UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

CONSOLIDATED OPPOSITION TO RESPONDENT CRAIG ZUCKER'S MOTIONS TO COMPEL DISCOVERY REGARDING HIS REQUESTS FOR ADMISSION, REQUESTS FOR PRODUCTION, AND INTERROGATORIES

On March 31, 2014, Respondent Craig Zucker filed three separate motions to compel discovery.[1] Mr. Zucker's pleadings assert the same general arguments in support of his Motions to Compel, including but not limited to relevance, privilege, and evasiveness.

In this Consolidated Opposition, Complaint Counsel first addresses those common arguments (Section I). In Section II, Complaint Counsel then responds in turn to each of Mr. Zucker's motions, and to the extent necessary addresses legal arguments specific to each Motion.

[1] Respondent Craig Zucker's Motion to Compel Complaint Counsel's Responses to Respondent's First Set of Requests for Admissions to Consumer Product Safety Commission ("Mot. to Compel RFAs"); 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 ("Mot. to Compel RFPs"); and Respondent Craig Zucker's Motion to Compel Complaint Counsel's Responses to Respondent's Amended First Set of Interrogatories to Consumer Product Safety Commission ("Mot. to Compel ROGs"). On April 3, 2014, the Court ordered that responses to the motions to compel be filed by April 18, 2014. Complaint Counsel notes that the motions were filed without any communication from counsel for Mr. Zucker as to the alleged deficiencies in the discovery requests.

I. LEGAL ANALYSIS OF COMMON ARGUMENTS RAISED IN RESPONDENT'S MOTIONS TO COMPEL

A. Complaint Counsel Properly Asserted Relevance Objections

Respondent contends that Complaint Counsel's objection to certain discovery requests on the grounds of relevance contained in the Requests for Production, Requests for Admission and Interrogatories are impermissible. Respondent requests that this Court order Complaint Counsel to respond to all such discovery requests. As will be demonstrated below, however, Respondent's arguments are factually unsupported, legally incorrect and do not warrant the relief he seeks.

Although Respondent is correct that the standard for relevance in discovery is broad, Mot. to Compel RFAs at 4, the Supreme Court has nevertheless held that "discovery, like all matters of procedure, has ultimate and necessary boundaries" and that "discovery of matter not 'reasonably calculated to lead to the discovery of admissible evidence' is not within the scope of Rule 26(b)(1)." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351-52 (1978) (internal citations omitted). In that case, the Supreme Court held that "Respondents' attempt to obtain the class members' names and addresses cannot be forced into the concept of 'relevancy' described above . . . respondents do not seek this information for any bearing that it might have on issues in the case." *Id.* at 352. Likewise, throughout his discovery requests, Respondent here seeks discovery related to issues that have no bearing on whether Buckyballs and Buckycubes (the "Subject Products") create a substantial product hazard or whether he is a responsible corporate officer.

Respondent's repeated request for information regarding products completely unrelated to the Subject Products—such as latex balloons, small balls, and laundry pods—fall squarely

within the ambit of objectionable, irrelevant information. For example, Respondent has asked Complaint Counsel to admit or deny that warnings in certain Commission regulations that do not pertain to the Subject Products are adequate to address risks and hazards posed with respect to these unrelated products. Respondent has further inquired about the Commission's enforcement actions with regard to such products. Under the Supreme Court's holding in *Oppenheimer*, Complaint Counsel may permissibly object to such requests as seeking irrelevant information. *See also Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("discovery, like all matters of procedure, has ultimate and necessary boundaries.").

In this case, this Court will determine whether the Subject Products present a substantial product hazard based on evidence presented at the administrative hearing. The determination will neither be based on nor informed by a comparison of the risks posed by the Subject Products with risks and hazards that may be presented by distinct products unrelated to the Subject Products. For example, Respondent requested that Complaint Counsel respond to inquiries comparing risks associated with latex balloons and small balls, which pose a risk of choking. In stark contrast, the Subject Products pose a completely different risk: as alleged in the Complaint, Subject Products that become affixed to each other through gastrointestinal walls may result in intestinal perforations which can lead to necrosis, the formation of fistulas, or ultimately perforation of the bowel and leakage of toxic bowel contents into the abdominal cavity. These conditions can lead to serious injury and possibly even death. The only thing common to the products about which Respondent seeks information is that those products, like the Subject Products, are consumer products regulated by the Commission, as are hundreds of thousands of other products.

Case law is clear that Mr. Zucker may not receive discovery relating to all products that the Commission regulates. *See Vives v. City of New York*, 2003 WL 282191, at *1 (S.D.N.Y. 2003) (unreported) (denying plaintiff's motion to compel because "the discovery requests in issue do not relate to plaintiff's case, but rather relate to policies and practices in general and an unrelated matter purported to involve analogous facts"); *see also Robbins v. Camden City Bd. of Educ.*, 105 F.R.D. 49, 55, 61 (D.N.J. 1985) (denying many of plaintiff's interrogatories and setting specific parameters for discovery because "discovery should be tailored to the issues involved in the particular case"); *Hardrick v. Legal Servs. Corp.*, 96 F.R.D. 617, 618-19 (D.D.C. 1983) (denying in part plaintiff's motion to compel because requested discovery is not "reasonably related to the circumstances involved in the alleged discrimination"); *Am. Canoe Ass'n v. E.P.A.*, 46 F. Supp. 2d 473, 475 (E.D. Va. 1999) (granting E.P.A.'s motion for a protective order limiting discovery and striking plaintiff's amended discovery requests which sought "extensive discovery beyond the administrative record" in a suit against the agency under the Clean Water Act).

Even in the case Respondent cites for the proposition that discovery is broad, *V.D. Anderson Co. v. Helena Cotton Oil Co.*, 117 F. Supp. 932 (E.D. Ark. 1953), see Mot. to Compel RFAs at 4, the court permitted some interrogatories, but held that others were "so broad and unlimited as to time and subject matter that to require the plaintiff to answer them would be unreasonable and unduly oppressive, and we sustain the objections thereto."). *V.D. Anderson Co.*, 117 F. Supp. at 950. Many other cases support the proposition that discovery is limited. *See, e.g., Miller v. Doctor's Gen. Hosp.*, 76 F.R.D. 136, 139 (W.D. Okla. 1977) ("though the scope of discovery is broad, it is not unlimited. . . . Plaintiff has failed to specify in his Motion to Compel how the information requested . . . would be relevant to the issues involved in this

lawsuit. Accordingly, Plaintiff's Motion to Compel should be overruled . . . ."); *Capital Vending Co. v. Baker*, 36 F.R.D. 45, 46 (D.D.C. 1964) ("discovery is not unbridled or unlimited."). The case law shows that Mr. Zucker's requests must be limited to whether magnets are a substantial product hazard and whether Mr. Zucker is a responsible corporate officer.

In each of his three motions to compel, Respondent seeks discovery about matters completely irrelevant to the instant proceedings and does not explain how the information sought would be relevant to the proceeding. Respondent's requests for information about other products and hazards contained in the Requests for Production, Requests for Admission and Interrogatories are therefore irrelevant and Complaint Counsel properly asserted relevance objections in declining to answer discovery requests on those topics.

B. Complaint Counsel Properly Asserted Privilege Objections

Respondent contends that Complaint Counsel's objection to certain discovery requests on the grounds of privilege contained in the Requests for Production, Requests for Admission and Interrogatories are impermissible. Respondent requests that this Court order Complaint Counsel to respond to all such discovery requests. As will be demonstrated below, however, Respondent's arguments are factually unsupported, legally incorrect and do not warrant the relief he seeks.

In regard to the Requests for Admission, Requests for Production of Documents, and Interrogatories, Respondent sought information about which Complaint Counsel objected on the grounds of privilege, including deliberative process privilege. Respondent concedes that the deliberative process privilege is valid, *see* Mot. to Compel RFAs at 5 ("The deliberative process privilege is qualified, and not absolute."). Indeed, the Supreme Court has recognized that the deliberative process privilege encourages "frank discussion of legal or policy matters" which

"might be inhibited if the discussion were made public; and that the 'decisions' and 'policies formulated' would be the poorer as a result." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) (internal citation omitted). Congress has even codified the deliberative process privilege in the Freedom of Information Act, Exemption No. 5, 5 U.S.C. § 552(b)(5).

The deliberative process privilege applies if the material is (1) pre-decisional and (2) deliberative in nature, containing opinions, recommendations, or advice about agency decisions. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 186 (1975); *Klamath Water Users Protective Ass'n v. United States Dep't of Interior,* 189 F.3d 1034, 1043 (9th Cir. 1999). The deliberative process privilege covers all "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (internal citation omitted). Deliberations concerning whether to initiate litigation, or whether to pursue a particular course of action in litigation, are squarely protected by the deliberative process privilege. *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993).

Here, the purpose of this proceeding is to determine whether the Subject Products pose a substantial product hazard. A determination concerning the Subject Products will be based on evidence presented at the hearing, not based on opinions or internal deliberations of staff expressed prior to the filing of the Complaint. Pre-decisional deliberations by CPSC staff leading to the filing of this litigation or with regard to other consumer products are fully protected by this privilege. Moreover, staff's investigation of and/or enforcement actions with regard to consumer products other than the Subject Products (such as latex balloons, small balls, laundry pods, for example), fall squarely within the deliberative process privilege, and Complaint Counsel has properly invoked the deliberative process privilege in its objections.

C. Complaint Counsel Was Not Evasive in Responding to Discovery Requests

Respondent contends that Complaint Counsel's objection to certain discovery requests contained in the Requests for Production, Requests for Admission and Interrogatories were evasive and has moved the Court to compel responses to those requests on those grounds. Although Respondent is not entitled to the relief he seeks, Complaint Counsel has addressed Respondent's assertion by supplementing many of its answers to Requests for Admission, Requests for Production, and Interrogatories, rendering Respondent's claim—the validity of which Complaint Counsel disputes—without basis whatsoever.

