

UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
	)	
	)	
MAXFIELD AND OBERTON HOLDINGS, LLC	)	CPSC DOCKET 12-1
ZEN MAGNETS, LLC	)	CPSC DOCKET 12-2
STAR NETWORKS USA, LLC	)	CPSC DOCKET 13-2
	)	(Consolidated)
Respondents.	)	
	)	

**OPPOSITION TO MOTION FOR LEAVE TO AMEND COMPLAINT IN CPSC  
DOCKET 12-1**

On February 11, 2013, Complaint Counsel filed a motion for leave to amend the complaint in Consumer Product Safety Commission (“CPSC” or “Commission”) Docket 12-1<sup>1</sup> to add Craig Zucker, both in his capacity as CEO of the now-dissolved Maxfield & Oberton Holdings, LLC and as an individual. Should Buckyballs® and Buckycubes® be found by this Court to present a substantial product hazard, Complaint Counsel seeks an Order, *inter alia*, requiring Mr. Zucker personally to give public notice of the hazard and to offer consumers a refund of their purchase price for the products.

On February 21, Mr. Zucker filed a Request to Participate in the Proceeding as a Non-party Participant and Leave to File an Opposition to Complaint Counsel’s Motion for Leave to Amend Complaint. On February 25, 2013, the Court granted Mr. Zucker’s Request. Mr. Zucker is participating for the limited purpose of advising this Court of the substantial legal reasons why

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<sup>1</sup> Complaint Counsel’s motion also seeks to amend the complaint in CPSC Docket 12-2. Mr. Zucker takes no position with respect to that portion of Complaint Counsel’s motion.

he should not be added as a party to this proceeding, either in his individual capacity or as the former Chief Executive Officer of the former entity, Maxfield and Oberton Holdings, LLC.

Complaint Counsel is asking this Court to rewrite Section 15 of the Consumer Product Safety Act (“CPSA” or “Act”) to add words that are simply not present there. The proposed Amended Complaint seeks an Order under Sections 15(c) and 15(d) of the Act requiring Mr. Zucker personally to undertake several specific actions comprising a recall. But Section 15 does not authorize the Commission to issue such an order against an individual officer or director of a corporation that manufactures consumer products. By contrast, Section 21 of the statute *does* provide for individual officer or director liability for certain actions. Under well settled principles of statutory construction, when a statute includes language in one section, but omits it in another section of the same statute, the presumption is that Congress acted intentionally in crafting the different provisions. The CPSA therefore does not permit Mr. Zucker to be the subject of a recall order.

Moreover, bedrock principles of corporate law make clear that corporate officers such as Mr. Zucker are not liable for the company’s obligations, even if the company has dissolved. And although Complaint Counsel relies on the “responsible corporate officer” doctrine enunciated in *United States v. Dotterweich*, 320 U.S. 277 (1943), and *United States v. Park*, 421 U.S. 658 (1975), that theory does not apply in this case. Complaint Counsel’s motion must accordingly be denied.

***I. This Court Does Not Have Jurisdiction Over Mr. Zucker As An Individual.***

The motion to amend should be denied because it seeks to add a party over whom this court does not have jurisdiction. The CPSA is very clear in specifying the entities against whom an order requiring public notice and a product refund (hereinafter “recall” or “recall order”) may

issue: it specifies that a recall order may issue only to a “manufacturer, ... distributor or retailer.” 15 U.S.C. § 2064(c)-(d). That language does not provide for a recall order to issue against Mr. Zucker, who is and was in none of these categories.

Under the CPSA, a “manufacturer” is a “person who manufactures or imports a consumer product,” while a “distributor” is “a person to whom a consumer product is delivered or sold for purposes of distribution in commerce.” 15 U.S.C. § 2052(a)(8) & (11). Mr. Zucker does not fit into either of those definitions.<sup>2</sup> He never personally manufactured, imported, delivered, or sold Buckyballs® or Buckycubes®. He was an officer of a company—Maxfield & Oberton Holdings, LLC—that imported the product,<sup>3</sup> and the motion makes clear that Complaint Counsel seeks to add Mr. Zucker as a respondent precisely *because* he was an officer of that company. *See* Mem. in Support of Mot. for Leave to File Second Am. Compl. 3-6. The CPSA, however, does not provide for officer or director responsibility for recalls—and thus does not allow Complaint Counsel to obtain a recall order against Mr. Zucker.

The fact that the word “person” appears in the definitions of “manufacturer” and “distributor” does not alter that conclusion. “In determining the meaning of any Act of Congress, unless the context indicates otherwise[,] the word[] ‘person’ ... include[s] corporations, companies, associations, firms, [and] partnerships ... as well as individuals.” 15 U.S.C. § 1. Accordingly, when an individual *personally* manufactures or distributes consumer products, that person is potentially subject to conducting a recall where warranted under the

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<sup>2</sup> Although in its Admissions in this matter, Maxfield & Oberton admitted it was a distributor of the products, Maxfield & Oberton cannot be a “distributor” of the products, because the CPSA specifically states that a “manufacturer” cannot be a “distributor.” 15 U.S.C. § 2052(a)(8).

<sup>3</sup> The proposed Amended Complaint seeks to have Mr. Zucker added in his capacity as the CEO of this corporation. However, as discussed in greater detail, that corporation has been dissolved and Mr. Zucker is no longer its CEO.

CPSA. In other words, the plain wording of the CPSA authorizes a recall to be conducted by the manufacturer, distributor or retailer, which can in some cases be an individual who conducted business without forming a corporation or partnership. Complaint Counsel nonetheless seeks to alter this common-sense reading of the CPSA by seeking to add language that is simply not there, namely that an individual can be deemed a manufacturer or distributor whenever the Commission decides to redefine the applicable definitions to include corporate officers.

The wording and context of the CPSA also clearly indicate that the word “person” in the definition of “manufacturer” does not create personal responsibility for an individual to carry out a product recall when a valid corporate entity manufactured the product, and not the individual in his personal capacity. The CPSC’s regulations implementing Section 15 of the CPSA expressly define “person” to include corporate entities. *See* 16 C.F.R. § 1115.3(d); *see also id.* § 1115.27(h) (requiring recall notices to identify a presumptively corporate manufacturer by its “legal name and the city and state of its headquarters”). Maxfield & Oberton Holdings LLC is thus the “person” that manufactured or imported Buckyballs® and Buckycubes® within the meaning of the statute. Mr. Zucker is not,<sup>4</sup> either in his individual capacity as a private person or

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<sup>4</sup> A review of other CPSA provisions demonstrates why Complaint Counsel’s interpretation of the statute must be wrong and is, at least, inconsistent with common practice in conducting recalls. For example, Section 15(c)(1)(E) requires manufacturers to mail notice to “each person who is a manufacturer, distributor or retailer of such product” when the CPSC determines that a product presents a substantial product hazard. Under Complaint Counsel’s interpretation, this provision would require a manufacturer to notify its employees (or perhaps just some of them) about the substantial product hazard determination, something that CPSC has never required or expected. For the same reason, the recordkeeping requirements in Sections 16(b) and 16(c) would appear to pose an independent requirement on employees or corporate officers. We are unaware of any situation where the CPSC has ever interpreted these sections of the CPSA to apply to corporate officers or other employees of a manufacturer. Yet Complaint Counsel is apparently arguing here that the term “manufacturer” in Sections 15(c) and 15(d) means something different than the same term in other parts of Section 15 and elsewhere in the statute. This cannot be correct. The same interpretation of the term “manufacturer” must apply throughout the CPSA.

in his individual capacity as the former CEO of the former entity, Maxfield and Oberton Holdings, LLC.

This conclusion is further confirmed by the fact that, unlike some other health and safety statutes, the CPSA does not provide for individual responsibility to carry out safety recalls. *Compare* 15 U.S.C. § 2064(c)(1) & (d)(1) (allowing the CPSC only to “order the manufacturer or any distributor or retailer of [a] product” to notify the public of product defects or initiate recalls), *with, e.g.*, 7 U.S.C. § 136q(b)(4) (allowing EPA to demand that “any person ... subject” to pesticide regulations facilitate recalls of pesticides); 21 U.S.C. §§ 350f & 350l (stating that recall orders concerning adulterated food apply to any “person that submits a registration ... for a food facility”).

Still another problem with Complaint Counsel’s argument is that when Congress intended to apply a provision of the CPSA to corporate officers, Congress explicitly stated its intent in the specific wording of the provision. In particular, Congress *explicitly* provided for individual director, officer and agent liability in a different provision of the CPSA—namely Section 21(b). *See* 15 U.S.C. § 2070. Because Congress did so, it is clear under well settled principles of statutory construction that Congress did *not* extend the CPSA’s recall jurisdiction to a product manufacturer’s corporate officers: “When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 671 (2008) (internal quotation marks omitted), *superseded by statute on other grounds as stated in Boone v. MountainMade Found.*, 684 F. Supp. 2d 1, 9 n.9 (D.D.C. 2010); *accord, e.g., Carcieri v. Salazar*, 555 U.S. 379, 389-90 (2009). Thus, “the inclusion of an express [provision, here regarding individual director, officer

and agent liability in Section 21], combined with the absence of anything similar in [Section 15] suggests that Congress did not intend to include” individual director, officer or agent responsibility in Section 15. *Allison Engine Co.*, 553 U.S. at 671.

Complaint Counsel’s argument is also inconsistent with a second canon of statutory interpretation. Under the “rule of lenity,” any ambiguities in the statutory and regulatory requirements must be resolved in favor of Mr. Zucker. This well established doctrine mandates that where there is an ambiguity, a statute only applies to conduct *clearly* covered. The rule of lenity applies even when, as here, a statute is construed in a civil setting, when the statute has criminal applications. *E.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 11, n.8 (2004); *United States v. Thompson/Ctr. Arms. Co.*, 504 U.S. 505, 517-18 (1992). The CPSA carries criminal sanctions. 15 U.S.C. § 2070. As a result, even if CPSA were ambiguous as to whether Mr. Zucker can be subject to a recall order—and it is not—the ambiguity would have to be resolved against Complaint Counsel’s position.

## ***II. Established Principles of Corporate Law Compel Denial of Complaint Counsel’s Motion.***

Under well established principles of corporate law in the United States, an officer, director or shareholder of a corporation is not responsible for the debts or obligations of the corporation. *See Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1021 (7th Cir. 1995) (“Corporations are liable for the acts of their officers and directors, not the other way around.”). And when a company elects to dissolve, its assets and liabilities dissolve with the company, subject to state law regarding continuing liabilities. Complaint Counsel cites the extraordinary exception to these two principles that was established by the *Dotterweich* and *Park* line of cases (*see Dotterweich*, 320 U.S. 277; *Park*, 421 U.S. 658), but as we will show below,

the exception carved by those cases is not applicable to a proceeding seeking an order under Section 15 of the CPSA.

