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March 13, 2014

VIA E-MAIL AND CERTIFIED MAIL

Reed D. Rubinstein
Senior Vice President, Litigation
Cause of Action
1919 Pennsylvania Avenue, NW
Suite 650
Washington, D.C. 20006

Re: Request for Correction of Information Regarding Maxfield and Oberton Holdings, LLC Under the Information Quality Act

Dear Mr. Rubinstein:

This letter responds to Craig Zucker's request for correction of information related to Maxfield and Oberton Holdings, LLC (M&O) under the Information Quality Act (IQA),[1] the Consumer Product Safety Commission's (CPSC) Information Quality Guidelines (CPSC Guidelines),[2] and the Office of Management and Budget Information Quality Guidelines (OMB Guidelines).[3] By letter dated November 12, 2013 (November 12 Letter), Craig Zucker, through you, his counsel, requested

> (a) disclosure of the data and methods needed to determine whether influential information disseminated by the CPSC regarding (1) magnets sold under the trade names Buckyballs® and Buckycubes® and (2) a defunct company called Maxfield and Oberton Holdings, LLC ("M&O") meet IQA requirements, and (b) correction of disseminated influential information that does not appear to meet statutory and OMB information quality requirements.

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[1] Treasury and General Government Appropriations Act for FY 2001, Pub. L. No. 106-554 § 515, 114 Stat 2763 app. C, 44 U.S.C. § 3516 note (2014).
[2] http://www.cpsc.gov/en/Research--Statistics/Information-Quality-Guidelines/ (last accessed March 13, 2014).
[3] Office of Management and Budget Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002).

November 12 Letter at 1. You specify that the information that is the subject of your request is (A) "statements disseminated in an April 12, 2013 recall announcement" (April 2013 press release)[4] and (B) a statement contained in a July 25, 2012 news release (July 2012 press release).[5] November 12 Letter at 2. Because you request correction of information that is the subject of an ongoing adjudicative proceeding, your request for correction is denied.

I. Your Request For Correction Is Improper Because It Seeks Correction Of Information At Issue In An Ongoing Adjudicative Proceeding

Both the April 2013 press release and July 2012 press release state accurately staff's position that Buckyballs and Buckycubes are defective and hazardous. Further, both press releases explain that the question of whether the products are defective and hazardous is being litigated in an adjudicative proceeding. See April 2013 press release ("In July 2012, CPSC staff filed an administrative complaint against Maxfield & Oberton"); July 2012 press release (announcing "CPSC Sues Maxfield & Oberton" in the headline, and further stating "staff filed an administrative complaint today . . . alleging that Buckyballs and Buckycubes contain a defect" and that "CPSC staff seeks the remedies outlined in the complaint"). Both press releases also provide an internet link to the Complaint in which staff alleges that Buckyballs and Buckycubes are defective and hazardous under the CPSA. Because the staff's statements are set forth in a clear context, the press releases are objective and accurate. *See* OMB Guidelines § V.3.a, 67 Fed. Reg. at 8459 ("'Objectivity' . . . involves whether the information is presented within a proper context."). To the extent you are requesting a correction of staff's legal theory in the adjudicative proceeding, such requests are not appropriate subjects for a request for correction under the IQA. *See* OMB Guidelines § V.8, 67 Fed. Reg. at 8460 (defining "dissemination" to exclude "adjudicative processes").[6] Mr. Zucker has ample opportunity to probe staff's legal theories in the administrative litigation rather than through the IQA process as his request appears to do.

Similarly, your request for "metrics" or "data" regarding the legal question of whether Buckyballs and Buckycubes contain a defect that presents a substantial product hazard is not a proper request for correction under the IQA. To the extent there are "metrics" or "data" for the legal definitions of defect and substantial product hazard, they are found in the CPSA and Commission regulations. Staff's legal theory of why Buckyballs and Buckycubes are defective

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[4] *Available at* http://www.cpsc.gov/en/Recalls/2013/Six-Retailers-Announce-Recall-of-Buckyballs-and-Buckycubes-High-Powered-Magnet-Sets/ (last accessed March 13, 2014).

