national debate on the role of big government.

Zucker said his company has tried to reach a compromise with the government. Namely, he has taken

steps to educate consumers about magnet safety and pointed out that Buckyballs packaging carries clear warnings to parents.

"[Warning labels are] on the top, the side, the carrying case. It's on the instructions," he said. "I would say it's impossible to miss the warnings. They're all over the place."

But the CPSC said these warning labels do not go far enough because they don't "travel with the product," meaning once the toy is removed from the packaging, there is nothing to expose its potential dangers or stop children from "facing serious injuries."

Children like Presley Bjarnson, who was eventually rushed to the hospital where doctors were able to remove the 18 Buckyballs without major surgery. He has since made a full recovery.

Tips for Parents: What To Do if Your Child Swallows a Magnet

But 2-year-old Braylon Jordan was not so lucky. In April, Braylon swallowed eight magnetic toy balls called NeoCubes -- one of the 11 companies targeted by the proposed government ban that volunteered to stop selling its product in the United States.

Braylon's parents said they first noticed something was wrong when their son started vomiting. At first they thought it was a stomach virus, but soon an x-ray revealed that the tiny magnets were making their son sick.

The Jordans said they bought the desk toy from a local supermarket before Braylon was born and saw the warnings on the package. So when they baby-proofed their house, they made sure to hide the magnets in a cabinet out of his reach, but said they weren't careful enough.

"We didn't say, 'hey Braylon here you go, play with these little beads,'" said Brayton's father, Jonathan Jordan. "Common sense tells you don't have them around kids but yet somehow he found them, a couple had rolled out of sight."

Tips for Parents: What To Do if Your Child Swallows a Magnet

The eight magnets Braylon had swallowed stuck together and ultimately destroyed his intestines. After eight surgeries and one month in the ICU, the rambunctious little boy is now tethered to a feeding tube 18 hours a day, unable to process solid food.

The Jordans have accrued more than $1.5 million in medical bills over the past five months, and Braylon's best hope for a normal life is a rare lower bowel transplant. But his parents said they are not angry with NeoCubes, but at themselves.

"If I had known how dangerous they are, they wouldn't have been in the house at all," Jonathan Jordan said.

Neocubes told "Nightline" they did not want to be responsible for anyone getting hurt, but added, that "there are lots of dangerous products out there, especially if you eat them."

The Consumer Product Safety Commission wants to regulate the production of future magnetic office toy products to make them safer by making magnets larger, so they are more difficult to swallow, and

less powerful.

In the meantime, they are determined to get all existing toys out of kids' hands and off store shelves as soon as possible.

For now, Buckyballs can still be purchased in specialty stores and on the company's website. Zucker said he is holding out hope for a compromise.

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# For Buckyballs Toys, Child Safety Is a Growing Issue

By ANDREW MARTIN
Published: August 16, 2012

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Three years ago, two pals from Brooklyn came up with the idea of creating a desktop toy out of powerful magnets. Their creation, Buckyballs, became an instant hit. And by this year, the two — Craig Zucker and Jake Bronstein — had expected annual sales to reach about $25 million.

But their business plan has hit a major, unanticipated snag.

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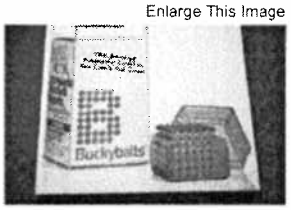


Richard Perry/The New York Times

Buckyballs are aimed at adults, but regulators say such magnets are hazardous to curious children, who swallow them.

Buckyballs are made from rare-earth elements, which makes them much more powerful than most magnets — and potentially more dangerous when ingested. Though the product is marketed to adults and festooned with warning labels, regulators have moved to stop sales because children keep swallowing Buckyballs and similar products made by others.

Richard Perry/The New York Times

Craig Zucker of Buckyballs is fighting safety complaints.

An administrative complaint filed last month by the Consumer Product Safety Commission seeks to require the company — officially called Maxfield & Oberton Holdings — to tell the public about the problem and offer customers a refund. The safety commission also asked 12 other manufacturers of rare-earth magnets to voluntarily recall their products and stop sales; 11 have complied.

Besides Buckyballs, Zen Magnets, a small company in Denver, refused. Last week, the safety commission filed an administrative complaint against Zen Magnets too."The labeling, the warnings, the packaging does not work," Scott Wolfson, spokesman for the safety agency, said of the products. "You have young children who come into a room and get their hands on a loose magnet or two."

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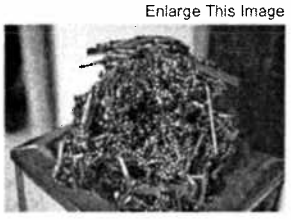

Richard Perry/The New York Times

A Buckyball art piece. Children sometimes swallow the magnets, causing health emergencies.

The action involving Buckyballs and Zen Magnets is unusual because the safety commission rarely files an administrative complaint, which is essentially a request for a mandatory recall. The last one, filed 11 years ago, was against Daisy Manufacturing, which makes BB guns. In Buckyballs' case, a hearing will be scheduled before an administrative law judge, who will decide whether to grant the safety commission's request.

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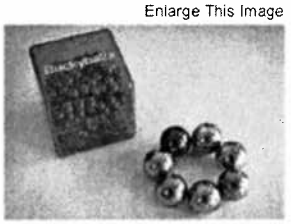

Richard Perry/The New York Times

In the meantime, Mr. Zucker has started an aggressive public campaign to win support for Buckyballs. Using the cheeky slogan "Save Our Balls," his company has taken out newspaper ads in Washington, directed at President Obama and lawmakers, and stoked a campaign on social media Web sites like Facebook and Twitter.

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Buckyballs, sold in sets, are made from rare-earth materials.

In doing so, Mr. Zucker has found enthusiastic support from those who believe the Obama administration has pushed regulation too far.

"When an adult, a 28-year-old, can't buy this for their desk, then this agency has run amok," said Mr. Zucker. "This is government gone absurd."

There were an estimated 1,700 incidents of rare-earth magnets being swallowed and requiring emergency room care, in some cases surgery, in the three years beginning in January 2009, according to the safety commission.

It was not clear how many of those incidents involved Buckyballs, the dominant vendor in the United States. Mr. Zucker, 33, said there have been 2.5 million sets of Buckyballs sold and the company has confirmed 12 swallowing incidents. A set of 216 Buckyballs, which are about the size of BBs, costs $35 (colored Buckyballs cost $40).

Swallowing two or more rare-earth magnets is particularly dangerous because they attract each other in the intestines and can cause blockages, tissue damage and even perforation.

"Kids do swallow all kinds of stuff, but few pose the kind of risk that these magnets do," said Dr. Bryan Vartabedian, a pediatric gastroenterologist at Texas Children's Hospital, who treated a toddler whose bowel had been perforated after swallowing rare-earth magnets. "These are very unique magnets. They are incredibly powerful."

While expressing sympathy for the victims, Mr. Zucker maintained that the complaint against his company was a case of selective enforcement. He noted that the safety commission has not banned many other products that cause far more injuries, and even deaths, to children, including all-terrain vehicles, button-cell batteries and window blinds.

"You can't say warnings work on some products but not others," he said.

But this is not the first effort by the safety commission to crack down on magnets. In 2006, for instance, the agency announced the recall of several million toys because children were swallowing magnets that had fallen out of them, causing injuries and at least one death. Toy manufacturers are now required to encase magnets so they will not fall out.

Initially at least, Mr. Zucker worked with the safety commission to try to educate consumers that the magnets were dangerous to children. The company voluntarily recalled 175,000 sets of Buckyballs in 2010 because they were labeled for "Ages 13+." The warning was changed to say that Buckyballs should be kept away from all children.

A year and half later, the safety agency and Mr. Zucker created a safety alert video to warn consumers about the dangers of ingesting magnets. Mr. Zucker said his company also created a Web site, called magnetsafety.com, for the same purpose, and required retailers to agree not to sell the product to children.

But the injuries continued, leading to the newest action against the 13 manufacturers.

In a statement on its Web site, Zen Magnets' founder, Shihan Qu, noted that there had been no reports of children ingesting its magnets. "Obviously we are being punished because children have regretfully misused our competitor's magnets," he said. "I urge those within the C.P.S.C. to think twice before applying the death penalty to innocent corporate citizens."

Daniel Peykar, co-founder of Magnicube, said his six-month-old company agreed to voluntarily stop selling its rare-earth magnets, at least temporarily, because it did not want to pay the legal fees associated with an administrative complaint. "Hopefully, they will come up with a resolution on labeling and that will apply to everyone in the industry," he said.

But Mr. Peykar, of Pine Brook, N.J., said he did not agree with the commission's actions.

"The C.P.S.C. has gone to great lengths to try to ban a product rather than come up with a

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reasonable resolution," he said.

The safety commission and consumer advocates maintain that the ban is warranted because rare-earth magnets are irresistible to children, even if the packaging says the toys are intended for adults. In the past, the commission has banned toys that it deemed too dangerous, like lawn darts, Mr. Wolfson said.

Not surprisingly, Betty Lopez, whose 12-year-old daughter swallowed four Buckyballs in March while pretending to have a pierced tongue, supports the commission's actions.

"There were kind of three portions of the bowel that were stuck together by the Buckyballs," said Ms. Lopez, who explained that her daughter required two operations and missed a month of school. "Knowing what my daughter went through, I don't feel that Buckyballs serve any true purpose."

Such injuries have marred what may have been a feel-good business success story that started in a Williamsburg apartment in Brooklyn in 2009.

Mr. Zucker was an entrepreneur who started, among other things, a bottled water business that sold New York City tap water. Mr. Bronstein wrote a blog, zoomdoggle.com, that offered tips about workplace fun.