Complaint Counsel disagrees that it has provided evasive responses to Mr. Zucker. See *Henderson v. Frank*, 2006 WL 3377567 at *1 (W.D. Wis. 2006) ("an answer to a discovery request is not evasive or incomplete just because plaintiff says it is. Generalized statements of incompleteness or evasiveness are insufficient to obtain relief from the court; plaintiff must identify the specific reasons why he thinks he is entitled to such relief.") (internal citation omitted). Complaint Counsel notes that Respondent failed to identify any specific reason why the answers provided were evasive, and instead made a blanket assertion along with other charges of deficiency regarding the discovery responses. Moreover, Complaint Counsel produced a significant amount of information and numerous documents to Mr. Zucker in response to Mr. Zucker's discovery requests, providing good faith responses that cannot fairly be characterized as evasive. *See Badalmenti v. Dunham's, Inc.*, 896 F.2d 1359, 1363 (Fed. Cir. 1990) (reversing discovery sanctions order because responses were "not so evasive and misleading as to constitute a failure to respond . . . there has been no clear misrepresentation that requested documents did not exist."). It is important to note that when Complaint Counsel was responding to Respondent's discovery requests, it did not have access to the MOH documents,

which were eventually provided by the Trust pursuant to a subpoena in January 2014. Nevertheless, in an effort to address Respondent's claims, Complaint Counsel has provided amended discovery responses which render Mr. Zucker's any claim of evasiveness moot and do not warrant further action by this Court.

D. Complaint Counsel Properly Asserted that Many of the Discovery Requests Could be Answered from Information in the Public Domain

Respondent contends that Complaint Counsel improperly asserted defenses to certain discovery requests on the grounds that the documents could be found in the public domain, and has moved the Court to compel responses to those requests on those grounds. Respondent is not entitled to the relief he seeks.

Mr. Zucker correctly concedes that "discovery is not required of documents of public record which are equally accessible to all parties." Mot. to Compel RFPs at 5; see also *SEC v. Samuel H. Sloan & Co.*, 369 F. Supp. 994 (S.D.N.Y. 1973) (denying respondent's motion to compel the SEC to produce a transcript of the publicly available administrative hearing because "[i]t is well established that discovery need not be required of documents of public record which are equally accessible to all parties."); *Anderson v. Reliance Standard Life Ins. Co.*, 2012 WL 835722 (D. Md. 2013) (unreported) ("It is not clear why [plaintiff] served a discovery request on [defendant] if it believed the material was already available in the public domain. That availability would have been sufficient for [the magistrate judge] to have denied the discovery request."); *Wells v. Allergan U.S.A., Inc.*, 2014 WL 117773 at *3 n.3 (D.S.C. Jan. 13, 2014) (slip copy) ("In addition, the court has reviewed the discovery requests that plaintiff's counsel submitted . . . and finds that much of the requested information is publicly available on the FDA's website."). Complaint Counsel's objection that it need not produce publicly available documents is consistent with the case law cited above and does not warrant intervention by the

Court. Notwithstanding this position, Complaint Counsel notes that it has supplemented its discovery responses, rendering Respondent's requests for relief moot.

E. Complaint Counsel Properly Asserted that Requested Discovery Called for Legal Conclusions

Respondent contends that Complaint Counsel improperly asserted defenses to certain discovery requests on the grounds that the answers called for a legal conclusion, and has moved the Court to compel responses on that basis. Respondent is not entitled to the relief he seeks because he misinterprets the law.

Mr. Zucker claims that Federal Rule of Civil Procedure 36 "has been interpreted to permit a request for admission relating to how a particular source of a legal obligation applies to a given set of facts." Mot. to Compel RFAs at 3. While Commission regulations indeed permit requests for admission regarding application of law to facts, 16 C.F.R. § 1025.34(a), case law is also well established that a party may not request admission of a legal conclusion. *Disability Rights Council v. Wash. Metro. Area*, 234 F.R.D. 1, 3 (D.D.C. 2006) ("one party cannot demand that the other party admit the truth of a legal conclusion."); *Tulip Computers, Int'l B.V. v. Dell Computer Corp.*, 210 F.R.D 100, 108 (D. Del. 2002) ("requests that seek legal conclusions are not allowed under Rule 36."); *English v. Cowell,* 117 F.R.D. 132, 135 (C.D. Ill. 1986) ("Requests asking for legal conclusions are not proper.").

Miller v. Holzmann, 240 F.R.D. 1 (D.D.C. 2006) (Mot. to Compel RFAs at 3), a case cited in Respondent's Motion to Compel RFAs under the title "Legal Conclusions," does not stand for the proposition that a party may request admission of a legal conclusion. *Miller*, 240 F.R.D. at *5 (holding that the requests for admission at issue did not request legal conclusions, not that requests for legal conclusions are permissible). *Miller* was a qui tam action in which the court recognized that a party may not make a request for admission of a legal conclusion, *id.* at

*5, but held that in that case, there was no request to admit legal conclusions or even the application of law to facts. *Id.* To the extent that Mr. Zucker's requests for admission call for legal conclusions, Complaint Counsel properly objected to those requests in its answers.

F. Complaint Counsel Properly Declined to Answer Discovery Requests in Reliance on 15 U.S.C. § 2055(a)(2)

Respondent contends that Complaint Counsel improperly asserted a defense to certain discovery requests on the grounds that the answers would disclose trade secrets and has moved the Court to compel responses on that basis. Again, Respondent is not entitled to the relief he seeks because he misinterprets relevant the legal authority.

Section 6(a)(2) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2055(a)(2), clearly prohibits the Commission from disclosing trade secrets. Section 6(a)(8) of the CPSA provides an exception for adjudicative proceedings, although such disclosure may be required to occur *in camera*. 15 U.S.C. § 2055(a)(8). Contrary to the statute, Respondent suggests that the protective order affords sufficient protection,[2] but the CPSA is clear that *in camera* treatment generally is required to obtain an exception to the prohibition on disclosure of trade secrets. 15 U.S.C. § 2055(a)(8).[3] Thus, Complaint Counsel would not be relieved of the restrictions imposed by § 2055(a)(8) simply by virtue of the protective order.

The purpose of Section 6 is to protect companies that engage in confidential negotiations with the Commission from having details of their negotiations released to competitors or the public. As Congress explained in initially enacting Section 6, in order to protect public safety, the Commission needs "access to a great deal of information which would not otherwise be available to the public or the Government. Much of this relates to trade secrets or other sensitive

[2] Mot. to Compel RFPs at 5.

[3] If the Court allows such *in camera* examination, Complaint Counsel is amenable to disclosing such documents to Mr. Zucker to the extent necessary to respond to his request for production.

cost and competitive information." House Committee Report, H.R. Rep. No. 92-1153, 92d Cong. 2d. Sess. (1972), at 31-32. Section 6 reflects the determination by Congress that it would have a chilling effect on firms' willingness to engage in frank discussions concerning product recalls if those communications could be disclosed to competitors or the public absent a compelling need to do so.

Respondent is imprecise when he claims that "the purpose of 15 U.S.C. § 2055 is to protect manufacturers from the disclosure of inaccurate and misleading public releases by the CPSC." Mot. to Compel RFPs at 4. It is true that 15 U.S.C. § 2055(b) provides that agency disclosures of non-trade secret information must be accurate and fair. However, here Respondent is making an argument about 15 U.S.C. § 2055(a) relating to trade secrets. This section prohibits entirely the disclosure of trade secret information (subject to its listed exceptions) and does not seek to protect manufacturers from "inaccurate and misleading public releases" of trade secret information. Thus Mr. Zucker conflates 15 U.S.C. § 2055(a) and 15 U.S.C. § 2055(b), and in doing so undermines his argument and request for relief. To the extent that Complaint Counsel asserted that the information requested contained trade secrets, it properly objected to the disclosure of such material.

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny the three motions to compel that Mr. Zucker filed on March 31, 2014.

II. THIS COURT SHOULD DENY RESPONDENT'S MOTIONS TO COMPEL

A. The Court Should Deny Mr. Zucker's Motion to Compel Complaint Counsel's Responses to Respondent's Amended First Set of Interrogatories.

1. Mr. Zucker's Objections to Complaint Counsel's Citation to Respondent's and M&O's Business Records Are Moot.

Mr. Zucker objects to Complaint Counsel's Responses to Interrogatories 4, 6, 8, 10-12, 14, 16 and 28, which included a statement that information responsive to those Interrogatories may be derived or ascertained from Respondent's and M&O's business records. *See* Mot. to Compel ROGs at 3-4. Complaint Counsel submitted these Responses prior to receiving M&O's business records from the Trust. Complaint Counsel has now received those records and has supplemented its Responses to these Interrogatories with specific cites to responsive documents, and will continue to do so as permitted by the Rules. Complaint Counsel hereby withdraws all statements in its Responses to these Interrogatories stating that information generally may be derived or ascertained from Respondent's and M&O's business records. Because Complaint Counsel has now supplemented its Responses to these Interrogatories and no longer generally refers to Respondent's and M&O's business records, Mr. Zucker's objection is moot.

