

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

_____)	
In the matter of)	
MAXFIELD AND OBERTON HOLDINGS, LLC)	CPSC DOCKET 12-1
ZEN MAGNETS, LLC)	CPSC DOCKET 12-2
STAR NETWORKS USA, LLC)	CPSC DOCKET 13-2
CRAIG ZUCKER)	
)	(Consolidated)
Respondents.)	
_____)	

ANSWER AND AFFIRMATIVE DEFENSES OF RESPONDENT CRAIG ZUCKER

Respondent Craig Zucker, by his undersigned attorneys, hereby answers each paragraph of the Consumer Product Safety Commission’s Second Amended Complaint (“Complaint”) and responds to the Complaint’s allegations as follows:

Nature of Proceeding

1. In response to the allegations in paragraph 1, Mr. Zucker does not dispute the answer filed previously by Maxfield and Oberton Holdings, LLC (“Maxfield and Oberton”) admitting that Maxfield and Oberton imported Buckyballs® and Buckycubes® (“the Subject Products”). Mr. Zucker denies that Maxfield & Oberton was a “distributor” of the Subject Products, because the Consumer Product Safety Act (“CPSA”) specifically states that an “importer” is a “manufacturer,” and a “manufacturer” cannot be a “distributor.” 15 U.S.C. § 2052(a)(7) and (a)(11). Mr. Zucker denies that he imported or distributed the Subject Products. The allegations related to 15 U.S.C. § 2064 state a legal conclusion to which no response is required. Mr. Zucker denies that the Subject Products present a substantial risk of injury.

2. Paragraph 2 contains legal conclusions to which no response is required. To the extent a response is required, Mr. Zucker admits that this proceeding is governed by the Rules of Practice set forth at 16 C.F.R. Part 1025.

Jurisdiction

3. Paragraph 3 contains legal conclusions to which no response is required. To the extent a response is required, Mr. Zucker denies the allegations in this paragraph and specifically denies that Section 15 of the CPSA confers jurisdiction to include him as a respondent in this proceeding.

Parties

4. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4, and on that basis denies the allegations in this paragraph.

5. On the basis that Maxfield and Oberton liquidated in December 2012, Mr. Zucker denies the allegations in this paragraph.

6. Mr. Zucker admits that he was the cofounder and Chief Executive Officer of the now-defunct Maxfield and Oberton. Mr. Zucker denies the remaining allegations in this paragraph.

7. Mr. Zucker admits the allegations in this paragraph.

8. Mr. Zucker admits the allegations in this paragraph.

9. This paragraph sets forth a definition to which no response is required. To the extent a response is required, Mr. Zucker avers that this paragraph is vague, ambiguous and assumes facts not in evidence, and on that basis, Mr. Zucker denies the allegations in this paragraph.

10. This paragraph sets forth a definition to which no response is required. To the extent a response is required, Mr. Zucker avers that this paragraph is vague, ambiguous and assumes facts not in evidence, and on that basis, Mr. Zucker denies the allegations in this paragraph.

11. Mr. Zucker does not dispute the answer filed previously by Maxfield and Oberton admitting that Maxfield and Oberton imported Buckyballs® and Buckycubes® (“the Subject Products”). Mr. Zucker denies that Maxfield & Oberton was a “distributor” of the Subject Products, because the Consumer Product Safety Act (“CPSA”) specifically states that an “importer” is a “manufacturer,” and a “manufacturer” cannot be a “distributor.” 15 U.S.C. § 2052(a)(7) and (a)(11). Mr. Zucker denies that he imported or distributed the Subject Products.

12. Paragraph 12 contains legal conclusions to which no response is required. To the extent a response is required, Mr. Zucker denies the allegations in this paragraph and specifically denies that he was a “manufacturer” or “distributor” of the Subject Products.