After they saw rare-earth magnets on YouTube, they bought some inventory and repackaged them as Buckyballs (the nickname of a spherical carbon molecule that resembles the geodesic dome popularized by the inventor R. Buckminster Fuller).

At first, the two packed the magnets themselves and walked orders to the post office. Before long, they struggled to keep up with the demand. This year, they were on pace to sell 1.5 million sets, at least before the safety commission's actions.

"We put $1,000 each into it," said Mr. Zucker, whose cause to stay in business has been championed by the conservative commentators Rush Limbaugh and Michelle Malkin, among others. "We never put in another dime. No loans. No investors. We exceeded every single expectation."

But now, Mr. Zucker says he is fighting for the survival of his business, which is in a cramped office with eight employees and a "We Love Our Jobs" sign, made out of Buckyballs, on the front door. And he is hoping customers will rally behind his unconventional campaign.

For instance, last week his company urged its Facebook fans to contact the agency "that is trying to take away our balls," and it listed the names, phone numbers and e-mail addresses of Mr. Wolfson and the commission members, along with unflattering caricatures.

Rachel Weintraub, director of product safety at the Consumer Federation of America, said the Buckyballs campaign was simply an effort to shift the focus away from safety. "The essence here is safety, that children are being injured in horrendous ways," she said. "It is classic industry strategy: changing the subject, attacking the messenger."

Mr. Zucker prefers to cast the issue as one of fairness. "This is an issue about when can consumers make a decision to buy an adult product?" he said. "It's a good fight. And it's a fight I think we can win."

A version of this article appeared in print on August 17, 2012, on page B1 of the New York edition with the headline: Fateful Attractions.

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# Buckyballs vs The Consumer Products Safety Commission

Joshua Swain & Kennedy | September 12, 2012

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"We are the first compay in 11 years who has said no to the U.S. Consumer Products Safety Commission," says Craig Zucker, co-founder and CEO of Maxfeild and Oberton, creators of the popular magnetic desktoy Buckyballs. Citing roughly two dozen instances in which these magnets were swallowed by children and teenagers, the Consumer Products Safety Commission recently filled a lawsuit to recall and stop their sale. Zucker, however, is not backing down. "We are not going to recall the product....We'll fight it and we'll fight vigorously."

"Our packaging has five warnings on it, we don't sell to stores that sell only children's products and we don't sell to toy stores," Zucker explained. "There is a level of personal responsibility that comes into play when it comes to consumer product safety."

Zucker sat down with Reason TV's Kennedy to discuss the recall, the bullying tactics employed by the CPSC, and how they are pushing back with their "Save Our Balls" campaign.

Shot by Jim Epstein and Anthony Fisher. Edited by Joshua Swain.

# CEO of Buckyballs: Save Our Balls

July 30, 2012

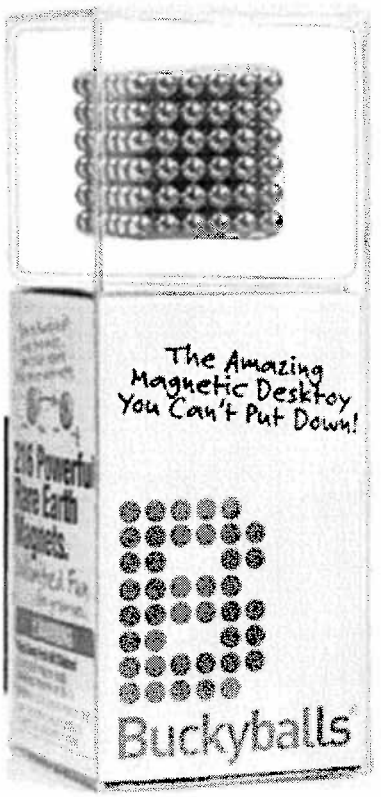
Windows MediaBEGIN TRANSCRIPT

RUSH: We have on the phone the CEO of Buckyballs, a guy from New York named Craig Zucker. Mr. Zucker, welcome to the program. Great to have you here.

ZUCKER: Thanks a lot, Rush.

RUSH: You have had your product banned?

ZUCKER: The Consumer Product Safety Commission has begun a process to ban our product and magnets in general. It has not been banned yet.




RUSH: Okay, not yet. Not yet.

ZUCKER: Not yet.

RUSH: But you're on the way. What's the problem they've got, first with magnets, and then we'll get to yours. What's their problem with magnets?

ZUCKER: I guess over the past couple years they've seen a couple of children who have gotten their hands on an adult product, they've ingested the product. Twelve children over the past three years have ingested our product out of two-and-a-half million units sold, and the Consumer Product Safety Commission believes that now all magnets should be taken off the market. They should be banned and recalled due to these 12 incidents.

RUSH: Even refrigerator magnets that remind people to shut the door and stuff like that?

ZUCKER: Not those kind. The products that they're looking at are more of the products like Buckyballs and Buckycubes.

RUSH: How big is a Buckyball?

ZUCKER: They're about five millimeters. Each one's about the size of a BB and they come in packs of, you know, 125 or 216.

RUSH: Right.

ZUCKER: They're marketed and sold as adult stress relievers, desk toys, things to build, create structures out of, and have been sold to adults for nearly three years now. They've become probably one of the best-selling adult gift product in the specialty gift industry the past three years.

RUSH: And because of a minuscule percentage of children misusing the product, now they want to ban whole thing?

ZUCKER: The incident rate compared to other products is extremely low. You take products like balloons or five gallon buckets or adult-size ATVs where hundreds of kids are sent to the hospital per year and there are multiple deaths, and the Consumer Product Safety Commission, their remedy for that is warnings. But when it comes to an adult product, marketed and sold to adults, they now say that warnings, which is the basis for most of the

regulation of what they do out there, warnings don't work anymore.

RUSH: Were you breast-fed, or did you drink formula?

ZUCKER: (laughing) I was given formula.

RUSH: Formula. Well, they might have found that out.

ZUCKER: (laughing) They might have.

RUSH: (laughing) You know, I was popping some popcorn over the weekend to watch the Olympics. And the kind of popcorn, it's Orville Redenbacher and it comes with the coconut oil, the popcorn, all in one package in two separate compartments. So I'm looking for an expiration date just for the fun of it, and I see on the back of the package there is this warning that suggests popcorn is dangerous to let kids eat because the kernels and the partially popped kernels could end up choking them to death.
ZUCKER: Right.

RUSH: Now, I know this is a liability thing. They put it on there just to protect themselves in case some accident happens, but how is anybody supposed to stay in business in this country? Accidents happen. You talk about balloons, they tried to ban these things once because birds were eating. You know, they'd send balloons up and they'd lose their buoyancy, come back, and birds would find the used balloons on the ground. I remember the environmentalists were all upset about that. How are people like you supposed to stay in business, Craig?

CALLER: Look, I mean, I think product safety, it's a partnership between three different organizations. It's the government, the CPSC, it's manufacturers/industry, and it's consumers. And all three have to do their part to keep businesses and to keep children safe and to keep us in business. The government has to create rules and regulations that are reasonable. Manufacturers like us have to follow those. We have to educate consumers. But it is the responsibility of consumers as well to follow the regulations that we give them and to be educated on the products that they're purchasing, especially when it comes to having children in the house.

RUSH: Well, you know, you refer to your product Buckyballs as a toy, but I remember as a kid, when I first discovered magnets, they fascinated me.

ZUCKER: Right, listen, they've been around for thousands of years.

RUSH: Of course they're natural. You can't take magnetism out of physics.

ZUCKER: They're used in all sorts of applications. And, by the way, we don't say toy, we say adult desk toy. So there's a context here when we talk about the product.

RUSH: Yeah.

ZUCKER: The product, if you just take a look, you know, warnings are on the packaging in five places. That's five times more places than a pack of cigarettes. We have it on the instructions, the packaging in four different places. You can't miss the warnings, you can't miss the display --

RUSH: Yeah, but see, the mistake you're making is you're not factoring the education system and how many people can't read.

ZUCKER: Well, I don't know about that, but we created a lot of awareness.

RUSH: Ah, but you're doing everything you have to do. Folks, the reason I like this -- well, I don't like it, but I mean it's illustrative of what this government is doing to small businesses.

CALLER: It's hard. We built this company from scratch. We were a two-man operation. We have exceeded every possible expectation the US entrepreneur could have, and it does feel un-American. It does feel that us being put out of business and what to tell my employees and my sales reps and my retailers that count on this product to pay their rent -- it's hard to know what to tell them. It doesn't feel like the American way.

RUSH: How long did you say you've been in business?

ZUCKER: We've been in business three years.

RUSH: Three years. So you're just now revving up?

ZUCKER: We have been revved up since day one. I mean we've had a trajectory that's been just astronomical. We showed up to our first trade show, and we were probably the most popular product there.

RUSH: No, no, no, you didn't build that, you didn't. Is your business on a road?

ZUCKER: I'll tell you what. We built it. Me and a partner, with $2,000 in an apartment in New York, built it, and it's getting slowly disassembled by the Consumer Product Safety Commission piece by piece. It's death by a thousand cuts is what they've done to us. They've gone to our retail chain. They've put out press releases even before serving us. They've ignored our letters asking for how they determined the product was defective, and yet still went to retailers and basically destroyed our wholesale channel within a week. They've put out false information to the press, saying it's banned, although it hasn't been banned.

RUSH: What do you think is really motivating them, Craig?

ZUCKER: It's a good question, Rush. It could be politically driven. It's an election season.

RUSH: Yeah, but Buckyballs doesn't have a political identity. And I'm not gonna ask you who you donate to. They could find out, but I mean there's no political identity to your product.

ZUCKER: Not at all.

RUSH: They're crucifying you.