2. Mr. Zucker's Objections to Complaint Counsel's Privacy Act and CPSA Section 25(c) Objections Are Moot.

Mr. Zucker objects to Complaint Counsel's Responses to Interrogatories 1, 2, 5, 7, 10, 12, 14-15, 17-19, 22-25, 27, 29, 30, 33-34, 38-39, 41, 46-47, 56-58, 60-63, 65-66, 68-70, and 74-80, which included an objection that certain personally identifiable information could not be released pursuant to the Privacy Act, 5 U.S.C. § 552a, and Section 25(c) of the Consumer Product Safety Act, 15 U.S.C. § 2074(c). *See* Mot. to Compel ROGs at 4-6. Complaint Counsel submitted these Responses prior to the Court's entering a Protective Order allowing Complaint

Counsel to protect documents that contained personally identifiable information from public disclosure. Because the Court has now entered a Protective Order, Complaint Counsel has supplemented its responses and provided personally identifiable information that otherwise would have been prohibited by the Privacy Act and CPSA Section 25(c). Complaint Counsel hereby withdraws all objections in its Responses to these Interrogatories stating that certain personally identifiable information could not be released pursuant to the Privacy Act and Section 25(c) of the Consumer Product Safety Act. Complaint Counsel has now supplemented its Responses to these Interrogatories and, pursuant to the protections afforded by the Protective Order, no longer objects based on the Privacy Act or CPSA Section 25(c). Accordingly, Respondent's objection is moot.

3. Mr. Zucker's Objections to Complaint Counsel's Attachment of Documents Without Specifically Identifying Such Documents Are Moot.

Mr. Zucker objects to Complaint Counsel's Responses to Interrogatories 5-8, 10-12, 14-19, 22-25, 34-35, 43-45, 47-48, 53, 56-58, 60-62, 68, 70 and 80 because those Responses refer to documents generally without specifically identifying which documents are responsive to each request. Complaint Counsel submitted these Responses prior to the entry of a Protective Order allowing the production of confidential documents identified by Bates number. Because the Court has now entered a Protective Order, Complaint Counsel has supplemented its Responses to these Interrogatories with specific cites to responsive documents by Bates number. *See* Attachment A. Because Complaint Counsel has now supplemented its Responses to these Interrogatories with specific cites to documents identified by Bates number, Mr. Zucker's objections are moot.

4. Mr. Zucker's Objections to Complaint Counsel's Work-Product Privilege Objections Are Moot.

Mr. Zucker objects to Complaint Counsel's Responses to Interrogatories 1-2, 5, 7, 10, 12, 14-15, 17-19, 22-25, 27, 29-30, 33-34, 38-39, 41, 46, 47, 56-58, 60-63, 65-66, 68-70, 74-75, 77 and 80, based on Complaint Counsel's invocation of the work product privilege. Upon further review of Complaint Counsel's Responses to these Interrogatories, Complaint Counsel has determined that its Responses to these Interrogatories do not contain any attorney work product, and so Complaint Counsel has agreed to withdraw its objections to these Interrogatories based on the work product privilege. Because Complaint Counsel has withdrawn its work product privilege objection to these Interrogatories, Mr. Zucker's objection is moot.

5. Mr. Zucker's Objections to Complaint Counsel's Relevance Objections Should Be Denied.

Mr. Zucker objects to Complaint Counsel's Responses to Interrogatories 36, 38-42, 46, 48-52, 58-59, 69, 71-73, and 75-79, arguing that Complaint Counsel improperly objected that those Interrogatories sought information that is not relevant to this proceeding. For the reasons stated below, Mr. Zucker's motion to compel further responses to these Interrogatories should be denied.

a. The Motion to Compel Responses to Interrogatories Seeking Information About Products Other Than the Subject Products Should Be Denied Because Such Interrogatories Do Not Seek Relevant Information (Interrogatories 36, 39-42, 46, 49-52).

With respect to Interrogatories 36, 39, 41, 46, 49 and 51 (seeking information concerning a comparison of magnet injuries to injuries caused by all other products), and 40, 42, 50 and 52 (seeking information concerning liquid detergent pod incidents), Complaint Counsel objected on the grounds that these Interrogatories are irrelevant because they improperly seek information related to other products. As explained in more detail in Section I of this Consolidated

Opposition, these Interrogatories improperly seek irrelevant information concerning other products that are not at issue in this proceeding and are thus not discoverable.

Most of these Interrogatories seek an overwhelming amount of irrelevant data, such as injury analysis concerning potentially thousands of products under the CPSC's jurisdiction and even products beyond the scope of the CPSC's jurisdiction, *i.e.*, comparisons of magnets to the ingestion of any other product, "including but not limited to consumer products." *See* Interrogatories 36, 39, 41, 46, 49 and 51; *see also* Interr. 40, 42, 50 and 52 (seeking information about detergent unrelated to the Subject Products). To allow discovery into a virtually limitless array of products *not* at issue in this case would burdensome and divert a vast amount of the parties' resources to issues not relevant to this proceeding. Such information is not relevant to the determination of the hazard posed by the Subject Products, and the ultimate determination of whether the Subject Products pose a substantial product hazard. For the reasons explained more fully in Section I of this Consolidated Opposition, the motion to compel responses to these Interrogatories should be denied.

b. The Motion to Compel Responses to Interrogatories Based on Complaint Counsel's Relevance Objections Should Be Denied as Moot Where Complaint Counsel Has Supplemented Its Responses to Provide the Requested Information (Interrogatories 38, 48, 58, 69, 71, 75, 76).

Mr. Zucker objected to Complaint Counsel's Responses to Interrogatories 38, 48, 58, 69, 71, 75 and 76 based on Complaint Counsel's objection that such information is irrelevant. Complaint Counsel has supplemented its responses to these Interrogatories and no longer objects based on relevance (see Attachment A). Because Complaint Counsel no longer objects to these Interrogatories based on relevance and has supplemented its responses to provide the requested information, Mr. Zucker's objection is moot.

c. The Motion to Compel a Response to Interrogatory 59 Should Be Denied Because This Interrogatory Does Not Seek Relevant Information and is Duplicative and Speculative.

Mr. Zucker objected to Complaint Counsel's Response to Interrogatory 59 based on Complaint Counsel's objection that such information is irrelevant. This Interrogatory asked:

> INTERROGATORY NO. 59: State whether CPSC believes that the majority of parents and caregivers will restrict access by children under three years of age to products containing small parts if the products are properly labeled with warnings in compliance with the regulations contained in 16 C.F.R. §1500.19, and describe in complete detail the basis for your answer.

Complaint Counsel responded:

> RESPONSE: Objection. This Interrogatory is overbroad, duplicative, speculative, and seeks information that is not relevant to the subject matter involved in the proceedings as required by 16 C.F.R. § 1035.31(c)(1).

Mr. Zucker fails to explain how this Interrogatory seeks relevant information, stating only boilerplate language used throughout his motion that "[t]he scope of Interrogatory No. 59 directly relates to the CPSC's determination that Buckyballs® and Buckycubes,™ present a substantial hazard and is thus relevant to the litigation." Motion to Compel Interr. Responses at 14.

This Interrogatory concerns regulations for products with small parts that are intended for use by children at least three years of age but less than eight years of age. *See* 16 C.F.R. § 1500.19. The Second Amended Complaint (Complaint) does not allege that the Subject Products are subject to the requirements of 16 C.F.R. § 1500.19. Because the Complaint does not allege that the Subject Products are subject to 16 C.F.R. § 1500.19, it is irrelevant to this proceeding what "CPSC believes" about this standard, and Mr. Zucker's motion to compel a further response to this Interrogatory should be denied.

Furthermore, even if the Court determines that this Interrogatory is relevant, Complaint Counsel objected on the grounds that it "is overbroad, duplicative, [and] speculative...." Mr. Zucker has not challenged Complaint Counsel's objection on those grounds and that objection stands. Complaint Counsel objected on those grounds because the regulation at 16 C.F.R. § 1500.19 speaks for itself about the Commission's policy concerning small parts. As a federal agency, the Commission states its policies, in part, through its regulations. The public may examine the Commission's policies by reviewing its public regulations, but it would be speculative for Complaint Counsel to attempt to divine what "CPSC believes" in an abstract sense apart from its published regulations. Because Mr. Zucker's motion to compel did not challenge Complaint Counsel's objections that this Interrogatory "is overbroad, duplicative, [and] speculative," and because the Interrogatory seeks information that would be duplicative of the Commission's public regulations or speculative about what "CPSC believes" apart from those regulations, the motion to compel a further response to this Interrogatory should be denied.

d. The Motion to Compel Responses to Interrogatories 72 and 73 Should Be Denied Because These Interrogatories Do Not Seek Relevant Information and Seek Information Outside the Custody and Control of Complaint Counsel.

Mr. Zucker objected to Complaint Counsel's Responses to Interrogatories 72 and 73 based on Complaint Counsel's objection that such information is irrelevant. These Interrogatories and Complaint Counsel's responses are as follows:

> INTERROGATORY NO. 72: Identify any person at the CPSC who subscribed to receive updates and promotions from M&O, or who provided their email address to M&O either on the M&O website or the Buckyballs® Facebook page in order to receive updates and promotions from M&O.
>
> RESPONSE: Complaint Counsel objects to this Interrogatory as vague and ambiguous, and not relevant to the subject matter involved in the proceedings as required by 16 C.F.R. § 1035.31(c)(1). Complaint Counsel also objects to the Interrogatory to the extent that it seeks information about persons at CPSC outside of their role as CPSC staff, because such information is not relevant and is not in Complaint Counsel's custody or control. Subject to and without waiving its

objections, Complaint Counsel states that this information may be located within Respondents' records which may be accessible to Respondents but not currently accessible to Complaint Counsel. Such information also may be available to Respondent from the Trust, and Respondent is directed to those documents.

INTERROGATORY NO. 73: Describe in complete detail the purchase of Subject Products by any person at the CPSC, including without limitation, the identity of the person making the purchase, the date of the purchase, the identity of the person from whom the Subject Products were purchased, the price of the Subject Products purchased, and whether the purchase was for governmental or personal purposes.