“The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception.” *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-03 (1960). Thus, when a statute is silent about extending vicarious liability to officers or owners of a corporation, there is an inference that Congress intended to apply the ordinary rules about liability. The United States Supreme Court “has applied unusually strict rules [for vicarious liability] only where Congress has specified that such was its intent.” *Meyer v. Holley*, 537 U.S. 280, 287 (2003) (citing to *Park and Dotterweich*). The Court has also held that, even when a statute’s objectives demonstrate an “overriding societal priority,” those objectives do not alter the traditional rules on vicarious liability. *Id.* at 290 (internal quotation marks omitted).

In short, limited individual liability for the obligations of a corporation is a hallmark of corporate law in the United States. *See United States ex rel. Siewick v. Jamieson Sci. & Eng’g, Inc.*, 191 F. Supp. 2d 17 (D.D.C. 2002), *aff’d*, 322 F. 3d 738 (D.C. Cir. 2003) (noting the distinction between limited definition of an “employer” as opposed to other provisions of the same statute which imposed liability on “any person,” the Court refused to find that liability attached to the majority shareholder, even though the statute at issue, the False Claims Act, was deemed a broad remedial statute designed to prevent fraud against the federal government). That general rule applies with full force to Maxfield & Oberton, which was formed under Delaware’s Limited Liability Company Act. *See, e.g.*, Proposed Second Am. Compl. in No. 12-1, ¶ 5. And that Act provides that “no member or manager of a limited liability company shall be obligated personally for any ... debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the ... company.” 6 Del. C. § 18-303(a); *see also*

*Great Lakes Chem. Corp. v. Monsanto Co.*, 96 F. Supp. 2d 376, 391-92 (D. Del. 2000) (“[T]he Delaware Limited Liability Company Act permits a member in an LLC to be an active participant in management and still to retain limited liability.”). As discussed above, Complaint Counsel seeks to subject Mr. Zucker to the recall process solely because he acted as the CEO of Maxfield & Oberton. *See* Mem. in Support of Mot. for Leave to File Second Am. Compl. 3-6. Neither Delaware law nor general corporate-law standards provide any basis for that action.

Even when a corporation is judgment-proof, an officer or investor cannot be held liable for the obligations of the corporation in the absence of evidence or allegations that the corporation’s insolvency was the result of undercapitalization or other fraud by an individual officer or investor. *See Siewick*, , 191 F. Supp. 2d at 22 n.5 (“There is some suggestion that the corporation may be judgment-proof. However, there is no allegation or evidence that this is the result of undercapitalization or other fraud by the decedent, making plaintiff’s potential inability to execute a monetary judgment against the corporation a condition created by the underlying, time-honored purpose of the law limiting liability by incorporation, rather than an inequity.”) (internal citation omitted).

Complaint Counsel appears to dispute (or question) the validity of the dissolution of Maxfield & Oberton. There is no factual basis to dispute the dissolution. The company has, in fact, dissolved, and in accordance with Delaware law, it has formed a liquidating trust to carry out the remaining obligations of the dissolved company. *See* Certificate of Dissolution, copy attached as Ex. A. Complaint Counsel is well aware of this fact, because she has filed a letter with the liquidating trust requesting the trust to sell its assets (including other magnetic products that would be banned under the CPSC’s pending rulemaking (*see* 77 Fed. Reg. 53,781 (Sept. 4, 2012))) in order to add funds to the trust. *See* Letter from Complaint Counsel to MOH

Liquidating Trust dated February 5, 2013, copy attached as Ex. B; *see also* Letter from CPSC Trial Attorney to MOH Liquidating Trust dated January 18, 2013, copy attached as Ex. C.

These principles of corporate law are illustrated by numerous cases in which the government has unsuccessfully attempted to impose civil liability against an individual for actions taken by his corporate employer. Many of these unsuccessful efforts have occurred when the government was seeking to protect the public health and safety.

In *United States v. USX Corp.*, 68 F.3d 811 (3d Cir. 1995), for example, the government sought to hold an individual named White jointly liable under Section 107 of CERCLA for response costs incurred by the United States at a hazardous waste site. White was also a partner in a joint venture with the corporate defendant. White had formed the company along with one other person 30 years earlier, was the president of the company, and owned half its stock. The company refused to participate in the remediation sought by the government. As a result, the government sued two companies and others including White.

The statutory provision in question limited liability to those *persons* who accept hazardous substances for transport and have a substantial input into selecting the disposal site. 42 U.S.C. § 9607(a)(4). The government contended that Congress intended to impose liability “on those who control the affairs of a responsible corporation, irrespective of whether those in control actually participate in the liability-creating conduct.” *USX Corp.*, 68 F.3d at 822. The court found that CERCLA is to be construed liberally to effectuate its goals. *Id.* Nevertheless, the court ruled that in light of the limited liability that protects corporate officers who do not actually participate in liability-creating conduct, there must be a basis in the statute itself, beyond its general purpose, to support the conclusion that Congress intended to impose liability on those who control the corporation’s day-to-day activities. *Id.*

The court further ruled that Congress could have specified that a majority shareholder or officer of a corporation engaged in the waste handling business is personally responsible. And the court concluded that its disagreement with the government over the meaning of the statute was not inconsistent with CERCLA's purpose of making those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

Similarly, in *People v. Commonwealth Edison Co.*, 490 F. Supp. 1145 (N.D. Ill. 1980), the court ruled that a corporate officer could not be sued under a Clean Air Act provision which authorized suits against "any person," where "person" was defined in the statute to include individuals. The plaintiff alleged that because a corporate officer was an individual, he was therefore a person. The Court ruled that individual corporate officers were exempt from liability. *Accord People v. Celotex Corp.*, 516 F. Supp. 716 (C.D. Ill. 1981).

In *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1300-01 (5th Cir. 1976), the court had to determine an individual's personal liability to pay the costs of a restoration order. The court ruled that a corporate officer may not be held civilly liable for a corporate violation of the Rivers and Harbors Act unless either the Act itself authorizes such liability, or there are sufficient allegations and proof to permit negation of the corporate form. The court additionally ruled that the statute, 33 U.S.C. § 406, did not provide that an officer of a corporation was personally liable on any subsequent civil judgment obtained against the corporation. The court explicitly rejected the argument that *Park* should be applied in that case as a basis to impose liability.

Finally, the court in *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047 (10th Cir. 1993), denied piercing of the corporate veil regarding enforcement of an NLRB order against the owner

of a corporation where there was no evidence that the individual committed fraud either in the formulation of the corporation or the misuse of the corporate form. The court reached that conclusion even though the individual violated many corporate formalities, including by commingling corporate assets with personal assets and carelessly conducting business under the corporate name. *See also NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 341-42 (6th Cir. 1990) (refusing to enforce NLRB order against former officers of a company even though the company ceased operations without paying all of its debts).

Complaint Counsel's Motion implies that there is a presumption in favor of extending responsibility for carrying out recalls to the officers, directors or employees of product manufacturers. But this is simply not true. There is no general presumption in American law that individuals are responsible for the obligations of their corporate employers. To the contrary, the general presumption is that individuals are not responsible for the obligations of their corporate employers, except in the rare instances in which Congress has explicitly provided otherwise.

### ***III. The Dotterweich and Park Line of Cases Does Not Extend To This Proceeding.***

Complaint Counsel seeks to add Mr. Zucker to this proceeding, citing *United States v. Dotterweich*, 320 U.S. 277 (1943), *United States v. Park*, 421 U.S. 658 (1975), and cases that have relied on those two decisions.

*Dotterweich* and *Park* both involved whether a responsible corporate officer could be liable for violations of the Federal Food, Drug and Cosmetic Act pursuant to a provision now codified at 21 U.S.C. § 333(a)(1). That statute provides explicitly for liability for *any person* violating one of its provisions. *Dotterweich* held that a responsible officer of a corporation

subject to the Act could be subject to criminal penalties for violations of the Act, and *Park* confirmed that holding.

The comparable provisions of the CPSA are Section 20 (15 U.S.C. § 2069), which provides for penalties against “any person” committing certain violations, and Section 21 (15 U.S.C. § 2070), which provides for penalties against any “individual director, officer, or agent of a corporation” who is found to have committed certain violations.

But this Court is not being asked to adjudicate whether Mr. Zucker committed any violation of Sections 20 or 21 of CPSA; nor could this Court be asked to do so. *See Athlone Indus., Inc. v. CPSC*, 707 F.2d 1485 (D.C. Cir. 1983) (CPSC actions for penalties under the CPSA may be brought only in federal district court). Rather, this Court is being asked to determine whether the subject products present a substantial product hazard, and if so, to issue an appropriate order pursuant to an entirely different provision of the CPSA, namely Section 15, which does *not* contain the “individual director, officer or agent” language found elsewhere in the Act. Since the CPSA provides in Section 15 that such an order may be issued only to a manufacturer, retailer or distributor of such products, the *Park* line of cases cannot apply in this proceeding. In this case, the starting point, and indeed the ending point, of the inquiry is the statutory language chosen by Congress, not an amorphous policy argument that lacks any statutory underpinning.

Complaint Counsel invokes *Park* and *Dotterweich* for the “rationale that individual liability is properly imposed on corporate officers where *the failure to comply with regulatory schemes* affects the health and safety of the public.” Mem. in Support of Mot. for Leave to File Second Am. Compl. 9 (emphasis added). Rather than supporting Complaint Counsel’s position, this argument demonstrates yet another reason why an amendment cannot be permitted, namely

because the amendment would be futile. There has been no finding that any person has “fail[ed] to comply with regulatory schemes” in this case. To the contrary, the then General Counsel of the Commission confirmed to Maxfield & Oberton’s counsel in July 2012, shortly before this proceeding commenced that “it is not a violation of any law administered by the CPSC for any retailer to continue to sell Buckyballs and Buckycubes. ... If a retailer continues to sell your client’s product, it is not in violation of any law CPSC administers until we have obtained a court order, which is the next step in our process ....” Copy attached as Ex. D.

Thus, just a few days before this matter was initiated, the Commission’s top lawyer confirmed in writing to counsel for Maxfield & Oberton the obvious truth about the regulatory scheme, namely that the manufacturer could *legally* sell Buckyballs® and Buckycubes® absent a court order finding that the products present a substantial product hazard. At least as to the allegation in the Complaint that the Subject Products violated the toy standard, this letter is fatal, because it acknowledges that the CPSC did not consider the products to violate any safety standards.

