**UNITED STATES OF AMERICA**
**CONSUMER PRODUCT SAFETY COMMISSION**

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| In the Matter of | ) | |
| | ) | DOCKET NUMBERS: |
| MAXFIELD AND OBERTON HOLDINGS, LLC) | ) | CPSC Docket No. 12-1 |
| AND | ) | CPSC Docket No. 12-2 |
| ZEN MAGNETS, LLC | ) | |
| | ) | Hon. Parlen L. McKenna |
| Respondents. | ) | |

**NOTICE OF REQUEST FOR CONSOLIDATION OF CPSC DOCKET NUMBERS 12-1 AND 12-2 BY AGENCY AND ORDER FOR RESPONDENT ZEN MAGNETS' RESPONSE**

The United States Consumer Product Safety Commission (CPSC) moved to consolidate CPSC Docket Numbers 12-1 and 12-2 on September 20, 2012. (See Attached Motion). CPSC requests the cases be consolidated pursuant to 16 C.F.R. § 1025.19 because the above named proceedings involve similar issues. CPSC Docket Number 12-1 involves "high-powered, small rare earth magnets" that are distributed under the brand names Buckyballs® and Buckycubes®. CPSC Docket Number 12-2 involves "high-powered, small rare earth magnets."

Since the above named CPSC cases are assigned to two different administrative law judges, the Acting Chief Administrative Law Judge will render the decision whether the cases will be consolidated. In accordance with 16 C.F.R. § 1025.23(c), a party has ten (10) days after service of a motion to respond. However, the Motion to Consolidate was only served on the respondent in CPSC Docket Number 12-1 (Maxfield and Oberton Holdings, LLC). Therefore, the undersigned is attaching the Motion to Consolidate to

this Notice and providing Respondent Zen Magnets, LLC (CSPC Docket Number 12-2) with a copy of the Motion. Respondent Zen Magnets, LLC must respond to the Motion to Consolidate within ten (10) days of service of this Notice in accordance with the regulations. Respondent Maxfield and Oberton Holdings, LLC filed their response to the Motion to Consolidate on September 28, 2012.

**SO ORDERED.**

Hon. Parlen L. McKenna
Acting Chief Administrative Law Judge
United States Coast Guard

Done and Dated: October 5, 2012 at
Alameda, California

# ALJ ATTACHMENT:

# AGENCY'S MOTION TO CONSOLIDATE

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

**COMPLAINT COUNSEL'S MOTION TO CONSOLIDATE PROCEEDINGS**

Complaint Counsel for the U.S. Consumer Product Safety Commission ("CPSC") has initiated adjudicative proceedings against Maxfield and Oberton Holdings, LLC ("M&O") (CPSC Docket No. 12-1) and Zen Magnets, LLC ("Zen") (CPSC Docket No. 12-2) requesting that the CPSC determine that high-powered, small rare earth magnets (the "Subject Products") imported and distributed by M&O and Zen present a substantial product hazard as defined in section 15(a)(2) of the Consumer Product Safety Act, 15 U.S.C. § 2064(a)(2).

Complaint Counsel moves to consolidate Docket 12-1 and Docket 12-2 and have the matters heard before this Court pursuant to Commission Regulations at 16 C.F.R. Part 1025.19 because the proceedings "involve similar issues" that can be resolved more consistently and efficiently in consolidated proceedings than in separate proceedings. The facts and rationale supporting consolidation are set forth in the attached Memorandum of Points and Authorities in Support of Complaint Counsel's Motion to Consolidate Proceedings.

Wherefore, Complaint Counsel requests that the Presiding Officer grant this motion and consolidate these two administrative matters.