ZUCKER: They are not crucifying us. They are destroying, they are putting a US business out of business as we speak. And it's been frustrating. But I'll tell you one thing. The support of people online and people like your listeners and people that are all over the Internet have given us -- we've done more sales through our website than we could have possibly done through all the retailers that CPSC shut down last week in the course of four days. The individual consumer online coming to rally to support us and the absurdity of what's happening at CPSC and the support that we're given is gonna end up keeping this business thriving and alive, and we're gonna fight this, and we're gonna fight CPSC and we're gonna go to court and we're gonna beat them in litigation, and that's what we're kind of building up our business for to do right now.

RUSH: Well, it's great you're gonna do that. It's a shame you have to.

ZUCKER: Can I give my website address?

RUSH: Sure, by all means. I think it's fabulous you've got so much public support on this.

ZUCKER: Thanks. So there's two places. Getbuckyballs.com is where we have all our products, but there's a great campaign at

saveourballs.net.

RUSH: Oh, I love saveourballs.net.

ZUCKER: There's a great video there that explains what's happening. There's a lot of information, and, again, any support we can get helps, Facebook, Twitter. Call CPSC. Call chairwoman Inez Tenenbaum. Let your voice be heard.

RUSH: You know, Craig, I've looked at this, I could be wrong on this, but I don't think so. I think you're being singled out, being sued the way you are being sued, this particular legal tactic, I think it's only been used once before in the past ten years.

ZUCKER: Twice, and last time was 11 years ago.

RUSH: Yeah, okay.

ZUCKER: The CPSC lost both of those cases in an administrative complaint in front of an administrative law judge. So it's not a tactic they like. You know, 99.9% of companies when they're told to recall a product do it. CPSC is not used to somebody saying "no" and they're not used to people standing up to their bullying and intimidation tactics, and it's what we're doing. And so, again, any support we can get is great. Thanks for talking about us today. Thanks for taking the call.
RUSH: Glad you called, yeah. All the best. God bless. I'm ecstatic to hear you've got a such a loud and boisterous public response to what's happening to you.

ZUCKER: Oh, there's probably over a hundred thousand comments on all the blogs and all the articles out there. And all of them are in support of that the company's doing everything right and that the Consumer Product Safety Commission has overstepped their reach in what they're doing.

RUSH: That's who they are. That is exactly it.

ZUCKER: It seems to be the case.

RUSH: Craig, thanks for the call, and best of luck.

ZUCKER: Thank you.

RUSH: Save our balls. And we'll be back after this.

BREAK TRANSCRIPT

RUSH: It was not the birds. It was turtles that they tried to ban balloons because of. Balloons would end up -- used balloons -- they never tried to ban condoms for this reason. I never understood the difference why, but they banned balloons 'cause these turtles, both land turtles and sea turtles, were ingesting the balloons that had no air in 'em. Turtles come up there and eat the balloon on the ground, and that's it. They tried to ban balloons. But never condoms. And what you heard happening to Buckyballs. It sounds like they're being singled out, but they're not. There are a lot of small businesses, the same technique is not being used, but this administration is at war with small business. And they'll find any pretext they can.

Buckyballs is a $50 million business and it is growing. It's the United States government trying to drive them out of business. Not find a way to work with them on the safety side, but put them out of business. It's uncalled for. There's no excuse. There's no rational reason for it, and Mr. Zucker could not explain why he was being targeted. So I mean you've got an attempted ban of a product and the shutting down of a business. They're doing this in different ways to the oil industry. They're not succeeding, but what do you think the oil moratorium's

all about, the drilling moratorium? The fascinating thing about that, there is a boom economy happening in the Dakotas, and it's like it's in the Twilight Zone.

We talk about it here, but nobody knows about it, it never gets reported on. But there is an absolute economic boom going on because of new discoveries and technologies in getting oil out of the ground. They happen to be ways that the left doesn't approve of. And they've concocted a bunch of lies about what happens, say, to groundwater and other such things because of this method of extracting oil from the ground, and it's all lies, it's all trumped up. But this boom in the Dakotas is so rapid that the biggest problem they have is lack of housing for the people who are moving there to find jobs in the oil business. They don't have enough places for people to live. So the next phase is gonna be a bunch of developers going in there and rapidly building apartment complexes, condominiums, houses, this kind of thing, 'cause the oil business in the Dakotas is gonna have deep roots. The left is targeting it, trying to make it harder and harder for these people with more and more regulation to profitably extract the oil. It's cleaner.

Here we are in the midst of one of the most dismal economies since the Great Depression, and what ought to be happening is that everybody ought to be going to the Dakotas and saying, "Look, here is how we escape this. Here's how they're doing it. This is how it's done. You want to see economic growth, here it is. It's happening right here in the country." Instead, everybody's doing everything they can to keep it a secret. And beyond even keeping it a secret, they're trying to treat it as though it's some odd fluke thing that is made up of a bunch of weirdos. There's a Wall Street Journal story today. They can't build homes fast enough in North Dakota. Wouldn't you like to see that headline in a lot of states? It's mind-boggling, folks. There is a glorious economic boom and recovery happening in North Dakota and it remains one of the best-kept secrets in all of the world.

BREAK TRANSCRIPT

RUSH: North Dakota, 2002. This is in Williston, North Dakota. In 2002, rent on a two-bedroom apartment might have been $340 a month, but now rent on two-bedroom apartments in Williston, North Dakota, is between $1755 and $2700 a month. Just supply and demand. There isn't enough housing to accommodate people working in bringing about this boom.

END TRANSCRIPT

## *Related Links*

- CBS: Buckyballs CEO on CPSC Complaint: "How Can This Happen in America?"
- Wall Street Journal: North Dakota Oil Boom Puts Stress on State Courts

# EXHIBIT I

# EXAMPLES OF M&O PRESS RELEASES

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You've heard about our ongoing battle with the CPSC.
Thanks for your support as we campaign to **Save Our Balls!**

The press has talked about us. The world has supported us.
And our CEO is telling the whole Buckin' story about just how seriously we take safety.

Keep up the fight with us: Comment Facebook; send tweet; write or comment on blogs, tell your friends; complain loudly, or just buy a set.



Buckyballs

# A Letter from Our CEO

The **REAL** Story Behind Why We're Fighting

## Letter from the Chief Bucky to our Supporters, our Critics, and even the CPSC:

Some things about us that you might want to know

If you've been a Buckyballs® supporter, especially over the past few weeks, we want to start off by thanking you for blogging, commenting, Tweeting, Liking, and of course, purchasing our products. Because of you, we're able to stay in business and keep fighting an important fight.

If you're a critic of our products and our safety program, we respect your sincerity and commitment, but believe you may not know the whole story.

For all of you – friends and critics alike, I want to share some of the history and vigor of our safety program, along with an outline of how we have interacted with the Consumer Product Safety Commission (CPSC) over the three years we have been in business.

And I want to make a clear declaration that we continue to be very concerned about the ways in which our adult products have been misused and we have gone to extraordinary lengths to prevent that misuse through warnings, education, labeling, retailer sales restrictions and continuous cooperation with the CPSC – right up until literally the moment they turned on us. More about that shortly. First, information about our company and our safety program as it developed over the past three years.

### 2009 - 2010

A friend and I started Maxfield and Oberton in an apartment in New York City with an investment of $2,000. We bought magnetic spheres, hand packed them in jars, and branded them Buckyballs®, as one of our favorite shapes to make with them was the geodesic dome. We made some Youtube videos and started selling them on the web. We sold Buckyballs® on exactly three websites, all of which sell primarily adult products, from March, 2009 until October, 2009.

In October, 2009 we started wholesaling to brick and mortar retailers. The product was instantly a top-seller in high-end gift shops, bookstores, stationary stores, museum shops, and hundreds of other independent specialty gift stores.

Buckyballs were initially labeled 13+ because the Consumer Product Safety Improvement Act (CPSIA), which was passed on August 14, 2008, defined a children's product as one intended or designed primarily for a child 12 and younger. That was the appropriate age grade at

the time.

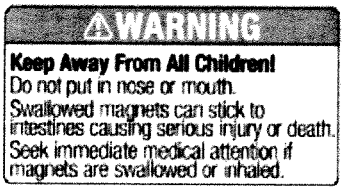
Our products were never intended, designed or marketed for children; so we labeled them for ages 13+ to make that clear.

Then the rules changed. In August, 2009, ASTM F963-08 became a mandatory toy standard and redefined a child as being under 14. Even though our products were not children's toys and therefore not subject to this new standard, we changed our age grading from 13+ to 14+. In addition, we changed our warning to say "Keep Away From All Children", to avoid any possible confusion.

In March 2010, we worked with CPSC to voluntarily recall all products with packaging that said 13+ and replace it with our updated and enhanced warnings.

Having complied with the change in the rules, we then decided to go well beyond that and created a comprehensive safety program to ensure Buckyballs® would be kept out of children's hands. That program, which was approved by CPSC two months later, in May, 2010, included:

- Changing the warning on new product to say "Keep Away From All Children" and adding language to explain the exact hazard of swallowing multiple magnets. The warning was developed with the help of former CPSC Compliance and Human Factors staff, and is modeled after language in ASTM F963 for rare earth magnets allowed to be sold to children as part of a hobby, craft or science-type kit.




- Adding three additional warnings to the packaging and carrying case, for a total of five warnings on the packaging and instructions.
- Developing our Responsible Seller Agreement (RSA) to ensure that our products were not sold in stores that sell children's products exclusively and that, in general merchandise stores with lots of children's products, they were only sold in a section with other products intended for adults. During this period, as we put the RSA into effect, we removed from our dealer list over 600 stores that did not meet the criteria of the new program.
- Ensuring that every new account goes through a compliance check or fills out and signs a Responsible Seller Agreement so that we can determine if they're an appropriate place for our products to be sold. The RSA, for those retailers required to have one, must be resubmitted and reevaluated every year and kept on file.
- Sending new signage with the updated warnings for use with retail displays.
- Including a copy of our Responsible Seller Notice (RSN) which states the retail requirements, in every shipment to retailers.