RESPONSE: Complaint Counsel objects to this Interrogatory as vague and ambiguous, and not relevant to the subject matter involved in the proceedings as required by 16 C.F.R.§ 1035.31(c)(1). Complaint Counsel also objects to the Interrogatory to the extent that it seeks information about persons at CPSC outside of their role as CPSC staff, because such information is not relevant, is not reasonably calculated to the discovery of admissible evidence, and is not in Complaint Counsel's custody or control. Subject to and without waiving objections, Complaint Counsel states that this information may be located within Respondents' records and may be accessible to Respondents. Such information also may be available to Respondent from the Trust, and Respondent is directed to those documents.

These Interrogatories ask for irrelevant information concerning persons at the Commission who provided an e-mail address to M&O or purchased a product from M&O. The act of providing an e-mail address or purchasing a product from M&O is not relevant to this proceeding and would not lead to the discovery of relevant information. Any persons providing an e-mail address to, or purchasing products from, Mr. Zucker's company would have received only the information or products sent by Mr. Zucker's own company. There is nothing new that Mr. Zucker could learn about any such e-mails or products that he does not already know.[1]

In addition, Mr. Zucker has already asked for, and received, a list of persons with relevant knowledge of the subject matter of this proceeding. *See* Complaint Counsel's Response to Interr. 1 (providing 20 staff names with knowledge concerning Mr. Zucker's discovery

[1] In addition to being irrelevant, release of the purchase methods and identities of CPSC staff making such purchases could reveal confidential Commission investigatory techniques and personnel.

requests). Mr. Zucker has not challenged the accuracy or completeness of this list. *See* Motion to Compel Interr. Responses. Having been provided a list of staff with knowledge of the issues raised in these discovery responses, there is no further relevant information to be gained by knowing who simply entered an e-mail address or purchased an item from him.

Furthermore, Complaint Counsel objected to these Interrogatories on the grounds that they sought "information about persons at CPSC outside of their role as CPSC staff," such as the entering of a personal e-mail address or Facebook identity or purchasing a product for "personal purposes." Complaint Counsel objected that in addition to being irrelevant, such information is "is not in Complaint Counsel's custody or control." Mr. Zucker has not challenged this objection. *See* Motion to Compel Interr. Responses. Thus, to the extent these Interrogatories seek personal information about CPSC staff actions outside their role as staff, the Motion to Compel such information should be denied.[2]

e. The Motion to Compel a Response to Interrogatory 77 Should Be Denied Because It Does Not Seek Relevant Information.

Mr. Zucker objected to Complaint Counsel's Responses to Interrogatory 77 based on Complaint Counsel's objection that such information is irrelevant. This Interrogatory and Complaint Counsel's response is as follows:

> INTERROGATORY NO. 77: Describe in complete detail all communications between the CPSC (including without limitations Scott Wolfson, the Office of Information and Public Affairs and/or the Office of Communications) and representatives of non-governmental organizations (including without limitation Kids in Danger and Consumer Federation of America) involving the Subject Products.
>
> RESPONSE: Objection. This Interrogatory is overbroad, seeks information that is not relevant to the subject matter of this proceeding and is not reasonably calculated to the discovery of admissible evidence because it is not limited to the

[2] Without waiving any objection that these Interrogatories seek irrelevant information, Complaint Counsel admits that Scott Wolfson subscribed to receive updates and promotions from M&O. See Complaint Counsel's Responses to Requests for Admission 156 and 157.

subject matter of these proceedings. Further, Complaint Counsel objects to this Interrogatory to the extent that a response would encompass information protected from disclosure by the attorney-client privilege, the attorney-work product doctrine, the deliberative process privilege, and/or the privilege afforded information given to the staff of the Commission on a pledge of confidentiality and/or by other law or rule of procedure, including, but not limited to, the Privacy Act, 5 U.S.C. § 552a, and section 25(c) of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2074(c). Subject to and without waiving its objections, Complaint Counsel refers Respondent to Complaint Counsel's Response to Request for Production of Documents number 14.

Mr. Zucker fails to explain how any communications with non-governmental organizations are relevant to the determination of whether the Subject Products are a substantial product hazard. Instead, he simply repeats without explanation a phrase used throughout his motion that this Interrogatory seeks information that "directly relates to the CPSC's determination that Buckyballs® and Buckycubes™ present a substantial hazard and is thus relevant to the litigation." Mot. to Compel ROGs at 18. Non-governmental organizations are not a party to this case and have not been listed by any party as a witness in this case. As such, communications with such groups are irrelevant to this proceeding.

Furthermore, although Complaint Counsel objected based on relevance, without waiving that objection, Complaint Counsel nonetheless produced responsive documents containing facts concerning the Subject Products that may have been communicated to non-governmental organizations or other members of the public. *See* Compl. Counsel Response to Interrogatory 77 ("Subject to and without waiving its objections, Complaint Counsel refers Respondent to Complaint Counsel's Response to Request for Production of Documents number 14."). Now that Complaint Counsel has produced documents pursuant to a Protective Order, it now has further supplemented its response with cites to specific documents containing such information, including incident data and investigative reports (ZUC000001-ZUC000945, ZUC00948-953, ZUC000961-963, ZUC001000-001010, ZUC001317-001318, ZUC1509-1514, ZUC001515-

001527, ZUC001509-1537, ZUC005396-5499, ZUC0010462-10525, ZUC11021-11038, ZUC11266-11299, ZUC011557-11559), documents from the custodial files of Office of Communications staff (ZUC000946-947, ZUC001319-1331, ZUC006283-6292, ZUC006295-6297, ZUC009926-10091, ZUC010093-10097, ZUCZUC010130-10437), and custodial files of Compliance staff (ZUC002010-2908, ZUC003080-4050, ZUC004051-4798, ZUC005500-6128, ZUC006175-6247, ZUC006248-6258). Because this Interrogatory seeks irrelevant information, and because Complaint Counsel has nonetheless produced documents responsive to this Interrogatory, the Motion to Compel regarding this Interrogatory should be denied.

f. The Motion to Compel Responses to Interrogatories 78-79 Should Be Denied Because They Do Not Seek Relevant Information and Seek Information Protected From Disclosure By the CPSA.

Mr. Zucker objected to Complaint Counsel's Responses to Interrogatories 78-79 based on Complaint Counsel's objection that such information is irrelevant. These Interrogatories and Complaint Counsel's responses are as follows:

> INTERROGATORY NO. 78: Describe in complete detail all communications between the CPSC and Strong Force, Inc. relating to any corrective action plan for Neocube magnets, and/or the notice posted at http://www.theneocube.com.
>
> RESPONSE: Objection. This Interrogatory seeks information that is not relevant to the subject matter of this proceeding and is not reasonably calculated to the discovery of admissible evidence because it is not limited to the subject matter of these proceedings. It also seeks the disclosure of information protected by the deliberative process privilege and the privilege afforded information given to the staff of the Commission on a pledge of confidentiality and/or by other law or rule of procedure, including, but not limited to, 15 U.S.C. § 2055(a)(2), 15 U.S.C. § 2074(c), the Privacy Act, or any other privilege, doctrine or protection as provided by any applicable law.
>
> INTERROGATORY NO. 79: Describe in complete detail the reason why the CPSC did not issue a press release or recall alert for the corrective action by Strong Force, Inc. for Neocube magnets posted at http://www.theneocube.com/.
>
> RESPONSE: Objection. This Interrogatory seeks information that is not relevant to the subject matter of this proceeding and is not reasonably calculated to the

> discovery of admissible evidence because it is not limited to the subject matter of these proceedings. The Interrogatory is also unduly burdensome because it seeks the disclosure of information protected by the deliberative process privilege and the privilege afforded information given to the staff of the Commission on a pledge of confidentiality and/or by other law or rule of procedure, including, but not limited to, 15 U.S.C. § 2055(a)(2), 15 U.S.C. § 2074(c), the Privacy Act, or any other privilege, doctrine or protection as provided by any applicable law.

These Interrogatories pertain to a voluntary recall of high powered magnets announced by Strong Force, concerning its NeoCube magnet sets. Strong Force, on its website, describes the reasons for its recall, stating that Strong Force is "urging purchasers to discard the NeoCube magnet sets" because "[i]f two or more magnets are swallowed, they can link together inside a child's intestines and clamp onto body tissues, causing severe injuries. Internal injury from magnets can pose serious lifelong health effects. They should be discarded for your safety, and the safety of others."[3]

Although the terms of this recall are publicly available to Mr. Zucker on Strong Force's website, these Interrogatories seek confidential communications between Strong Force and CPSC and internal deliberations concerning the corrective action taken by Strong Force. The reasons behind Strong Force's decision to recall its products in a particular way (via announcement on its website) are not at all relevant to the determination here of whether the Subject Products are a hazard and are protected by the deliberative process privilege. Furthermore, Congress has made clear in the CPSA that, to encourage firms to undertake voluntary recalls without risking disclosure of confidential communications, such information generally may not be disclosed to other parties absent a compelling need to do so.

As discussed in Section I of this Consolidated Opposition, Section 6 of the CPSA, 15 U.S.C. § 2055, limits disclosure of such confidential communications. This section states generally that trade secrets "shall not be disclosed," *id.* at § 2055(a)(2) and that, similarly,

[3] Neocube Magnets Set Safety Warning, available at http://www.theneocube.com/.

"information that a manufacturer or private labeler has marked to be confidential and barred from disclosure under paragraph (2) ... shall not be disclosed...." *Id.* at § 2055(a)(4). Outside of an administrative proceeding, the Commission may disclose such information if it first determines that such information is not in fact confidential and then allows a firm whose information will be disclosed to first object or file suit in federal district court to block the release of such information. *Id.* § 2055(a)(6). Within the confines of an administrative proceeding, Section 6 does allow the disclosure of confidential information as necessary, but only if relevant and "as governed by the rules of the Commission (including in camera review rules for confidential material)." *Id.* at § 2055(a)(8).

