CAUSE of ACTION
Advocates for Government Accountability
A 501(c)(3) Nonprofit Corporation

July 23, 2014

VIA UPS EXPRESS
Christopher W. Dentel
Inspector General
U.S. Consumer Product Safety Commission
4330 East West Highway
Room 827
Bethesda, MD 20814

Re: Request for Investigation into Waste, Abuse, and Mismanagement at the Consumer Product Safety Commission

Dear Mr. Dentel:

I am writing on behalf of Cause of Action (CoA), a non-profit, nonpartisan government accountability organization that fights to protect economic opportunity when federal regulations, spending, and cronyism threaten it.

CoA is reporting to you waste, abuse, and mismanagement by the Consumer Product Safety Commission (CPSC) in connection with the matter captioned *In re: Maxfield and Oberton Holdings,* LLC, CPSC Docket No. 12-1 (*In re: M&O*), which has led to CPSC expending considerable money, CPSC wasting resources and an individual targeted by CPSC expending considerable financial and other resources to defend himself. For the reasons discussed below, and because the Office of the Inspector General (OIG) seeks to prevent "fraud, waste, abuse, and mismanagement," *see* 5 U.S.C. App. § 2, CoA requests that you investigate this matter.

I. SUMMARY OF ALLEGATIONS

First Allegation – CPSC Made Material Misrepresentations in its Amended Complaints. Former CPSC Executive Director Kenneth Hinson and CPSC Assistant General Counsel Mary B. Murphy, potentially with the acquiescence of then Chairman Inez Tenenbaum and/or Commissioner Robert Adler, on two separate occasions knowingly misrepresented material facts to the Administrative Law Judge (ALJ) in *In re: M&O* that the Commission had authorized the staff to file motions seeking to amend the original Complaint (which was authorized by the Commission), when in fact no such authorization had been provided. Based on these representations, the amendments were accepted – thereby adding additional count(s), including pursuing individual liability against Craig Zucker (former General Manager, co-founder and member of Maxfield and Oberton Holdings, LLC (M&O)). Not only do these actions violate

CPSC's Rules of Practice, which led to considerable waste of CPSC's resources, but they also violated Mr. Zucker's due process rights.

Second Allegation – CPSC Retaliation in Response to First Amendment Rights. Mr. Zucker has aggressively defended his and M&O's actions in numerous forums. Upon information and belief, CPSC responded to Mr. Zucker's exercise of his First Amendment rights by pursuing the complaint against Mr. Zucker.

Third Allegation – CPSC Fails to Comply with IQA and FOIA. In connection with *In re: M&O*, CPSC's actions demonstrated its failure to comply with its information collection, dissemination and quality requirements under the Information Quality Act (IQA) and the Freedom of Information Act (FOIA). With respect to the IQA violations, at least one of the press releases in question was approved by former Chairman Tenenbaum and one was approved by current Acting Chairman Adler. As a result, CoA was forced to file an IQA petition and FOIA lawsuit, which unnecessarily resulted in CPSC and Mr. Zucker expending considerable time and resources.

II. BACKGROUND

M&O was registered as a Limited Liability Company in Delaware in March 2009 by members Mr. Zucker and Jake Bronstein. The company, among other things, developed the brands Buckyballs and Buckycubes, both of which were products lawfully being sold at all times during which the company operated.

When first introduced, Buckyballs were labeled "Ages 13+" to meet labeling requirements for children's products as defined by the Consumer Product Safety Act (CPSA). In August 2009, ASTM F963-08 became a mandatory toy standard and redefined a child as being a person under age 14. M&O worked cooperatively with CPSC to voluntarily recall Buckyballs with packaging that said 13+ and to replace them with enhanced warnings that met the new standard, even though M&O's position remained that the standard was inapplicable. Exhibit A. In May 2010, CPSC accepted these changes and approved Buckyballs as an adult product meeting all safety standards and with sufficient warnings.

In November 2011, M&O joined with CPSC to issue a joint press and video news release regarding the dangers of high-powered magnets to children.[1] In April 2012, at M&O's request, officials from M&O met individually with Commissioners Robert Adler, Nancy Nord and Anne Northup, and with staff at CPSC, so that M&O could educate CPSC about the company's expanded safety program. At that time, the Commissioners and staff commended M&O's commitment to safety.