## 2011

Over the next 18 months, our business took off and we added new products, such as Buckycubes® and Buckyballs® Chromatics. The press raved about our products for workplace fun and stress relief. We advertised and were reviewed on major blogs with adult audiences. We showed our products at all of industry gift shows around the country. We were selling to major chains like Macy's, Brookstone, and Urban Outfitters. And thousands of independent retailers were happy to find a product that could be sold by the millions to adults. We weren't sold in stores that sold children's products exclusively and the business was growing wonderfully without ever being marketed to children. While life was buckin' good, safety was still our top priority.

In September, 2011, we wrote to all of our retailers reminding them, as we entered the holiday season, they must not sell to children under 14 or to adults buying our products to give to a child under 14. We mailed the letter along with another copy of our Responsible Seller Notices to our more than 4,000 retailers.

In November, 2011, we joined with CPSC which issued a joint press and video news release, reinforcing the importance of keeping our products out of the hands of children and reinforcing the potential consequences of misuse. I went down to Bethesda and met with CPSC Chairwoman Inez Tenenbaum. She commended our safety

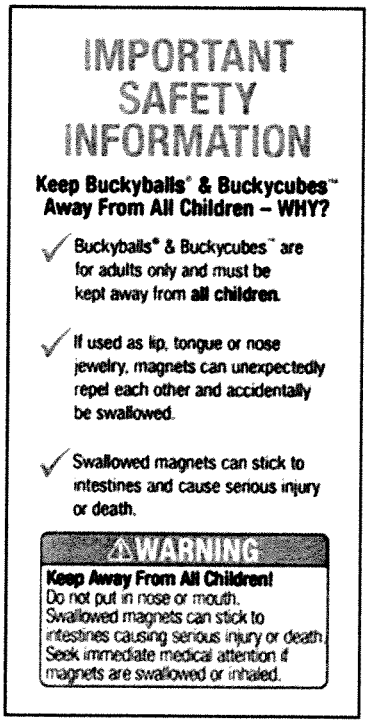
program and we filmed the video news release together.

## 2012

In March, 2012, we developed our new magnet safety website and created a safety video to air on it and on our main website. The site is promoted on our home page in three different places and was created to raise awareness and educate parents, educators, retailers, and doctors on the risks of letting high-powered magnets get into the hands of children. Our full safety policy and retail compliance program were published for the public to read.

Over 60,000 people have visited that site in under 5 months.

That month we also created additional retail signage to further explain why Buckyballs® and Buckycubes® were not for children. These were sent to every retailer selling our products with a request that it be clipped onto the in-store display. A copy of our Responsible Seller Notices was again included with this mailing.




In April, 2012, at our request, we met individually with Commissioners Adler, Nord and Northup (Chairman Tenenbaum declined to meet with us) and with staff at CPSC so that we could educate them about our expanded safety program. We also expressed concern that some other manufacturers were continuing to age grade and market products similar to ours inappropriately. We wanted to bring to the CPSC's attention some retailers, such as Amazon.com, who continued to list high-powered magnets in the children's products sections of their websites or in their stores.

The Commissioners and staff had some suggestions, but overall and once again, commended our program and our commitment to safety.

Acting on suggestions from CPSC and at our own initiative, over the next 60 days, we:

- Formed a medical advisory group of four physicians specializing in pediatric and emergency medicine and toxicology. Together we developed a Diagnosis and Treatment Service Announcement for medical professionals to help ensure they would recognize and know how to treat magnet ingestion.
- Hired a company that facilitates the creation of industry associations and brought our competitors together to create with us The Coalition for Magnet Safety. Our mission statement: "To protect the public through responsible labeling, promotion, distribution, and sales of high powered, rare earth magnets intended for adult use."
- Petitioned ASTM, the independent testing standards body, to develop a voluntary standard for the labeling and marketing of products like ours – one by which all Coalition members agreed to abide when issued. The request was unanimously approved by ASTM and currently is under development by an ASTM Subcommittee.

## The Sudden Attack

Suddenly, on July 10, 2012, after years of cooperative work with CPSC and with a safety program approved and supported by the Commission, the CPSC Office of Compliance issued a preliminary determination that our products are defective and that warnings and education in our safety program do not work. It was, in practical terms, a declaration that they were going to shut us down.

On July 12, 2012, we responded formally to the preliminary determination letter expressing our strong disagreement, pointing out all of the safety measures that we have taken in cooperation with CPSC and the clear evidence of our commitment to keeping our products out of children's hands. CPSC never responded to this letter. Instead, CPSC staff began contacting our major retailers, expressing serious concern about the safety of our products and "requesting" that these retailers immediately stop selling them. The effect was predictable, as the retailers yielded to the CPSC's intimidation tactics.

Although we disagree that any of our products are defective, on July 24th at 4 pm, we submitted a comprehensive proposed voluntary Corrective Action Plan to the CPSC to further enhance our already unprecedented safety program. The plan includes a child-resistant carrying case, possibly a bittering agent, enhanced warnings, additional retail signage and education and an increased public awareness campaign -- all at our own expense. CPSC did not bother to respond to this proposal, either.

On July 25th, the very next day, at 11am, CPSC's Executive Director called our lawyer to tell him CPSC had issued an administrative complaint against us. By 1pm, we had read about it on USA Today's website. It appears that the Corrective Action Plan requested from us was never seriously considered and it's possible that the Commissioners didn't even know we had proposed it to the CPSC staff. CPSC immediately issued a press release and began making statements to the national media, some of which were inaccurate or misleading and that went beyond the allegations in the lawsuit.

All of this happened before we were even legally served with the lawsuit.

Three years of building a business selling extremely popular products to adults was torn down by the CPSC in just a week, and without their ever talking with us, or responding in writing to anything we sent them on further ways to work cooperatively.

On August 8th, CPSC made public a staff briefing package recommending that the Commission ban ALL high-powered magnets that are "...intended or marketed by the manufacturer primarily as a manipulative or construction desk toy for general entertainment, such as puzzle working, sculpture, mental stimulation, or stress relief." The briefing package included a Notice of Proposed Rulemaking to ban our products and similar products.

## Going Forward – Why We Are Fighting

If the Commission gets its way, in the future, a responsible adult, even one with no children, will be unable to purchase products like Buckyballs® or Buckycubes®, no matter how they're labeled, packaged, or marketed.

We are fighting the CPSC action because we believe responsible adults should have the right to choose to purchase adult products like ours.

We are fighting the CPSC action because we have been betrayed by a government organization that switched overnight from being an ally, helpful in ensuring our products would be marketed correctly, to being an enemy trying to shut us down.

We are fighting the CPSC action because we believe they are wrong. Our strong, demonstrated commitment to safety is unwavering and our comprehensive safety program is unmatched in industry. Our products are not defective. We feel what is being done to us – and to the millions of consumers who safely enjoy our products - is both wrong and unfair and we will fight this injustice for as long as we can.

This is who we are and where we stand. If you support us, we are grateful; if you do not, we hope you at least understand us better.

Regards,

Craig Zucker
Co-founder, CEO
Maxfield and Oberton

Last Chance for Free Shipping on Orders of 1+ Sets w/ Promocode "FreeShipFriday" Buy Now

Buckyballs®

Get updates and deals!
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You've heard about our **ongoing battle** with the CPSC.
Due to their baseless and relentless legal badgering,
we've sadly decided to stop production of Buckyballs and Buckycubes.
We still have a few thousand sets in stock, but once we sell through those, they're gone for good.
Act fast. Tell your friends. Spread the word.



# Buckyballs® Manufacturer Calls Consumer Product Safety Commission Complaint "Arbitrary, Capricious and Wholly Without Merit"

NEW YORK, August 14, 2012

Maxfield & Oberton (M&O), the manufacturers of Buckyballs® and Buckycubes®, formally responded today to the Consumer Product Safety Commission's (CPSC) administrative complaint, terming it arbitrary, capricious and wholly without merit. The CPSC's lawsuit seeks, in essence, to shut down M&O by requiring it to halt sales of its primary products, Buckyballs® and Buckycubes®, and to recall all existing products in consumers' hands. No company could withstand that type of action, and especially not a small one like M&O.

In its response to the Complaint, M&O made the following points:

- M&O denies all allegations that its products are defective or create any unreasonable risk. In fact, we have gone out of our way to minimize any risk through our CPSC-reviewed safety program.
- There is no applicable rule, regulation, standard or ban with which M&O has failed to comply. CPSC seems intent on creating a new rule to ban our product and put us out of business.
- The complaint is arbitrary and capricious because it is not based on any reasonable assessment of risk and is clearly inconsistent with the CPSC's own mandatory standards. There are so many truly risky products that the CPSC allows to be marketed with warning labels that we are at a loss to understand how they assess relative risk among the products they oversee.
- The CPSC itself contributed to the issue by failing to take action against online retailers, as requested repeatedly by M&O, to force them to cease offering ours and similar products for sale to or use by children under 14. After our direct efforts with these retailers were rebuffed, we appealed to the CPSC to take action and they did not.
- The CPSC staff did not fairly and adequately consider, and the Commissioners may not have been made fully aware of, a comprehensive voluntary corrective action plan which Maxfield and Oberton submitted, at the request of the CPSC staff, the day immediately preceding the CPSC staff's filing of its Complaint. Not only that, but the CPSC staff subsequently included elements of Maxfield and Oberton's voluntary corrective action plan in the CPSC staff's Notice of Proposed Rulemaking for a Safety Standard for Magnet Sets, dated August 8, 2012.

In summary, M&O believes the CPSC's rush to judgment is both unfair and unprecedented and Maxfield && Oberton will mount a vigorous defense.