Here, Mr. Zucker has made no effort to explain why communications with another manufacturer concerning a product recall, and the reasons behind the firm's decision to conduct a recall in a particular manner, are at all relevant to this proceeding. Such communications and internal decision-making are not relevant to whether the Subject Products are a substantial product hazard, so they are protected from disclosure by CPSA Section 6. Such communications are also protected from disclosure by the deliberative process privilege, as described in Section I of this Consolidated Opposition. Mr. Zucker's motion to compel disclosure of the information requested in Interrogatories 78 and 79 should be denied.

6. Mr. Zucker's Motion to Compel Concerning Responses Alleged to Be Evasive Should Be Denied.

In his motion, Mr. Zucker argues that certain responses by Complaint Counsel are evasive. Complaint Counsel's responses were provided prior to this Court's entering of a Protective order allowing the production of confidential documents and prior to the Trust's production of documents pursuant to a subpoena. As part of its obligation to supplement responses, Complaint Counsel has provided supplemental responses to the Interrogatories

described below. Because Complaint Counsel's responses were not evasive but were based on information known to it at that time, and because the responses have now been supplemented in light of the documents served or obtained after the service of Complaint Counsel's initial Interrogatory responses, Mr. Zucker's motion to compel concerning these Interrogatories should be denied.

a. The Motion to Compel Responses to Interrogatories 3-4 Should Be Denied Because They Misstate the Allegations of the Complaint.

Mr. Zucker objected to Complaint Counsel's Responses to Interrogatories 3-4 as allegedly evasive. These Interrogatories and Complaint Counsel's responses are as follows:

> INTERROGATORY NO. 3: Describe in complete detail the basis for the allegation in paragraph 15 of the Complaint that the Subject Products are offered for sale to consumers in or around "a school."
>
> RESPONSE: Objection. This Interrogatory misstates the allegations of the Complaint. Paragraph 15 of the Complaint does not allege that the Subject Products are offered for sale to consumers in or around a school. Paragraph 15 of the Complaint alleges that "Respondents imported and distributed the Subject Products in U.S. commerce and offered the Subject Products for sale to consumers for their personal use in or around a permanent or temporary household or residence, a school, and in recreation or otherwise."
>
> INTERROGATORY NO. 4: Describe in complete detail the basis for the allegation in paragraph 15 of the Complaint that the Subject Products are offered for sale to consumers "in recreation."
>
> RESPONSE: Objection. This Interrogatory misstates the allegations of the Complaint. Paragraph 15 of the Complaint does not allege that the Subject Products are offered for sale to consumers "in recreation." Paragraph 15 of the Complaint alleges that "Respondents imported and distributed the Subject Products in U.S. commerce and offered the Subject Products for sale to consumers for their personal use in or around a permanent or temporary household or residence, a school, and in recreation or otherwise." Subject to and without waiving this objection, Complaint Counsel states that additional information responsive to this Interrogatory may be derived or ascertained from Respondent's and M&O's business records, and the burden of deriving the answer is substantially the same or less for Respondent as for Complaint Counsel. Such information also may be available to Respondent from the Trust, and Respondent is directed to those documents.

Complaint Counsel responded that these Interrogatories misstate the allegations of the Complaint. Interrogatory 3 asks Complaint Counsel to state the basis for the allegation "that the Subject Products are offered for sale to consumers in or around 'a school.'" As Complaint Counsel explained in its Response, the Complaint does not allege that the Subject Products are offered for sale in or around a school. Rather, the Complaint alleges that the Subject Products are offered for sale for consumers' "personal *use* in or around ... a school...." Compl. ¶ 15 (emphasis added). Similarly, Complaint Counsel has not alleged that the Subject Products are offered for sale "in recreation," but rather that they are sold for "personal *use* ... in recreation...." *Id.* (emphasis added). Complaint Counsel's allegations track the CPSA, which does not require that products be offered for sale in schools or in recreation, but rather that they be sold for "personal use, consumption or enjoyment ... in or around a permanent or temporary household or residence, a school, in recreation or otherwise." 15 U.S.C. § 2052(a)(5).

Mr. Zucker responds that, although he asked only about where the Subject Products are sold, he apparently meant to ask about the basis for all of the allegations of Paragraph 15 of the Complaint. *See* Motion to Compel Interr. at 19-20. He argues that Complaint Counsel was under a duty to "engage in a conscientious endeavor to understand the questions" he meant to ask, and thus describe the basis for all of the allegations of paragraph 15. *See id.* Complaint Counsel is not under a duty to attempt to divine what Mr. Zucker meant to ask. Nonetheless, Complaint Counsel refers Mr. Zucker to documents that show that the Subject Products were sold for use in schools and in recreation.[4] The motion to compel further responses to Interrogatories 3 and 4 should be denied.

[4] *See* Complaint Counsel's Supplemental Response to Interrogatory 10, at Attachment A; *see also* Maxfield & Oberton, *The Big Book of Bucky Vol. 1* (2012) (describing recreational uses of the Subject Products, including attaching a bullseye to a fridge and throwing loose Subject Products at it).

b. The Motion to Compel Responses to Interrogatories 6, 8, 10-14, 16, 21 and 28 Should Be Denied Because Complaint Counsel Has Supplemented Its Response and Its Response is Not Evasive.

Mr. Zucker, for the first time by motion without any attempt to meet and confer, requested that Complaint Counsel provide more complete responses to Interrogatories 6, 8, 10-14, 16, 21 and 28. In its initial responses to these Interrogatories, Complaint Counsel referred to documents produced by Complaint Counsel. Now that a Protective Order is in place and Complaint Counsel has produced documents pursuant to that Order, Complaint Counsel has provided specific page number cites for each of these responses. *See* Attachment B. Furthermore, Complaint Counsel has supplemented its responses with additional information responsive to these requests. *See* Attachment A. Because Complaint Counsel has provided specific page number cites for each Response and has supplemented its responses, the motion to compel further responses to these Interrogatories should be denied.

For the reasons stated herein, Mr. Zucker's Motion to Compel Complaint Counsel's Responses to Respondent's Amended First Set of Interrogatories should be denied.

B. Respondent's Motion to Compel Complaint Counsel's Response to Respondent Craig Zucker's First Set of Requests for Production of Documents Should Be Denied

1. The Rules Do Not Require Parties to Provide a Description of Documents that Are Otherwise Not Relevant to the Proceeding.

In its Response to Respondent Zucker's Request for Production of Documents, Complaint Counsel declined to answer certain questions on the grounds that the information was not relevant or was otherwise protected from disclosure by the attorney client privilege and/or the work product doctrine. In his Motion to Compel, Respondent argues that Complaint Counsel has not provided enough information to allow him to assess the applicability of attorney work product or attorney-client privilege. *See Mot. to Compel RFPs* at 3. Complaint Counsel is not required to provide such information for irrelevant documents because case law establishes that an objection on the grounds of relevance relieves Counsel of the obligation to do so.

Any document that is not relevant does not need to be described in any detail, regardless of whether the document is also privileged. *See, e.g. ASPCA v. Ringling Brothers and Barnum & Bailey Circus*, 233 F.R.D. 209, 213 ("there is no obligation to assert a privilege for documents that are not within the scope of a request or that are outside of the scope of what could permissibly be requested.") All documents and information reviewed or created by Staff or the Commission prior to the Commission's decision to file a Complaint are not relevant to the instant proceeding, and, in any event, are also protected by the deliberative process privilege. *See* Section I of this

Consolidated Opposition, *supra* at pp. 2-6. As the ALJ stated in a recent matter before the Federal Trade Commission[1],

> It is beyond dispute that Respondent's purpose in eliciting information concerning the pre-Complaint investigation and the Commission's decision making in issuing the Complaint is to challenge the bases for the Commission's commencement of this action. Precedent dictates that such matters are not relevant for purposes of discovery in an administrative adjudication.

See In re LabMD, Inc., 2014 FTC LEXIS 22 at *15 (Docket No. 9357, January 30, 2014) (collecting cases); *see also In re Basic Research*, 2004 FTC LEXIS 210 at *10-11 (Docket No. 9318, Nov. 4, 2004) (denying motion to compel response requesting information regarding why complaint was not filed earlier). Further, for the reasons outlined in Section I of this Comprehensive Objection, documents relating to consumer products that are not the Subject Products, including laundry pods, latex balloons and other items are also not relevant and therefore need not be described in any detail. Respondent requested numerous documents about other consumer products, and Complaint Counsel properly objected to those requests on the grounds of relevance.

Respondent's Motion to Compel also seeks information regarding arguably relevant materials that are protected by both the attorney work product doctrine and the attorney-client privilege.[2] Complaint Counsel objected to the production of such material on the grounds of privilege, and those objections were proper. The Rules governing this

[1] FTC Administrative Proceeding cases are particularly instructive on these discovery issues given that the CPSC Rules of Administrative Proceedings applicable to the scope of discovery, 16 C.F.R. § 1025.31, are patterned on provisions of the Federal Trade Commission's Rules of Practice, 16 C.F.R. 3.31. *Rules of Practice for Adjudicative Proceedings*, 45 F.R. 29200, 29211 (1980).

[2] Respondents have not requested similar information with regard to Complaint Counsel's invocation of the deliberative process privilege. Complaint Counsel, therefore, will limit its response here to relevant documents that are either attorney work product or protected by the attorney-client privilege. All material, however, that is (1) pre-decisional and (2) deliberative in nature, containing opinions, recommendations, or advice about agency decisions are protected by this privilege. Thus, all documents that contain opinions, recommendations or advice concerning whether the Subject Products are defective or present a substantial product hazard and litigation strategy pertaining to M&O or Zucker would be protected by the deliberative process privilege. *See Consolidated Opposition, supra* at pp. 5-6.

proceeding make clear that "discovery should be denied to preserve the privilege of a witness, person or governmental agency..." *See* 16 C.F.R. § 1025.31. The attorney-client privilege is one of the oldest privileges afforded the protection of confidential communications known to common law. *See Upjohn v. U.S.* 449 U.S. 383, 389 (1981). The privilege applies to governmental clients as well as private citizens and may be invoked to protect confidential communications between Government officials and Government attorneys. *See U.S. v. Jicarilla Apache Nation*, __ U.S. __, 131 S.Ct. 2313, 2321 (2011). Among other documents and communications, memoranda concerning discussions among Commissioners and staff regarding the complaint, the underlying reasons for the complaint, as well as legal advice regarding prior corrective actions are all protected from disclosure under this doctrine.