13. Mr. Zucker admits the allegations in this paragraph.

14. Mr. Zucker admits the allegations in this paragraph.

The Consumer Product

15. Mr. Zucker does not dispute the answer filed previously by Maxfield and Oberton admitting that Maxfield and Oberton offered Buckyballs® and Buckycubes® for sale to consumers for their personal use and denying that Maxfield and Oberton offered Buckyballs® and Buckycubes® for sale to consumers for use in or around “schools” or “in recreation,” or for any other purpose, to the extent such allegations are intended to describe any entity or activity involving persons under 14 years of age. Mr. Zucker denies that he imported or distributed the Subject Products for any purpose.

16. Mr. Zucker does not dispute the answer filed previously by Maxfield and Oberton admitting that Buckyballs® and Buckycubes® have a flux index over 50. On the basis that the paragraph does not identify all of the packaging in which the Subject Products were offered, Mr. Zucker denies the allegations in this paragraph.

17. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 17, and on that basis denies the allegations in this paragraph.

18. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 18, and on that basis denies the allegations in this paragraph.

19. Mr. Zucker does not dispute the answer filed previously by Maxfield and Oberton admitting that Buckyballs® are small spherically shaped magnets and were introduced in U.S. commerce in March 2009. Mr. Zucker denies that he introduced the Subject Products into commerce at any time.

20. Mr. Zucker does not dispute the answer filed previously by Maxfield and Oberton admitting that Buckycubes® are small cube shaped magnets and were introduced in U.S. commerce in October 2011. Mr. Zucker denies that he introduced the Subject Products into commerce at any time.

21. Mr. Zucker does not dispute the answer filed previously by Maxfield and Oberton admitting this allegation.

22. Mr. Zucker admits that Maxfield and Oberton discontinued sale of the Subject Products on December 27, 2012. Because Mr. Zucker never personally sold the Subject Products, he denies this allegation insofar as it pertains to him personally.

23. Mr. Zucker does not dispute the answer filed previously by Maxfield and Oberton admitting that the Subject Products were sold with a carrying case. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 23, and on that basis denies the allegations in this paragraph.

24. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 24, and on that basis denies the allegations in this paragraph. Because Mr. Zucker never personally sold the Subject Products, he denies this allegation insofar as it pertains to him personally.

25. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 25, and on that basis denies the allegations in this paragraph. Because Mr. Zucker never personally sold the Subject Products, he denies this allegation insofar as it pertains to him personally.

26. Mr. Zucker does not dispute the answer filed previously by Maxfield and Oberton in response to Paragraph 52 of the original Complaint admitting that Maxfield and Oberton had not agreed to voluntarily stop selling Subject Products as of the time of the previously filed Answer and averring that CPSC staff contacted major retailers of the Subject Products, without prior notice to Maxfield and Oberton, and requested the retailers to stop selling Subject Products immediately, effectively shutting down Maxfield and Oberton's network of major retailers for the Subject Products. Mr. Zucker denies that the staff's request for a corrective action plan for the Subject Products was refused, and to the extent it is implied by the allegation, denies that he was asked to submit a corrective action plan as an individual.

27. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 27, and on that basis denies the allegations in this paragraph.

28. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 28, and on that basis denies the allegations in this paragraph.

Count I

29. In response to the allegations incorporated in Paragraph 29, Mr. Zucker incorporates by reference his responses to Paragraphs 1 through 28 as though fully set forth herein.

30. Paragraph 30 contains legal conclusions to which no response is required.

31. Paragraph 31 contains legal conclusions to which no response is required.

32. Paragraph 32 contains legal conclusions to which no response is required.

33. Mr. Zucker denies the allegations in Paragraph 33. Because Mr. Zucker never personally sold the Subject Products, he also denies this allegation insofar as it pertains to him personally.

34. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 34, and on that basis denies the allegations in this paragraph.

35. Mr. Zucker does not dispute the answer filed previously by Maxfield and Oberton in response to Paragraph 28 of the original Complaint admitting that Maxfield and Oberton conducted a voluntary recall in cooperation with the CPSC and voluntarily changed its packaging, warnings, instructions and labeling to reflect that Buckyballs® are not intended for

persons under 14 years of age. Mr. Zucker denies that he personally conducted a recall of the Subject Products.