Respectfully submitted,

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF COMPLAINT COUNSEL'S MOTION TO CONSOLIDATE PROCEEDINGS**

On July 25, 2012, Complaint Counsel for the U.S. Consumer Product Safety Commission ("CPSC") initiated this adjudicative proceeding against Maxfield and Oberton Holdings, LLC ("M&O" or "Respondent") and requested that the Commission determine that high-powered, small rare earth magnets imported and distributed by Respondent under the brand names Buckyballs® and Buckycubes® ("M&O Products") contain a defect that presents a substantial product hazard under section 15(a)(2) of the Consumer Product Safety Act, 15 U.S.C. § 2064(a)(2). Complaint Counsel further requested that the Commission order, among other remedies, that M&O cease importation and distribution of the Subject Products and offer consumers a refund.

On August 6, 2012, Complaint Counsel filed an administrative complaint against Zen Magnets, LLC ("Zen") and requested that the Commission determine that high-powered, small rare earth magnets imported and distributed by Respondent under the brand name Zen Magnets Rare Earth Magnetic Balls ("Zen Magnets" or "Zen Products") contain a defect that presents a substantial product hazard under section 15(a)(2) of the Consumer Product Safety Act. *See*

CPSC Docket No. 12-2. Commission Regulations at 16 C.F.R. Part 1025 govern both proceedings. *See* 16 C.F.R. § 1025.1. Buckyballs, Buckycubes and Zen Magnets are referred to herein as the "Subject Products".

On September 18, 2012, Complaint Counsel filed an Amended Complaint in the instant matter, which included the original count alleging a violation of 15 U.S.C. §2064(a)(2), and added a second count alleging that the Subject Products fail to comply with ASTM 963-08 and ASTM 963-11 (the "Toy Standard") in violation of 15 U.S.C. §2064(a)(1). On September 20, 2012, Complaint Counsel filed an Amended Complaint against Zen Magnets, LLC. In the Zen Magnets Amended Complaint, Complaint Counsel included the original count alleging a violation of 15 U.S.C. § 2064(a)(2), and added a second count alleging that the rare earth products sold by Zen Magnets fail to comply with the Toy Standard and thus violate 15 U.S.C. §2064(a)(1).

Commission Regulations at 16 C.F.R. § 1025.19 provide that, "two or more matters which have been scheduled for adjudicative proceedings and which involve similar issues may be consolidated for the purposes of hearing or Commission review." The Regulations further provide that "the proceedings may be consolidated to such extent and upon such terms as may be proper." 16 C.F.R. § 1025.19. *See also* Preamble to 16 C.F.R. Part 1025, 45 Fed. Reg. 29206, 29207 (May 1, 1980) (attached as Exhibit A) ("The granting of broad discretion to the Presiding Officer can be seen throughout the provisions of these rules:").[1] The Regulations thus provide

[1] Although not controlling, federal case law also gives this Court broad discretion to consolidate the proceedings. *See Thomas Inv. Partners, Ltd. v. United States*, 444 Fed. Appx. 190, 193 (9th Cir. 2011) ("The court appropriately determined that 'the saving of time and effort consolidation would produce' outweighed 'any inconvenience, delay, or expense that it would cause.' [internal citations omitted])." Although this proceeding is governed by Commission Regulations and not the Federal Rules of Civil Procedure ("FRCP"), "the Commission expects that interpretations of

that proceedings involving similar issues, but also some party-specific issues, may be consolidated.

The cases against M&O and Zen contain multiple similar issues, making consolidation appropriate. Both the M&O Products and the Zen Products consist of aggregated masses of small, high-powered rare earth magnets that can cause serious injury if ingested. The Subject Products share, at a minimum, the following similarities: (1) they are nearly identical in terms of physical size, appearance, magnetic properties, and metallic composition; (2) they exhibit nearly identical behavior when manipulated; (3) they have the potential to cause severe intestinal injuries if ingested; (4) children are likely to interact with both Subject Products in a way that puts the children at risk to ingest the magnets; and (5) the hazard presented from swallowing the Subject Products is a hidden hazard because parents and caregivers often cannot determine that the magnets have been swallowed until intestinal injury has already occurred. Because similar issues are presented in both the M&O and Zen cases, many of the issues to be litigated in this proceeding will apply equally to M&O and Zen.

