

UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION

Received CPSC

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Office of the Secretary  
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In the Matter of )  
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 MAXFIELD AND OBERTON HOLDINGS, LLC )  
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 Respondent. )  
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CPSC DOCKET NO. 12-1

**ANSWER OF RESPONDENT MAXFIELD AND OBERTON HOLDINGS, LLC**

Respondent Maxfield and Oberton Holdings, LLC (“Maxfield and Oberton”), by counsel, hereby files this Answer and responds to the allegations in the Consumer Product Safety Commission (“CPSC”) Complaint as follows:

**FIRST DEFENSE**

In response to the separately numbered paragraphs of the CPSC’s Complaint, Maxfield and Oberton responds as follows:

1. In response to the allegations in paragraph 1, Maxfield and Oberton admits that it imports and distributes Buckyballs® and Buckycubes®, but denies the remaining allegations in this paragraph and specifically denies that either Buckyballs® or Buckycubes® presents a substantial risk of injury. The allegations relating to 15 U.S.C. § 2064 state a legal conclusion to which no response is required. To the extent a response is deemed to be required, Maxfield and Oberton denies the allegations relating to 15 U.S.C. § 2064.

2. The allegations in paragraph 2 state a legal conclusion to which no response is required. To the extent a response is deemed to be required, Maxfield and Oberton denies the allegations in paragraph 2.

3. The allegations in paragraph 3 state a legal conclusion to which no response is required. To the extent a response is deemed to be required, Maxfield and Oberton denies the allegations in paragraph 3.

4. The allegations in paragraph 4 state a legal conclusion to which no response is required. To the extent a response is deemed to be required, Maxfield and Oberton denies the allegations in paragraph 4.

5. Maxfield and Oberton admits the allegations in paragraph 5.

6. The allegations in paragraph 6 state a legal conclusion to which no response is required. To the extent a response is deemed to be required, Maxfield and Oberton denies the allegations in paragraph 6.

7. In response to the allegations in paragraph 7, Maxfield and Oberton admits that it offers Buckyballs® and Buckycubes® for sale to consumers for their personal use. Maxfield and Oberton denies that it offers Buckyballs® or 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. Maxfield and Oberton further responds that Buckyballs® and Buckycubes® each display multiple, conspicuous warnings that specifically state that they should be kept away from all children. In response to the allegations in the second and third sentences of paragraph 7, Maxfield and Oberton admits that Buckyballs® and Buckycubes® have a flux index of over 50, but is unable to admit or deny, and therefore denies, the remaining allegations because the allegations fail to specify which measurements pertain to which product.

8. Maxfield and Oberton admits the allegations in paragraph 8.

9. Maxfield and Oberton admits the allegations in paragraph 9.

10. Maxfield and Oberton admits the allegations in paragraph 10.
11. In response to the allegations in paragraph 11, Maxfield and Oberton admits that Buckyballs® advertising contained, *inter alia*, the statement, “The Amazing Magnetic Toy,” but denies that Buckyballs® were advertised and marketed to appeal to children.
12. Maxfield and Oberton denies the allegations in paragraph 12.
13. In response to the allegations in paragraph 13, Maxfield and Oberton admits that it has marketed and advertised Buckyballs® as an adult executive desk toy and/or stress reliever, but denies the remaining allegations in paragraph 13.
14. In response to the allegations in paragraph 14, Maxfield and Oberton admits that Buckyballs® and Buckycubes® are sold with a carrying case, but denies that replacement sets are available for purchase without a carrying case. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 14 and therefore denies those allegations.
15. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15 and therefore denies those allegations. Maxfield and Oberton further responds that as of July 2012, Maxfield and Oberton had sold more than 2.57 million packaged units of Buckyballs® to retailers for resale to consumers and online.
16. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16 and therefore denies those allegations. Maxfield and Oberton further responds that as of July 2012, Maxfield and Oberton had sold more than 290,000 packaged units of Buckycubes® to retailers for resale to consumers and online.

17. Maxfield and Oberton denies the allegations in paragraph 17 and specifically denies that either Buckyballs® or Buckycubes® poses any risk when used as intended. Maxfield and Oberton further responds that any risk of ingestion can occur only if the multiple, conspicuous warnings accompanying Buckyballs® and Buckycubes® are ignored and the products are misused.

18. Maxfield and Oberton denies the allegations in paragraph 18. The allegations do not reference any particular incident, but rather appear to be a speculative list of the potential harms that allegedly could occur if two or more magnets are swallowed. Buckyballs® and Buckycubes® are each sold with multiple, conspicuous warnings which state, *inter alia*, that they should not be put in the mouth or nose, that immediate medical attention should be sought if the magnets are swallowed or inhaled, and that swallowed magnets can cause serious injury or death. Thus, the allegations in this paragraph are based on the supposition that the multiple, conspicuous warnings accompanying Buckyballs® and Buckycubes® will be ignored and the products will be misused. Numerous consumer and other products can potentially cause injury, including serious injury requiring medical treatment, if the product warnings are ignored and the products are misused.

19. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 19 and therefore denies those allegations. More specifically, Maxfield and Oberton cannot speculate as to what medical professionals may or may not know or the health risks that may or may not occur in any particular case as the result of a medical professional's lack of awareness or delay in medical intervention.

20. Maxfield and Oberton denies the allegations in paragraph 20. The allegations do not reference any particular incident, but rather appear to be a speculative list of the potential

harms that could occur if multiple magnets are swallowed. Buckyballs® and Buckycubes® are each sold with multiple, conspicuous warnings which state, *inter alia*, that they should not be put in the mouth or nose, that immediate medical attention should be sought if the magnets are swallowed or inhaled, and that swallowed magnets can cause serious injury or death. Thus, the allegations in this paragraph are based on the supposition that the multiple, conspicuous warnings accompanying Buckyballs® and Buckycubes® will be ignored and the products will be misused. Numerous products can potentially cause injury if a product's warnings are ignored and the product is misused.

21. Maxfield and Oberton denies the allegations in paragraph 21. The allegations do not reference any particular incident, but rather appear to be a speculative description of the potential harms that could occur if multiple magnets are swallowed.

22. Maxfield and Oberton denies the allegations in paragraph 22. The allegations do not reference any particular incident, but rather appear to be a speculative list of the potential harms that could occur if multiple magnets are swallowed.

#### Count I

23. In response to the allegations in paragraph 23, Maxfield and Oberton hereby incorporates by reference, as if fully set forth herein, its responses to paragraphs 1 through 22 of the Complaint.

24. In response to the allegations in paragraph 24, Maxfield and Oberton admits that Buckyballs® were first sold in 2009, but denies that “numerous” ingestion incidents involving Buckyballs® and children under the age of 14 have occurred.

25. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25 and therefore denies those allegations.

26. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 26 and therefore denies those allegations.

27. Maxfield and Oberton denies the allegations in paragraph 27.

28. In response to the allegations in the first sentence of paragraph 28, Maxfield and Oberton admits that the CPSC issued a Notice of Noncompliance in March 2010, but denies that Buckyballs® failed to comply with any alleged requirements. In response to the allegations in the second sentence of this paragraph, Maxfield and Oberton admits that in March 2010 it conducted a voluntarily 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.

29. In response to the allegations in paragraph 29, Maxfield and Oberton admits that it has voluntarily undertaken numerous steps to prevent the sale or use of Buckyballs® to children under the age of 14.

30. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 30, and therefore denies those allegations, because the allegations do not refer to any product. To the extent the allegations are intended to refer to Buckyballs®, Maxfield and Oberton further responds that such incidents can occur only if the multiple, conspicuous warnings accompanying Buckyballs® are ignored and the products are misused.

31. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31 and therefore denies those allegations.

32. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 32 and therefore denies those allegations.

33. In response to the allegations in paragraph 33, Maxfield and Oberton admits that the CPSC issued a public safety alert in November 2011, the contents of which speak for itself. Maxfield and Oberton further responds that it worked cooperatively with the CPSC regarding such public safety education effort. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 33 and therefore denies those allegations.

34. Maxfield and Oberton is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34 and therefore denies those allegations.

35. Maxfield and Oberton denies the allegations in paragraph 35.

36. Maxfield and Oberton denies the allegations in paragraph 36.

37. In response to the allegations in paragraph 37, Maxfield and Oberton admits that it is not feasible to attach a warning to each individual magnet, but denies the remaining allegations in paragraph 37.

38. Maxfield and Oberton denies the allegations in paragraph 38.

39. Maxfield and Oberton denies the allegations in paragraph 39.

40. Maxfield and Oberton denies the allegations in paragraph 40.

#### Count II

41. In response to the allegations in paragraph 41, Maxfield and Oberton hereby incorporates by reference, as if fully set forth herein, its responses to paragraphs 1 through 40 of the Complaint.

42. Maxfield and Oberton denies the allegations in paragraph 42. Maxfield and Oberton further responds that the allegation that the Subject Products “do not operate exclusively as intended” is unintelligible.

43. Maxfield and Oberton denies the allegations in paragraph 43.

44. Maxfield and Oberton denies the allegations in paragraph 44.

45. Maxfield and Oberton denies the allegations in paragraph 45.

46. Maxfield and Oberton denies the allegations in paragraph 46. Maxfield and Oberton further responds that the allegations that the Subject Products “do not operate as intended” or “act” in specific ways are unintelligible.

47. In response to the allegations in paragraph 47, Maxfield and Oberton admits that the plastic carrying case does not prevent adults from making the magnets accessible to children, contrary to the multiple, conspicuous warnings provided with the Subject Products, including on the carrying case. Maxfield and Oberton denies the remaining allegations in paragraph 47.