36. Mr. Zucker admits the allegations in Paragraph 36.

37. Mr. Zucker admits the allegations in Paragraph 37.

38. Mr. Zucker admits that a press release containing the title and date referenced in the allegations in Paragraph 38 appears on the website of the U.S. CPSC. To the extent the allegations are intended to suggest that Maxfield and Oberton or Mr. Zucker admitted that the Buckyballs® violated the Federal toy standard, Mr. Zucker denies that allegation.

39. Mr. Zucker admits the allegations in Paragraph 39.

40. Mr. Zucker does not dispute the answer filed previously by Maxfield and Oberton in response to Paragraph 28 of the original Complaint admitting that Maxfield and Oberton voluntarily changed its packaging, warnings, instructions and labeling to reflect that Buckyballs® are not intended for persons under 14 years of age. Mr. Zucker denies that he personally undertook the relabeling and, to the extent that the allegation implies that the Buckyballs® were ever within the scope of the mandatory provisions of ASTM F963-08, *Standard Consumer Safety Specification for Toy Safety*, Mr. Zucker denies the allegation.

41. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 41.

42. Mr. Zucker admits the allegations in Paragraph 42.

43. Mr. Zucker admits that warnings were present on Buckyballs® sold by Maxfield & Oberton until December 27, 2012. Mr. Zucker denies that he personally sold the Subject Products.

44. Mr. Zucker admits the allegations in Paragraph 44.

45. Mr. Zucker does not dispute the answer filed previously by Maxfield and Oberton in response to Paragraph 24 of the original complaint admitting that Buckyballs® were first sold in 2009, but denies that “numerous” ingestion incidents involving Buckyballs® and children under the age of 14 have occurred.

46. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 46, and on that basis denies the allegations in this paragraph.

47. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 47, and on that basis denies the allegations in this paragraph.

48. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 48, and on that basis denies the allegations in this paragraph.

49. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 49, and on that basis denies the allegations in this paragraph.

50. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 50, and on that basis denies the allegations in this paragraph.

51. Mr. Zucker admits that a press release warning about the risk of ingestion of high-powered magnets appears on the website of the U.S. CPSC, with the issuance date of November 10, 2011, the contents of which speaks for itself.

52. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 52, and on that basis denies the allegations in this paragraph.

53. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 53, and on that basis denies the allegations in this paragraph.

54. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 54, and on that basis denies the allegations in this paragraph.

55. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 55, and on that basis denies the allegations in this paragraph.

56. Mr. Zucker denies the allegations in Paragraph 56 and avers that the warnings adopted in 2010 as part of the recall referred to in Paragraph 38 were accepted by CPSC staff.

57. Mr. Zucker denies the allegations in Paragraph 57 and avers that the warnings adopted in 2010 as part of the recall referred to in Paragraph 38 were accepted by CPSC staff.

58. Mr. Zucker denies that the liquidation of Maxfield & Oberton makes it more likely that children will gain access to the Subject Products and avers that Maxfield & Oberton's liquidation was made necessary in part by the CPSC's unilateral efforts to discourage retailers from selling Subject Products prior to any Commission determination that the products contained a substantial product hazard or were violative of any standard, thereby depriving Maxfield & Oberton of its network of major retailers.

59. Mr. Zucker denies the allegations in Paragraph 59.

60. Mr. Zucker denies the allegations in Paragraph 60.

61. Mr. Zucker denies the allegations in Paragraph 61.

62. Mr. Zucker denies the allegations in Paragraph 62.

63. Mr. Zucker denies the allegations in Paragraph 63.

64. Mr. Zucker denies the allegations in Paragraph 64.

65. Mr. Zucker denies the allegations in Paragraph 65.

66. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 66, and on that basis denies the allegations in this paragraph.

67. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 67, and on that basis denies the allegations in this paragraph.

68. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 68, and on that basis denies the allegations in this paragraph.