On July 10, 2012, the CPSC Office of Compliance issued a preliminary determination that Buckyballs and Buckycubes were defective. Exhibit B. On July 12, 2012, M&O responded

[1] *Available at* http://www.cpsc.gov/en/Newsroom/News-Releases/2012/CPSC-Warns-High-Powered-Magnets-and-Children-Make-a-Deadly-Mix/.

formally to the preliminary determination and requested reconsideration. Exhibit C. CPSC never responded to this letter.

CPSC staff began contacting M&O's major retailers, "requesting" that these retailers immediately stop selling the products. On July 20, 2012, at M&O's request in response to these letters, then General Counsel for CPSC, Cheryl Falvey, sent letters to M&O and some of their retailers confirming "that it is not a violation of any law administered by the CPSC for any retailer to continue to sell Buckyballs and Buckycubes." Exhibit D. Despite this, CPSC continued to pressure retailers to stop selling the products.

M&O responded to CPSC's preliminary determination letter within the requested 10 days on July 24, 2012 with a proposed voluntary Corrective Action Plan. CPSC did not respond to this proposed plan, but instead issued an Administrative Complaint on July 25, 2012. The vote sheet from the Commission authorizing the complaint as required was dated July 23, 2012, two days before the Corrective Action Plan was due. Exhibit E.

On December 27, 2012, as a result of the above, M&O dissolved in accordance with the laws of the State of Delaware and filed a certificate of cancellation with the Secretary of State.

III. FIRST ALLEGATION – CPSC MADE MATERIAL MISREPRESENTATIONS IN ITS AMENDED COMPLAINTS.

A. Relevant Facts

1. Complaint Against Respondent Maxfield and Oberton Holdings, LLC

On July 25, 2012, then-Executive Director Kenneth Hinson signed an Administrative Complaint in his capacity as Executive Director against M&O, which states that it is "ISSUED BY ORDER OF THE COMMISSION." Exhibit F, at 12. Commissioner Ann Marie Buerkle later noted in a statement accepting a settlement of this matter, "[t]hat complaint was duly authorized by a majority vote of the Commission, and it states explicitly that it was 'ISSUED BY ORDER OF THE COMMISSION.'" Exhibit G. M&O was the only Respondent named in the original complaint; there is no mention of Mr. Zucker. *See* Exhibit G. The Commission vote sheet reflects that a majority of the Commission authorized issuance of this administrative complaint. Exhibit E.

2. The First Amended Complaint

On September 18, 2012, CPSC Assistant General Counsel Mary B. Murphy and CPSC trial attorneys Jennifer Argabright, Leah Wade and Richa Dasgupta (Complaint Counsel), filed a motion with the ALJ seeking to amend the original complaint by, among other things, "adding a count alleging that the Subject Products [Buckyballs and Buckycubes] present a substantial product hazard under Section 15(a)(I) of the CPSA, 15 U.S.C. § 2064(a)(I), because they fail to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public."

A proposed amended complaint was attached to the Motion as an exhibit. The proposed First Amended Complaint stated "ISSUED BY ORDER OF THE COMMISSION" and was signed by Kenneth R. Hinson in his capacity as Executive Director. Exhibit H, at 19.

However, unlike the original complaint, no vote sheet exists to reflect that the Commission voted to authorize the filing of an amended complaint. Upon information and belief, no such vote occurred. Nevertheless, and presumably based on the misrepresentation by Ms. Murphy, the First Amended Complaint – with an additional count – was accepted by the ALJ, despite it not being authorized by the Commission.

3. The Second Amended Complaint

On February 11, 2013, Ms. Murphy, Ms. Argabright, Ms. Wade and Ms. Dasgupta again filed a motion with the ALJ seeking to amend the complaint. This time, in an extraordinary action, Complaint Counsel sought leave of the ALJ to amend the First Amended Complaint by adding Mr. Zucker in his *individual* capacity and as Chief Executive Officer of M&O, a now defunct company.

