

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
)	
MAXFIELD AND OBERTON HOLDINGS, LLC)	
)	
and)	CPSC Docket NO. 12-1
)	
CRAIG ZUCKER, individually, and as an officer)	
Of MAXFIELD AND OBERTON HOLDINGS,)	
LLC.)	
)	
)	
Respondents.)	

**RESPONDENT CRAIG ZUCKER’S MOTION TO COMPEL COMPLAINT
COUNSEL’S RESPONSES TO RESPONDENT’S FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS TO CONSUMER PRODUCT SAFETY
COMMISSION**

Pursuant to 16 C.F.R. § 1025.36, Craig Zucker (“Mr. Zucker” or “Respondent”) hereby moves the Presiding Officer for an order directing Complaint Counsel to answer Respondent’s Amended First Set of Interrogatories to Consumer Product Safety Commission, and in support states:

I. INTRODUCTION

This is an action under Section 15(d) of the Consumer Product Safety Act, 15 U.S.C. § 2064(d), which states in pertinent part:

(1) If the Commission determines (after affording interested parties, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f) of this section) that a product distributed in commerce presents a substantial product hazard and that action under this subsection is

in the public interest, it may order the manufacturer or any distributor or retailer of such product to provide the notice required by subsection (c) and to take any one or more of the following actions it determines to be in the public interest:

(A) To bring such product into conformity with the requirements of the applicable rule, regulation, standard, or ban or to repair the defect in such product.

(B) To replace such product with a like or equivalent product which complies with the applicable rule, regulation, standard, or ban or which does not contain the defect.

(C) To refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more

(i) at the time of public notice under subsection (c) of this section, or

(ii) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs).

Specifically, in this matter, Complaint Counsel is seeking “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™.” Second Amended Compl. at ¶ 1. Complaint Counsel is also seeking an order holding Respondent Craig Zucker responsible for the recall under the doctrine holding corporate officers responsible for criminal acts of corporations upheld in United States v. Dotterweich, 320 U.S. 277 (1943) and United States v. Park, 421 U.S. 658 (1975).

Every single Response of Complaint Counsel to Respondent’s First Set of Requests for Production of Documents is non-responsive.¹ The CPSC has taken actions that have forced M&O out of business, and now is using the power of the federal government to seek to hold Mr.

¹ A copy of Complaint Counsel’s Responses to Respondent’s First Set of Requests for Production of Documents accompanies this motion as **Exhibit A**.

Zucker individually responsible for paying for a recall based on unprecedented legal theory. Having done so, however, Complaint Counsel has failed to honor its obligations to respond fully to Respondent's discovery requests. Specifically, Complaint Counsel's Answers are evasive, improperly invoke certain privileges, and improperly shift the burden of discovery to Respondents. For the reasons more thoroughly discussed below, Respondent respectfully request that the Presiding Officer enter an order directing Complaint Counsel to answer Respondent's First Set of Requests for Production of Documents to Consumer Product Safety Commission. Respondent has a constitutional right to conduct a defense in the matter, and the rules permit broad discovery as part of conducting that defense. Complaint Counsel's attempt to respond only to the discovery it wants to answer has already put undue financial burden on both parties and should not be allowed.

II. ARGUMENT

A. When invoking the work-product doctrine or privilege a party must describe the information in detail sufficient to allow other parties to assess the applicability of the privilege.

A party may not rely on the work product doctrine to withhold a discovery where it fails to describe the withheld documents or information in detail sufficient to allow other parties to assess the applicability of the privilege. U.S. ex rel. Pogue v. Diabetes Treatment Centers of Am., Inc., 235 F.R.D. 521, 524 (D.D.C. 2006). Courts have specifically rejected one-sentence restatements of the privilege. Id. Every single Response to Respondent's Requests for Production of Documents invokes the attorney-client privilege, the attorney work product privilege or both. However, Complaint Counsel's Responses in no way provide sufficient information for Respondent to assess the applicability of the privileges, as required by the Rules. Indeed, Complaint Counsel's Responses are a mere one-sentence restatement of the privilege.