"We are more emboldened than ever to continue fighting this egregious action, and today have posted nearly 2,500 comments related to this proposed ban," said Craig Zucker, Founder and CEO of Maxfield and Oberton. "We have collected some of the thousands of comments that are being posted online and sent to us, as well as many that were sent directly to the CPSC. We have posted them unfiltered and you will note that almost 99% of these are in favor of our efforts and against taking away this product that is marketed to and enjoyed by millions of adults."

Buckyballs® and Buckycubes™ are the number one selling brand names in high-powered magnets - recently called America's "fave desk accessory" by the Washington Post (July 13, 2012), and named "the next big thing in cubicle fidgeting" by New York magazine (July 16-23, 2012). For more information visit SaveOurBalls.net and GetBuckyballs.com. Or visit us on Facebook or Twitter.

http://facebook.com/buckyballs
http://twitter.com/getbuckyballs
http://www.getbuckyballs.com/from-the-people
http://www.getbuckyballs.com/cpsc-response

CONTACT: Andrew Frank (212-935-0210)

SOURCE Maxfield and Oberton

# EXHIBIT J

# MR. ZUCKER'S DECLARATION IN *The Estate of Buckminster Fuller v. Maxfield & Oberton Holdings, LLC*

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Attorneys for Defendant
MAXFIELD & OBERTON HOLDINGS, LLC

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION**

THE ESTATE OF BUCKMINSTER FULLER,

Plaintiff,

v.

MAXFIELD & OBERTON HOLDINGS, LLC, A Delaware Limited Liability Company,

Defendants.

CASE NO.: CV 12-2570 LHK (HRL)

**DECLARATION OF CRAIG ZUCKER IN SUPPORT OF MAXFIELD & OBERTON HOLDINGS, LLC'S REQUEST FOR JUDICIAL NOTICE**

**[Filed concurrently with Notice of Motion and Motion to Dismiss Plaintiff's Complaint; Request for Judicial Notice; and [Proposed] Order]**

**Date:** **August 23, 2012**
**Time:** **1:30 p.m.**
**Dept.:** **8**

Complaint filed: May 18, 2012

**DECLARATION OF CRAIG ZUCKER**

I, Craig Zucker, declare as follows:

1. I am the Chief Executive Officer of Maxfield & Oberton Holdings, LLC ("MOH"), a defendant in the above-entitled matter. I make this declaration in support of MOH's Request for Judicial Notice, which is filed concurrently with MOH's Motion to Dismiss the Complaint of The Estate of Buckminster Fuller ("Plaintiff"). Unless otherwise stated, I have personal knowledge of the facts set forth herein and if called as a witness could competently testify thereto.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the "Fun Fact" page of the "Big Book of Bucky Vol. 1," as referenced in Paragraph 18 of Plaintiff's complaint.

3. Attached hereto as **Exhibit 2** is a true and correct copy of the October 24, 2011 non-exclusive license granted to MOH by Plaintiff for the permission to use Buckminster Fuller's name, likeness, words and images on the packaging of MOH's limited edition commemorative set of approximately 1,000 units of MOH's Buckyballs® product, as referenced in Paragraph 12 of Plaintiff's complaint. The agreement reflects my signature on behalf of MOH.

4. Attached hereto as **Exhibit 3** are true and correct copies of the Buckminster Fuller commemorative edition Buckyballs® product packaging, as referenced in Paragraph 12 of Plaintiff's complaint.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this was executed on the 13th day of July, 2012 at Atlanta, Georgia.

CRAIG ZUCKER, Declarant

CEO, Maxfield & Oberton Holdings, LLC

# EXHIBIT 1

# BUCKYBALLS – ZUCKER

**FUN FACT**

Buckyballs were named for Buckminster Fuller. Who was he? The Internet has all of the answers... but we're happy to share a few. He invented the geodesic dome (a sphere made of triangles—you'll learn how to make it in the pages ahead), coined the term "Space Ship Earth" (referring to the fact that we're all in this together, hurtling through space in a group), and once gave a lecture for 36 straight hours. He was smart. He was crazy. He was fun. Remind you of anything?

# BIGGER & BETTER BUCKY

Every journey begins with a single step. You've already taken that first step — it was the basic stuff you just learned. Time to run, jump, and pole-vault Bucky-style! Brace yourself for auto-assembling forms, shapes that bend and twist, and more. Master this section and you'll appear more attractive to the opposite sex, you'll be more likely to get a raise at work, and more likable all around. Or so we'd like to think...

Time to get serious...ish.

Case5:12-cv-02570-LHK Document13-1 Filed07/13/12 Page4 of 11

# EXHIBIT 2

# BUCKYBALLS – ZUCKER

*The Estate of R. Buckminster Fuller*
P.O. BOX 3248, SANTA BARBARA, CA 93130 Ph: (805) 563-0914 Fax: (805) 456-2912 Email: info@buckminsterfuller.net

Letter of Agreement

October 24, 2011

Maxfield & Oberton Holdings, LLC
PO Box 528
New York, NY 10014

The Estate of R. Buckminster Fuller hereby grants to Maxfield and Oberton Holdings, LLC its one-time non-exclusive permission to use Buckminster Fuller's name, likeness, words and images on the packaging of their limited edition commemorative set of approximately 1000 units of their "Buckyball" product, and on their brochure related to the product; the profits of which sale will go to The Buckminster Fuller Institute. Maxfield and Oberton Holdings, LLC shall also have the limited license to use the name, likeness, words and images in connection with marketing and promotion of this commemorative edition set.

Maxfield & Oberton Holdings, LLC will ensure that the following credit information is clearly and visibly printed on the packaging of the "Buckyball:"

> "Buckminster Fuller's name, likeness and words used with permission of The Estate of R. Buckminster Fuller."

For the brochure, Maxfield Oberton Holdings, LLC will include the following credit in a clearly visible place:

> "Buckminster Fuller's name, likeness, words, images and the trademark "Dymaxion" used by permission of The Estate of R. Buckminster Fuller." Fuller Projection Map design & SPACESHIP EARTH® are trademarks of the Buckminster Fuller Institute.

This limited license to use the name and likeness of Buckminster Fuller solely in connection with the commemorative edition of Buckyballs is without prejudice to the rights of the Estate of Buckminster Fuller to enforce its rights of publicity under California Civil Code § 3344.1 and similar statutes in the United States and abroad.

This agreement will be in effect upon receipt of a signed copy of this letter. The undersigned understand and agree to all of the above conditions.

John Ferry
For The Estate of R. Buckminster Fuller

Agreed to and signed by:

Craig Zucke
Name:

For Maxfield & Oberton Holdings, LLC

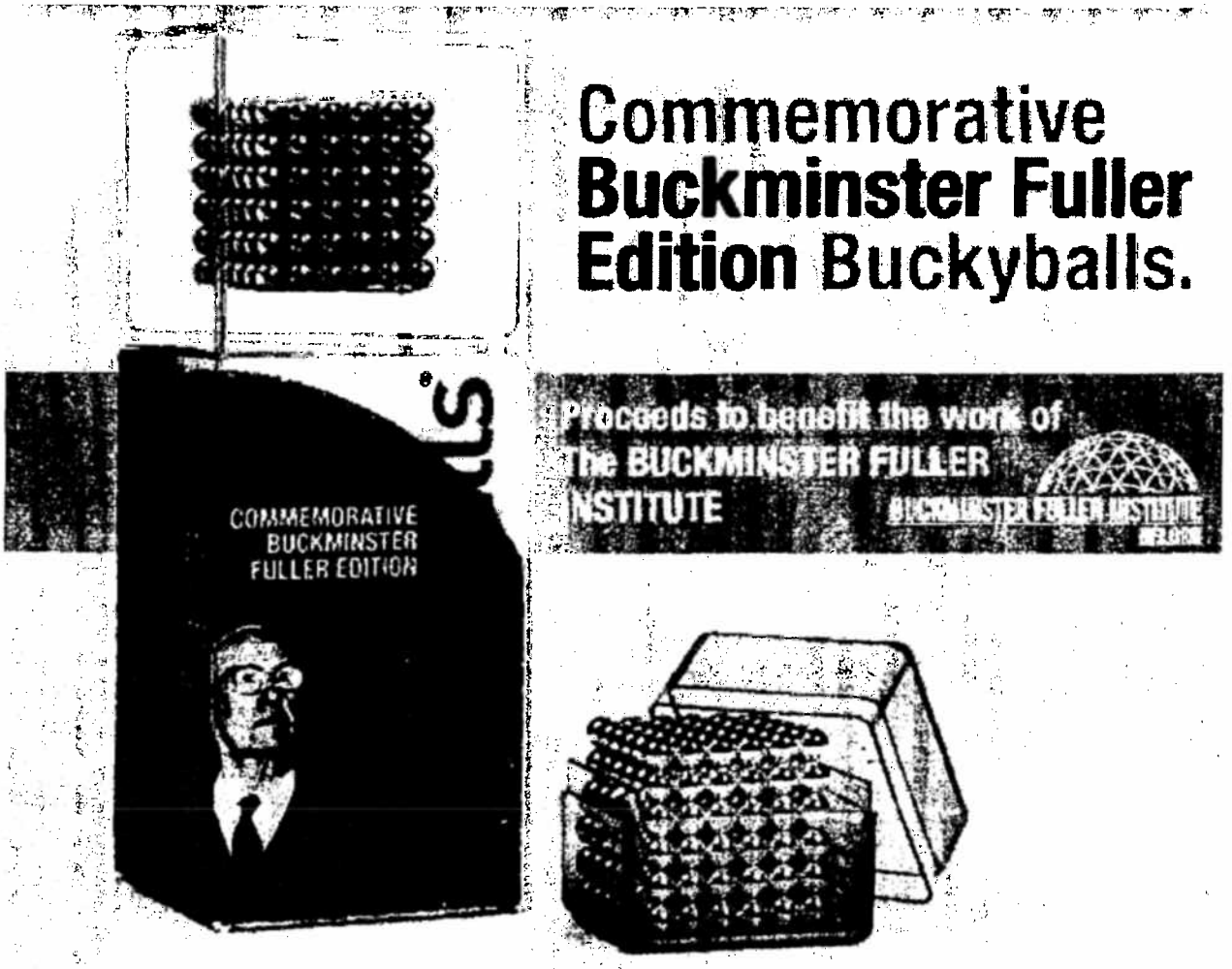
# EXHIBIT 3

# BUCKYBALLS - ZUCKER

# Buckyballs®

BY ZOOMDOGGLE

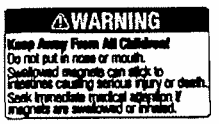
The Amazing Magnetic Desktoy You Can't Put Down!