Moreover, Complaint Counsel anticipates that some of its expert witnesses will be used in both proceedings and will provide testimony on points common to both matters. Counsel for Respondents M&O and Zen will likely seek to depose the same fact witnesses at the agency, augmenting the rationale for consolidation. Consolidation will allow for the most efficient conduct of discovery and, if necessary, streamlining of hearings and, ultimately, trial proceedings.

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these Rules by the Presiding Officer will be guided by principles stated and developed in case law interpreting the Federal Rules of Civil Procedure." *See* Preamble to 16 C.F.R. Part 1025, 45 Fed. Reg. 29206, 29207 (May 1, 1980).

Consolidation would also avoid duplication of effort and would expedite the resolution of both administrative proceedings. Consolidation would minimize the possibility of inconsistent adjudications of common factual and legal issues, limit expenditures associated with litigating the matters in two separate forums, and lower expenditure of time and resources for the parties, witnesses, and the Court.[2] Consolidation of the matters would be beneficial to both M&O and Zen, and Complaint Counsel submits that neither Respondent would suffer prejudice through consolidation of the proceedings.[3]

Commission regulations give the Court broad latitude to order consolidation at any time during the proceedings and to determine which issues should be considered jointly. *See* 16 C.F.R. § 1025.19 ("the proceedings may be consolidated to such extent and upon such terms as may be proper.").[4] Complaint Counsel requests at this juncture that the court order both matters be consolidated before this court, and requests that further matters be consolidated as the parties may request and as the court deems appropriate. Consolidation of these matters before this court would provide a more and efficient and economical forum for resolution of two administrative

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[2] Under the standard set forth in *Arnold v. Eastern Airlines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982), this case is an excellent candidate for consolidation:

> The critical question for the district court in the final analysis was whether the specific risks of prejudice and possible confusion were overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

[3] Complaint Counsel is aware that Commission Regulations at 16 C.F.R. § 1025.23(c) provide opposing counsel ten days to oppose this Motion, and is amenable to allowing Respondents' counsel the full ten days to file any opposition if they so request. However, this Court may grant consolidation even if Respondents oppose. *See, e.g., Gonzalez-Quiles v. Cooperativa De Ahorro Y Credito De Isabela*, 250 F.R.D. 91, 93 (D.P.R. 2007) ("the fact that one or all of the parties object, or that the issue of consolidation is raised by the court *sua sponte*, is not dispositive. The important question is whether the cases involve a common question of law or fact.").

[4] *See also* FRCP 42(a)(1) (allowing for the consolidation of "any or all matters at issue in the actions"); *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 27 (E.D.N.Y. 2001) (a court may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue in those claims in a class action proceeding).

matters and would avoid having two courts in separate jurisdictions resolve the same issues in duplicative proceedings.

Complaint Counsel hereby moves to consolidate the Zen proceeding (CPSC Docket 12-2) with the instant proceeding pursuant to § 16 C.F.R. § 1025.19 and have the matters heard by this court. Complaint Counsel respectfully requests that the Court consider this motion at the prehearing conference scheduled to be held on September 25, 2012. *See* 16 C.F.R. §1025.21 ("at the prehearing conference any or all of the following shall be considered: . . . motions for consolidation of proceedings").

Respectfully submitted,

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Seth Popkin, Trial Attorney
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# EXHIBIT A

# PREAMBLE TO 16 C.F.R. PART 1025

**CONSUMER PRODUCT SAFETY COMMISSION**

**16 CFR Part 1025**

**Rules of Practice for Adjudicative Proceedings**

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Final rules.

**SUMMARY:** In this document, the Consumer Product Safety Commission sets forth its final Rules of Practice for Adjudicative Proceedings, which shall govern the procedure in adjudicative proceedings arising under the Consumer Product Safety Act, the Flammable Fabrics Act, and in such other proceedings as the Commission may designate.