Additionally, Complaint Counsel has indiscriminately marked every document it produced as “confidential.” By doing so Respondent has no ability to determine what documents are actually confidential and thus his ability to use such documents in litigating this case is significantly problematic.

Based on the above, Respondents move to compel Complaint Counsel’s Responses to all Respondent’s Requests for Production of Documents.

B. 15 U.S.C. § 2055(a)(2) does not prohibit the disclosure of documents relevant in any administrative proceeding to which the CPSC is a party.

Complaint Counsel responses to numerous Requests² contain an objection on the grounds that the response encompasses information protected from disclosure by 15 U.S.C. § 2055(a)(2). However, 15 U.S.C. § 2055(a)(8) explicitly provides that:

The provisions of paragraphs (2) through (6) shall not prohibit the disclosure of information to other officers, employees, or representatives of the Commission (including contractors) concerned with carrying out this Act or ***when relevant in any administrative proceeding under this Act or in judicial proceedings to which the Commission is a party.*** Any disclosure of relevant information--

(A) in Commission administrative proceedings or in judicial proceedings to which the Commission is a party, or

(B) to representatives of the Commission (including contractors),

shall be governed by the rules of the Commission (including in camera review rules for confidential material) for such proceedings or for disclosures to such representatives or by ***court rules*** or orders, except that the rules of the Commission shall not be amended in a manner inconsistent with the purposes of this section.

15 U.S.C. § 2055 (emphasis added). In particular, 15 U.S.C. § 2055(a)(8)(B) dictates that where the CPSC is a party to an administrative proceeding, the disclosure of documents subject to the Act shall be governed by court rules. Id. Indeed, as the purpose of 15 U.S.C. § 2055 is to protect manufacturers from the disclosure of inaccurate and misleading public releases by the CPSC, it would be inconsistent with that purpose for the Act to limit discovery by Respondent in

² Complaint Counsel interposes this objection in its Responses to Request Numbers: 2, 7, 8, 9, 10, 11, 14, 17, 20, 22, 25, 33, 36, 57, 61, 65, 66, and 67.

an action such as this one. See e.g. GTE Sylvania Inc. v. Consumer Prod. Safety Comm'n, 404 F. Supp. 352, 366 (D. Del. 1975).

This court has already entered a protective order in this proceeding to protect confidential information. If Complaint Counsel believes that any documents responsive to Mr. Zucker's are confidential, Complaint Counsel can mark them as confidential and subject to the protective order.³ The confidentiality of those documents will then be protected.

Based on the above, Respondent moves to compel Complaint Counsel's Responses to Request Numbers: 2, 7, 8, 9, 10, 11, 14, 17, 20, 22, 25, 33, 36, 57, 61, 65, 66, and 67.

C. Complaint Counsel's unqualified response that requested documents are in the public domain and/or are as readily or more accessible to Respondent is not sufficient.

While discovery is not required of documents of public record which are equally accessible to all parties, such an objection is insufficient where the responding party is far more likely to know precisely which public entities possess the information sought. RTC Mortgage Trust 1994-S3 by Trotter Kent, Inc. v. Guadalupe Plaza, 918 F. Supp. 1441, 1451 (D.N.M. 1996). Here, Complaint Counsel objected to Requests Nos. 1, 2, and 21 on the grounds that they sought documents "that are within the public domain and/or are readily or more accessible to [Respondent]." Specifically, Request No. 1 sought: "[a]ll documents described in your 'List and Summary of Documentary Evidence' filed in these proceedings;" Request No. 2 sought: "[a]ll documents that support the allegations in the Complaint;" and Request No. 21 sought: "[a]ll documents relating to the CPSC November 10, 2011 safety alert identified in paragraph 51 of the Complaint." With respect to Request No. 1, as the requested documents were listed by Complaint Counsel in its "List and Summary of Documentary Evidence," the documents are

³ Indeed, every single page of every single document produced by Complaint Counsel is marked as confidential and subject to the protective order, including documents, like final press releases, that are clearly not confidential.

clearly more accessible by Complaint Counsel. Similarly, as Requests Nos. 2 and 21 seek documents that form the basis of Complaint Counsel's allegations against Respondent, those documents are also clearly more identifiable let alone accessible by Complaint Counsel. Finally, Complaint Counsel has provided no further information as to identity of responsive public documents or the entities that possess the information sought.

