

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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| _____) | CPSC Docket No. 12-1 |
| In the Matter of) | CPSC Docket No. 12-2 |
|) | CPSC Docket No. 13-2 |
| MAXFIELD AND OBERTON) | |
| HOLDINGS, LLC) | Hon. Dean C. Metry |
| and) | Administrative Law Judge |
| CRAIG ZUCKER, individually and as) | |
| officer of MAXFIELD AND OBERTON) | |
| HOLDINGS, LLC) | |
| and) | |
| ZEN MAGNETS, LLC) | |
| STAR NETWORKS USA, LLC) | |
|) | |
| Respondents.) | |
| _____) | |

MEMORANDUM IN SUPPORT OF COMPLAINT
COUNSEL’S MOTION FOR LEAVE TO TAKE DEPOSITIONS

Complaint Counsel respectfully seeks leave pursuant to 16 C.F.R. § 1025.35 to take the depositions upon oral examination of three former Maxfield & Oberton (“M&O”) employees, one human factors consultant used by M&O, one additional employee each from Respondents Zen Magnets LLP (“Zen”) and Star Networks USA, LLC (“Star”), and six expert witnesses identified by the Respondents in response to discovery requests. For the reasons stated in this Memorandum, the Motion should be granted.

The rules permit depositions of parties, “including the agents, employees, consultants, or prospective witnesses of that party,” upon leave of the Presiding Officer. 16 C.F.R. § 1025.35(a). Here, Complaint Counsel is seeking leave to take depositions of individuals who are central to, or have important information about, the issues raised by the parties in this

proceeding. Specifically, Complaint Counsel seeks leave to take the depositions of the following individuals:

Former M&O Employees

Reid Synenberg is identified by Respondent Zucker as the former Head of Operations at M&O from approximately May 2011 to December 2012 (when M&O filed dissolution papers). Respondent Zucker's Answers to Complaint Counsel's First Set of Interrogatories ("Zucker Interrogatory Responses") at 3. Mr. Synenberg is identified by Mr. Zucker as having "knowledge regarding the design and development of the Subject Products," *id.* at 5, and as being "involved in creating, designing, and manufacturing any and all versions or iterations of the packaging, labels, warnings, and instructions that accompanied the Subject Products," *id.* at 7-8, 11. According to Mr. Zucker, Mr. Synenberg also participated in the "marketing, advertising and/or promotion of the Subject Products," and also was involved in creating and maintaining the "getbuckyballs.com," "magnetsafety.com" and "saveourballs.net" web sites. *Id.* at 8, 15. As such, Mr. Synenberg is a crucial fact witness, not only regarding the design and marketing of Buckyballs, but also regarding the packaging and warnings that accompanied the Subject Products at various times.

Bethel Costello is identified by Respondent Zucker as M&O's former head of compliance and wholesale customer service at M&O from 2010 to December 2012. *Id.* at 3. Like Mr. Synenberg, she was involved the "marketing, advertising and/or promotion of the Subject Products," *id.* at 8, and was "responsible for ensuring compliance by Retailers with the terms of M&O's Responsible Seller Agreements," *id.* at 14. As head of compliance, Ms. Costello should have detailed information on one of the key issues in this proceeding.

Alexis Lewites was M&O's Accounting Manager from approximately November 2010 to approximately November 2012. Zucker Interrogatory Responses at 8. As such she participated in the "marketing, advertising and/or promotion of the Subject Products," and along with Mr. Zucker, Mr. Bronstein and Ms. Costello was "responsible for ensuring compliance by Retailers with the terms of M&O's Responsible Seller Agreements." *Id.* at 8, 14.