[5] *Available at* http://www.cpsc.gov/en/Newsroom/News-Releases/2012/CPSC-Sues-Maxfield--Oberton-Over-Hazardous-Buckyballs-and-Buckycube-Desk-Toys-Action-prompted-by-ongoing-harm-to-children-from-ingested-magnets-/ (last accessed March 13, 2014).

[6] Nor is any decision by the Presiding Officer or the Commission in the adjudicative proceeding subject to challenge under the IQA. *See* OMB Guidelines, 67 Fed. Reg. at 8454 ("The exemption from the definition of 'dissemination' for 'adjudicative processes' is intended to exclude, from the scope of these guidelines, the findings and determinations that an agency makes in the course of adjudications involving specific parties. There are well-established procedural safeguards and rights to address the quality of adjudicatory decisions and to provide persons with an opportunity to contest decisions. These guidelines do not impose any additional requirements on agencies during adjudicative proceedings and do not provide parties to such adjudicative proceedings any additional rights of challenge or appeal.").

and hazardous is available in staff's Complaint, which both press releases link to, and other public filings, and the merits of those assertions will be litigated in that adjudicative proceeding. CPSC staff's non-public legal theories are not available under the IQA, the OMB Guidelines, or the CPSC Guidelines. *See* OMB Guidelines § V.8, 67 Fed. Reg. at 8460 (defining "dissemination" to exclude "adjudicative processes"); CPSC Guidelines ("CPSC's Guidelines do not apply to . . . [o]ther materials specifically exempted in the OMB guidelines"). In short, you may not obtain discovery in the adjudicative proceeding through the IQA process. *See* OMB Guidelines, 67 Fed. Reg. at 8454 ("These guidelines do not impose any additional requirements on agencies during adjudicative proceedings and do not provide parties to such adjudicative proceedings any additional rights of challenge or appeal.").

Because your request asks that we address matters that are the subject of pending litigation and because the IQA does not offer an appropriate means to respond to such a request, your request for correction is denied.

II. CPSC Staff Need Not Reach Your Arguments That Craig Zucker Is An Affected Person Or That The Information For Which You Seek Correction Is Influential Information

The CPSC Guidelines provide an administrative process to request correction of information that "is designed to address the genuine and valid needs of affected persons." You claim that "CPSC's information quality violations and wrongful dissemination drove M&O, Mr. Zucker's former employer, out of business. Therefore, Mr. Zucker is an 'affected person' entitled to seek and obtain IQA correction." November 12 Letter at 2. Because the matters at issue here are the subject of pending litigation and therefore are not appropriately within the IQA ambit, CPSC need not reach your argument that Mr. Zucker is an affected person with regard to the information for which you have requested correction. However, we note that the April 2013 press release, upon which four out of your five requests for correction are based, was issued more than three months after M&O filed its certificate of cancellation in December 2012. Therefore it is impossible for the April 2013 press release to have driven "M&O, Mr. Zucker's former employer, out of business," as you claim. November 12 Letter at 2. Nor do you explain how the one sentence for which you request correction in the July 2012 press release "drove M&O . . . out of business." *Id.*

For similar reasons, we need not reach your assertion that your request for correction pertains to "influential information," such that "higher standards of transparency and reproducibility must be met." November 12 Letter at 3; CPSC Guidelines. The CPSC Guidelines underscore that information qualifying as "influential" represents a small percentage of the information CPSC disseminates. Indeed, the Guidelines specifically state that "[m]ost of the information disseminated by CPSC does not fall under OMB's definition of 'influential.'" The Guidelines state further that "CPSC's staff and contractor technical reports related to engineering, health science, or hazard analysis issues potentially" fit the definition of influential. Staff notes that you have not requested correction of staff technical reports. Instead, you have requested correction of statements made in press releases relating to an adjudicative proceeding filed against M&O. Thus, although your request fails as a threshold matter because the request

pertains to information that is the subject of an administrative proceeding, we note that under CPSC Guidelines higher standards of transparency and reproducibility apply in only very limited circumstances.

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Under the CPSC Guidelines you have the right to submit an appeal to the Office of the Executive Director within 30 calendar days of receipt of this letter. Please see the procedures for appeal described in the CPSC Guidelines.

Sincerely,

George A. Borlase