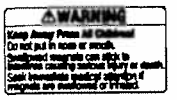



## Commemorative **Buckminster Fuller Edition** Buckyballs.

Proceeds to benefit the work of The BUCKMINSTER FULLER INSTITUTE

48.5
WARNING
Free carrying case inside
"I'm not trying to imitate Nature. I'm trying to find the principles she is using."
- Buckminster Fuller
COMMEMORATIVE BUCKMINSTER FULLER EDITION
216 Powerful Rare Earth Magnets.
Unlimited Fun
(for grown-ups.)
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.
Buckyballs
Commemorative Edition
Buckminster Fuller:
Architect, Designer, Artist, Inventor, Evolutionary Strategist, Objective Economist & Buckyballs' Namesake.
How fun is that?
84
48.5
48.5


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.


WARNING

Buckyballs
READ REVIEWS
CUSTOMER SERVICE
1-888-WE-BUCKY
Home
Balls
Cubes
Gift Packs
Books
Colors
Holiday Balls
Commemorative Buckminster Fuller Edition Buckyballs.
BUY NOW
WARNING!
Orders placed within THE NEXT 24 MINUTES will be shipped by MONDAY MORNING.
The World's Best Selling Desktoy!
Unlimited Forms, Structures, Stress Relief & More.
(How fun is that?)
"Payment for addiction therapy not included"
Entertainment
BUY NOW
WARNING!
WARNING

Buckyballs
COMPLETE MY ORDER

# EXHIBIT K

PLEADINGS AND DOCKET ENTRIES IN *United States v. Shelton Wholesale, Inc.*, 34 F. Supp. 2d 1147 (W.D. Mo. 1999)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>SHELTON WHOLESALE, INC., a Missouri Corporation, d/b/a Shelton Fireworks, and POLARIS FIREWORKS, INC., a Missouri Corporation,<br><br>Defendants. | ) | No. 96-6131-CV-SJ-1 |

MOTION TO AMEND COMPLAINT

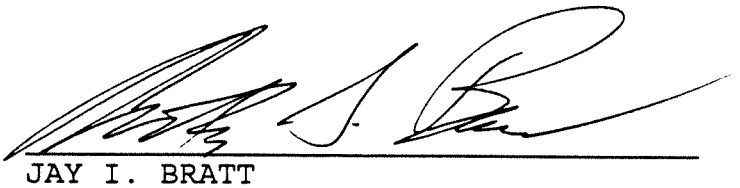
Plaintiff, the United States of America, hereby moves, pursuant to Rule 15, Fed. R. Civ. P., for an order permitting it to amend its complaint in order to add Gregory P. Shelton as an additional defendant. A copy of the Government's Second Amended Complaint is attached to this motion. In support of this motion, the Government is filing the accompanying Memorandum in Support of Motion to Amend Complaint.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General
Civil Division

STEPHEN L. HILL, JR.
United States Attorney

ALLEEN S. VAN BEBBER
Deputy United States Attorney
Missouri Bar No. 41460
1201 Walnut Street
Suite 2300
Kansas City, Missouri 64106-2149
(816) 426-3130



JAY I. BRATT
ANTHONY SCOTT BARKOW
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U.S. Department of Justice
Office of Consumer Litigation
P.O. Box 386
Washington, D.C. 20044
(202) 616-0509

OF COUNSEL:
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General Counsel

ALAN SHAKIN
Assistant
General Counsel

MELISSA V. HAMPSHIRE
Attorney
U.S. Consumer Product
Safety Commission
Bethesda, MD 20814
(301) 504-0980

Attorneys for Plaintiff

Dated: February 19, 1997

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>SHELTON WHOLESALE, INC., a Missouri Corporation, d/b/a Shelton Fireworks, and POLARIS FIREWORKS, INC., a Missouri Corporation,<br><br>Defendants. | ) | No. 96-6131-CV-SJ-1 |

**ORDER**

Before the Court is the Government's Motion to Amend the Complaint. The Court having considered the parties' submissions, it is hereby ORDERED that said motion is GRANTED and that plaintiff is given leave to file the Second Amended Complaint.

Honorable Howard F. Sachs
U.S. District Judge

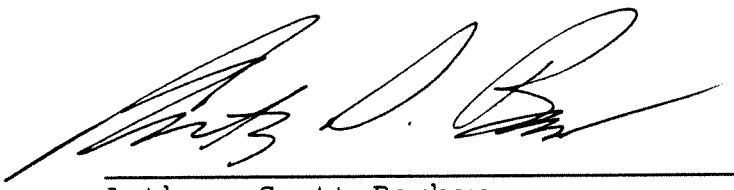
Dated: February ___, 1997

**CERTIFICATE OF SERVICE**

I, Anthony Scott Barkow, hereby certify that copies of Plaintiff's Motion for Leave to File Second Amended Complaint and Plaintiff's proposed Order were served upon counsel for defendants, via Federal Express, on this 19th day of February, 1997, addressed to:

David W. Whipple
Whipple Law Firm, P.C.
818 Grant Avenue
Kansas City, Missouri 64106

Attorney for Defendants



Anthony Scott Barkow
Trial Attorney
U.S. Department of Justice
Office of Consumer Litigation
P.O. Box 386
Washington, D.C. 20044
(202) 616-0509

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>SHELTON WHOLESALE, INC., a Missouri Corporation, d/b/a Shelton Fireworks, and POLARIS FIREWORKS, INC., a Missouri Corporation,<br><br>Defendants. | ) | No. 96-6131-CV-SJ-1 |

MEMORANDUM IN SUPPORT OF MOTION TO AMEND COMPLAINT

BACKGROUND

On October 2, 1996, Plaintiff filed a Complaint for Civil Penalties and Injunction against the above-captioned defendants, alleging that the defendants had violated the Federal Hazardous Substances Act (the "Act"), 15 U.S.C. § 1261 et seq. On November 7, 1996, Plaintiff filed a First Amended Complaint for Civil Penalties and Injunction, which dropped some of the violations alleged in the original Complaint and corrected one typographical error in the original Complaint. Defendants filed an Answer on November 29, 1996.

On December 11, 1996, the parties agreed that each side would send the other copies of the initial disclosures required by Rule 26(a). After a review of the initial disclosures that the defendants provided, the Government has concluded that the defendant corporations are closely held and run entirely by Mr. Shelton. According to those documents, Shelton, Inc.,

employs only Mr. Shelton, a secretary, and three employees, and Polaris, Inc., has no current employees. See Defendants' Initial Disclosures Pursuant to Rule 26, at 1-2. In addition, all contacts between the Consumer Product Safety Commission ("CPSC"), the agency charged with enforcing the Act, and the defendant corporations have always been through Mr. Shelton.

No discovery has occurred in the case beyond the exchange of the aforementioned initial disclosures.

ARGUMENT

Rule 15(a), Fed. R. Civ. P., provides that "leave [to amend a pleading] shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); see Foman v. Davis, 371 U.S. 178, 182 (1962) ("this mandate is to be heeded"); Gamma-10 Plastics, Inc., v. American President Lines, Ltd., 21 F.3d 1244, 1255 (8th Cir. 1994). Decisions in this circuit have made clear that leave to amend may be denied only when the plaintiff does not have at least colorable grounds for relief, or if the plaintiff is guilty of undue delay, bad faith, or dilatory motive, or if permission to amend would unduly prejudice the opposing party. Williams v. Little Rock Municipal Water Works, 21 F.3d 218, 225 (8th Cir. 1994). None of the factors applies here. Indeed, there is no question of bad faith, undue delay, or dilatory motive, and no basis for concluding that plaintiff does not have colorable grounds for the relief requested.

In addition, the defendants will suffer no prejudice if the Court grants the amendment. Discovery has only just begun. The

defendants have not sought to depose any witnesses yet, and the new complaint will thus not cause them to seek to redepose anyone. Moreover, Mr. Shelton is the real party in interest defending this litigation. His addition as an individual defendant will not change the substance of the allegations or the identity of the witnesses.

Joining Mr. Shelton in his individual capacity is necessary to ensure the effectiveness of any injunctive relief that might be granted against the defendant corporations. The companies are closely held and principally operated by Mr. Shelton. If Mr. Shelton is not added as a defendant in his individual capacity, he could avoid any injunction entered against the defendant corporations by dissolving the companies and reincorporating them under a different name. Furthermore, the addition of Mr. Shelton insures the availability of funds for payment of a civil penalty. See Federal Trade Commission v. Kitco of Nevada, Inc., 612 F. Supp. 1282, 1292 (D. Minn. 1985).