Because Mr. Synenberg, Ms. Costello and Ms. Lewites are former senior employees at M&O, they have detailed information regarding the design and development of the Subject Products, the creation, design and manufacturing of the packaging, labels and warnings for the Subject Products, the marketing, advertising and promotion of the Subject Products, and the sale of the products, as well as information on M&O's compliance programs. On information and belief, Mr. Synenberg and Ms. Lewites also have knowledge regarding the finances of M&O. Because these are all crucial issues in the proceedings, the depositions of these former high-level M&O employees should be granted.¹

Former M&O Consultants and Proposed Experts

Carol Pollack-Nelson is a human factors consultant for M&O. In discovery, Mr. Zucker identified Dr. Pollack-Nelson as a person who participated not only in age grading and age labeling of the Subject Products, but also in package and warning design. Zucker Interrogatory Responses at 6, 8. Dr. Pollack-Nelson also participated the "marketing, advertising and/or promotion of the Subject Products, and was personally involved in drafting M&O's Responsible Seller Agreement. *Id.* at 8, 12. As such, Dr. Pollack-Nelson's testimony is important to address fully the issues which will be presented at this hearing to demonstrate that the Subject Products

¹ Complaint Counsel has filed separate subpoena requests for Mr. Synenberg, Ms. Costello and Ms. Lewites, pursuant to 16 C.F.R. § 1025.35(b), which controls depositions of nonparties. Although Section 1025.35(b) does not by its terms clearly require leave of Court to depose non-parties, out of an abundance of caution Complaint Counsel addresses these former employees in this Motion as well.

present a substantial product hazard, and leave to take her deposition should therefore be granted.²

Proposed M&O Expert Witnesses

M&O has identified three proposed expert witnesses: James M. Miller, P.E., Ph.D., Miller Engineering; Mr. Gene Rider, Rider Technologies; and John F. Morrall, III, Ph.D., Morrall Economics. To date, M&O has not identified the issues these witnesses will address, but Complaint Counsel believes that they will provide testimony on the overall safety and utility of the Subject Products. Because the expert opinions of these witnesses relate directly to significant issues in the case, leave to take their depositions should be granted.

Zen Employee Eric Sigurdson

Eric Sigurdson, who identifies himself on LinkedIn as the Operations Manager at Zen Magnets, is the only Zen employee other than founder Shihan Qu whose identity is known to Complaint Counsel. He is identified in Zen's discovery responses (albeit with his last name blanked out) as dealing not only with customer communications, but also with "day to day operational matters, such as customer service, fulfillment, and shipping logistics." Respondent Zen Magnets, LLC's Responses to Complaint Counsel's First Set of Interrogatories at 2-3. Because of Mr. Sigurdson's intimate involvement with all aspects of Zen's business practices and customer communications, leave to take his deposition should be granted.

Star Founder and Owner David Adel

Star co-founder and owner David Adel is identified as "involved with Star Networks since the company began selling [the Subject Products] in December 2011," and as the individual along with founder Daniel Peykar who "deal[s] with most aspects of the business."

² In addition to seeking leave to take the deposition of Dr. Pollack-Nelson in this Motion, Complaint Counsel is filing separately a subpoena request for her testimony and documents. 16 C.F.R. § 1025.35(b),

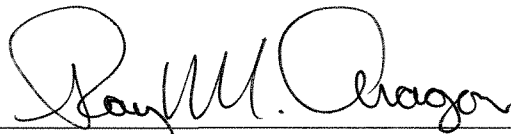
Star Networks, LLC's Responses to Complaint Counsel's First Set of Interrogatories at 1. Mr. Adel is also identified as knowledgeable about product design and development, age grading and packaging, and warning design. *Id.* at 4-5, 8. As co-founder and owner involved in all aspects of Star's business, Mr. Adel's testimony is both appropriate and necessary for a full review of the issues in this action, and therefore leave to take his deposition should be granted.

Proposed Zen and Star Expert Witnesses

Zen and Star have identified three proposed expert witnesses: Anthony J. Pelletier, Ph.D., The Bishop's School; Boyd Edwards Ph.D., Utah State University; and David A. Richter, Ph.D., Western Michigan University. Each of these witnesses is expected to discuss the utility, use, and safety of the Subject Products. Because the opinions of these witnesses is expected to relate to central issues in the case, leave to take their depositions should be granted.

In summary, Complaint Counsel seeks leave to take these depositions to develop evidence directly pertinent to the issues before this Court, and has identified the witnesses above as necessary to accomplish that goal. For the reasons stated herein, Complaint Counsel respectfully requests that the motion be granted.

Respectfully submitted,



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