A proposed amended complaint was attached to the Motion as an exhibit. The proposed Second Amended Complaint stated "ISSUED BY ORDER OF THE COMMISSION" and was signed by Kenneth R. Hinson in his capacity as Executive Director. Exhibit I, at 21.

As with the First Amended Complaint, no vote sheet exists to reflect that the Commission voted to authorize the filing of a second amended complaint. Upon information and belief, no such vote occurred. Nevertheless, and presumably based on the misrepresentation by Ms. Murphy, the Second Amended Complaint – with claims against Mr. Zucker individually – was accepted by the ALJ, despite a lack of authorization by the Commission.

B. Analysis

1. CPSC Staff Violated its Rules of Practice

CPSC's Rules of Practice provide that: "Any adjudicative proceedings under this part shall be commenced by the issuance of a *complaint authorized by the Commission,* and signed by the Associate Executive Director for Compliance and Enforcement." 16 C.F.R. § 1025.11(a) (emphasis added).[2] Moreover, CPSC made clear that staff may seek an amendment to a Complaint only if the Commission authorizes such an amendment.[3] *See* Exhibit G (statement by

[2] The Rules of Practice prescribe the form and content of such a complaint, including that the complaint shall contain "[i]dentification of each respondent or class of respondents." 16 C.F.R. § 1025.11(b)(2).

[3] The Rules of Practice were issued through notice and comment rulemaking. Relevant here, CPSC received comments on the proposed rule with respect to allowing a Presiding Officer to permit certain amendments to a Complaint. Commenters expressed concern that allowing the Presiding Officer to approve amending a Complaint could "alter the charges originally authorized by the Commission, thereby usurping the Commission's function[.]" Rules of Practice for Adjudicative Proceedings, 45 Fed. Reg. 29206, 29207 (col. 3) (May 1, 1980). In response, CPSC stated: "[S]ince § 1025.11(a) provides that only a complaint authorized by the

Commissioner Buerkle when accepting settlement of *In re: M&O*: "[A]lthough the Commission's Rules of Practice permit the Presiding Officer in an adjudicative proceeding to approve an amended complaint if the amendment 'do[es] not unduly broaden the issues in the proceedings or cause undue delay,' (16 C.F.R. § 1025.13), this authority does not usurp the authority of the Commission to authorize an expansion of a case or the naming of additional Respondents in the first instance."). As a practical matter, the authorization by the Commission is accomplished through a vote; CPSC staff has no authority to expand the scope of a Complaint authorized by the Commission without a vote of approval by the Commission.

Here, there was no vote of the Commission authorizing the filing of either the First or Second Amended Complaints, contrary to the representations by Mr. Hinson and Ms. Murphy that the Amended Complaints were "ISSUED BY ORDER OF THE COMMISSION." The misrepresentations, which presumably formed the basis of the ALJ approving the amendments, were abuse and mismanagement perpetrated on the ALJ and also led to CPSC litigation costs and use of resources not approved or authorized by the Commission.

In moving to amend the original complaint (*i.e.*, the First Amended Complaint) by adding new charges that Buckyballs and Buckycubes violated a mandatory CPSC standard not included in the original Complaint authorized by the Commission, CPSC staff's action clearly falls outside the scope of the original Complaint authorized by the Commission. Similarly, in moving to amend the amended complaint (*i.e.*, the Second Amended Complaint) by adding a new Respondent, Mr. Zucker in his individual capacity, not included in the original Complaint authorized by the Commission, CPSC staff's action clearly falls outside the scope of the original Complaint authorized by the Commission.

As discussed above, the Rules of Practice are clear that CPSC staff cannot expand an adjudicatory proceeding beyond that authorized by the Commission. Here, adding new claims and naming a new respondent falls outside the scope of the original complaint approved by the Commission. Indeed, Commissioner Buerkle stated in the context of this case: "[t]o allow such an amendment without Commission approval would usurp the prerogative of the Commission under § 1025.11(a)."