In a case involving the recall authority of the National Highway Traffic and Motor Vehicle Safety Act, a statute with many similarities to CPSA, the D.C. Circuit held that “a manufacturer cannot be found to be out of compliance with a standard if [the regulatory agency] has failed to give fair notice of what is required by the standard. And absent notice, there can be no recall based solely on noncompliance.” *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998); *see also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012).

Complaint Counsel has cited no authority for what would be an unwarranted expansion of the *Park* line of cases to civil cases seeking to compel specific remedial actions by an individual formerly employed by a corporation against which such an order could issue. Mr.

Zucker acknowledges that there are a few civil cases that have applied *Park* when the government has sought civil penalties. There are even a few cases that have applied *Park* when the government has sought an injunction seeking to force an individual to comply with regulatory requirements in the future. However, Mr. Zucker is aware of no case that has applied *Park* to a product recall matter and of no case that has applied *Park* to require a former officer of a corporation to be enjoined for activities that were taken by a now-defunct corporation. Thus, each of the cases cited by Complaint Counsel is simply inapplicable to this case, particularly because of the specific statutory language applicable here.<sup>5</sup>

Moreover, contrary to Complaint Counsel's construal of *Park* and *Dotterweich* as support for a broad proposition that liability may be imposed on corporate officers for failures to comply with health or safety regulations, the Supreme Court recently read those cases to stand for the simpler, and much narrower, proposition that liability for regulatory violations may be imposed on corporate officers "only where Congress has specified that such was its intent." *Meyer*, 537 U.S. at 287. Those cases, then, do not establish a broad principle of individual employee or officer vicarious liability for violations of statutes that relate to health and safety, but rather make the imposition of such liability a question of Congressional intent and statutory interpretation.

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<sup>5</sup> Complaint Counsel attempts to establish responsibility for Mr. Zucker by asserting that he exercised "personal control" over the company, and by citing various actions that he allegedly took on behalf of the company. Some of the representations of his actions as the former CEO are correct and some are not. However, none of the representations make any difference, because all of the assertions are of actions that are unremarkable for a corporate officer. For example, he did, indeed, request to meet and met with CPSC Commissioners; he signed correspondence; he granted media interviews; and he took other steps in the ordinary course of business as the CEO of the company. Other representations are not correct: for example, he did not design the products; he did not personally import them. He was not "integral" to the manufacturing of the products. Until this proceeding commenced, he did not manage day-to-day marketing activities, nor was he the "face" of the company. Again, however, none of these representations matter to this case. The CPSA does not provide that a recall order can be issued against an individual who used to be employed by a consumer product manufacturer. The *Park* line of cases simply do not reach this far, no matter what actions Mr. Zucker undertook as the former CEO.

To the extent that cases decided prior to the Supreme Court's *Meyer* decision stand for a broader reading of the impact of *Park* and *Dotterweich*, those cases can no longer be relied upon. In any event, what is at issue here is not an attempt to make Mr. Zucker *liable* for any *violation*, but rather to impose the burden of conducting a recall upon him. As we have shown, the CPSA does *not* provide that a recall order can be imposed on an individual who was employed by a consumer product manufacturer, and Congress certainly evinced no intent to authorize the CPSC to require such individuals to conduct recalls.

As discussed above, the cases cited by Complaint Counsel are unavailing. They did not involve orders for specific performance of a recall, such as the order sought by Complaint Counsel in this case.

This is true even with respect to the two cases involving the CPSC. In *United States v. Shelton Wholesale, Inc.*, No. 96-6131-CV-SJ-6, 1999 WL 825483 at \*3 (W.D. Mo. Sept. 21, 1999) (unreported), *aff'd sub nom. Shelton v. CPSC*, 277 F.3d 998 (8th Cir. 2002), the Commission was seeking civil penalties for violations of the fireworks regulation adopted pursuant to the Federal Hazardous Substances Act, and an injunction against further importation of noncompliant fireworks. The Court found that the individual, Mr. Shelton, could be personally liable for the civil penalties where he had *personally* imported many of the noncompliant products in his own name. No such allegation of Mr. Zucker's personal involvement is contained in the Amended Complaint. Moreover, this case interpreted the broad "any person" statutory language that was at issue in *Park* and *Dotterweich*. Finally, *Shelton* did not involve a recall, so it does not support the novel position taken by the CPSC here—namely, that an individual who formerly was employed by a manufacturer could be held responsible for personally carrying out a recall.

The other CPSC case cited by Complaint Counsel, *Barrett Carpet Mills, Inc. v. CPSC*, 635 F. 2d 299 (4th Cir. 1980), is particularly instructive and, indeed, supports Mr. Zucker. In *Barrett Carpet*, the CPSC found a violation of the Flammable Fabrics Act with respect to certain carpet and issued a cease-and-desist order against the carpet manufacturer. The cease-and-desist order included a provision obligating Mr. Roy Barrett, the President of the company, personally to carry out the requirements of the order. The Fourth Circuit reversed this portion of the Commission's order, holding that there was no reason to apply the order to an individual who is an officer of a corporation "unless the Commission can show some reason for including an officer other than the mere fact that he is an officer." *Id.* at 304. The Court reviewed numerous cases involving cease-and-desist orders issued by the Federal Trade Commission in which a corporate officer was personally included in the order, and found all of them to be distinguishable from the CPSC's order against Mr. Barrett. Complaint Counsel has cited no evidence that Mr. Zucker "conducted the affairs of the business as though no corporation had existed," nor does Complaint Counsel allege that Mr. Zucker engaged in any "deceptive and unfair practices [of the type] perpetrated in the cases in which the officers of the corporate respondent have been included in the cease-and-desist order." *Id.* And as to the likelihood that the complained-of conduct will recur, there is no reasonable likelihood that Mr. Zucker will engage in importing or selling Buckyballs® and Buckycubes® in the future.

#### ***IV. Other Factors Clearly Require Denial of Complaint Counsel's Motion***

In addition to the plain text of CPSA, fundamental principles of corporate law, and the limits on the *Park* doctrine described above, four other factors also compel denial of Complaint Counsel's motion. *First*, if Mr. Zucker is added to the case, he will surely be obligated to expend considerable resources to defend the case. While that course would be appropriate if Mr. Zucker

were a proper respondent, it is surely not appropriate when Mr. Zucker cannot, as a matter of law, be subject to a recall order regardless of any facts that Complaint Counsel might present.

It is small consolation that if Mr. Zucker prevails before the agency, or successfully challenges a Commission order in court, he can (and likely will) seek attorneys' fees under the Equal Access to Justice Act ("EAJA"). *See* 5 U.S.C. § 704 (an agency that conducts an adversary adjudication shall award to the prevailing party attorneys' fees and expenses unless the position of the agency was substantially justified); *see also* 28 U.S.C. § 2412(b) & (d) (authorizing attorneys' fees when a party prevails in a lawsuit against the federal government). This is small consolation because EAJA would only compensate Mr. Zucker after he has spent considerable money defending the action (assuming he is not thrown into bankruptcy as a result of the proceeding) and would not compensate Mr. Zucker either for his own time spent defending against this action or for the substantial worry and stress that this action is imposing on him.

*Second*, while we believe that there are *no* facts that CPSC could prove that would establish a valid legal basis for including Mr. Zucker in this case under the *Park* line of cases or otherwise, the proposed Amended Complaint, and indeed, Complaint Counsel's Motion fall woefully short of setting forth any such basis.

In Paragraph 6 of the proposed Amended Complaint, Complaint Counsel asserts that Mr. Zucker is the CEO who controlled the acts of the company. This appears to be the only specific assertion in the proposed Amended Complaint relating to what the CPSC believes Mr. Zucker did (as opposed to what the "respondents" generally did). This is inadequate in terms of setting forth a basis of alleging that Mr. Zucker actually performed acts that justify including him in the case. Although there are other statements about his purported involvement in Complaint

Counsel's legal memorandum (some of which we address above in Footnote 6), these statements in that memorandum cannot remedy an inadequate proposed amended complaint. Moreover, as discussed above, the statements asserting that Mr. Zucker was "integral to the design, manufacturing and marketing" of the products is wrong. In fact, Complaint Counsel does not allege that Mr. Zucker knew or believed that anything was wrong with the product. The Motion to Amend the Complaint should therefore be denied because it fails to plead necessary facts to support a claim against Mr. Zucker.

*Third*, under the Commission's procedural rules, the amendment of a complaint is permitted only when the amendment will not "unduly broaden the issues in the proceedings or cause undue delay." 16 C.F.R. § 1025.13. The notion that an individual might be held responsible for the actions of a company for which he previously worked represents a very controversial proposition that will introduce undue delay into—and raises the potential to overwhelm—these proceedings.

The overriding issues before this Court are whether certain products identified in the original Complaint present a substantial product hazard within the meaning of the Consumer Product Safety Act, and whether a remedial order for specific relief should be issued to the manufacturer of those products. Complaint Counsel is asking this Court to enlarge the issues to include whether a former officer of a manufacturer is a person against whom such a remedial order may issue. Granting the motion to amend the Complaint would surely "broaden the issues" and "cause undue delay" in this matter. Indeed, to counsel's knowledge, this issue has never been litigated by the CPSC in the context of this statute, and the issue will introduce substantial controversy about the extent to which the CPSC can assert jurisdiction under Section 15 of the CPSA over individuals who hold (or held) responsible positions in corporate manufacturers that

are subject to the jurisdiction of the CPSC. Thus, because the proposed amendment would unduly broaden (and greatly complicate) the issues, the motion to amend should be denied.

*Fourth*, Complaint Counsel would also be unable to amend the Complaint under the standards contained in the Federal Rules of Civil Procedure. We recognize, of course, that this case is governed by the Commission's rules rather than the rules applicable in federal court. Nevertheless, we address the corresponding federal rule regarding amending complaints because the policy considerations applicable to amendments in courts are virtually the same as those set forth in the Commission's rules.<sup>6</sup>

Federal Rule of Civil Procedure 15(a)(2) permits liberal amendments to complaints filed in federal court "when justice so requires." But courts will deny a motion to amend a complaint when the amendment would be futile, namely, when the amendment, if granted, could not have subsequently survived a motion to dismiss. *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). Courts also deny motions to amend when "allowance of the amendment" would cause "undue prejudice to the opposing party." *Id.* at 182. Both of these factors are present here: Complaint Counsel's proposed amendment would be futile for all of the reasons discussed above. It would also be highly prejudicial to force Mr. Zucker to defend this action, both because this Court lacks jurisdiction over him and because he would suffer reputational harm if subjected to these proceedings. Given the strong similarity of the policy considerations underlying Rule 15 and the Commission's rules, Complaint Counsel's motion to amend should be denied for this reason as well.