## CONCLUSION

For the foregoing reasons, the Court should grant the Government's Motion to Amend the Complaint.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General
Civil Division

STEPHEN L. HILL, JR.
United States Attorney

ALLEEN S. VAN BEBBER
Deputy United States Attorney
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MELISSA V. HAMPSHIRE
Attorney
U.S. Consumer Product
Safety Commission
Bethesda, MD 20814
(301) 504-0980

Attorneys for Plaintiff

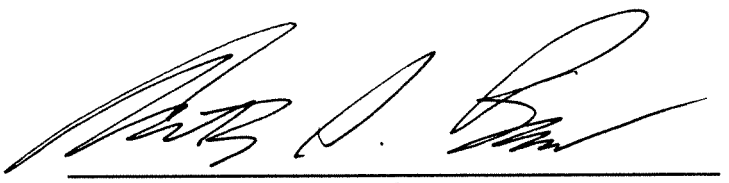
Dated: February 19, 1997

**CERTIFICATE OF SERVICE**

I, Anthony Scott Barkow, hereby certify that a copy of Plaintiff's Memorandum in Support of Motion for Leave to File Second Amended Complaint was served upon counsel for defendants, via Federal Express, on this 19th day of February, 1997, addressed to:

David W. Whipple
Whipple Law Firm, P.C.
818 Grant Avenue
Kansas City, Missouri 64106

Attorney for Defendants



Anthony Scott Barkow
Trial Attorney
U.S. Department of Justice
Office of Consumer Litigation
P.O. Box 386
Washington, D.C. 20044
(202) 616-0509

CLOSED,PROTO

# U.S. District Court
# Western District of Missouri (St. Joseph)
# CIVIL DOCKET FOR CASE #: 5:96-cv-06131-HFS

USA v. Shelton Wholesale, et al
Assigned to: Judge Howard F. Sachs
Demand: $0
Cause: 28:1391 Personal Injury

Date Filed: 10/02/1996
Date Terminated: 01/30/2001
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: U.S. Government Plaintiff

**Plaintiff**

**USA**

represented by **Alleen C. VanBebber**
McDowell, Rice, Smith & Buchanan, PC-KCMO
605 West 47th Street
Suite 350
Kansas City, MO 64112-1900
(816) 753-5400
Fax: (816) 753-9996
Email: avanbebber@mcdowellrice.com
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

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**Drake Cutini**
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**Frank W. Hunger**
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Washington, DC 20044

*ATTORNEY TO BE NOTICED*

**Delilah S. Seroussi**
(See above for address)
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

**Robert B. Hopkins**
(See above for address)
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

| Date Filed | # | Docket Text |
|---|---|---|
| 10/02/1996 | 1 | COMPLAINT For Civil Penalties and Injunction w/ JSS-44c ( none Summons(es) issued) (Court Employee) (Entered: 10/07/1996) |
| 10/09/1996 | 2 | Notice of pretrial procedures ;proposed scheduling order due 2/7/97 (Court Employee) (Entered: 10/10/1996) |
| 11/07/1996 | 3 | First AMENDED COMPLAINT for civil penalties and injunction Number of summon(s): none; adding Polaris Fireworks,In (Court Employee) (Entered: 11/12/1996) |
| 11/13/1996 | 4 | WAIVER OF SERVICE executed by defendant Shelton Wholesale on 10/31/96 (Court Employee) (Entered: 11/18/1996) |
| 11/29/1996 | 5 | ANSWER by defendant Shelton Wholesale, defendant Polaris Fireworks,In (Court Employee) (Entered: 12/04/1996) |
| 01/14/1997 | 6 | ORDER by Judge Dean Whipple that the Clerk of the Court is directed to reutn this case to the regular draw to be reassigned; Case reassigned to Judge Howard F. Sachs (cc: all counsel) (Court Employee) (Entered: 01/14/1997) |
| 01/23/1997 | 7 | CERTIFICATE by defendant Shelton Wholesale of service of Rule 26 Disclosure (Court Employee) (Entered: 01/27/1997) |
| 01/27/1997 | 8 | CERTIFICATE by plaintiff USA of service of Disclosure Pursuant to Rule 26 (Court Employee) (Entered: 01/28/1997) |
| 02/05/1997 | 9 | Rule 26 Disclosure by plaintiff, defendant (Court Employee) (Entered: 02/05/1997) |
| 02/20/1997 | 10 | CERTIFICATE by plaintiff USA of service of 1st req for prod. of doc. (Court Employee) (Entered: 02/21/1997) |
| 02/20/1997 | 11 | ENTRY OF APPEARANCE on behalf of plaintiff USA by Stephen L. Hill Jr. (Court Employee) (Entered: 02/21/1997) |
| 02/20/1997 | 12 | MOTION by plaintiff USA to amend complaint (Court Employee) (Entered: 02/21/1997) |
| 02/20/1997 | 13 | Suggestions by plaintiff USA in support of motion to amend complaint [12-1] |

| | | |
|---|---|---|
| | | (Court Employee) (Entered: 02/21/1997) |
| 03/11/1997 | 14 | SCHEDULING ORDER: by Judge Howard F. Sachs ;discovery ddl set 7/1/97 ;witness list ddl set 7/25/97 ;exhibit list ddl set 7/25/97 Prop. Pretrial order due 8/15/97 (cc: all counsel) (Court Employee) (Entered: 03/11/1997) |
| 03/25/1997 | 15 | CERTIFICATE by defendant of service of Answer to plt's 1st set of interr. (Court Employee) (Entered: 03/26/1997) |
| 04/01/1997 | 16 | CERTIFICATE by plaintiff USA of service of Expert Designation on counsel. (Court Employee) (Entered: 04/02/1997) |
| 04/10/1997 | 17 | CERTIFICATE by plaintiff USA of service of amended notice of deposition of Gregory P. Shelton. (Court Employee) (Entered: 04/11/1997) |
| 04/29/1997 | 18 | PROTECTIVE ORDER by Judge Howard F. Sachs : (cc: all counsel) (Court Employee) Modified on 04/30/1997 (Entered: 04/30/1997) |
| 05/16/1997 | 19 | CERTIFICATE by USA of service of 2nd set of interr to dft (Court Employee) (Entered: 05/19/1997) |
| 05/20/1997 | 20 | ORDER by Judge Howard F. Sachs Telephonic Conference held 5/16/97. Case set for trial 12/1/97; Joint Prop. Sch order due; 5/27/97 granting motion to amend complaint by adding Gregory P. Shelton as dft in Case No. 96-6131-CV-SJ-6 as [12-1] The Clerk shall file the attached 2nd Amended Complaint. (cc: all counsel) (Court Employee) (Entered: 05/20/1997) |
| 05/20/1997 | 21 | AMENDED COMPLAINT Number of summon(s): none; adding Gregory P. Shelton (Court Employee) (Entered: 05/20/1997) |
| 06/10/1997 | 22 | CERTIFICATE by defendant Shelton Wholesale of service of 1st set of interros & req f/prod of docs (Phyllis Travers) (Entered: 06/11/1997) |
| 06/11/1997 | 23 | CERTIFICATE by defendant Shelton Wholesale of service of answers to pla's 2nd set of interrs (Court Employee) (Entered: 06/11/1997) |
| 06/11/1997 | 24 | ANSWER to second amended complaint by defendant Shelton Wholesale, defendant Polaris Fireworks,In, defendant Gregory P. Shelton (Court Employee) (Entered: 06/11/1997) |
| 07/01/1997 | 25 | CERTIFICATE by plaintiff USA of service of 2nd req f/prod of docs & things to dfts Shelton Wholesale, Inc., Polaris Fireworks, Inc., & Gregory Shelton (Georgia Kee) (Entered: 07/01/1997) |
| 07/15/1997 | 26 | CERTIFICATE by plaintiff USA of service of Objections & Responses to dfts' 1st req f/prod of docs, & 1st set of Interr (Georgia Kee) (Entered: 07/16/1997) |
| 08/08/1997 | 27 | CERTIFICATE of transmission of deposition of Gregory P.Shelton taken on May 6 & 7,97 on behalf of Plt. Costs: $1742.00 to Plt. (Court Employee) (Entered: 08/08/1997) |
| 08/08/1997 | 29 | CERTIFICATE by defendant of service of response to request for production (Jackie Price) (Entered: 08/12/1997) |
| | | |

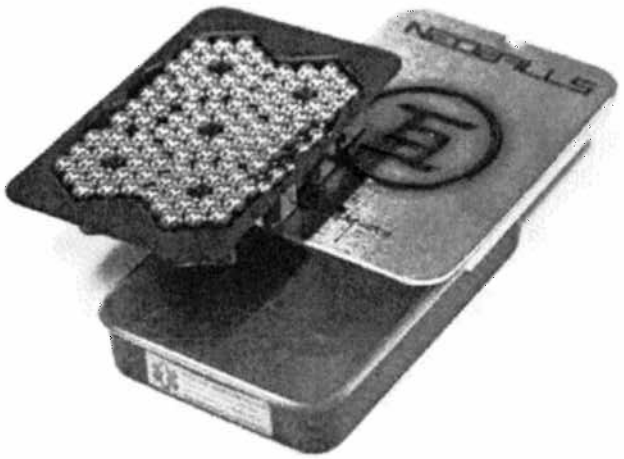
# EXHIBIT L

# SCREEN SHOTS OF WWW.NEOBALLS.COM

# Purchase

Neoballs are professional sculpture neodymium magnet spheres. 5mm diameter, n35 grade, with colorful Polymer coatings and precise Electroplate coatings. Our goal is to provide you great quality magnet spheres, at extremely aggressive prices, with minimal fluff. High powered magnets are not toys.

Due to **CPSC requests**, we are selling the magnets individually. However, shipping is flat rate no matter how many neoballs you purchase, whether you buy 216, or 21,600 magnet spheres.



A sliding tin container is included with every 216 magnets of a color. The custom designed and embossed tin is more than an attractive storage case, it also serves as magnetic shielding during transport. Also included with every 216 magnets of a color, is an insulator clamshell to allow magnets to be easily removed from the tin, and a shaped tray for counting and shipping.

## Frequently Asked Questions

Can I buy more than one?