2. Filing the Second Amended Complaint was Particularly Egregious

Upon information and belief, former Chairman Inez Tenenbaum and/or Commissioner Robert Adler, without the requisite authority, ordered, authorized or approved Mr. Hinson and Ms. Murphy to submit the Second Amended Complaint without a vote of the Commission.[4] Support for this comes from two sources:

Commission may be issued, *amendments to the complaint must come within the scope of the Commission's authorization.* Thus, neither the presiding officer nor the Commission's staff is usurping the Commission's function." *Id.* at 29208 (col. 1) (emphasis added).

[4] The "Commission" is defined in the CPSA as the Consumer Product Safety Commission, not a single commissioner. *See* 15 U.S.C. § 2052(a)(4).

First, Complaint Counsel's discovery answer on the issue of whether a Commission vote took place authorizing the amendments to the original Complaint are instructive: "Complaint Counsel further objects to this Request as vague *because it fails to distinguish between actions of individual CPSC commissioners as opposed to the Commission.*" Exhibit J, Responses to First Set of Requests for Admissions, Nos. 84-86 (emphasis added); *see also infra* at 7.

Second, in a June 19, 2014 blog post, former CPSC Acting Chairman Nancy Nord wrote: "Former Commissioner Northup recently wrote an opinion article that describes her reactions to the recent settlement of the CPSC's administrative suit against Buckyballs. . . . Like me, she is most disappointed that the agency staff, *presumably with the acquiescence of the Chairman,* expanded the scope of the lawsuit to include one of the company's principals as a party in his personal capacity. *This unprecedented action was never put to a vote and, hence, was not done by agreement of the commission."*[5] (emphasis added).

The misrepresentation to the ALJ regarding the authorization of the Commission to file the Second Amended Complaint is particularly egregious because it sought to add Mr. Zucker as a Respondent in his individual capacity, and require him personally to give notice of the alleged product hazard to consumers and refund their purchase price – an amount that Complaint Counsel estimated to be $57 million in the aggregate. Invoking the Responsible Corporate Officer doctrine (also known as the *Park* doctrine[6]), CPSC's brief supporting the motion for leave to file the Second Amended Complaint alleged that Mr. Zucker was an appropriate respondent because he "exercised personal control over the acts and practices of the corporation." Exhibit K, at 3. Expanding the *Park* doctrine to apply to Mr. Zucker in this case was an extraordinary action that should have been considered, and voted on, by the full Commission for various reasons, including:

- The CPSA does not expressly grant the Commission jurisdiction to order individuals to conduct a recall of a product that was imported by a corporation and distributed by other corporations. If CPSC is going to interpret its statute as implicitly granting it the authority to proceed against an individual (who is a former executive of a defunct company that previously distributed consumer products under the Commission's jurisdiction), any such interpretation should come from the Commission itself, and should be subject to judicial review prior to being applied to any individual.

- Although CPSC regulations provide that the General Counsel is authorized to issue advisory opinions interpreting the CPSA, *see* 16 C.F.R. § 1000.7(a), CoA is not aware of the General Counsel or the Commission issuing any opinion interpreting the statute as extending its jurisdiction to an individual executive of a manufacturer of consumer products.

- CPSC has never proceeded against an individual former executive of a defunct company to require the individual to conduct a recall. Ordinarily, when a firm goes out of

[5] *Available at* http://nancynord.net/2014/06/19/fielding-differences/.
[6] *U.S. v. Park*, 421 U.S. 658 (1975); *see also United States v. Dotterweich*, 320 U.S. 277 (1943).

business, CPSC issues a press release advising the public that the firm is no longer in business and recommending discarding the product that was the subject of a recall or investigation.

- The *Park* doctrine is ordinarily applied in cases in which there is an allegation of a criminal violation of law or regulations. Even when it has been applied in the civil context, it has been in cases involving regulatory violations. Here, there was no evidence that Mr. Zucker violated any standards or regulations[7] – making the *Park* doctrine completely inapplicable.