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<sup>6</sup> Complaint Counsel noted as much in Footnote 1 of the Memorandum In Support of Motion for Leave to File Amended Complaint filed in this case on September 18, 2012.

*V. Conclusion*

Complaint Counsel has failed to cite to even a single case that actually supports the extraordinary and improper relief they are seeking via an amendment to the Complaint. We have shown that there is a presumption in American law in favor of finding that a corporation's obligations do not ordinarily extend personally to its officers or directors. We have also shown that the *Park* line of cases, which creates a limited exception to this presumption, is applicable only upon showing of specific Congressional intent to apply the statutory provision to corporate officers and directors, a showing which cannot be made with respect to Section 15 of CPSA.

Because it would be futile to allow Complaint Counsel to amend the Complaint to include Mr. Zucker as a respondent, he should not be put through the time and expense of defending a case that cannot ultimately succeed against him.

For the above reasons, Mr. Zucker respectfully moves this Court to deny the motion of Complaint Counsel to add him as a party to this proceeding.

Respectfully submitted,

Dated: February 28, 2013

BY: John R. Fleder / ej  
John R. Fleder (D.C. Bar 176123)  
HYMAN, PHELPS & McNAMARA, P.C.  
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BY: Erika Z. Jones  
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# **EXHIBIT A**

PAGE 1



# State of Delaware

121394274

SECRETARY OF STATE  
 DIVISION OF CORPORATIONS  
 P.O. BOX 888  
 DOVER, DELAWARE 19903

12-27-2012

9546849  
 KAPLAN PAPADAKIS & GOURNIS P.C.  
 180 N. LASALLE ST. #2108  
 CHICAGO IL 60601

ATTN: JARED ROTHKOPT X

DESCRIPTION	AMOUNT
MAXFIELD & OBERTON HOLDINGS LLC 4668376 17203 Cancellation	
Cancellation Fee	180.00
Franchise Tax Balance	250.00
Court Municipality Fee, Wilm.	20.00
Expedite Fee, One Hour	1,000.00
FILING TOTAL	1,450.00
TOTAL PAYMENTS	1,450.00
SERVICE REQUEST BALANCE	.00

### STATE OF DELAWARE CERTIFICATE OF CANCELLATION

- 1. The name of the limited liability company is Maxfield & Oberton Holdings LLC
- 2. The Certificate of Formation of the limited liability company was filed on March 23, 2009
- 3. This Certificate of Cancellation is effective immediately upon filing.

IN WITNESS WHEREOF, the undersigned has executed this Certificate of Cancellation this 27<sup>th</sup> day of December, A.D. 2012.

By:   
Authorized Person(s)

Name: Craig J. Zucker  
Print or Type

# **EXHIBIT B**



## U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY  
BETHESDA, MARYLAND 20814-4408

Mary B. Murphy  
Assistant General Counsel  
Divisions of Compliance and Import Surveillance  
Office of the General Counsel

Tel: (301) 504-7809  
Fax: (301) 504-0403  
Email: mmurphy@cpsc.gov

February 5, 2013

### VIA ELECTRONIC AND CERTIFIED MAIL

MOH Liquidating Trust  
c/o Julie Beth Teicher, Trustee  
Erman, Teicher, Miller, Zucker & Freedman, P.C.  
400 Galleria Officentre – Suite 444  
Southfield, MI 48034-2162

Re: *In re Maxfield & Oberton Holdings, LLC* (CPSC No. 12-1)

Dear Ms. Teicher:

On January 17, 2013, a Product Safety Investigator of the U.S. Consumer Product Safety Commission (CPSC or Commission) conducted an establishment inspection of Amware Fulfillment of CT, LLC's (Amware), facility located at 33 Stiles Lane, North Haven, CT. Through this inspection, our Product Safety Investigator confirmed that Amware currently possesses an unknown quantity of high-powered magnet products that were formerly the property of MOH (the MOH Inventory) and that Amware's counsel has contacted you regarding these items.

CPSC staff is unable at this point to determine whether the inventory consists of only Buckycubes and Buckyballs, or whether other MOH products, specifically Buckybars and BuckyBigs, are stored at the facility as well. The Commission has an interest in the disposition of the MOH Inventory by virtue of its mission as well as its status as a potential beneficiary of the Trust.

As you know, CPSC staff has filed an administrative lawsuit seeking a determination that Buckyballs and Buckycubes (the Subject Products), which were manufactured and distributed by MOH, present a substantial product hazard. The Complaint seeks an order that the firm be required to engage in remedial action, including offering a refund to consumers and making public notification of the hazard presented by the Subject Products. This lawsuit follows a preliminary determination by staff that the Subject Products pose a substantial risk of injury to consumers pursuant to Section 15(a) of the Consumer Product Safety Act, 15 U.S.C. § 2064(a).

Julie Beth Teicher, Trustee  
Erman, Teicher, Miller, Zucker & Freedman, P.C.  
400 Galleria Officentre – Suite 444  
Southfield, MI 48034-2162

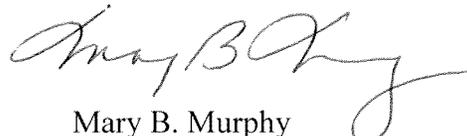
You have indicated that the Trust you are administering contains approximately \$262,000 in funds. In light of the more than 2.5 million sets of Buckyballs sold, this sum is obviously insufficient to compensate consumers if staff prevails in its action. To that end, staff requests that you, as Trustee, take possession of the inventory and determine which, if any, of the products may be sold or liquidated so that the additional funds may be placed in the Trust.

However, because staff has made a preliminary determination that Buckycubes and Buckyballs pose a substantial risk of injury to the public, we ask that you, as transferee and assignee of MOH's assets, make every effort to ensure that, when assessing whether any of the remaining inventory may be sold, no Subject Products re-enter the stream of commerce.<sup>1</sup>

To the extent that the MOH Inventory includes products other than Buckyballs and Buckycubes, we also ask that you to make every effort to liquidate those items for the benefit of the Trust's creditors.

Thank you for your attention to this matter. If you have any questions, please feel free to contact me.

Very truly yours,



Mary B. Murphy  
Assistant General Counsel

---

<sup>1</sup> Any attempt by any person to distribute Buckyballs or Buckycubes in commerce within the United States could give rise to a reporting obligation under Section 15(b) of the CPSA, 15 U.S.C. § 2064(b) and/or to further legal action by Commission.

# **EXHIBIT C**



U.S. CONSUMER PRODUCT SAFETY COMMISSION  
4330 EAST WEST HIGHWAY  
BETHESDA, MD 20814

Leah Wade  
Trial Attorney  
Division of Compliance  
Office of the General Counsel

Tel: (301) 504-7225  
Fax: (301) 504-0403  
Email: lwade@cpsc.gov

January 18, 2013

**Via Certified U.S. Mail**

Julie Beth Teicher, Trustee for MOH Liquidating Trust  
Erman, Teicher, Miller, Zucker & Freedman, P.C.  
400 Galleria Officentre, Suite 444  
Southfield, MI 48034

**Re: MOH Liquidating Trust, Proof of Claim**

Ms. Teicher:

Enclosed is a Proof of Claim, with attachments, filed by the United States Consumer Product Safety Commission against the MOH Liquidating Trust. I am requesting a receipt of the Proof of Claim, and have included a duplicate copy of the document and a self-addressed, stamped envelope.

Sincerely,

A handwritten signature in cursive script that reads "Leah Wade".

Leah Wade  
Trial Attorney  
Division of Compliance  
Office of the General Counsel

Enclosure

**MOH LIQUIDATING TRUST  
PROOF OF CLAIM**

The undersigned asserts a claim against **Maxfield and Oberton Holdings, LLC**, a Delaware limited liability company that, pursuant to applicable Delaware law, dissolved and ceased to exist on December 27, 2012. The basis for the undersigned's claim is one of the following (check appropriate reason):

- Refund for retail or consumer purchase
- Refund for wholesale purchase
- Injury claim
- Breach of contract
- Lawsuit
- Other

**PLEASE ATTACH ALL DOCUMENTS IN SUPPORT OF YOUR CLAIM.**

**Documents must include, as applicable to the particular claim, invoices, paid shipping receipts, filed complaint, judgment, administrative award, and all other documents that support your claim. You should also include a written description of the basis for your claim. The Trustee reserves the right to require the submission of additional documents and information regarding your claim. If you are represented by an attorney in connection with your claim, provide the name and contact information of the attorney.**

**TOTAL CLAIM AMOUNT: At least \$57,057,000.**

**The CPSC submits this preliminary Proof of Claim reflecting a partial monetization of the Commission's claims for relief. This submission is without prejudice to the CPSC's ability to file an amended Proof of Claim before the Claims Deadline.**

**Company:**

Company Name: United States Consumer Product Safety Commission  
Signature:   
Title: Kenneth R. Hinson, Executive Director  
Date: January 16, 2013  
Legal Contact: Mary B. Murphy, Assistant General Counsel  
Division of Compliance, Office of the General Counsel  
United States Consumer Product Safety Commission  
Company Address: 4330 East West Highway, Bethesda, Maryland 20814  
Phone No.: (301) 504-7809  
Fax No.: (301) 504-0403  
E-Mail Address: MMurphy@cpsc.gov  
Tax ID No.: Not Applicable

**Basis of Claim:**

On July 25, 2012, the staff of the U.S. Consumer Product Safety Commission (CPSC) initiated an administrative enforcement action, pursuant to section 15 of the Consumer Product Safety Act, as amended, 15 U.S.C. § 2064. The Complaint is attached to this Proof of Claim as Exhibit A, and it is captioned: "In the Matter of Maxfield and Oberton, LLC." The case has been assigned to the Honorable Dean C. Metry, Administrative Law Judge for the United States Coast Guard, in Galveston, TX, and docketed as "CPSC Docket No. 12-1."

On September 18, 2012, the CPSC filed a "Motion for Leave to File Amended Complaint." On September 24, 2012, the CPSC filed a "Supplemental Motion for Leave to File Amended Complaint." A copy of the Amended Complaint, dated September 18, 2012, was attached to both motions. The Amended Complaint was deemed filed on November 16, 2012, pursuant to an Order entered by the Honorable Dean C. Metry. The Amended Complaint is attached to this Proof of Claim as Exhibit B. On December 10, 2012, Respondent, Maxfield and Oberton Holdings, LLC, filed an Answer to the Amended Complaint (Answer), which is attached to this Proof of Claim as Exhibit C.