Based on the above, Respondent moves to compel Complaint Counsel's Responses to Request Numbers: 1, 2 and 21.

D. Complaint Counsel has entirely refused to respond to certain requests for production of documents without sufficient grounds.

As a preliminary matter, Complaint Counsel produced over 11,000 pages of documents without identifying how they are maintained in the ordinary course of business, or specifying which documents relate to the specific document requests. Federal Rule of Civil Procedure 34 provides that a party "shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." FED. R. CIV. P. 34. Complaint Counsel has clearly failed to label the produced documents to correspond with the categories of the request. To the extent Complaint Counsel asserts that the documents were produced in the usual course of business, it has failed to also provide information about the manner in which the documents were produced (i.e. where the documents were maintained, who maintained them, whether the documents came from one single source or file or from multiple sources or files). Johnson v. Kraft Foods N. Am., Inc., 236 F.R.D. 535, 540 (D. Kan. 2006). In this regard, Complaint Counsel has not met its burden of showing that the documents were in-fact produced as they are kept in the ordinary course of business. Id. As a result of this failure, Respondent has no way of knowing whether or not Complaint Counsel actually produced documents responsive to his Requests and thus reserves his right to move to further compel

production after Complaint Counsel properly produces the documents and Respondent can assess the responsiveness of the production.

However, Complaint Counsel's Responses to Requests Nos. 18, 19, 29, 36, 37, 38, 39, 41, 42, 44, 46, 47, 48, 49, 50, 51, 52, 53, 57, 58 and 62 indicate its refusal to produce any responsive documents. Generally, Complaint Counsel's primary basis for objecting entirely to these Requests is its contention that the "documents [are] not related to a determination that the Subject Products create a substantial product hazard." However, Federal Rule of Procedure 26(b)(1) explicitly provides that the scope of discovery includes information "relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." FED. R. CIV. P. 26. Further, Rule 26 also confirms that relevant information need not be admissible at trial if the discovery is reasonably calculated to lead to the discovery of admissible evidence. *Id.* As stated above, in this matter, Complaint Counsel is seeking "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™." Second Amended Compl. at ¶ 1. Complaint Counsel is also seeking an order holding Respondent Craig Zucker responsible for the recall under the doctrine holding corporate officers responsible for criminal acts of corporations upheld in United States v. Dotterweich, 320 U.S. 277 (1943) and United States v. Park, 421 U.S. 658 (1975). Based on the scope of discovery and the subject of this litigation, Complaint Counsel has wrongfully refused to produce any documents in response to the following Requests:

1. Requests For Documents Relating To Products Other Than The Subject Products

A number of Respondent's Requests relate in some way to the CPSC's analysis or action taken with respect to products other than the Subject Products. For example, consider the following requests:

REQUEST THIRTY-SEVEN. All documents relating to any analysis performed by or on behalf of the CPSC, or upon which the CPSC relies or has relied, comparing the number or frequency of magnet ingestions to the number of frequency of ingestions of any other product, including but not limited to consumer products.

REQUEST FORTY-FOUR. All documents relating to any analysis performed by or on behalf of the CPSC, or upon which the CPSC relies or has relied considering the "utility to consumers" of any of the following products: children's products with small parts, latex balloons, small balls, marbles, single-load liquid laundry' detergent packets, corded baby monitors, and/or button batteries.

REQUEST FORTY-SIX. All documents relating to any analysis performed by or on behalf of the CPSC, or upon which the CPSC relies or has relied considering whether of any of the following products are necessary to consumers: children's products with small parts, latex balloons, small balls, marbles, single-load liquid laundry detergent packets, corded baby monitors, and/or button batteries.

REQUEST FIFTY. All documents relating to the incidents, injuries or deaths involving children ingesting button batteries.

REQUEST FIFTY-ONE. All documents relating to the actions of button battery manufacturers to address the risk of children ingesting button batteries.

REQUEST FIFTY-TWO. All documents relating to actions taken by CPSC to address the risk of children ingesting button batteries.

