

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

CAUSE OF ACTION	)
1919 Pennsylvania Ave., NW, Suite 650	)
Washington, D.C. 20006,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES CONSUMER PRODUCT	)
SAFETY COMMISSION	)
4330 East West Highway	)
Bethesda, MD 20814	)
	)
Defendant.	)
_____	)

**Case No.:** \_\_\_\_\_

**Judge:** \_\_\_\_\_

**COMPLAINT**

This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking the release of records requested by Cause of Action from the United States Consumer Product Safety Commission.

**JURISDICTION AND VENUE**

1. This Court has personal and subject matter jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 552(a)(6)(E)(iii), and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(1)(C) and 5 U.S.C. § 552(a)(4)(B).

**PARTIES**

3. Cause of Action (COA or Plaintiff) is a non-profit, nonpartisan organization that educates the public on how government transparency and accountability protects economic opportunities for American taxpayers. In furtherance of this mission, Plaintiff regularly requests

access to the public records of federal government agencies, entities, and offices, and disseminates its findings.

4. The United States Consumer Product Safety Commission (CPSC or Defendant) is an agency within the meaning of 5 U.S.C. § 552(f)(1). Defendant has possession, custody, and control of records to which COA seeks access and that are the subject of this Complaint.

### **FACTS**

5. This matter involves a FOIA request related to CPSC's efforts, through heavy-handed regulatory overreach, to shut down a number of successful and responsible businesses, including one that was operated by Mr. Craig Zucker.

6. Mr. Zucker is the former General Manager of Maxfield and Oberton Holdings, LLC ("M&O"), a now-dissolved company that previously imported and sold Buckyballs® and Buckycubes®, rare earth magnetic adult executive desk toys that CPSC seeks to recall and ban.

7. Buckyballs® are small magnetic spheres, a few millimeters in diameter. When many are placed together, they can be formed into innumerable shapes and patterns. Manipulating Buckyballs® into different shapes and patterns is an entertaining way to relieve stress and exercise the mind. Buckycubes® are small magnetic cubes that M&O marketed and sold using the same safety program developed for Buckyballs®.

8. Buckyballs® and Buckycubes® are completely safe when used as intended. Like many other products, they may cause harm if ingested. For this reason, M&O never marketed its products towards children.

9. On July 10, 2012, without warning or evidence of a statistically significant number of injuries, and after years of working side-by-side with M&O in the development of its safety program, the CPSC's Office of Compliance issued a preliminary determination that M&O's products were defective and that its safety program would not work.

10. At this point, CPSC initiated an all-out effort to shut down M&O. CPSC immediately began contacting many of M&O's major retailers, telling them that Buckyballs® and Buckycubes® were unsafe and "requesting" them to stop selling the products.

11. M&O's retailers almost unanimously caved in to the government's pressure and intimidation.

12. In a good-faith effort to regain CPSC's favor and to save its business, M&O submitted a voluntary Corrective Action Plan that proposed further expansions to its already-robust safety program, including a child-resistant carrying case, the possibility of adding a bittering agent, enhanced warnings, additional retail signs, and programs to further public awareness of the danger of ingestion.

13. CPSC received the plan at 4:00 p.m. on July 24, 2012. On information and belief, CPSC never read it. Instead, CPSC filed an administrative complaint against M&O on July 25, 2012, initiating a proceeding to order M&O to stop selling all of its products and to conduct a total recall of all of its products already sold. *See In the Matter of Maxfield and Oberton Holdings, LLC*, CPSC Docket No 12-1 [hereinafter CPSC Proceeding], *available at* <http://www.cpsc.gov/en/Recalls/Recall-Lawsuits/Adjudicative-Proceedings/>.

14. On August 27, 2012, CPSC issued a news release stating that "CPSC staff estimates that small, high powered magnet sets were associated with 1,700 emergency room-treated injuries between 2009 and 2011. The majority of injuries (70 percent) have been to children 4 to 12 years of age." News Release, U.S. Consumer Product Safety Comm'n, CPSC Starts Rulemaking to Develop New Federal Standard for Hazardous, High-Powered Magnet Sets (Aug. 27, 2012), *available at* <http://www.cpsc.gov/en/newsroom/news-releases/2012/cpsc-starts-rulemaking-to-develop-new-federal-standard-for-hazardous-high-powered-magnet-sets/> [hereinafter CPSC Press Release].

15. Without retailers willing to sell M&O's products in the face of CPSC's campaign of duress and intimidation, the agency forced M&O out of business in a matter of months. On December 27, 2012, M&O filed its certificate of cancellation with the Division of Corporations of the Delaware Secretary of State and ceased to exist.