The Amended Complaint seeks an order requiring that the Respondent refund consumers the purchase price of the Subject Products and requiring that the Respondent provide public notification as well as undertake 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 and Buckycubes (Subject Products), imported and distributed by Maxfield and Oberton Holdings, LLC. The Amended Complaint alleges that the Subject Products pose a risk because they may be ingested by children under the age of 14. If more than two 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.

The Amended Complaint alleges that the Subject Products were sold at retail prices that ranged from approximately \$19.95 to \$100.00 per set. The Amended Complaint further alleges that Maxfield and Oberton Holdings, LLC, sold more than 2,500,000 sets of Buckyballs and 290,000 sets of Buckycubes to consumers. In their Answer, Respondent Maxfield and Oberton Holdings, LLC admits that it sold 2.57 million sets of Buckyballs and 290,000 sets of Buckycubes, as of July 2012.

**Amount of Claim:**

Maxfield and Oberton Holdings, LLC, filed a certificate of cancellation with the State of Delaware on December 27, 2012, and they created the MOH Liquidating Trust (Trust) before the CPSC could initiate discovery in this matter. As a result, the CPSC currently does not have all the information necessary to report a final monetization of our claim.

Nevertheless, the CPSC believes that the claim can be monetized initially at an amount of, *at least*, \$57,057,000. This amount was determined by multiplying the known number of Subject Products sold to consumers, to wit, 2,860,000, by the lowest retail price of the Subject Product known to the CPSC, which is \$19.95. The CPSC anticipates that the final claim amount may exceed that figure because that figure does not include the cost of the Subject Products that sold for more than \$19.95, the number of additional units sold through December 2012, or the costs of public notification and administration of a consumer-level refund process. Accordingly, the CPSC submits this preliminary Proof of Claim, based on the information available at the present time, without prejudice to the CPSC's ability to submit an amended Proof of Claim before the Claims Deadline.

# Exhibit A



### Parties

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

5. Respondent Maxfield is a domestic corporation with its principal place of business located at 180 Varick Street, Suite 212, New York, New York, 20014. Respondent is an importer and distributor of the Subject Products known as Buckyballs® and Buckycubes.™

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

### The Consumer Product

7. The Subject Products are imported and distributed in U.S. commerce and offered for sale to consumers for their personal use in or around a permanent or temporary household or residence, a school, and in recreation or otherwise. The Subject Products consist of small, individual magnets that are packaged as aggregated masses in different sized containers holding 10, 125, and 216 small magnets, ranging in size from approximately 4.01 mm to 5.03 mm, with a variety of coatings, and a flux index of over 50. Upon information and belief, the flux of the Subject Products has reached levels ranging from 204.1 to 556kg<sup>2</sup>mm<sup>2</sup> Surface Flux Index.

8. Upon information and belief, Buckyballs,<sup>®</sup> which are small spherically shaped magnets, were introduced in U.S. commerce in March 2009.

9. Upon information and belief, Buckycubes,<sup>™</sup> which are small cube shaped magnets, were introduced in U.S. commerce in October 2011.

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

11. Upon information and belief, Respondent initially advertised and marketed Buckyballs<sup>®</sup> to appeal to children, calling it an “amazing magnetic toy.”

12. Upon information and belief, Respondent advertised and marketed Buckyballs<sup>®</sup> by comparing its appeal to that of other children’s products such as erector sets, hula hoops, and silly putty.

13. Upon information and belief, despite making no significant design or physical changes to the product since its introduction in 2009, Respondent subsequently rebranded Buckyballs<sup>®</sup> as an adult executive desk toy and/or stress reliever, marketing and advertising it as such.

14. The Subject Products are sold with a carrying case and range in retail price from approximately \$19.95 to \$100.00. Upon information and belief, the Subject Products can also be purchased in sets of 10 for \$3.50 without a carrying case.

15. Upon information and belief, more than 2,000,000 Buckyballs<sup>®</sup> have been sold to consumers in the United States.

16. Upon information and belief, more than 200,000 Buckycubes<sup>™</sup> have been sold to consumers in the United States.

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

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

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

19. 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 due to the patient's presentation with non specific symptoms and/or a

lack of awareness by medical personnel of the dangers posed by multiple magnet ingestion can exacerbate life-threatening internal injuries.

20. Magnets which become affixed through the gastrointestinal walls and are not surgically removed may result in intestinal perforations which 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.

21. 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.

22. 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 possible fertility issues for women.

#### COUNT I

The Warnings and Labeling Are Defective as they Do Not Effectively Communicate  
the Hazards Associated with Ingestion of the Subject Product

23. Paragraphs 1 through 22 are hereby re-alleged and incorporated by reference as though fully set forth herein.

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

25. Upon information and belief, on January 28, 2010, a 9-year-old boy used

Buckyballs® to make tongue and lip rings, and accidentally ingested seven magnets. He was treated at an emergency room.

26. Upon information and belief, on September 5, 2010, a 12-year-old girl accidentally swallowed two Buckyballs®. She sought medical treatment at a hospital, including x-rays and monitoring for infection and internal damage.

27. Since March 2009 to approximately March 11, 2010, the Subject Products were sold in packaging that contained the following warning label: “**Warning:** Not intended for children. Swallowing of magnets may cause serious injury and require immediate medical care. **Ages 13+.**”

28. In February 2010, CPSC notified Respondent that the Buckyballs® failed to comply with the requirement that such products be marketed to children 14+. On or about March 11, 2010, Respondent changed its packaging, warnings, instructions, and labeling on Buckyballs® and later conducted a recall of the products.

29. Since recalling Buckyballs®, Respondent agreed to certain labeling and marketing changes in an effort to prevent the sale of Buckyballs® to children under 14.

30. Despite the marketing and labeling changes made by the Respondent, ingestion incidents continued to occur.

31. Upon information and belief, on or about December 23, 2010, a 3-year-old girl ingested 8 Buckyballs® magnets she found on a refrigerator in her home, requiring 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.

32. Upon information and belief, on or about January 6, 2011, a 4-year-old boy

suffered intestinal perforations after ingesting three Buckyballs® magnets he thought were chocolate candy because they looked like the decorations on his mother's wedding cake.

33. In November 2011, the Commission issued a public safety alert warning the public of the dangers of the ingestion of rare earth magnets. However, such ingestion incidents continue to occur. Since the November 10, 2011 safety alert, the Commission has received over one dozen reports of children ingesting the Subject Products, many of which required surgical intervention.

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

35. Notwithstanding the labeling, warnings, and efforts taken by Respondents, ingestion incidents requiring surgery continue to occur because such warnings are ineffective.

36. Warnings are ineffective because parents and caregivers do not appreciate the hazard associated with Subject Products and magnet ingestion and will continue to allow children to have access to the Subject Products. Children cannot and do not appreciate the hazard and will continue to mouth the items, swallow them, or, in the case of young adolescents and teens, mimic body piercings.

37. Warnings are ineffective because once the Subject Product is removed from its carrying case, the magnets carry no warning guarding against ingestion or aspiration, and the small size of the individual magnets precludes the addition of such a warning.

38. Warnings are ineffective because individual magnets are easily shared among children such that many end users of the product are likely to have had no exposure to any warning.

39. The Subject Products are defective because their labeling and warning labels cannot guard against the foreseeable misuse of the product and prevent the substantial risk of injury to children.

40. Therefore, the warnings and labeling on the Subject Products are defective pursuant to sections 15(a)(2) of the CPSC, 15 U.S.C. §2064 (a)(2).

## COUNT II

### The Subject Products as Designed Are Defective and Pose a Substantial Risk of

#### Injury

41. Paragraphs 1 through 40 are hereby realleged and incorporated by reference as though fully set forth herein.

42. The Subject Products are defective because they do not operate exclusively as intended and present a risk of injury to the public. Although the Subject Products warn against placing the magnets in one's mouth, the misuse is foreseeable.

43. The Subject Products present a risk of substantial injury to children because the magnets are intensely appealing to children due to their tactile features, their small size, and their highly reflective, shiny metallic coatings.

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

45. The Subject Products also move in unexpected, incongruous ways as the poles on

the magnets move to align properly, which may evoke a degree of awe and amusement among children.

46. The design of the Subject Products presents a risk of injury because they do not operate as intended; that is, they do not act as desk toys or manipulatives that are handled solely by adults and remain on adults' desks out of the reach of children.

47. The packaging of the Subject Products is also a design defect. The plastic carrying case that holds the Subject Products does not prevent children from accessing the magnets, nor does it prevent individual magnet pieces from separating from the product. In addition, the packaging of the Subject Product does not allow parents and caregivers to appreciate if a magnet is missing, and potentially, within the reach of a young child who may mouth or ingest the product.

48. Different packaging cannot remedy the hazard posed by Subject Products because users are unlikely to return the magnets to any case, regardless of the packaging design. Users of the Subject Products are unlikely to disassemble magnet configurations, many of which are elaborate and time-consuming to create, after each use.

### COUNT III

#### The Subject Products Are a Substantial Product Hazard

49. Paragraphs 1 through 48 are hereby realleged and incorporated by reference as though fully set forth herein.

50. The Subject Products present a substantial risk of injury because the pattern of defect—failure to operate as intended, and to effectively communicate warnings that the product should not be purchased for or used by children under the age of 14—is present in all of the

Subject Products.

51. The Subject Products, therefore, present a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. §2064(a)(2), by reasons of the substantial risk of injury or death alleged in paragraphs 1 through 48 above.

52. The Respondents have refused to voluntarily stop sale and conduct a recall of the Subject Products.

#### Relief Sought

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

A. Determine that Respondents' Subject Products known as Buckyballs® and Buckycubes™ present a "substantial product hazard" within the meaning of Section 15 U.S.C. §2064(a)(2).

