

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	CPSC DOCKET 12-1
)	CPSC DOCKET 12-2
)	CPSC DOCKET 13-2
MAXFIELD AND OBERTON HOLDINGS, LLC)	(Consolidated)
ZEN MAGNETS, LLC)	
STAR NETWORKS USA, LLC)	Hon. Dean C. Metry
)	Administrative Law Judge
Respondents.)	

**MEMORANDUM IN SUPPORT OF RESPONDENT CRAIG ZUCKER'S FIRST
APPLICATION FOR LEAVE TO TAKE DEPOSITIONS (RE-FILED)**

Pursuant to 16 C.F.R. § 1025.35, Respondent Craig Zucker seeks leave to take depositions upon oral examination in defense of Complaint Counsel's allegations in the above proceeding.

On or about December 23, 2013, Respondent filed his First Application for Leave to Take Depositions. Upon filing of the Application, Complaint Counsel requested that, in lieu of identifying particular persons for deposition, counsel for Respondent identify topics for deposition and allow Complaint Counsel to identify witnesses to testify concerning those topics, analogous to a notice of deposition under Federal Rule of Civil Procedure 30(b)(6). At the request of Complaint Counsel, Respondent withdrew his Application, without prejudice to re-filing the Application or seeking the depositions of particular persons.

By letter dated March 25, 2014, counsel for Respondent provided Complaint Counsel with a list of topics for which he sought deponents to testify. A copy of the list of proposed topics provided to Complaint Counsel is attached hereto as Exhibit A.

Counsel for Respondents requested that Complaint Counsel respond to its request for deponents by close of business on April 1, 2014. Complaint Counsel has neither responded to the request, nor acknowledged that it is considering the request.

Accordingly, Respondent is re-filing his Application.

Section 1025.31 of Title 16 of the Code of Federal Regulations contains general provisions concerning discovery. Section 1025.31(c)(1) provides:

Parties may obtain discovery regarding any matter, not privileged, which is within the Commission's statutory authority and is relevant to the subject matter involved in the proceedings, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

16 C.F.R. § 1025.31(c)(1).

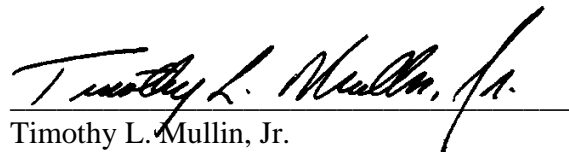
The list of proposed deponents is identical to the list of proposed deponents included in the original Application, with the exception of Acting Chairman Adler and Carolyn Manley. The proposed deponents consist of two categories of persons. First, Respondent seeks leave to depose some employees (and one former employee) of the U.S. Consumer Product Safety Commission ("CPSC") who were identified by Complaint Counsel as assisting in responding to Respondent's interrogatories, or who are identified in the public record as participating in the CPSC's investigation into aggregated masses of high-powered magnets.

Second, Respondent seeks leave to depose the expert witnesses designated by Complaint Counsel. Although Complaint Counsel has identified expert witnesses, Complaint Counsel has

not provided a substantive response to Respondent's interrogatory requesting the subject matter of each expert's testimony, the substance of the facts and opinions of each expert and a summary of the grounds for each expert's opinions.

Finally, Respondent seeks leave to depose Acting Chairman Adler on the issue of whether the Second Amended Complaint naming Respondent was properly authorized by the Commission.

The testimony of each of these persons is clearly relevant to the subject matter involved in this proceeding and within the scope of permissible discovery. Consequently, Respondent respectfully requests that his application be granted.