Shipping Details

Holiday Shipping Schedule

## Purchase

The CPSC is attempting to ban 'Aggregates of powerful magnets', and have requested all magnet sphere brands to stop selling. However, you can still purchase as many neoballs as you would like.

neodymium magnet spheres. 5mm diameter, atings and precise Electroplate coatings. Our nagnet spheres, at extremely aggressive ered magnets are not toys.

Due to **CPSC requests**, we are selling the magnets individually. However, shipping is flat rate no matter how many neoballs you purchase, whether you buy 216, or 21,600 magnet spheres.

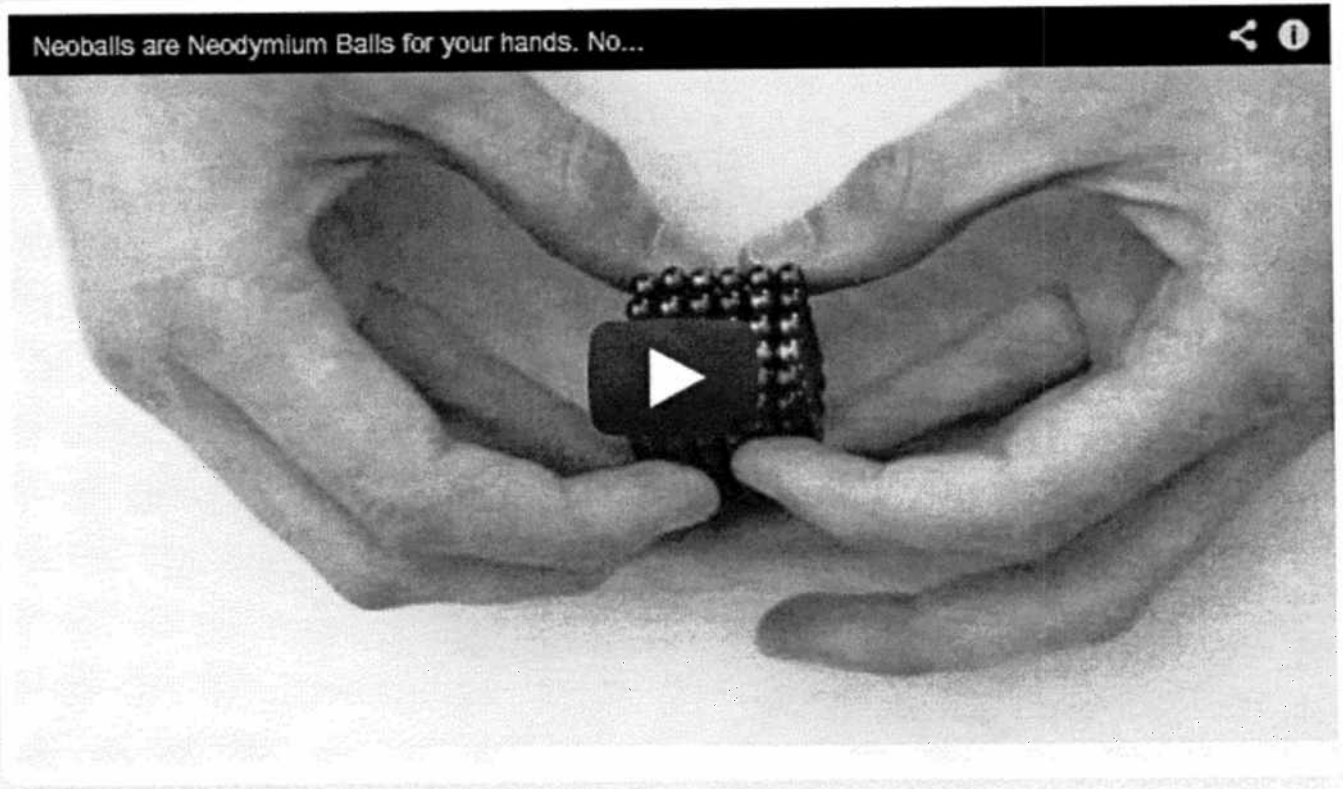
A sliding tin container is included with every 216 magnets of a color. The custom designed and embossed tin is more than an attractive storage case, it also serves as magnetic shielding during transport. Also included with every 216 magnets of a color, is an insulator clamshell to allow magnets to be easily removed from the tin, and a shaped tray for counting and shipping.

### Frequently Asked Questions

- Can I buy more than one?
- Shipping Details
- Holiday Shipping Schedule

## Polymer Neoballs

Cyan | 10¢ Green | 10¢ Yellow | 10¢ Orange | 10¢




Buy Some

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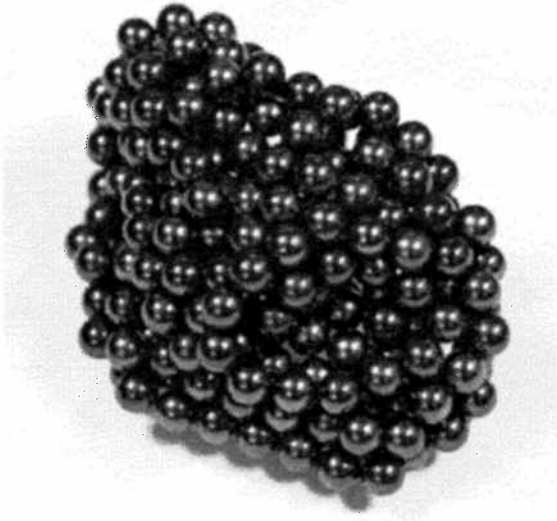

# Win These Magnets

## By Guessing How Many

Easy

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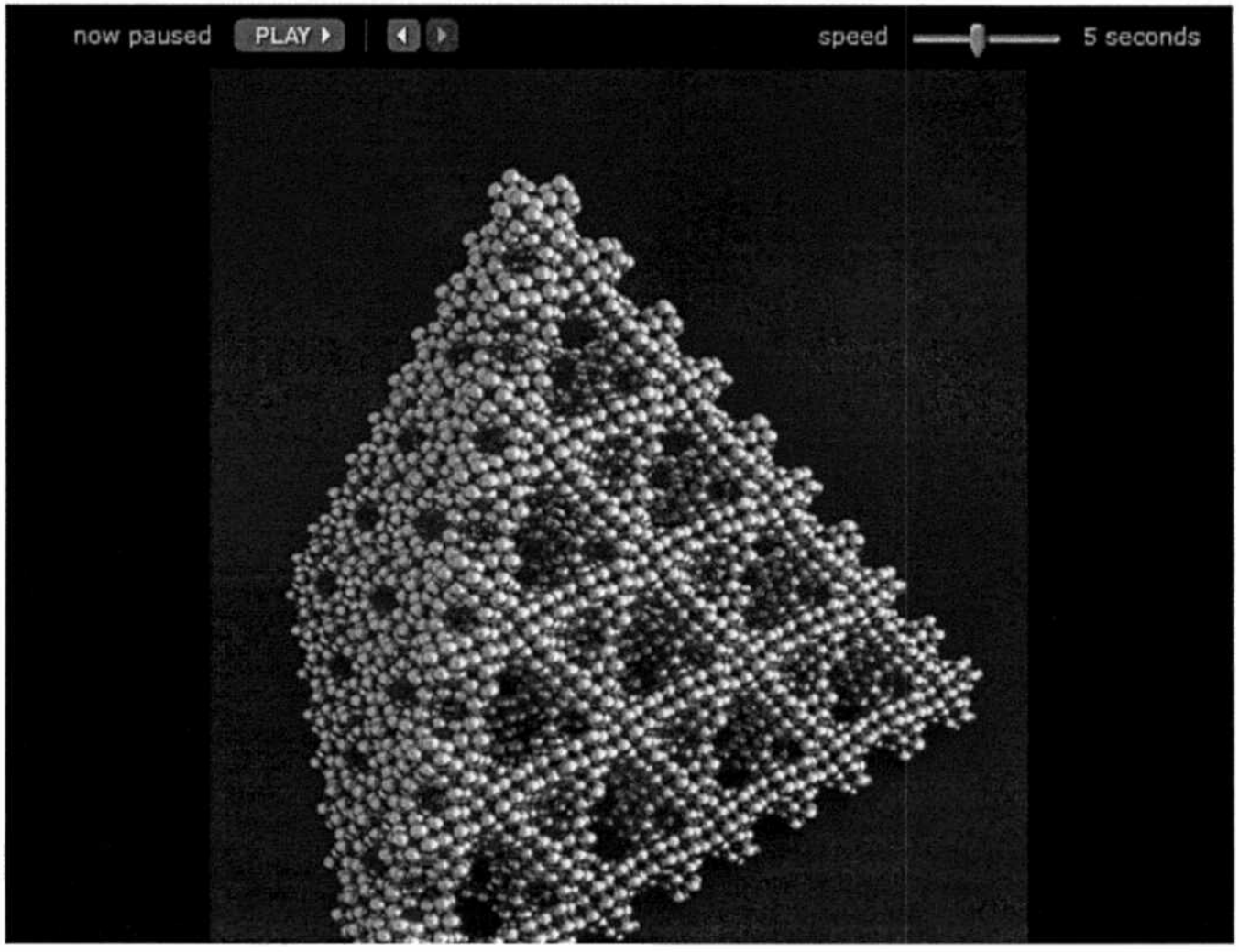
# Photographic Communities

Magnet Sphere Commons

Zen Gallery

Dotpedia

Buckyball Facebook

## MagnetSpheres.com

MagnetSpheres.com is the largest collection of magnet sphere art on the internet with over eight thousand submissions. The community is open to all brands of magnet spheres. Neoballs, Buckyballs, Nanodots, Zen Magnets and others are all welcome. Since the community is built on Flickr, tags and groups can exhibit your work to thousands of other photographers, and sharing photos with friends is easy with facebook integration. Everybody is welcome to share passionate ideas and collaborate. No approval is needed to join.