**EFFECTIVE DATE:** May 1, 1980.

**FOR FURTHER INFORMATION CONTACT:** Winston M. Haythe, Directorate for Compliance and Enforcement, Consumer Product Safety Commission, Washington, D.C. 20207, Telephone No. (301) 492–6633.

**SUPPLEMENTARY INFORMATION:** On July 23, 1974 the Consumer Product Safety Commission published in the Federal Register (39 FR 26843) proposed and interim rules of practice for adjudicative proceedings and received comments on that proposal. Thereafter, on June 21, 1977 the Commission published in the Federal Register (42 FR 31431) a revised set of proposed and interim rules of practice for adjudicative proceedings, 16 CFR Part 1025. The revisions in the second proposal were made in light of the comments received on the first proposal, as well as the experience gained by the Commission staff in trying cases pursuant to the initially published rules. The proposal of June 21, 1977 invited public comment by July 21, 1977. The comment period was extended until August 22, 1977 at the request of several interested persons who were unable to prepare comments by July 21 (42 FR 29089, August 2, 1977).

A basic intent of the Commission in the development of these final Rules of Practice has been to promulgate a single set of procedural rules which can accommodate both simple matters and complex matters in adjudication. The Commission believes this objective has been accomplished in these Rules. For this reason, the Commission has concluded that it will be unnecessary, and confusing, to have separate rules to govern procedures in adjudications to assess civil penalties. Therefore, the Commission is simultaneously revoking its interim Rules of Practice for Expedited Proceedings ("Expedited Rules") (16 CFR Part 1028) and withdrawing the proposed rule (45 FR 27923, April 25, 1980).

As discussed in the notice revoking the Expedited Rules, the three public comments on 16 CFR Part 1028 stated that, among other things, procedural rights (e.g., discovery) would be limited in expedited proceedings for the assessment of civil penalties. Since the Commission is revoking the Expedited Rules and will conduct all administrative proceedings for the assessment of civil penalties under these final Rules of Practice, the concerns expressed by the public comments have been rendered moot. Thus, the final Rules of Practice, which are patterned on the Federal Rules of Procedure, will be used in all administrative matters, including civil penalty assessment hearings, except in those instances where the matter of a civil penalty is presented to a United States District Court in conjunction with an action by the Commission for injunctive or other appropriate relief. When the Commission proceeds against a person for injunctive or other appropriate relief in a United States District Court, the Commission may, if it so chooses, combine the assessment of a civil penalty with the injunctive application into a single case to be heard by the Court. However, the Commission retains the right to institute an administrative proceeding for the assessment of a civil penalty separate and distinct from any court action for an injunction against the same party. In either instance every affected party will be afforded the full panoply of procedural due process rights as guaranteed by the Constitution.

## Discussion of Major Comments

### *Identification of Comments*

In response to the Commission's proposal of June 21, 1977 comments were received from manufacturers, directly and through trade associations, an association of retailers and a law school-affiliated public interest organization.

In addition to the public comments on the proposed rules, a number of suggestions were made by members of the Commission staff, based upon their individual experiences in using the proposed rules in the course of administrative hearings.

As the "Section-By-Section Analysis of Comments" will show, the Commission has accepted some suggestions contained in the comments, thereby either amending or deleting portions of the proposed rules, and has rejected others.

### *Commission Objectives in Development of Rules*

The Commission has been guided by certain overall objectives in drafting rules which are to govern matters in adjudication. The primary objective is to achieve a just, speedy and inexpensive determination based upon the evidence, with a uniformity of treatment in all adjudications. Openness is another objective. From its inception in 1973, the Commission has conducted its regulatory activities in full public view and has encouraged, to the maximum extend, meaningful public participation in its regulatory efforts. These final Rules reflect the Commission's openness policy by requiring that matters in litigation be transacted in sessions which are open to the public to the fullest extent possible.