The work product doctrine, as incorporated into the CPSC Rules of Administrative Proceedings, protects materials that are "prepared in anticipation of litigation or for hearing by or for another party or for that party's representative (including his attorney or consultant)". *See* 16 C.F.R. § 1025.31(c)(3). This protection allows lawyers a degree of privacy to assemble information, sift the facts, prepare legal theories, and plan strategy free from unnecessary intrusion by opposing counsel. *See Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

Many of Respondent's overly broad requests seek exactly this type of information. For example, all drafts of the various complaints in this matter, emails, memoranda, and charts created by attorneys or at the direction of attorneys relating to the complaint, including replies to emails from CPSC staff, and discussions among attorneys regarding the matters contained in the complaint are attorney work product. Request No.

15 requests "[a]ll documents and communications among the staff and/or Commissioners, and among the CPSC and third parties, regarding or pertaining to the Complaint, its preparation, filing or approval." Request No. 14 likewise requests "[a]ll documents and communications among the staff and/or Commissioners, and among the CPSC and third parties, regarding or pertaining to the Subject Products" without any limitation as to time or person. Hundreds of emails, drafts, and memoranda would be responsive to these requests; however, none is discoverable because all such documents constitute attorney work product.

Respondent asserts that Complaint Counsel's Responses to Request for Production of Documents do not "provide sufficient information for Respondent to assess the applicability of the privileges."[3] Complaint Counsel, therefore, has provided in Attachment D a more fulsome description of arguably relevant documents withheld solely on the basis of attorney work product or attorney-client privilege.

2. Parties Are Not Required to Produce Publicly Available Documents and/or Documents that Are Readily Accessible to the Other Party

Respondent stated that Complaint Counsel improperly failed to produce documents in response to Requests number 1, 2 and 21. *See Mot. to Compel RFPs* at 5. Request Number 1 sought; "all documents described in your List and Summary of Documentary Evidence filed in these proceedings." Request Number 2 sought "all documents that support the allegations in the Complaint, and Request Number 21 sought

[3] Respondent also objected to Complaint Counsel's designation of documents as Confidential. *See Mot. to Compel RFPs* at 4. Complaint Counsel has further reviewed its production and removed the "Confidential" designation from documents contained within its confidential files that can also be found within the public domain. Complaint Counsel notes, however, that these documents contain research, technical, financial or commercial information selected by staff and kept within the confidential files of the staff, and arguably fall within the ambit of the Confidentiality Order. Counsel will provide a supplemental production with these documents to Respondents by May 2, 2014.

"all documents relating to the CPSC November 10, 2011 safety alert...." Respondent argues that Complaint Counsel is more likely to know who possesses documents responsive to Requests 1, 2, and 21, and thus, should be required to produce them. *See id.* Complaint Counsel, however, did produce many documents responsive to these requests as shown in Attachment B, Document Production Log. Complaint Counsel provided publicly-available documents and documents from its internal Compliance files supporting the allegations in the Complaint and described in the Complaint's List and Summary of Documentary Evidence as well as documents relating to the November 10, 2011 Safety Alert in its production. Because some documents responsive to these requests are also publicly available (such as the Safety Alert and press coverage of the Safety Alert), Complaint Counsel also directed Respondent to search in the public domain.

As conceded by Respondent, Complaint Counsel is not required to produce documents that are of public record. See *Mot. to Compel RFPs* at 5. *See also S.E.C. v. Samuel H. Sloan & Co.*, 369 F. Supp. 994, 995 (S.D.N.Y. 1973) ("It is well established that discovery need not be required of documents of public record which are equally accessible to all parties.") The November 10, 2011 Safety Alert is in the public domain and can be found at http://www.cpsc.gov/en/Newsroom/News-Releases/2012/CPSC-Warns-High-Powered-Magnets-and-Children-Make-a-Deadly-Mix/ through a quick Google search. Regardless, Complaint Counsel has already provided a copy of that Alert at ZUC001013-1016.

Complaint Counsel is not required to produce documents that are equally accessible to the Respondent. *See Baum v. Village of Chittenango*, 218 F.R.D. 36, 40

(N.D.N.Y. 2003) ("compelling discovery from another is unnecessary with the documents sought are equally accessible to all"); *see also S.E.C. v. Strauss*, 2009 U.S. Dist. LEXIS 101227 at *32 (S.D.N.Y. 2009) (denying motion to compel access to database held by third party because agency is entitled to "protection from hav[ing] to produce documents that are equally available to the other party" through subpoena). Because Complaint Counsel did not have access to the M&O documents at the time it filed its initial responses to Respondent's Discovery requests and believed that Mr. Zucker did, Complaint Counsel directed Respondent to search the M&O files with the understanding that the files that were equally available to Respondent. Respondent subsequently advised Complaint Counsel that he had transferred the MOH documents to the Trust sometime subsequent to the filing of the Complaint and dissolution of M&O, and that he did not have access to those documents.[5]

Complaint Counsel obtained the documents on February 20, 2014, pursuant to a Subpoena, and subsequently provided those documents to Respondents. Documents that Complaint Counsel believed were, and are, as accessible to Respondent as to Complaint Counsel include documents in the Trust's files regarding the Safety Alert, as well as marketing and advertising material that was transferred to the Trust by Respondent . Complaint Counsel believes that some documents within those provided by the Trust may

[5] Complaint Counsel contacted the Trust within days of M&O's dissolution in late December 2012. The Trustee stated that she would only be receiving records that she believed would assist in determining assets and liabilities, including records from creditors and bank statements for the last six months. She stated that she believed that the books and records were being preserved by Respondent. Complaint Counsel, therefore, believed that Respondent had most of the documents responsive to discovery until Respondent responded to discovery in September 2013 and stated that all documents had been given to the Trust. When Complaint Counsel then requested that the Trust voluntarily provide these documents to Complaint Counsel, the Trust refused to produce any documents unless Complaint Counsel secured a subpoena.

be responsive to Requests No 1, 2, and 21, and direct Respondent to the documents which contain materials created by or at his direction.

3. Respondent's Claim that Complaint Counsel Refused to Respond to Certain Requests for Production of Documents Is Unfounded

Respondent claims that Complaint Counsel refused to respond to requests for identification of how documents provided to Respondent were maintained in the ordinary course of business. *See Mot. to Compel RFPs* at 6. Complaint Counsel has attached to this Motion a spreadsheet indicating Bates Ranges for its production, the file origination and description, as well as the Requests to which the Bates Ranges respond. *See* Attachment B, Document Production Log. Complaint Counsel has also provided a list of the servers and custodians that were searched for relevant, responsive information in Attachment C, List of Custodians.

Complaint Counsel states that for Electronically Stored Information ("ESI"), Complaint Counsel limited the date range for responsive documents to January 1, 2009 through the date of the search. Complaint Counsel chose a series of keywords, including Magnet, magnetic, magnets, "Rare Earth", Neodymium, Buckyball, Maxfield, "M&O", Zen, "Star Networks", Qu, Peykar and Zuckerto search several terabytes worth of data for potentially relevant information. Complaint Counsel then reviewed hundreds of thousands of pages of documents to provide relevant, responsive documents to Respondent.

For non-ESI, Complaint Counsel reviewed and provided relevant, non-privileged information from all official Compliance Files relating to the Subject Products as well as

products sold by Zen and Star Networks. Finally Complaint Counsel requested and reviewed non-duplicative paper files relevant to the proceeding from relevant custodians.

4. Complaint Counsel Properly Objected to Other Specified Requests on the Grounds of Relevance

Respondent claims that Complaint Counsel improperly refused to provide documents responsive to Requests No. 18-19, 29, 36-39, 41-42, 44, 46-53, 57-58 and 62. Complaint Counsel, however, has provided relevant responsive documents to these Requests. *See* Attachment B noting response to Request No. 29. Counsel did not provide responsive documents to the other Requests because such Requests do not seek documents that are relevant to whether the Subject Products present a substantial product hazard.

For example, Respondent's Request No. 18 and 62 sought 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 F963-5.17" and for "documents relating to consideration by any voluntary standards organization of a voluntary standard with respect to Magnets or other consumer products consisting of or containing magnets."

The applicability of these quoted standards to other consumer products has no bearing on whether the Subject Products present a substantial product hazard. Respondent here seeks information about the Commission's investigation and enforcement actions regarding other consumer products that contain magnets—not rare-earth magnets, such as the Subject Products—that are within the Commission's jurisdiction. Not only is such an

inquiry protected by the deliberative process privilege, the inquiry is not likely to yield admissible evidence because they are entirely distinct from the Subject Products. The ASTM standard prohibits loose as received magnets with a flux less than fifty; the Subject Products average a flux several times that amount. How the ASTM standard is applied to other products containing magnets is not relevant, and on that basis Respondent's request should be denied. *See, e.g., In re LabMD, Inc.*, 2014 FTC LEXIS 35 at *8, Docket No. 9357 (Feb. 21, 2014) (denying request for "all documents sufficient to show the standards the FTC used in the past and is currently using to determine whether an entity's data-security practices violate Section 5 of the Federal Trade Commission Act" because such information was irrelevant).

Respondent's Request No. 58 sought the production of documents for "any disclosure of any information from M&O's response to CPSC's requests for information under section 15 of the CPSA." Complaint Counsel states it can produce no documents that show any such disclosure of information because there was no such disclosure.