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 risks of injury presented by rare earth magnet products and order Respondents under Section 15(c) of the CPSA, 15 U.S.C. §2064(c) to:

- (1) Cease importation and distribution of the product;
- (2) Notify all persons that transport, store, distribute, or otherwise handle the rare earth magnet products, or to whom such product has been transported, sold, distributed, or otherwise handled, to cease immediately distribution of the product;
- (3) Notify appropriate state and local public health officials;
- (4) Give prompt public notice of the defect in the Subject Products, including the incidents and injuries associated with ingestion or aspiration, including posting clear

and conspicuous notice on its Internet website, and providing notice to any third party Internet website on which Respondents have placed the product for sale, and announcements in languages other than English and on radio and television where the Commission determines that a substantial number of consumers to whom the recall is directed may not be reached by other notice;

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

(6) Mail notice to every person to whom the person required to give notice knows such product was 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 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 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 (5) 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;

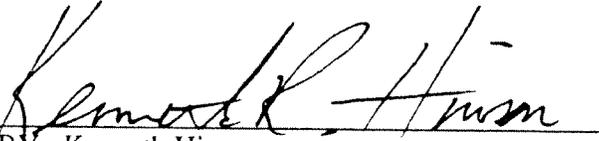
(6) For a period of five (5) years after issuance of the Final Order in this matter, to keep records of its actions taken to comply with Paragraphs B(1) through (5) and C(1) through (4) above, and supply these records to the Commission for the purpose of monitoring compliance with the Final Order;

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

D. Order that 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 25 day of July, 2012

  
BY: Kenneth Hinson  
Executive Director

U.S. Consumer Product Safety Commission  
Bethesda, MD 20814  
Tel: (301) 504-7854

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

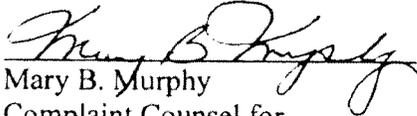
Jennifer Argabright, Trial Attorney  
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U.S. Consumer Product Safety Commission  
Bethesda, MD 20814  
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CERTIFICATE OF SERVICE

I hereby certify that on July ~~25~~, 2012, I served the foregoing Complaint upon all parties of record in these proceedings by hand-delivering and mailing, certified mail, postage prepaid, a copy to each at their principal place of business, and courtesy copy to counsel, as follows:

Maxfield and Oberton Holdings, LLC  
180 Varick Street  
Suite 212  
New York, NY 10004

Alan H. Schoem, Esquire  
Law Office of Alan Schoem LLC  
14809 Rolling Green Way  
North Potomac, Maryland 20878



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

# Exhibit B

UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION

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

AMENDED COMPLAINT

Nature of Proceedings

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

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

Jurisdiction

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

### Parties

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

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

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

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

### The Consumer Product

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

9. Upon information and belief, the flux of Buckyballs ranges from approximately 414 to 556kg<sup>2</sup>mm<sup>2</sup> Surface Flux Index.

10. Upon information and belief, the flux of Buckycubes ranges from approximately 204 to 288kg<sup>2</sup>mm<sup>2</sup> Surface Flux Index.
11. Upon information and belief, Buckyballs, which are small spherically-shaped magnets, were introduced in U.S. commerce in March 2009.
12. Upon information and belief, Buckycubes, which are small cube-shaped magnets, were introduced in U.S. commerce in October 2011.
13. Upon information and belief, the Subject Products are manufactured by Ningbo Prosperous Imp. & Exp. Co. Ltd., of Ningbo City, in China.
14. The Subject Products are sold with a carrying case and range in retail price from approximately \$19.95 to \$100.00. Upon information and belief, the Subject Products can also be purchased in sets of 10 for \$3.50.
15. Upon information and belief, more than 2,500,000 sets of Buckyballs have been sold to consumers in the United States.
16. Upon information and belief, approximately 290,000 sets of Buckycubes have been sold to consumers in the United States.

#### COUNT 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

38. Ingestion incidents, however, continue to occur.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Count 2

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

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

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

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

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

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

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

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

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

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

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

#### Relief Sought

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

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

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

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

- (1) Cease importation and distribution of the product;
- (2) Notify all persons that transport, store, distribute or otherwise handle the Subject Products, or to whom such products have been transported, sold, distributed or otherwise handled, to immediately cease distribution of the products;
- (3) Notify appropriate state and local public health officials;
- (4) Give prompt public notice of the defects in the Subject Products, including the incidents and injuries associated with ingestion including posting clear and conspicuous notice on Respondent's website, and providing notice to any third party website on which Respondent has placed the Subject Products for sale, and provide further announcements in languages other than English and on radio and television;
- (5) Mail notice to each distributor or retailer of the Subject Products; and
- (6) Mail notice to every person to whom the Subject Products were delivered or sold;

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

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

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

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

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

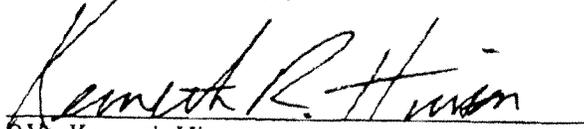
(6) For a period of five (5) years after issuance of the Final Order in this matter, to keep records of its actions taken to comply with Paragraphs B(1) through (6) and C(1) through (4) above, and supply these records to the Commission for the purpose of monitoring compliance with the Final Order;

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

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

ISSUED BY ORDER OF THE COMMISSION:

Dated this 18 day of September 2012



BY: Kenneth Hinson  
Executive Director

U.S. Consumer Product Safety Commission  
Bethesda, MD 20814  
Tel: (301) 504-7854

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# Exhibit C

UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION

_____ )	
In the Matter of )	
)	
MAXFIELD AND OBERTON HOLDINGS, LLC )	CPSC DOCKET NO. 12-1
AND )	CPSC DOCKET NO. 12-2
ZEN MAGNETS, LLC )	
)	HON. DEAN C. METRY
)	Administrative Law Judge
Respondent. )	
_____ )	

**RESPONDENT MAXFIELD AND OBERTON  
HOLDINGS, LLC'S ANSWER TO AMENDED COMPLAINT**

Respondent Maxfield and Oberton Holdings, LLC (“Maxfield and Oberton”), by counsel, hereby files this Answer and responds to the allegations in the Consumer Product Safety Commission’s (“CPSC”) Amended Complaint as follows:

**FIRST DEFENSE**

In response to the separately numbered paragraphs of the CPSC’s Amended Complaint, Maxfield and Oberton responds as follows:

1. In response to the allegations in paragraph 1, Maxfield and Oberton admits that it imports and distributes Buckyballs® and Buckycubes®, but denies the remaining allegations in this paragraph and specifically denies that either Buckyballs® or Buckycubes® presents a substantial risk of injury. The allegations relating to 15 U.S.C. § 2064 state a legal conclusion to which no response is required. To the extent a response is deemed to be required, Maxfield and Oberton denies the allegations relating to 15 U.S.C. § 2064.

2. The allegations in paragraph 2 state a legal conclusion to which no response is required. To the extent a response is deemed to be required, Maxfield and Oberton denies the allegations in paragraph 2.

3. The allegations in paragraph 3 state a legal conclusion to which no response is required. To the extent a response is deemed to be required, Maxfield and Oberton denies the allegations in paragraph 3.

4. The allegations in paragraph 4 state a legal conclusion to which no response is required. To the extent a response is deemed to be required, Maxfield and Oberton denies the allegations in paragraph 4.

5. Maxfield and Oberton admits the allegations in paragraph 5.

6. Maxfield and Oberton admits the allegations in paragraph 6.

7. The allegations in paragraph 7 state a legal conclusion to which no response is required. To the extent a response is deemed to be required, Maxfield and Oberton denies the allegations in paragraph 7.

8. In response to the allegations in paragraph 8, Maxfield and Oberton admits that it offers Buckyballs® and Buckycubes® for sale to consumers for their personal use. Maxfield and Oberton denies that it offers Buckyballs® or Buckycubes® for sale to consumers for use in or around “schools” or “in recreation,” or for any other purpose, to the extent such allegations are intended to describe any entity or activity involving persons under 14 years of age. Maxfield and Oberton further responds that Buckyballs® and Buckycubes® each display multiple, conspicuous warnings that specifically state that they should be kept away from all children. In response to the allegations in the second sentence of paragraph 8, Maxfield and Oberton admits that Buckyballs® and Buckycubes® have a flux index of over 50.

9. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 and therefore denies those allegations.

10. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 and therefore denies those allegations.

11. Maxfield and Oberton admits the allegations in paragraph 11.

12. Maxfield and Oberton admits the allegations in paragraph 12.

13. Maxfield and Oberton admits the allegations in paragraph 13.

14. In response to the allegations in paragraph 14, Maxfield and Oberton admits that Buckyballs® and Buckycubes®, including replacement sets, are sold with a carrying case. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 14 and therefore denies those allegations.

15. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15 and therefore denies those allegations. Maxfield and Oberton further responds that as of July 2012, Maxfield and Oberton had sold more than 2.57 million packaged units of Buckyballs® to retailers for resale to consumers and online.

16. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16 and therefore denies those allegations. Maxfield and Oberton further responds that as of July 2012, Maxfield and Oberton had sold more than 290,000 packaged units of Buckycubes® to retailers for resale to consumers and online.

## COUNT 1

17. In response to the allegations in paragraph 17, Maxfield and Oberton hereby incorporates by reference, as if fully set forth herein, its responses to paragraphs 1 through 16 of the Amended Complaint.

18. The allegations in paragraph 18 state a legal conclusion to which no response is required. To the extent a response is deemed to be required, Maxfield and Oberton denies the allegations. Maxfield and Oberton further responds that 16 C.F.R. Part 1115 is a non-binding Commission interpretative rule.

19. The allegations in paragraph 19 state a legal conclusion to which no response is required. To the extent a response is deemed to be required, Maxfield and Oberton denies the allegations. Maxfield and Oberton further responds that 16 C.F.R. Part 1115 is a non-binding Commission interpretative rule.

20. Maxfield and Oberton admits the allegations in paragraph 20.

21. Maxfield and Oberton denies the allegations in paragraph 21.

22. Maxfield and Oberton admits the allegations in paragraph 22.

23. In response to the allegations in paragraph 23, Maxfield and Oberton admits that in March 2010, at the request of the CPSC staff, it voluntarily changed its packaging, warnings, instructions and labeling to reflect that Buckyballs® are not intended for persons under 14 years of age, and later conducted a recall, in conjunction with the CPSC, of Buckyballs® that had been labeled as 13+.

24. Maxfield and Oberton admits the allegations in paragraph 24.

25. In response to the allegations in paragraph 25, Maxfield and Oberton admits that at the time of the recall it was aware of two reported incidents alleged to involve ingestions of Buckyballs®.

26. In response to the allegations in paragraph 26, Maxfield and Oberton admits that in March 2010, at the request of the CPSC staff, it voluntarily changed its packaging, warnings, instructions and labeling to reflect that Buckyballs® are not intended for persons under 14 years of age. Maxfield and Oberton denies the remaining allegations in paragraph 26.