To encourage meaningful public participation in the adjudicative process, the Commission has provided in these Rules for a person to appear as a "participant." A participant shall have the privilege of participating in the proceedings to the extent of making a written or oral statement of position, and may file proposed findings of fact and conclusions of law, as well as a post hearing brief, with the Presiding Officer. See § 1025.17(b). A participant's statements shall be considered but not accorded the status of probative evidence. A participant may also participate in any appeal of a matter by complying with §§ 1025.53–54. In exchange for the limited participation just described, those provisions relieve participants from the necessity of complying with the more stringent legal requirements which are imposed on parties with full litigating rights. Additionally, if a member of the public, who is not a named party to the proceedings, desires to participate in the adjudication with the full range of litigating rights of any other party, one can be an "intervenor" if the requirements for intervenor status set forth in § 1025.17 are met.

Another major objective of the Commisaion in the development of these rules has been to insure that all matters in adjudication move forward in a timely manner because of the safety issues involved in the Commission's enforcement actions. Thus, while affording adequate protection to the Constitutional due process rights of every affected party, the Commission has imposed certain time restrictions within these Rules. For example, all discovery must be completed within 150 days after issuance of a complaint,

unless otherwise ordered by the Presiding Officer in exceptional circumstances. See § 1025.31(g).

These rules have been designed to accommodate both the simplest and the most complex types of cases. The vehicle for achieving such flexibility within a single set of adjudicative rules is to place broad discretion in the Presiding Officer who hears a matter in controversy. The granting of broad discretion to the Presiding Officer can be seen throughout the provisions of these rules.

Except as otherwise provided, these Rules have been patterned on the Federal Rules of Civil Procedure. Therefore, legal practitioners who are familiar with the United States court system will already be familiar with most, if not all, procedural requirements of the Commission. Additionally, the Federal Rules of Evidence are applicable to proceedings before the Commission, except as they may be relaxed by the Presiding Officer if the ends of justice will be better served in so doing. See § 1025.43(a).

The major overall objective of the Commission in developing these Rules has been to ensure that matters in adjudication be carried out in furtherance of the Commission's Congressional mandate "to protect the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. 2051(b)(1). The Commission believes that these final Rules of Practice for Adjudicative Proceedings achieve the Commission's objectives for matters in administrative litigation.

*Section-by-Section Analyses of Comments*

Significant changes have been made throughout these Rules as a result of public comments, staff recommendations, and/or upon the Commission's own initiative. The principal issues raised by the comments and the Commission's conclusions are as follows:

1. *Section 1025.3(e).* Two comments suggested that the definition of the term "motion" be amended to make clear that only those persons with an interest in the subject of the motion would be entitled to respond to it. Section 1025.3(e) limits responses to motions to parties in a proceeding. Section 1025.3(f) defines the term "party" to mean any person named in the proceedings subject to the Rules or any intervenor. Section 1025.17(d) sets forth factors which a Presiding Officer shall consider in ruling on petitions to intervene, e.g., the nature and extent of the property, financial or other substantial interest in the proceedings of the person seeking to intervene. Section 1025.17(a) provides that once granted intervenor status, such intervenor shall have the full range of litigating rights afforded to any other party. Since § 1025.3(e) already limits responses to parties to the proceedings, the Commission's view is that the commenters objective has already been achieved and no further clarification within § 1025.3(e) is necessary.

2. *Section 1025.3(f).* One comment requested that the term "Presiding Officer" be redefined to include only a member of the Commission or an administrative law judge. The Commission has decided to revise the definition of the term "Presiding Officer" to exclude Commissioners. Without this change a Commissioner could review on appeal the determinations he/she made during the hearing and the initial decision he/she prepared.

The Commission has decided it is better to exclude a member of the Commission from serving as a Presiding Officer than to exclude the Commissioner who serves as a Presiding Officer from participating as a member of the Commission in an appeal. If a Commissioner presides at an adjudication, prepares the initial decision and is excluded from the appellate process, the other Commissioners might nonetheless be influenced by the fact that a fellow Commissioner rendered the decision. In addition, there may be the public perception that that may happen. Also, by excluding the Commissioner that presided, the possibility of a tie Commission vote is greatly enhanced. To avoid these difficulties the definition has been changed to exclude members of the Commission.