Respondent also seeks to compel requests for the production of documents regarding a wide range of consumer products distinct from the Subject Products (Requests 36-39, 41-42, 44, and 46-53 and 57), including, but not limited to, latex balloons, button batteries, children's products with small parts, small balls, marbles, single-load liquid laundry detergent packets, corded baby monitors, and Magnets.[6] The Commission's actions in another enforcement action or investigation, however, are protected by the deliberative process privilege and are not relevant to whether these

[6] Respondent defined Magnets as "aggregated masses of high-powered, small rare earth magnets similar in function to the Subject Products," "magnets that are not Magnets," and "Neocube magnets."

Subject Products present substantial product hazards.[7] *See In the Matter of Outdoor World Corp.*, 1989 FTC LEXIS 142 at *2 (Docket No. 9229, 1989) (denying discovery for "all documents in the files of the [FTC] relating to the operations of its competitors").

Finally, Respondent's request No. 19 for "All documents relating to the decision to file the Complaint" is both overbroad and protected from disclosure by the deliberative process privilege. The bases for the Commission's commencement of the action become irrelevant once the Complaint has issued. *See In the Matter of LabMD, Inc.*, Docket No. 9357 at *5-6 (Jan. 30, 2014) (denying discovery that would be "helpful in determining whether the Commission's actions in investigating and filing a complaint against [Respondent] was arbitrary and capricious."). This type of request is routinely denied in administrative proceedings and should be denied here. *See, e.g. In the Matter of Outdoor World Corp.*, at *3 (documents in the FTC's files on which the FTC based its decision to issue an administrative complaint held not discoverable because issue cannot be litigated in an administrative proceeding). *In the Matter of Flowers Industries, Inc.*, 1981 FTC LEXIS 117 at *6 (1981) (documents sought in pre-complaint files held not discoverable because decision to file complaint is an issue committed to agency discretion and cannot be reviewed in administrative proceeding); *see also In the Matter of Hoechst Marion Roussel, Inc.*, 2000 F.T.C. LEXIS 134 at *15 (Aug. 18, 2000) (denying requests for "any documents or portions thereof which consist of the [FTC's] or its staff's views, policy considerations, analyses, interpretations or evaluations; any internal agency memoranda

[7] Complaint Counsel, therefore, is also prohibited from disclosing information in response to Request Nos. 2, 7-11, 14, 17, 20, 22, 25, 33, 36, 57, 61, 65-67 relating to other manufacturers or importers that is protected by 15 U.S.C. § 2055(a)(2). The exception cited by Respondents at p. 4 of their Motion to Compel applies only to relevant information. Further, for the reasons cited in Section I, any non-privileged, relevant information would need to be reviewed *in camera* and not simply provided to Respondent in the ordinary course of discovery. *See Consolidated Opposition, supra* at 10.

that reflect the government's decision and policy making processes; pre-complaint notes or reports of communications with third parties or identification of all parties the FTC communicated with during its pre-complaint investigation.")

Conclusion

For the reasons set forth herein, Complaint Counsel respectfully requests that the Presiding Officer deny Respondent's Motion to Compel Complaint Counsel's Responses to Respondent's First Set of Requests for Production of Documents to Consumer Product Safety Commission.

Attachments

Attachment B: *Document Production Log*

Attachment C: *List of Custodians*

Attachment D: *Documents For Which Complaint Counsel Has Asserted Attorney-Client Privilege or Work Product*

C. Respondent's Motion to Compel Additional Responses to Requests for Admissions Should be Denied

1. Introduction and Summary

Respondent Craig Zucker has moved the Presiding Officer to Compel Answers to Respondent's First Set of Requests for Admissions ("Mot. To Compel RFAs"). Information made available since Respondent first propounded the Requests for Admission has allowed Complaint Counsel to substantially update its initial responses. In response to the RFA Motion, Complaint Counsel respectfully submits its Amended Responses to Respondent's First Set of Requests for Admissions ("Amended RFA Responses") (attached hereto as Exhibit E.). Complaint Counsel also submits this summary explanation of the Amended RFA Responses, which includes additional explanation of Complaint Counsel's pending objections.[1]

The Amended RFA Responses provide clear admissions or denials to a majority of the RFAs, and as such resolve and render moot most of the arguments set forth in Respondent's Mot. To Compel RFAs. In the case of many other RFAs, Complaint Counsel has provided clear responses indicating that Complaint Counsel lacks the information fully to admit or deny certain allegations.

However, certain disputes remain. Respondent has propounded many RFAs that request information on the adequacy of published warnings for completely unrelated risks, such as choking, chemical poisoning and motor vehicle accidents, and raise questions about products associated with these irrelevant risks, such as latex balloons, adult all-terrain vehicles and marbles. Respondent also has propounded many interrogatories asking about other rare earth

[1] Complaint Counsel's Answers to RFA Nos. 1-6, 8, 28-29, 50-51, 62, 75-77, 112, 115, 117-119, 151, 165, 167,169-70 were accepted and not challenged by Respondent. As such, they are not addressed either in the Amended RFA responses or in this memorandum.

magnets, and requesting information about CPSC actions regarding those products. He also propounds RFAs about CPSC's policies on public meetings, internal review of press releases, and appointment of CPSC's Director of Communications.

Such irrelevant requests raise issues about products, risks and issues that have no relevance to the litigation. In addition to raising completely irrelevant issues that serve no purpose in this litigation, these requests also cross directly into CPSC enforcement actions, which are protected by law from disclosure, and raise important issues of deliberative process privilege, which protects internal agency decision-making. As such, Complaint Counsel reasserts its objections to a number of RFAs, and asks the Presiding Officer to uphold these objections.

Because the RFAs have been updated with clear admissions and denials or valid objections, Complaint Counsel asserts that there are no outstanding issues for this Court to resolve, and requests that the Court deny Respondent's Motion to Compel. Should the Court conclude that issues remain, Complaint Counsel renews its request to Respondent to meet and confer regarding the pending discovery so that the Presiding Officer need not spend time addressing the many issues raised in Respondent's RFA Motion that are no longer in dispute.

2. Discussion

a. Complaint Counsel's Updated Responses Contain Clear Admissions, Denials or Statements of Lack of Information After Reasonable Inquiry

As discussed above, Complaint Counsel's Amended Responses substantively address most of the issues raised by Respondent by providing (1) admissions; (2) denials; and/or (3) clear statements that Complaint Counsel does not have enough information to provide a clear admission or denial.

The RFAs for which Complaint Counsel has made complete or substantial admissions are as follows:

RFA	Admissions
7	Request regarding correspondence from CPSC's former General Counsel largely admitted.
9-10	Requests regarding continued sale of certain magnets admitted, subject to objections.
25	Request regarding Buckyballs 2010 recall largely admitted.
26	Request regarding Buckyballs packaging largely admitted (partially denied based on lack of information).
27	Request regarding Buckyballs labeling in 2010 largely admitted.
31	Request regarding co-founding of Coalition for Magnet Safety admitted based on information and belief.
36	Request regarding 2010 Buckyballs press release admitted.
37	Request regarding Buckyballs press release admitted (with corrected date).
38	Request regarding updated packaging of Buckyballs in 2010 largely admitted.
40	Request regarding CPSC delegated authority admitted.
41	Request regarding CPSC delegated authority to accept corrective action plans largely admitted.
43	Request regarding communications between M&O to and CPSC staff largely admitted.
44	Request regarding manufacturer of certain magnets largely admitted based on public information.
48	Request regarding sale of magnets at a children's store admitted.
49	Request regarding Barnes and Noble sales admitted based on public information.
52	Request regarding Barnes & Noble recall admitted based on publicly available information (with objection regarding deliberative process privilege).
59	Request regarding M&O safety program is largely admitted.
60	Request regarding details in M&O safety program largely admitted.
61	Request regarding CPSC responses to M&O safety program largely admitted.
63	Request regarding CPSC comments on magnet website largely admitted.
64-65	Requests regarding details of M&O safety program largely admitted; denied in part based on lack of information.

68	Request regarding scope of children's toy standard (ASTM F963) largely admitted.
69	Request regarding sale of toys that violate children's toy standard (ASTM F963) largely admitted, subject to objection.
70-71	Requests regarding correspondence from CPSC's former General Counsel largely admitted.
73	Request regarding M&O characterization of Buckyballs as toys largely admitted.
74	Request regarding CPSC comments on magnet websites largely admitted.
78	Request regarding CPSC administrative practice (commencement of proceedings) admitted.
78	(Note: duplicate numbering in original.) Request regarding CPSC administrative practice (commencement of proceedings) admitted.
79	Request regarding CPSC administrative practice (commencement of proceedings) largely admitted.
80	Request regarding CPSC administrative practice (commencement of proceedings) admitted.
81	Request regarding CPSC administrative practice (commencement of proceedings) largely admitted.
82	Request regarding CPSC administrative practice (commencement of proceedings) admitted.
83	Request regarding CPSC administrative practice (commencement of proceedings) largely admitted.
84-86	Request regarding CPSC administrative practice (authorization of commencement of proceedings) largely admitted.
87	Request regarding legal definition of "distributor" under the Consumer Product Safety Act admitted.
88	Request regarding CPSC requests to M&O about stopping sale of Buckyballs admitted.
89-90	Request regarding M&O involvement in CPSC press and news releases admitted.
91	Request regarding M&O requests to CPSC staff about retail sale of magnets largely admitted.
100	Request regarding CPSC requests to stop sale of magnets admitted, subject to deliberative process privilege.
102	Request regarding CPSC requests to stop sale of magnets largely admitted.
103	Request regarding stop sale of magnets largely admitted based on publicly available information.