Timothy L. Mullin, Jr.
MILES & STOCKBRIDGE P.C.
100 Light Street
Baltimore, MD 21202
410-385-3641 (direct dial)
410-385-3700 (fax)
tmullin@MilesStockbridge.com

Co-Counsel for Respondent, Craig Zucker

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2014, a true and correct copy of the foregoing Memorandum in Support of Respondent Craig Zucker's First Application for Leave to Take Depositions (Re-Filed) was served on 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
Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
tstevenson@cpsc.gov

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 UA, LLC*, CPSC Docket No. 13-2:

The Honorable Dean C. Metry
U.S. Coast Guard
U.S. Courthouse
601 25th Street, Suite 508A
Galveston, TX 77550
Janice.M.Emig@uscg.mil

One copy by electronic mail (by agreement) 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
mmurphy@cpsc.gov

Jennifer C. Argabright, Trial Attorney
jargabright@cpsc.gov
Daniel Vice, Trial Attorney
dvice@cpsc.gov
Complaint Counsel

Division of Compliance
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

One copy by electronic mail (by agreement) 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

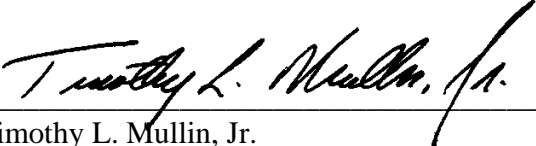
One copy by electronic mail (by agreement) to co-counsel for Craig Zucker:

Erika Z. Jones
Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006
ejones@mayerbrown.com

John R. Fleder
Hyman, Phelps & McNamara, P.C.
700 Thirteenth Street, N.W.
Suite 1200
Washington, DC 20005
jfleder@hpm.com

One copy by electronic mail (by agreement) to counsel for MOH Liquidating Trust:

Paul M. Laurenza
PLaurenza@dykema.com
Joshua H. Joseph
JJoseph@dykema.com
Dykema Gossett PLLC
Franklin Square Building
1300 I Street, N.W., Suite 300 West
Washington, DC 20005



Timothy L. Mullin, Jr.

Exhibit A

List of Topics for CPSC Witnesses

1. Warnings
 - a. How CPSC determines/evaluates the role of product warnings in the area of product safety.
 - b. Role of warnings under the FHSA.
 - c. Analysis of adequacy of the warnings on packages, instructions and carrying case for Buckyballs and Buckycubes.
 - d. Basis for allegation that no warnings could be devised that would effectively communicate the hazard associated with Buckyballs and Buckycubes so that they could be heeded and understood by consumers to reduce ingestions.
 - e. The effectiveness/role of choking warning labels for products for children 3-6 with small parts, marbles, and small balls.
 - f. Analysis of the value of product warnings and education to warn/alert consumers, including parents, about hazards associated with consumer products such as small balls, marbles, balloons, corded baby monitors, laundry pods, window coverings and button batteries.
 - g. Analysis of CPSC education and warning campaign for high powered magnets.
 - h. Comparison of CPSC education campaign for high powered magnets with laundry pods, window coverings, button batteries and corded baby monitors.

2. CPSC analysis of whether hazards associated with adult products that are dangerous for children can be warned against.

3. Risk Assessment
 - a. CPSC procedures for conducting risk assessment.
 - b. Analysis of difference in risks associated with Buckyballs and Buckycubes
 - c. Basis for determining preliminarily that Buckyballs are defective and a substantial product hazard.
 - d. Basis for determining preliminarily that Buckycubes are defective and a substantial product hazard.
 - e. Basis for allegation that Buckyballs and Buckycubes fail to operate as intended (i.e., for adults and not children).
 - f. Analysis of NEISS data with regard to high powered magnets.

4. Whether adult products that present a risk of injury to children render the product defective, and the basis for any conclusions.

5. Human Factors
 - a. Criteria used to determine whether Buckyballs and Buckycubes are children's products and the weight given to each of the statutory factors.
 - b. Basis for the allegation that Buckyballs and Buckycubes are intensely appealing to children due to their tactile features, small size and highly reflective, shiny, and colorful metallic coatings.
 - c. Basis for the allegation that Buckyballs and Buckycubes move in unexpected, incongruous ways.