16. On February 11, 2013, CPSC moved to amend its complaint in the CPSC Proceeding to add Mr. Zucker personally as a respondent. *See* CPSC Proceeding, CPSC Motion for Leave to File Second Amended Complaint and Memorandum in Support (Feb. 11, 2013), Docket Entry 29. The amended complaint seeks an order requiring Mr. Zucker to personally conduct a full recall of M&O's products at an estimated cost of \$57 million. *Id.*

17. CPSC has never filed an action to require an officer or former officer of a company to personally conduct a recall. Suggesting that M&O has only "purported" to dissolve, CPSC argues that Mr. Zucker must stand in the company's shoes because he exercised personal control over its acts and practices. *Id.*

18. Amidst general concern over CPSC's heavy-handed tactics and its unfounded legal theory regarding Mr. Zucker, COA sent a FOIA request to CPSC on November 12, 2013. This request seeks access to the following records:

- A. [A]ll records . . . underlying CPSC's estimate [that small, high-powered magnet sets were associated with 1,700 emergency room-treated injuries between 2009 and 2011]. These records should include, but are not limited to, all responsive "reports of harm" submitted to SaferProducts.gov, all responsive cases reported through the National Electronic Surveillance System (NEISS) database, responsive information contained in the Injury or Potential Injury Incident (IPII) database, responsive information contained in the In-depth Investigation Database (INDP), and relevant incident data received from the North American Society for Pediatric Gastroenterology, Hepatology and Nutrition (NASPGHAN).
- B. All records . . . related to the drafting, preparation and clearance of the April 12, 2013 CPSC recall release regarding the recall of Buckyballs® and Buckycubes® by six retailers (CPSC Recall Release 13-168).

- C. All records . . . comprising the monthly progress reports of the six retailers who agreed to participate in the Buckyballs® and Buckycubes® magnet recall that was announced on April 12, 2013 (CPSC Recall Release 13-168).
- D. All records . . . reflecting, regarding or referencing, and all communications between, CPSC staff and Strong Force, Inc. regarding the product marketed as NeoCube magnet sets.
- E. All records . . . generated, downloaded or created by CPSC and/or its staff containing, discussing, reflecting, regarding or referencing expressions of public criticism or concern with respect to: (1) their conduct concerning the recall of Buckyballs®, Buckycubes®, NeoCube or any other magnet sets, and/or (2) their actions against [M&O] and/or Mr. Craig Zucker.
- F. All records . . . generated, downloaded or created by CPSC and/or its staff referencing or concerning Mr. Craig Zucker.

*Ex. 1.*

19. In order to expedite CPSC's response, COA disclaimed any interest in obtaining the identity of any manufacturer other than M&O or Strong Force, Inc. *Id.*

20. COA's FOIA request included a request for a public interest fee waiver, as well as a request to be recognized as a representative of the news media. *Id.*

21. By letter dated November 19, 2013, CPSC acknowledged receipt of COA's FOIA request and assigned it a case number: #14-F-00079. CPSC did not invoke or request any extension of the statutorily mandated time period within which to respond to COA's request, stating merely that "there may be delays in providing the records" and that the records would be "made available to you at the earliest possible date." *Ex. 2.*

22. This acknowledgment letter has been the only update of any kind provided by CPSC regarding COA's request. COA has made multiple attempts to obtain a status update from CPSC to no avail.

23. For instance, on January 6, 2014, COA emailed CPSC requesting a status update on COA's request. COA received no response. *Ex. 3.*

24. On February 3, 2014, COA again emailed CPSC requesting a status update. COA received no response. *Ex.* 4.

25. The FOIA and CPSC's regulations both require that CPSC respond to COA's request within twenty (20) working days. 5 U.S.C. § 552(a)(6); 16 C.F.R. § 1015.5.

26. It has been more than 90 working days since COA submitted its FOIA request on November 12, 2013.

27. Through the date of this Complaint, CPSC has not responded to COA's request beyond issuing a routine acknowledgment letter. *Ex.* 2. CPSC has thus failed to comply with its now long-expired statutory deadline by which to make a determination on COA's request.

## COUNT I

### **Violation of the FOIA: Failure to Comply with Statutory Deadlines**

28. COA incorporates by reference paragraphs 1-27.

29. COA has exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C).

30. CPSC has improperly withheld agency records requested by COA by failing to make a determination on COA's request within the time limit set forth in 5 U.S.C. § 552(a)(6) and in CPSC's implementing regulation, 16 C.F.R. § 1015.5.

### **RELIEF REQUESTED**

WHEREFORE, COA respectfully requests that this Court grant the following relief:

- a. order CPSC to produce, by a date certain, all reasonably segregable, non-exempt records responsive to COA's FOIA request;
- b. provide for expeditious proceedings in this action;
- c. award COA its costs and reasonable attorney fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and,
- d. grant such other relief as the Court deems just and proper.

Respectfully submitted,

Dated: April 1, 2014

/s/ Allan Blutstein

Allan Blutstein

D.C. Bar No. 486156

/s/ Reed D. Rubinstein

Reed D. Rubinstein

Senior Vice President for Litigation

D.C. Bar No. 400153

Cause of Action

1919 Pennsylvania Ave., NW

Suite 650

Washington, D.C. 20006

(202) 499-4232 (telephone)

(202) 330-5842 (fax)

reed.rubinstein@causeofaction.org

*Counsel for Plaintiff*