Complaint Counsel has objected and refused to produce responsive documents to Requests Nos. 36, 37, 38, 39, 41, 42, 44, 46, 47, 48, 49, 50, 51, 52, 53, 53 and 62 on the grounds that because they seek information about other products they aren't relevant to this litigation. However, it is well established that the right of recovery in administrative proceedings encompasses both "an

interest in proper preparation of a defense and an interest in fair treatment of an accused party.” Smith v. Schlesinger, 513 F.2d 462, 475 (D.C. Cir. 1975) (citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963)). Here the issue is whether the Subject Products create a substantial hazard, thus the CPSC’s analysis of products similar and dissimilar is relevant to both Respondent’s defense and whether the Subject Products received fair treatment as compared to other magnets.

Based on the above, Respondent moves to compel Complaint Counsel’s Responses to Request Numbers: 36, 37, 38, 39, 41, 42, 44, 46, 47, 48, 49, 50, 51, 52, 53, 53 and 62.

2. Other Miscellaneous Improper Objections

REQUEST EIGHTEEN. All documents relating to CPSC evaluation and adoption of: (a) ASTM F963-08 4.38, including but not limited to section 4.38.3; (b) ASTM F963-08 5.17; (c) Any successor version of ASTM F963-08 4.38, including but not limited to section 4.38.3; and (d) Any successor version of ASTM F963-5.17.

RESPONSE: Object. Complaint Counsel objects to this request as overly broad and unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence to the extent that *it seeks documents not related to a determination that the Subject Products create a substantial product hazard.* Complaint Counsel further objects to this request as otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice for Adjudicative Proceedings to the extent that it seeks documents that are protected from disclosure by the deliberative process privilege, including but not limited to documents in the possession of expert consultants assigned to or reviewing this case but not designated as trial witnesses. Complaint Counsel further objects to this request to the extent that it seeks documents within the control of third parties, including but not limited to ASTM officers and members, because such documents are not in the possession, custody or control of staff.

Request No. 18 relates to certain standards referred to by Complaint Counsel as the “Toy Standard” in its Complaint. Second Amended Compl. at ¶ 7. Moreover, Complaint Counsel alleges that Buckyballs® and Buckycubes™ did not comply with such “Toy Standards.” See

e.g. id. at ¶¶ 115-120. Accordingly, Request No. 18 is relevant to whether the Subject Products create a substantial hazard.

REQUEST NINETEEN. All documents relating to the decision to file the Complaint.

RESPONSE: Object. Complaint Counsel objects to this request as overly broad and unduly burdensome and otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice for Adjudicative Proceedings to the extent that it seeks documents that are requesting or giving legal advice and thus are protected from disclosure by the attorney-client privilege. Complaint Counsel also objects to this request to the extent that it seeks documents that are protected from disclosure by the deliberative process privilege, including but not limited to documents in the possession of expert consultants assigned to or reviewing this case but not designated as trial witnesses. Complaint Counsel also objects to this request to the extent that it seeks attorney notes and internal memoranda prepared in anticipation of litigation or seeks disclosure of the mental impressions, conclusions, opinions or legal theories of Complaint Counsel on the grounds that such information is protected from disclosure by the attorney work product doctrine.

As discussed above in §IIA, Complaint Counsel provide sufficient information for Respondent to assess the applicability of the privileges asserted. Here, Complaint Counsel has refused to produce any documents relating to the decision to file the Complaint against Respondent and asserted several privileges including: (1) attorney-client; (2) deliberative process; and (3) attorney work product. Preliminarily, it is unlikely that every responsive document is protected by one of the above privileges. Regardless, Complaint Counsel failed to provide information substantiating the applicability of the privileges.

REQUEST THIRTY-SIX. All documents relating to any analysis performed by or on behalf of the CPSC, or upon which the CPSC relies or has relied, of magnets that are not Magnets.