- d. Basis for allegation that Buckyballs and Buckycubes can evoke awe and amusement among children, enticing them to play with the products.
 - e. Basis for allegation that the smoothness, uniqueness and soft snapping sound made by Buckyballs and Buckycubes makes them appealing to children.
 - f. Basis for allegation that design is defective because some parents and caregivers give or allow children to play with the products.
 - g. Basis for allegation that risk is neither obvious nor intuitive.
6. Basis for CPSC's economics evaluation and allegations in paragraphs 90 to 93 of the Second Amended Complaint
 - a. Evaluation of the products' utility.
 - b. Evaluation of the necessity of the products for consumers.
7. Analysis of impact on Maxfield and Oberton, LLC (M&O) if CPSC contacts retailers asking them to stop selling Buckyballs and Buckycubes prior to any formal finding.
8. Education
 - a. CPSC procedures for conducting and evaluating safety/education programs.
 - b. What components create an effective education and warning outreach program.
 - c. Responsibility of CPSC to educate consumers about product hazards.
 - d. Evaluation of the efficacy of M&O's safety program and Responsible Seller Agreement and Notices.
 - e. Evaluation of CPSC and Juvenile Products Manufacturers Association's education program for baby monitors.
 - f. Evaluation of M&O's magnet safety website.
 - g. Video news release and education program launched in November 2011.
9. Incidents
 - a. CPSC analysis of incidents and/or ingestions directly related to Buckyballs and Buckycubes.
 - b. Relation of number of products in the marketplace to incidents.
10. Consumer Responsibility
 - a. CPSC analysis of the role of adults in supervising children to minimize/prevent access to dangerous adult products.
11. Enforcement Efforts
 - a. Efforts by CPSC to prevent the sale of aggregated masses of high-powered, small rare earth magnets since the filing of the Complaint against M&O including enforcement efforts involving Amazon and competitors of M&O.
 - b. Basis for the settlement with Strong Force (Neocubes) where consumers merely were told to discard their high powered magnets.
 - c. Decision not to promote the Strong Force (Neocube) settlement on cpsc.gov or to issue a press release.
 - d. Basis for settlement with Baby Matters LLC (Nap Nanny) in June 2013 resulting in warnings to consumers to discard product.

- e. Negotiations with Barnes and Noble (who sold both Nanodots and Buckyballs) regarding the Buckyballs and Buckycubes recall in 2013.
- f. Content of the recall press release in 2013 with retailers and the approval process for that release.
- g. Negotiations with the 13 magnet manufacturers targeted in July 2012.
- h. Recalls with SCS Collectibles and Kringles Toys and Gifts.
- i. The Buckyballs press release dated July 25, 2012.

12. Children's Products

- a. Criteria for determining whether a product is a children's product.
- b. Application of criteria for determining whether a product is a children's product to Buckyballs and Buckycubes.
- c. Application of criteria for determining whether a product is a toy to Buckyballs and Buckycubes.
- d. Analysis of whether Buckyballs are children's products subject to ASTM F963
- e. Analysis of why CPSC agreed that if Buckyballs were relabeled and sold as adult products in 2010 they would be treated as adult products.
- f. Explanation of why CPSC issued a press release accepting M&O's relabeling of products and accepting safety program.
- g. Person with knowledge of the ASTM exception for magnets in hobby, craft and science kits.

13. Marketing and Advertising

- a. Basis for the allegation of effect of early advertising of Buckyballs on purchasing decisions or use by children diminishing warnings.
- b. Analysis of number of consumers who viewed/saw/heard of early advertising.
- c. Impact of any conflict with age grading of Buckyballs with early advertising.

14. Complaint

- a. The Commission vote (or lack thereof) to authorize amended complaint naming Mr. Zucker as a Respondent.
- b. Basis for designating that the Amended Complaint was signed "By Order of the Commission."

15. Public Statements

- a. Person with most knowledge about the approval of the Buckyballs recall press release dated April 12, 2013.
- b. Person with most knowledge about the basis for the following statements made by the CPSC.
 - i. "Great pt by Commissioner Adler that just one bad actor can impact the safety of 1000s of kids/consumers. #CPSC." Scott Wolfson's Twitter feed, November 13, 2013.
 - ii. "They're like a gunshot wound to the gut with no sign of entry or exit." Multiple news sources.
 - iii. "He dissolved Maxfield & Oberton," Wolfson says, and so the government needed to hold someone responsible for a recall. "We look at the domino effect,

to who was still standing,” he says. “We made a decision as an agency not to walk away from this case.” Inc Magazine, March, 2014.