69. Mr. Zucker admits the allegations in Paragraph 69.

70. Mr. Zucker denies the allegations in Paragraph 70.

71. Mr. Zucker denies the allegations in Paragraph 71.

72. Mr. Zucker denies the allegations in Paragraph 72.

73. Mr. Zucker denies the allegations in Paragraph 73.

74. Mr. Zucker denies the allegations in Paragraph 74.

75. Mr. Zucker denies the allegations in Paragraph 75.

76. Mr. Zucker denies the allegations in Paragraph 76.

77. Paragraph 77 contains legal conclusions to which no response is required.

78. Mr. Zucker denies the allegations in Paragraph 78.

79. Mr. Zucker denies the allegations in Paragraph 79.

80. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 80, and on that basis denies the allegations in this paragraph.

81. Mr. Zucker denies the allegations in Paragraph 81.

82. Mr. Zucker denies the allegations in Paragraph 82, and avers that the allegation that the products "fail to operate as intended" is unintelligible.

83. Mr. Zucker admits that the Subject Products are appropriate for persons aged 14 and older.

84. Mr. Zucker denies the allegations in Paragraph 84.

85. Mr. Zucker denies the allegations in Paragraph 85.

86. Mr. Zucker denies the allegations in Paragraph 86.

87. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 87, and on that basis denies the allegations in this paragraph.

88. Mr. Zucker denies the allegations in Paragraph 88, and avers that the allegation that the products "do not operate as intended" is unintelligible.

89. Mr. Zucker denies the allegations in Paragraph 89.

90. Paragraph 90 contains legal conclusions to which no response is required.

91. Mr. Zucker denies the allegations in Paragraph 91.

92. Mr. Zucker denies the allegations in Paragraph 92.

93. Mr. Zucker admits that there can be a serious risk of injury if two or more Subject Products are swallowed simultaneously in disregard of the explicit warnings on the Subject Products' packaging and carrying case and in their instructions. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations contained in Paragraph 93, and on that basis denies the remainder of the allegations in this paragraph.

94. Mr. Zucker denies the allegations in Paragraph 94.

95. Mr. Zucker denies the allegations in Paragraph 95.

96. Mr. Zucker denies the allegations in Paragraph 96.

97. Mr. Zucker denies the allegations in Paragraph 97.

98. Mr. Zucker denies the allegations in Paragraph 98.

99. Mr. Zucker denies the allegations in Paragraph 99.

100. Mr. Zucker admits that there is a risk of ingestion of any small product that is placed in the mouth of a child, and denies the remainder of the allegations in Paragraph 100.

101. Mr. Zucker admits that there is a risk of ingestion of any small product that is placed in the mouth of an adolescent or teen, and denies the remainder of the allegations in Paragraph 101.

102. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 102, and on that basis denies the allegations in this paragraph.

103. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 103, and on that basis denies the allegations in this paragraph.

104. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 104, and on that basis denies the allegations in this paragraph.

105. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 105, and on that basis denies the allegations in this paragraph.

106. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 106, and on that basis denies the allegations in this paragraph.

107. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 107, and on that basis denies the allegations in this paragraph.

108. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 108, and on that basis denies the allegations in this paragraph.

109. Mr. Zucker denies the allegations in Paragraph 109.

110. Mr. Zucker denies the allegations in Paragraph 110.

111. Mr. Zucker denies the allegations in Paragraph 111.

112. Mr. Zucker denies the allegations in Paragraph 112.

Count 2

113. Mr. Zucker incorporates by reference his responses to Paragraphs 1 through 112 as though fully set forth herein.

114. Mr. Zucker is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 114, and on that basis denies the allegations in this paragraph.

115. Mr. Zucker denies the allegations in Paragraph 115.

116. Mr. Zucker denies the allegations in Paragraph 116.

117. Insofar as Paragraph 117 attempts to characterize the content of ASTM F963, *Standard Consumer Safety Specification for Toy Safety*, that standard speaks for itself.