27. Maxfield and Oberton admits the allegations in paragraph 27.

28. Maxfield and Oberton admits the allegations in paragraph 28.

29. In response to the allegations in paragraph 29, it is unclear what “these warnings” refers to and, therefore, Maxfield and Oberton denies the allegations in paragraph 29. Maxfield and Oberton further responds that multiple warnings appear on the packaging and carrying case for all Buckyballs® currently sold.

30. Maxfield and Oberton admits the allegations in paragraph 30.

31. In response to the allegations in paragraph 31, Maxfield and Oberton admits that Buckyballs® were first sold in 2009, but denies that “numerous” ingestion incidents involving Buckyballs® and children under the age of 14 have occurred.

32. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 32 and therefore denies those allegations.

33. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 33 and therefore denies those allegations.

34. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34 and therefore denies those allegations.

35. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 35 and therefore denies those allegations.

36. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36 and therefore denies those allegations. Maxfield and Oberton further responds that the allegations are vague and ambiguous as they do not specify any particular product.

37. In response to the allegations in paragraph 37, Maxfield and Oberton admits that the CPSC issued a public safety alert in November 2011, the contents of which speak for itself. Maxfield and Oberton further responds that it worked cooperatively with the CPSC regarding such public safety education effort.

38. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 38 and therefore denies those allegations. Maxfield and Oberton further responds that the allegations are vague and ambiguous as they do not specify any particular product.

39. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39 and therefore denies those allegations.

40. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40 and therefore denies those allegations. Maxfield and Oberton further responds that the allegations with respect to unidentified “products” and “substantially similar to Buckyballs” are vague and ambiguous.

41. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41 and therefore denies those allegations.

42. Maxfield and Oberton denies the allegations in paragraph 42.

43. Maxfield and Oberton denies the allegations in paragraph 43.

44. Maxfield and Oberton denies the allegations in paragraph 44.

45. Maxfield and Oberton denies the allegations in paragraph 45.

46. Maxfield and Oberton denies the allegations in paragraph 46.

47. In response to the allegations in paragraph 47, Maxfield and Oberton admits only that it is not feasible to attach a warning to each individual magnet, but denies the remaining allegations in paragraph 47.

48. Maxfield and Oberton denies the allegations in paragraph 48.

49. Maxfield and Oberton denies the allegations in paragraph 49.

50. Maxfield and Oberton denies the allegations in paragraph 50.

51. In response to the allegations in paragraph 51, Maxfield and Oberton states that the advertisement speaks for itself and therefore denies the allegations as stated. Maxfield and Oberton further denies that Buckyballs® were advertised and marketed to appeal to children.

52. In response to the allegations in paragraph 52, Maxfield and Oberton states that the video speaks for itself and therefore denies the allegations as stated.

53. Maxfield and Oberton denies the allegations in paragraph 53.

54. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 54 and therefore denies those allegations.

55. In response to the allegations in paragraph 55, Maxfield and Oberton admits that it has marketed and advertised Buckyballs® as an adult executive desk toy and/or stress reliever, but denies the remaining allegations in paragraph 55.

56. Maxfield and Oberton denies the allegations in paragraph 56.

57. Maxfield and Oberton denies the allegations in paragraph 57.

58. Maxfield and Oberton denies the allegations in paragraph 58.

59. Maxfield and Oberton denies the allegations in paragraph 59.

60. Maxfield and Oberton denies the allegations in paragraph 60.

61. Maxfield and Oberton denies the allegations in paragraph 61.

62. The allegations in paragraph 62 state a legal conclusion to which no response is required. To the extent a response is deemed to be required, Maxfield and Oberton denies the allegations. Maxfield and Oberton further responds that 16 C.F.R. Part 1115 is a non-binding Commission interpretative rule.

63. Maxfield and Oberton denies the allegations in paragraph 63.

64. Maxfield and Oberton admits it advertises and markets the Subject Products to and for use by adults, but denies that it advertises and markets the products to or for use by children. Maxfield and Oberton further responds that to the extent the Subject Products are used by children, for whom the products are not intended, such use is solely as a result of parents or caregivers ignoring the multiple, conspicuous warnings accompanying the Subject Products and making the products available or accessible to such children.

65. Maxfield and Oberton denies the allegations in paragraph 65 as stated. Maxfield and Oberton further responds that any risk of injury the Subject Products may pose to children is solely the result of parents and caregivers ignoring the multiple, conspicuous warnings accompanying the Subject Products, which are not intended for children, and making them available or accessible to such children.

66. Maxfield and Oberton denies the allegations in paragraph 66.

67. Maxfield and Oberton denies the allegations in paragraph 67.

68. Maxfield and Oberton admits the allegations in paragraph 68.

69. Maxfield and Oberton denies the allegations in paragraph 69.

70. Maxfield and Oberton denies the allegations in paragraph 70.

71. Maxfield and Oberton denies the allegations in paragraph 71.

72. In response to the allegations in paragraph 72, Maxfield and Oberton admits that its independent tester designated an “appropriate age grade” as “over 8 years of age” for testing purposes, but further responds that this age designation was based solely on the tester’s assumption that the product, then labeled for ages 13+, fell within the exemption in ASTM F963 Section 5.17 as a hobby, craft or science kit item.

73. Maxfield and Oberton denies the allegations in paragraph 73.

74. In response to the allegations in paragraph 74, Maxfield and Oberton denies that the Subject Products are defective. Maxfield and Oberton further responds that any risk of injury the Subject Products may pose to children is the result solely of parents and caregivers ignoring the multiple, conspicuous warnings accompanying the Subject Products, which are not intended for children, and making them available or accessible to such children.

75. The allegations in paragraph 75 state a legal conclusion to which no response is required. To the extent a response is deemed to be required, Maxfield and Oberton denies the allegations. Maxfield and Oberton further responds that 16 C.F.R. Part 1115 is a non-binding Commission interpretative rule.

76. Maxfield and Oberton denies the allegations in paragraph 76. Maxfield and Oberton further responds that the allegation that the Subject Products have “low utility” is vague and ambiguous.

77. Maxfield and Oberton denies the allegations in paragraph 77. Maxfield and Oberton further responds that the allegation that the Subject Products are “not necessary” is vague and ambiguous.

78. Maxfield and Oberton denies the allegations in paragraph 78.

79. Maxfield and Oberton denies the allegations in paragraph 79. Maxfield and Oberton further responds that any risk of injury the Subject Products may pose to children is the result solely of parents and caregivers ignoring the multiple, conspicuous warnings accompanying the Subject Products, which are not intended for children, and making them available or accessible to such children.

80. Maxfield and Oberton denies the allegations in paragraph 80. Maxfield and Oberton further responds that the risk of injury is clearly and conspicuously explained in warnings accompanying the Subject Products, warnings to which the CPSC agreed and which are consistent with established voluntary and mandatory warnings for magnet products.

81. Maxfield and Oberton denies the allegations in paragraph 81.

82. Maxfield and Oberton denies the allegations in paragraph 82.

83. Maxfield and Oberton denies the allegations in paragraph 83. Maxfield and Oberton further responds that it never promoted any use of the Subject Products by children.

84. Maxfield and Oberton denies the allegations in paragraph 84.

85. Maxfield and Oberton denies the allegations in paragraph 85.

86. Maxfield and Oberton denies the allegations in paragraph 86.

87. Maxfield and Oberton denies the allegations in paragraph 87. The allegations do not reference any particular incident, but rather appear to be a speculative list of the potential harms that could occur if multiple magnets are swallowed. Buckyballs® and Buckycubes® are

each sold with multiple, conspicuous warnings which state, *inter alia*, that they should not be put in the mouth or nose, that immediate medical attention should be sought if the magnets are swallowed or inhaled, and that swallowed magnets can cause serious injury or death. Thus, the allegations in this paragraph are based on the supposition that the multiple, conspicuous warnings accompanying Buckyballs® and Buckycubes® will be ignored and the products will be misused. Numerous products can potentially cause injury if product warnings are ignored and the product is misused.

88. Maxfield and Oberton denies the allegations in paragraph 88. The allegations do not reference any particular incident, but rather appear to be a speculative description of the potential harms that could occur if multiple magnets are swallowed.

89. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 89 and therefore denies those allegations. More specifically, Maxfield and Oberton cannot speculate as to what caretakers, parents, and medical professionals may or may not know or the health risks that may or may not occur in any particular case as a result of delay in medical intervention.

90. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 90 and therefore denies those allegations. More specifically, Maxfield and Oberton cannot speculate as to what medical professionals may or may not know or the health risks that may or may not occur in any particular case as the result of a medical professional's lack of awareness or delay in medical intervention.

91. Maxfield and Oberton denies the allegations in paragraph 91. The allegations do not reference any particular incident, but rather appear to be a speculative list of the potential harms that could occur if multiple magnets are swallowed. Buckyballs® and Buckycubes® are

each sold with multiple, conspicuous warnings which state, *inter alia*, that they should not be put in the mouth or nose, that immediate medical attention should be sought if the magnets are swallowed or inhaled, and that swallowed magnets can cause serious injury or death. Thus, the allegations in this paragraph are based on the supposition that the multiple, conspicuous warnings accompanying Buckyballs® and Buckycubes® will be ignored and the products will be misused. Numerous products can potentially cause injury if product warnings are ignored and the product is misused.

92. Maxfield and Oberton denies the allegations in paragraph 92. The allegations do not reference any particular incident, but rather appear to be a speculative description of the potential harms that could occur if multiple magnets are swallowed.

93. Maxfield and Oberton denies the allegations in paragraph 93. The allegations do not reference any particular incident, but rather appear to be a speculative list of the potential harms that could occur if multiple magnets are swallowed.

94. Maxfield and Oberton denies the allegations in paragraph 94.

95. Maxfield and Oberton denies the allegations in paragraph 95.

96. Maxfield and Oberton denies the allegations in paragraph 96.

97. Maxfield and Oberton denies the allegations in paragraph 97.

## COUNT 2

98. In response to the allegations in paragraph 98, Maxfield and Oberton hereby incorporates by reference, as if fully set forth herein, its responses to paragraphs 1 through 97 of the Amended Complaint.

99. Maxfield and Oberton denies the allegations in paragraph 99.

100. In response to the allegations in paragraph 100, Maxfield and Oberton admits that its independent tester designated an “appropriate age grade” as “over 8 years of age” for testing purposes, but further responds that this age designation was based solely on the tester’s assumption that the product, then labeled for ages 13+, fell within the exemption in ASTM F963 Section 5.17 as a hobby, craft or science kit item.