48. Maxfield and Oberton denies the allegations in paragraph 48.

### Count III

49. In response to the allegations in paragraph 49, Maxfield and Oberton hereby incorporates by reference, as if fully set forth herein, its responses to paragraphs 1 through 48 of the Complaint.

50. Maxfield and Oberton denies the allegations in paragraph 50. Maxfield and Oberton further responds that the allegation that the Subject Products fail “to operate as intended” is unintelligible.

51. Maxfield and Oberton denies the allegations in paragraph 51.

52. In response to the allegations in paragraph 52, Maxfield and Oberton admits that it has not agreed to voluntarily stop selling and to recall Buckyballs® and Buckycubes®. Maxfield and Oberton further responds that, prior to the issuance of the Complaint or any order of the Commission or court, the CPSC staff, without prior notice to Maxfield and Oberton,



contacted major retailers whom the staff knew, based on confidential information provided by Maxfield and Oberton, were sellers of Buckyballs® and Buckycubes®, and requested that they stop selling these products immediately. The effect of these pre-Complaint actions was to effectively shut down Maxfield and Oberton's network of major retailers for these products.

53. Maxfield and Oberton denies the allegations in the unnumbered paragraph immediately following paragraph 52, and denies that the CPSC is entitled to any of the relief sought.

### **SECOND DEFENSE**

The allegations in the Complaint fail to establish that either Buckyballs® or Buckycubes® contains any defect or constitutes a substantial product hazard within the meaning of Section 15(a)(2) of the Consumer Product Safety Act (15 U.S.C. § 2064(a)(2)). More specifically, there is no fault, flaw, or irregularity that causes weakness, failure or inadequacy in the form or function of either Buckyballs® or Buckycubes®, nor is there any inadequacy or flaw in the contents, construction, finish, packaging, warnings or instructions of either Buckyballs® or Buckycubes®. Moreover, neither Buckyballs® nor Buckycubes® creates a substantial risk of injury to the public.

### **THIRD DEFENSE**

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

### **FOURTH DEFENSE**

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

### **FIFTH DEFENSE**

The CPSC has contributed to the alleged incidence of magnet ingestion and the alleged

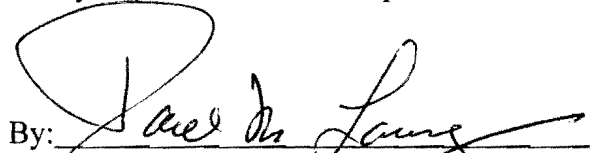
ineffectiveness of warnings by failing to take timely remedial action against major retailers that the CPSC staff knew were advertising, marketing, and offering for sale high-powered magnet sets, including those of Maxfield and Oberton, as appropriate for children under the age of 14.

#### **SIXTH DEFENSE**

Upon information and belief, the CPSC staff did not fairly and adequately consider, and the Commissioners may not have been made fully aware of, a comprehensive voluntary corrective action plan which Maxfield and Oberton submitted, at the request of the CPSC staff, the day immediately preceding the CPSC staff's filing of its Complaint. Maxfield and Oberton further asserts that the CPSC staff subsequently included elements of Maxfield and Oberton's voluntary corrective action plan in the CPSC staff's Notice of Proposed Rulemaking for a Safety Standard for Magnet Sets, dated August 8, 2012. The CPSC staff's proposal recommended issuance of a proposed rule seeking public comments on, *inter alia*, measures that are the same as or substantially similar to measures in the Maxfield and Oberton proposed corrective action plan, notwithstanding the CPSC staff's issuance of an administrative complaint on July 25, 2012, alleging that the Maxfield and Oberton proposed voluntary corrective action measures are ineffective.

WHEREFORE, Maxfield and Oberton respectfully requests that the Complaint be dismissed.

Dated: August 14, 2012

By: 

Paul M. Laurenza (D.C. Bar # 217919)

Eric C. Tew (D.C. Bar # 477023)

DYKEMA GOSSETT PLLC

Franklin Square Building

1300 I Street, N.W., Suite 300 West

Washington, D.C. 20005

Telephone: (202) 906-8600

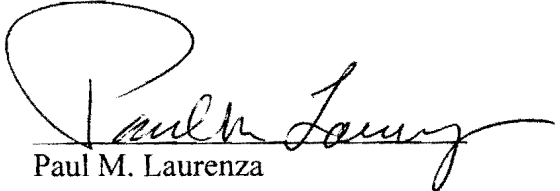
Facsimile: (202) 906-8669

**CERTIFICATE OF SERVICE**

I hereby certify that on August 14, 2012, a true and correct copy of the foregoing Answer of Respondent Maxfield and Oberton Holdings, LLC was served via first class, postage prepaid, U.S. Mail, on:

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

Jennifer Argabright, Trial Attorney  
Sarah Wang, Trial Attorney  
Complaint Counsel  
Division of Compliance, Office of General Counsel  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, Maryland 20814

  
Paul M. Laurenza