3. *Sections 1025.11 (a) and (b).* Although no public comment addressed these provisions which concern the commencement of proceedings, the Commission has amended the language in these sections to provide that adjudicative proceedings will be commenced, after the Commission has determined that a *prima facie* case has been established, by the issuance of a complaint bearing the signature of the individual delegated responsibility to sign the Complaint by the Commission. As proposed, §§ 1025.11 (a) and (b) provided that a complaint must be issued "by the Commission" and "signed by the Secretary on the seal of the Commission."

The final provision reflects the fact that the burden of proof in an administrative proceeding is on the Directorate for Compliance and Enforcement and to avoid the appearance that the Commission is both prosecuting and deciding each adjudication.

4. *Section 1025.11(b)(3).* As proposed, this section directs that the documents that accompanied the staff's recommendation to the Commission to initiate the proceeding, and that are obtainable under the Freedom of Information Act, 5 U.S.C. 552, be attached to the complaint. Two comments stated that this provision could authorize the attachment of trade secrets and other confidential commercial information to a complaint. The concerns expressed and suggestions raised in those comments are now moot since § 1025.11(c) has been changed in the final section to provide that only a list and summary of the documentary evidence shall be attached to the complaints.

5. *Section 1025.11(c) (§ 1025.11(d) as proposed).* This section provides for the prompt publication in the Federal Register of the complaint after it is issued. One comment stated that a complaint should not be published in the Federal Register as provided in proposed § 1025.11(d) and two other comments expressed concern that a complaint could conceivably be published before a respondent had knowledge of the complaint. Although it is theoretically possible that a complaint could be published in the Federal Register prior to completion of service, the Commission believes such an occurrence is unlikely because of the necessary delay in publication resulting from the preparation of transmitted documents at the Commission and the time required at the Office of the Federal Register to prepare the complaint for publication. Despite the risk of delayed service upon the respondent, the Commission believes prompt publication is important, especially in view of possible class actions under § 1025.18, as well as to give notice of the complaint to potential participants or intervenors under § 1025.17.

6. *Section 1025.13.* Three comments object to the section authorizing the Presiding Officer to allow appropriate amendments and supplemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay. The commenters expressed concern that amendments to the administrative complaint could (1) alter the charges originally authorized by the Commission, thereby usurping the Commission's function, (2) allow extraneous issues to be introduced into an adjudication, and (3) hamper the respondent's ability to develop an adequate defense or conduct adequate

CERTIFICATE OF SERVICE

I hereby certify that I have provided on this date, September 20, 2012, the attached Motion to Consolidate Proceedings, Memorandum of Points and Authorities, and Proposed Order to the Secretary, the Presiding Officers, and all parties and participants of record in these proceedings in the following manner:

Original by hand delivery to the Secretary of the U.S. Consumer Product Safety Commission:
Todd A. Stevenson

Copy by certified mail and electronic mail to the Presiding Officer for *In the Matter of Maxfield and Oberton Holdings, LLC*, CPSC Docket No. 12-1:

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Courtesy Copies via first class mail and electronic mail:

The Honorable Dean C. Metry
Administrative Law Judge
Presiding Officer, CPSC Docket 12-2 (In the Matter of Zen Magnets, LLC)
U.S. Coast Guard
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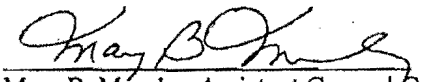

Mary B. Murphy, Assistant General Counsel
Complaint Counsel for
U.S. Consumer Product Safety Commission

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

ORDER

This matter having come before this Court on Complaint Counsel's Motion to Consolidate Proceedings, and upon consideration of the Motion and other pleadings of record herein, it is by this Court, this ___ day of _____, 2012,

ORDERED that the adjudicative proceedings of CPSC Docket Nos. 12-1 and 12-2 are consolidated before this Court for such purposes as the Court may deem appropriate.

The Honorable Bruce T. Smith
Presiding Officer