118. Insofar as Paragraph 118 attempts to characterize the content of ASTM F963, *Standard Consumer Safety Specification for Toy Safety*, that standard speaks for itself.

119. Mr. Zucker denies the allegations in Paragraph 119.

120. Mr. Zucker admits that a press release containing the date referenced in the allegations in Paragraph 120 appears on the website of the U.S. CPSC. The content of the press release speaks for itself. To the extent the allegations are intended to suggest that Maxfield and Oberton or Mr. Zucker admitted that the Buckyballs® violated the Federal toy standard, Mr. Zucker denies that allegation.

121. Mr. Zucker denies the allegations in Paragraph 121.

122. Mr. Zucker denies the allegations in Paragraph 122.

123. Mr. Zucker denies the allegations in the unnumbered paragraph immediately following Paragraph 122 and denies that the CPSC is entitled to any of the relief sought.

AFFIRMATIVE DEFENSES

Mr. Zucker asserts the following Affirmative Defenses in further opposition to the Complaint:

First Affirmative Defense

The CPSC lacks jurisdiction to issue an Order under Section 15 of the CPSA to Mr. Zucker as an individual or as a former executive of a now-defunct company that once imported the Subject Products. Mr. Zucker neither manufactured, nor imported, nor distributed the Subject Products and is thus not subject to Section 15 of the CPSA.

Second Affirmative Defense

The allegations in the Complaint fail to establish that either Buckyballs® or Buckycubes® contains any defect which creates a substantial risk of injury to the public.

Third Affirmative Defense

There is no applicable rule, regulation, standard or ban with which either Buckyballs® or Buckycubes® fails to comply.

Fourth Affirmative Defense

The Complaint is arbitrary and capricious as it is not based on any reasonable assessment of risk and is inconsistent with the CPSC's own mandatory standards.

Fifth Affirmative Defense

The CPSC did not provide fair notice of what it now purports to require for compliance.

Sixth Affirmative Defense

The allegations of the Complaint are barred, in whole or in part, by the doctrines of waiver, laches, and estoppel.

Seventh Affirmative Defense

Mr. Zucker reserves the right to assert such additional defenses and affirmative defenses as may be appropriate.

WHEREFORE, having fully answered, Mr. Zucker respectfully requests that the

Complaint be dismissed.

Dated: May 24, 2013

By: Erika Z. Jones ^{ACS}
Erika Z. Jones (D.C. Bar #339465)
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
Telephone: 202-263-3232
Facsimile: 202-263-5232
ejones@mayerbrown.com

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2013, a true and correct copy of the foregoing Answer to the Second Amended Complaint in CPSC Docket 12-1 was served first class, postage prepaid, U.S. Mail on the Secretary of the U.S. Consumer Product Safety Commission, the Presiding Officer, and all parties and participants of record in these proceedings in the following manner:

Original and three copies by U.S. mail, and one copy by electronic mail, to the Secretary of the U.S. Consumer Product Safety Commission, Todd A. Stevenson.

One copy by U.S. mail and one copy by electronic mail to the Presiding Officer for *In the Matter of Maxfield and Oberton Holdings, LLC*, CPSC Docket No. 12-1; *In the Matter of Zen Magnets, LLC*, CPSC Docket No 12-2, and *In the Matter Of Star Networks USA, LLC*, CPSC Docket No. 13-2:

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


One copy by U.S. mail and one copy by electronic mail to Complaint Counsel:

Mary B. Murphy
Complaint Counsel
And Assistant General Counsel
Division of Compliance
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Jennifer Argabright, Trial Attorney
Richa Shyam Dasgupta, Trial Attorney
Leah Wade, Trial Attorney
Complaint Counsel
Division of Compliance
Office of the General Counsel
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

One copy by U.S. mail and one copy by electronic mail to counsel for Respondents Zen Magnets, LLC and Star Networks USA, LLC:

David C. Japha
The Law Offices of David C. Japha, P.C.
950 S. Cherry Street, Suite 912
Denver, CO 80246
davidjapha@japhalaw.com



Adam C. Sloane
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3269