RESPONSE: Object. Complaint Counsel objects to the term "magnets that are not Magnets" as vague, undefined and not reasonably limited in time or scope. Complaint Counsel also objects to this request as overly broad and unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence to the extent that it seeks documents relating to "magnets that are not Magnets." Production of such documents and evidence are not related to a determination that the Subject Products create a substantial product

hazard. Complaint Counsel further objects to this request as otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice for Adjudicative Proceedings to the extent that it seeks documents that are protected from disclosure by the deliberative process privilege, including but not limited to documents in the possession of expert consultants assigned to or reviewing this case but not designated as trial witnesses. Complaint Counsel also objects to this request to the extent that it seeks attorney notes and internal memoranda prepared in anticipation of litigation or seeks disclosure of the mental impressions, conclusions, opinions or legal theories of Complaint Counsel on the grounds that such information is protected from disclosure by the attorney work product doctrine. Complaint Counsel further objects to this request to the extent that it seeks documents within the control of third parties, including but not limited to manufacturers, distributors or retailers of "magnets that are not Magnets," because such documents are not in the possession, custody or control of staff. Complaint Counsel also objects to this request to the extent that it seeks documents that contain confidential, proprietary or trade secret information prohibited from disclosure by 15 U.S.C. § 2055(a)(2) and were produced to staff by a third party.

The term "Magnets" are defined by Respondent as "aggregated masses of high-powered, small rare earth magnets similar in function to the Subject Products." Thus Request No. 36 clearly refers to magnets that the CPSC considers dissimilar to the Subject Products.

REQUEST FIFTY-EIGHT. All documents relating to any disclosure of any information from M&O's response to CPSC's requests for information under section 15 of the CPSA.

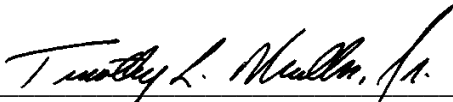
RESPONSE: Object. Complaint Counsel objects to this request as vague and ambiguous to the extent that it seeks documents regarding "disclosure of any information from M&O's response to CPSC's requests for information under section 15 of the CPSA" to the extent that "disclosure" is not limited in time or scope. Complaint Counsel further objects to this request as vague and ambiguous to the extent that it seeks documents regarding "M&O's response." Complaint Counsel further objects to this request as not reasonably calculated to lead to the discovery of admissible evidence because this request is not related to a determination that the Subject Products create a substantial product hazard. Complaint Counsel further objects to this request to the extent that it assumes or implies that the CPSC disclosed information it received from an M&O response under section 15 of the CPSA, which Complaint Counsel has denied in response to M&O's Request for Admission, number 165. Complaint Counsel also objects to this request as inconsistent with Complaint Counsel's obligations under the Rules of Practice for Adjudicative Proceedings to the extent that it seeks attorney

notes and internal memoranda prepared in anticipation of litigation or seeks disclosure of the mental impressions, conclusions, opinions or legal theories of Complaint Counsel on the grounds that such information is protected from disclosure by the attorney work product doctrine. Complaint Counsel also objects to this request to the extent that it seeks documents that are requesting or giving legal advice and thus protected from disclosure by the attorney-client privilege.

In developing his defense in this matter, Mr. Zucker is entitled to discover whether the Commission or staff disclosed information provided to it by M&O, because it may show that the Commission is prosecuting this action not to halt sales of a product that is a substantial product hazard but for other motivations, and to show that M&O and Mr. Zucker were denied due process in the actions of the CPSC leading up to the filing of this administrative proceeding. Mr. Zucker is entitled to production of any non-privileged documents that relate to the disclosure of information as described in the Request.⁴

Based on the above, Respondent moves to compel Complaint Counsel's Responses to Request Numbers: 18, 19, 29, 36, and 58.

Dated: March 31, 2014



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⁴ Complaint Counsel refers to its response to Request for Admission No. 165. In fact, Complaint Counsel did not make an unqualified denial of Request for Admission No. 165, which is the subject of a separate motion to compel.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2014, a true and correct copy of the foregoing Respondent Craig Zucker's Motion to Compel Complaint Counsel's Answers to Respondent's First Set of Requests for Production of Documents to Consumer Product Safety Commission 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
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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:

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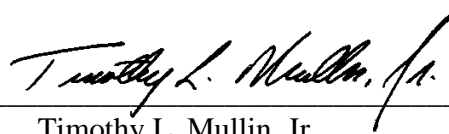
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