104 Request regarding manufacturer of a particular magnet admitted based on public information.

106 Request regarding sale of a particular magnet largely admitted based on public information.

107-11 Requests regarding stop sale of a particular magnet admitted based on public information.

128,129, 132, 135 Requests regarding language from various web sites admitted (subject to some objections).

136 Request re recall of other products (infant recliners) admitted based on public information.

137 Request re incidents in recall of other products (infant recliners) admitted based on public information.

138-40 Request regarding filing of other administrative litigation admitted.

141,143 Requests regarding sale of particular magnets admitted based on public information.

144-45 Request re recall and announcing press release of unrelated magnets admitted.

146-50, 152-53 Requests regarding CPSC's Office of Communications admitted subject to objections.

154-55 Requests regarding CPSC's Director of Communications admitted in part subject to objections

156-57 Requests regarding actions of CPSC's Director of Communications admitted subject to objections.

158 Request regarding review of press release by former Chairman partially admitted subject to objections.

161-62, 164 Requests regarding CPSC meetings policy admitted.

166 Request re administrative proceedings admitted based on public information and subject to several objections.

As these RFAs have largely been admitted, albeit without disclosing confidential aspects of ongoing investigations or matters protected from disclosure by the deliberative process privilege, Complaint Counsel believes that Respondent's arguments regarding them are moot, and that these answers should be accepted by Respondent and by the Presiding Officer as fully responsive.

Likewise, Complaint Counsel has been able to deny or largely deny a number of RFAs, as follows:

RFA	Denials
11	Request regarding admission of no injuries from Buckycubes denied.
30	RFA regarding adult magnet manufacturer's coalition denied.
47	Request regarding sale of magnets at children stores and on the Internet denied.
54	Request regarding age grading of certain denied based on public information (subject to objections on relevancy and vagueness).
159-60	Request regarding review of press release by Commissioners denied subject to objections.

As these RFAs have been denied, albeit without disclosing confidential aspects of ongoing investigations or matters protected from disclosure by the deliberative process privilege, Complaint Counsel believes that Respondent's arguments regarding them are moot, and that these answers should be accepted by Respondent and by the Presiding Officer as fully responsive.

Complaint Counsel has stated clearly for a number of RFAs that its denial or inability to answer is based on lack of information after reasonable inquiry, as follows:

RFA	Statement of Lack of Information
26	Request regarding Buckyballs packaging largely admitted but partially denied. based on lack of information (this RFA also listed in "admissions").
32	Request to authenticate M&O's Amended and Restated Limited Liability Co. Agreement denied based on lack of information.
33	Request regarding Mr. Zucker's legal authority denied based on lack of information.
35	Request regarding Mr. Bronstein's interest in M&O denied bases on lack of information.
34	Request regarding legal scope of Mr. Zucker's activities denied based on lack of information.

42	Request that Complaint Counsel review and substantiate test reports Buckyballs contracted from a third party denied based on lack of information
46	Request for admission on markings of other magnets denied based on lack of publicly available information
53	Request regarding online sales of magnets denied based on lack of information.
66-67	Requests regarding M&O's actions with regard to unnamed sellers denied based on lack of information.
72	Request that Complaint Counsel authenticate test reports Buckyballs contracted from a third party denied based on lack of information.

As these RFAs have been clearly answered based on a lack of information after reasonable inquiry, albeit without disclosing confidential aspects of ongoing investigations or matters protected from disclosure by the deliberative process privilege, Complaint Counsel believes that Respondent's arguments regarding them are moot, and that these answers should be accepted by Respondent and by the Presiding Officer as fully responsive.

b. Complaint Counsel Has Valid Pending Objections Regarding Respondent's RFAs

A number of RFAs exist for which Complaint Counsel maintains its objections, which should be sustained by the Presiding Officer.

Pending Objections on Relevance: Respondent has propounded many RFAs that request information on the adequacy of warnings for completely unrelated risks, such as choking, chemical poisoning and motor vehicle accidents, and raise questions about products associated with these irrelevant risks, such as latex balloons, adult all-terrain vehicles and marbles. Respondent also has propounded many RFAs asking about other rare earth magnets, and requesting information about CPSC enforcement actions regarding them. Although Complaint Counsel has answered a number of RFAs subject to objections with regard to other subjects, the RFAs on unrelated risks and products makes an appropriate answer impossible; the requests are

not only irrelevant and unlikely to lead to admissible information, but also inquire into CPSC investigations or matters of CPSC enforcement discretion. These matters are not only irrelevant but are protected by confidentiality concerns and by the deliberative process privilege.

In particular, these issues are raised by RFAs 12-24, 92-99, and a second RFA numbered "90", (which appears between RFAs 92 and 93). RFAs 12 through 19 ask for admissions about warnings in the Code of Federal Regulations that apply to choking risks caused by small parts including latex balloons, small balls, and marbles. RFAs 20 and 21 ask about warnings and hazards associated with child use of adult all-terrain vehicles. RFAs 22 and 23 ask about warnings on child baby monitors about the risk of strangulation. RFAs 24, 92, 93, 94, 95, 96, 97, 98, 99 and the second RFA No. 90 ask about warnings and risks related to single load liquid laundry packets, as well as whether CPSC is seeking recalls or other enforcement action against manufacturers of laundry detergent packets.

As stated in the Amended Responses and the Consolidated Opposition, such requests are not only irrelevant but also seek confidential, proprietary and trade secret information and/or information protected from disclosure by the deliberative process privilege. RFAs regarding distinct risks from distinct products (latex balloons, laundry pods, etc.) are objectionable as irrelevant, burdensome in that they request administrative decisions on classes of products and risks that CPSC has not necessarily addressed, and subject to the deliberative process privilege. As set forth in more detail in the Amended Responses and the Consolidated Opposition, the Presiding Officer should uphold Complaint Counsel's general and specific objections to these RFAs.

Pending Objections to RFAs Requesting Legal Determinations or Speculation:

Several other RFAs request legal determinations or speculation about what CPSC might have

done in a hypothetical scenario. For example, RFA 39 asks CPSC to admit what it might have done regarding sales of certain sets of Buckyballs had it previously made a determination that those sets violated child toy safety standards. This request is both speculative and seeks a legal determination. Likewise, RFAs 171-73 ask Complaint Counsel to provide legal conclusions about the dissolution of M&O. Because these actions are the subject of dispute, because they are based on information held by Respondent, and because they require legal conclusions, Complaint Counsel's objections to these RFAs should also be sustained. (Several other Requests, including 154 and 155, also request legal determinations, but are worded so vaguely that Complaint Counsel objected to them on the basis of vagueness as to what was even being asked).

Pending Objections Regarding RFAs that are Vague and Ambiguous: In a number of RFAs (Including Nos. 45, 105, 120, 122, 124, 126, 130, 133, 142), Respondent names various other types of magnets and requests that Complaint Counsel admit that the named magnets are "substantially similar in function" to the Subject Products. Because this is an undefined term, Complaint Counsel has responded with an admission that the products identified are small rare earth magnets, but also has objected based on the vagueness of the Requests. Because Respondent's RFAs are too vague to require or even allow Complaint Counsel to give clear responses, these objections should be sustained by the Presiding Officer. Elsewhere (RFA Nos. 9, 10, 100-04, 166) the term "Magnets" is defined using the undefined term "similar in function," making a clear response impossible.

Likewise, in RFAs 154 and 155, Respondent requests an admission that CPSC's Office of Communications was speaking "on behalf of" the Commission and CPSC Chairman at various times. This request is vague and ambiguous and requests legal conclusions, and for these reasons these objections should be sustained. Finally, in RFA 163 Respondent asks for an

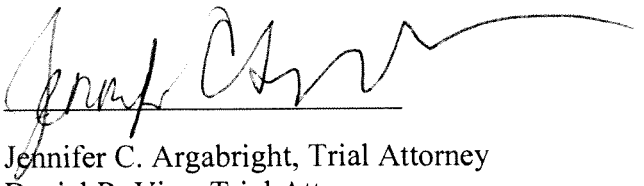
admission that magnets are a "substantial interest matter" under CPSC regulations related to open meetings. However, it is not clear what is being asked, as the cited regulation applies to public meetings, and not to particular subjects or products. Therefore, this objection as to vagueness and ambiguity should be sustained.

Pending Objections Regarding Deliberative Process Privilege/Confidentiality: Although Complaint Counsel asserts an overall objection to the production of confidential, proprietary and trade secret information, and information protected by the deliberative process privilege, these objections are particularly important in RFAs 9, 10, 39, 52, 55-58, 92-99, 101, 103, 113, 114, 116, 121, 123, 125, 127, 131, 134, 166 and 168. Each of these RFAs requests potentially non-public information on recalls and/or inquires whether any enforcement action was taken against various retailers, manufacturers or importers of magnets. Such questions raise issues of confidentiality, proprietary and trade secret information protected by law, and also raise issues of disclosing CPSC's internal processes in choosing enforcement actions, thus implicating deliberative process privilege. For these reasons, Complaint Counsel's objections should be sustained. Likewise, Respondent asks questions about CPSC staff actions and determinations regarding various warnings for unrelated products (RFAs 12-24). The deliberative process privilege should be sustained in the cases of these RFAs as well. RFA 168, which asks whether M&O had advance notice of CPSC action regarding magnets, implicates deliberative process privilege (as well as relevance) and Complaint Counsel's objections should be sustained.

In summary, Complaint Counsel's Amended RFAs provide appropriate admissions and denials for most of the pending RFAs. Where answers are not provided, the well-founded objections should be sustained by the Presiding Officer. Complaint Counsel believes that there are no outstanding issues for this Court to resolve and requests that the Court deny Respondent's

Mot. To Compel RFAs. Should the Court conclude that issues remain, Complaint Counsel respectfully suggests that the parties meet and confer, and thereafter present a list of disputed discovery issues to the Presiding Officer for resolution.

Dated: April 18, 2014



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