101. Maxfield and Oberton denies the allegations in paragraph 101.

102. The allegations in paragraph 102 state a legal conclusion to which no response is required. To the extent that a response is deemed to be required, Maxfield and Oberton denies the allegations in paragraph 102.

103. The allegations in paragraph 103 state a legal conclusion to which no response is required. To the extent that a response is deemed to be required, Maxfield and Oberton denies the allegations in paragraph 103.

104. Maxfield and Oberton denies the allegations in paragraph 104.

105. In response to the allegations in paragraph 105, Maxfield and Oberton states that the May 27, 2010 announcement speaks for itself and therefore denies the allegations as stated.

106. Maxfield and Oberton denies the allegations in paragraph 106.

107. Maxfield and Oberton denies the allegations in paragraph 107.

108. Maxfield and Oberton denies the allegations in the unnumbered paragraph immediately following paragraph 107, and denies that the CPSC is entitled to any of the relief sought.

109. Maxfield and Oberton denies all allegations in the Amended Complaint that are not expressly admitted, denied, or otherwise responded to.

## **SECOND DEFENSE**

The allegations in the Amended Complaint fail to establish that either Buckyballs® or Buckycubes® contains any defect or constitutes a substantial product hazard within the meaning of Section 15(a)(2) of the Consumer Product Safety Act (15 U.S.C. § 2064(a)(2)). More specifically, there is no fault, flaw, or irregularity that causes weakness, failure or inadequacy in the form or function of either Buckyballs® or Buckycubes®, nor is there any inadequacy or flaw in the contents, construction, finish, packaging, warnings or instructions of either Buckyballs® or Buckycubes®. Moreover, neither Buckyballs® nor Buckycubes® creates a substantial risk of injury to the public.

## **THIRD DEFENSE**

There is no applicable rule, regulation, standard or ban with which either Buckyballs® or Buckycubes® fails to comply.

## **FOURTH DEFENSE**

The Amended Complaint is arbitrary and capricious as it is not based on any reasonable assessment of risk and is facially inconsistent with the CPSC's own mandatory standards.

## **FIFTH DEFENSE**

The CPSC has contributed to the alleged incidence of magnet ingestion and the alleged ineffectiveness of warnings by knowingly and repeatedly failing to take timely remedial action against major retailers that the CPSC staff knew were advertising, marketing, and offering for sale high-powered magnet sets, including those of Maxfield and Oberton, as appropriate for children under the age of 14.

### **SIXTH DEFENSE**

Upon information and belief, 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 original Complaint. Maxfield and Oberton further asserts that 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. The CPSC staff's proposal recommended issuance of a proposed rule seeking public comments on, *inter alia*, measures that are the same as or substantially similar to measures in the Maxfield and Oberton proposed corrective action plan, notwithstanding the CPSC staff's issuance of an administrative complaint on July 25, 2012, alleging that the Maxfield and Oberton proposed voluntary corrective action measures are ineffective.

### **SEVENTH DEFENSE**

The May 27, 2010 joint recall by Maxfield and Oberton and the CPSC, which the CPSC initiated, participated in, oversaw, and monitored, constituted the full relief which the CPSC sought with respect to the Buckyballs® product which the CPSC at that time alleged was a violation of the ASTM F963 toy standard because of its labeling for children age 13+. From that date until the date of the CPSC's filing of its Amended Complaint, the CPSC has never alleged that Buckyballs® or Buckycubes® have been or are subject to the ASTM F963 toy standard.

### **EIGHTH DEENSE**

The CPSC's allegation that the Subject Products as currently advertised and marketed violate the ASTM F963 toy standard, as incorporated as a CPSC mandatory safety standard, is

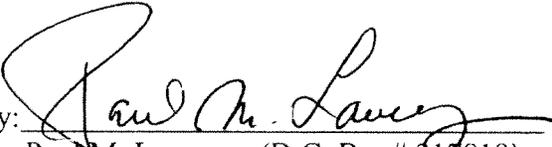
directly contrary to numerous written communications by the CPSC's General Counsel, the agency's chief legal officer, to Maxfield and Oberton and various retailers, both before and after the CPSC issued its original complaint herein, expressly representing that the sale of the Subject Products was lawful and not in violation of any law administered by the CPSC.

#### NINTH DEFENSE

The CPSC's allegation that the Subject Products as currently advertised and marketed violate the ASTM F963 toy standard, as incorporated as a CPSC mandatory safety standard, is directly contrary to representations made by the Commission to the public in connection with a notice of proposed rulemaking with respect to adult magnet sets, including the Subject Products, in which the CPSC has expressly represented that such products, including but not limited to the Subject Products, are adult products not subject to ASTM F963.

WHEREFORE, Maxfield and Oberton respectfully requests that the Amended Complaint be dismissed.

Dated: December 10, 2012

By:   
Paul M. Laurenza (D.C. Bar # 217919)  
Eric C. Tew (D.C. Bar # 477023)  
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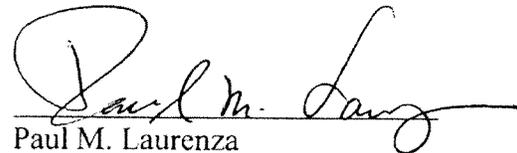
**CERTIFICATE OF SERVICE**

I hereby certify that on December 10, 2012, a true and correct copy of the foregoing Respondent Maxfield and Oberton Holdings, LLC's Answer to Amended Complaint was served via first class, postage prepaid, U.S. Mail, on:

Hon. Dean C. Metry  
Administrative Law Judge  
U.S. Coast Guard  
U.S. Courthouse  
601 25th Street, Suite 508A  
Galveston, Texas 77550

Mary B. Murphy, Assistant General Counsel  
Jennifer Argabright, Trial Attorney  
Division of Compliance, Office of General Counsel  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, Maryland 20814

David C. Japha, Esq.  
The Law Offices of David C. Japha, P.C.  
950 S. Cherry Street, Suite 912  
Denver, Colorado 80246

  
Paul M. Laurenza

# **EXHIBIT D**



U.S. CONSUMER PRODUCT SAFETY COMMISSION  
4330 EAST WEST HIGHWAY  
BETHESDA, MD 20814

Cheryl A. Falvey  
General Counsel

Tel: 301-504-7642  
Fax: 301-504-0403

July 20, 2012

Via Electronic and First Class Mail

Alan H. Schoem, Esq.  
14809 Rolling Green Way  
North Potomac, Maryland 20878

Re: Request for Statement

Dear Mr. Schoem:

Thank you for your July 17, 2012 letter to CPSC Compliance Officer Joe Williams. You state that Mr. William's letter to Brookstone concerned various types of aggregated masses of small, powerful, individual magnets and that he asked Brookstone voluntarily stop selling the magnets pending the outcome of our investigation. You further state that this communication to Brookstone is based on the fact that Maxfield and Oberton identified Brookstone as a retailer in a May 25, 2012 Full Report to the CPSC.

I can assure you that no violation of the disclosure restrictions has taken place for any section 15 information Maxfield and Oberton submitted in its Full Report. Brookstone was identified as a retailer independent from the section 15 report submitted by Maxfield and Oberton. As you know, the Commission has determined that the referenced section 6(b)(5) restrictions to not apply to information independently obtained or prepared by Commission staff. 16 C.F.R. § 1101.63(c).

Furthermore, the Commission staff has statutory authority to investigate retailers when it believes that they may be selling a product that presents a substantial product hazard. Your suggestion of intimidation by the staff is unfounded and belied by the fact that some retailers have not agreed to stop sale. As you acknowledged, the correspondence to retailers contained a generic description of magnets. While you may represent to staff that the firm, Brookstone, is selling only one type of magnet, staff has a duty to investigate fully and request information under the circumstances.

At your request, I am confirming that it is not a violation of any law administered by the CPSC for any retailer to continue to sell Buckyballs and Buckycubes. We are willing to

Alan H. Schoem, Esq.

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July 20, 2012

communicate that directly to the retailers that staff has contacted. As you note, staff requests have been for voluntary action. If a retailer continues to sell your client's product, it is not in violation of any law CPSC administers until we have obtained a court order, which is the next step in our process after the issuance of a PD, or the firm voluntarily agrees to a corrective action. The scope of administrative action needed to be taken by the agency to address the concern regarding a potential substantial product hazard is certainly minimized to the extent we can obtain voluntary corrective actions from manufacturers or retailers.

Sincerely,

A handwritten signature in cursive script that reads "Cheryl A. Falvey". The signature is written in dark ink and is positioned above the printed name.

Cheryl A. Falvey

## CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2013, a true and correct copy of the foregoing Opposition to Complaint Counsel's Motion For Leave to Amend Complaint in CPSC Docket 12-1 was served first class, postage prepaid, U.S. Mail on the Secretary of the U.S. Consumer Product Safety Commission, the Presiding Officer, and all parties and participants of record in these proceedings in the following manner:

Original and three copies by U.S. mail, and one copy by electronic mail, to the Secretary of the U.S. Consumer Product Safety Commission, Todd A. Stevenson.

One copy by U.S. mail and one copy by electronic mail to the Presiding Officer for *In the Matter of Maxfield and Oberton Holdings, LLC*, CPSC Docket No. 12-1; *In the Matter of Zen Magnets, LLC*, CPSC Docket No 12-2, and *In the Matter Of Star Networks USA, LLC*, CPSC Docket No. 13-2:

The Honorable Dean C. Metry  
U.S. Coast Guard  
U.S. Courthouse  
601 25<sup>th</sup> Street, Suite 508A  
Galveston, TX 77550  
[Janice.M.Emig@uscg.mil](mailto:Janice.M.Emig@uscg.mil)

One copy by U.S. mail and one copy by electronic mail to Complaint Counsel:

Mary B. Murphy  
Complaint Counsel  
And Assistant General Counsel  
Division of Compliance  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

Jennifer Argabright, Trial Attorney  
Richa Shyam Dasgupta, Trial Attorney  
Leah Wade, Trial Attorney  
Complaint Counsel  
Division of Compliance  
Office of the General Counsel  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, MD 20814

One copy by U.S. mail and one copy by electronic mail to counsel for Respondents Zen Magnets, LLC and Star Networks USA, LLC:

David C. Japha  
The Law Offices of David C. Japha, P.C.  
950 S. Cherry Street, Suite 912  
Denver, CO 80246  
[davidjapha@japhalaw.com](mailto:davidjapha@japhalaw.com)

A handwritten signature in cursive script, reading "Erika Z. Jones", written in black ink. The signature is positioned above a horizontal line.

Erika Z. Jones