To determine whether the Second Amended Complaint had been authorized by the Commission, Mr. Zucker served discovery on the issue. In response, CPSC staff knowingly and intentionally provided obfuscating and misleading discovery responses:

> **Request No. 85**. Admit that the CPSC Commissioners did not vote to authorize the Second Amended Complaint filed against Craig Zucker dated February 11, 2013.
>
> **Answer**: Objection. Complaint Counsel objects to this Request to the extent that it assumes or implies that the Rules require the Commission to vote to authorize an amended complaint. Complaint Counsel further objects to this Request as vague because it fails to distinguish between actions of individual CPSC commissioners as opposed to the Commission. Subject to and without waiving its objections, Complaint Counsel admits that that no Record of Commission action was posted on February 11, 2013.
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> **Request No. 86**. Admit that the CPSC Commissioners did not hold a vote after July 25, 2012 to authorize the Second Amended Complaint filed against Craig Zucker dated February 11, 2013.
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> **Answer**: Objection. Complaint Counsel objects to this Request to the extent that it assumes or implies that the Rules require the Commission to vote to authorize an amended complaint. Complaint Counsel further objects to this Request as vague because it fails to distinguish between actions of individual CPSC commissioners as opposed to the Commission. Subject to and without waiving its objections, Complaint Counsel admits that no Record of Commission action was posted between July 25, 2012 and October 3, 2013 regarding the Second Amended Complaint.

Exhibit J.

> **INTERROGATORY NO. 81.** Describe in complete detail the basis for any response to Respondent's First Set of Requests for Admission that is not an unqualified admission of the request.

[7] Although the First Amended Complaint alleged that the Buckyballs products violated CPSC's toy standard, CPSC's General Counsel found that the continued sale of Buckyballs was lawful – thus, CPSC's General Counsel did not consider the products to violate the toy standard – and there is no authority for Complaint Counsel to disregard this view. *See* Exhibit K.

> **RESPONSE:** Objection. This Interrogatory is overbroad and unduly burdensome. Subject to and without waiving its objections, Complaint Counsel refers Respondent to Complaint Counsel's Responses to Respondent's Requests for Admission.

Instead of responding to the discovery with a simple denial – which, as we now know, is the appropriate response – CPSC interposed a lengthy, immaterial objection, and then answered a question not asked. In ruling on discovery motions related to these inappropriate responses, the Presiding Officer, ALJ Dean C. Metry, noted: "A preliminary review of the filings indicates CPSC has failed to meet its discovery obligations. . . . Non-responsive or incomplete discovery responses serve only to delay the proceeding." *See* Exhibit L, at 2.

In fact, these evasive tactics confirm that Complaint Counsel sought to hide the truth that the Commission did not vote to authorize the filing of the Second Amended Complaint, only Chairman Tenenbaum and/or Commissioner Adler authorized it, and that the representation on the Second Amended Complaint that it was "ISSUED BY ORDER OF THE COMMISSION" was, in fact, false.

Notably, Acting Chairman Adler provided a similar evasive and obfuscating response to a Question for the Record posed by Senator John Thune in his own reappointment confirmation hearing in June 2014. Where, again, a simple yes or no would have answered Senator Thune's question, Acting Chairman Adler intentionally hid the plain fact that there was no vote to amend CPSC's complaint:

> **8) In the Buckyballs case, CPSC then sought to extend the "responsible corporate officer" doctrine to establish personal liability for the costs of the recall on Craig Zucker, one of the principals of the bankrupt company that sold Buckyballs.**
>
> **a. Did the Commission vote to amend its complaint to seek personal liability in this case? If not, why not?**
>
> [Response] On July 25, 2012, as authorized by the Commission, CPSC staff filed an Administrative Complaint against Maxfield and Oberton seeking a recall of the magnet products sold by the company. Subsequently, staff filed an amended complaint seeking to add Craig Zucker, individually and as an officer of Maxfield and Oberton, after he dissolved Maxfield and Oberton Holdings as an additional respondent. The Administrative Law Judge preliminarily granted CPSC staff's request to add Mr. Zucker individually as a respondent. Because the Commission negotiated a Consent Agreement with Mr. Zucker that supersedes the judge's ruling, the Commission did not rule on this issue. My own view is that, in an appropriate case, the Commission has the authority to include individuals as respondents, but I have made no determination whether this was such a case.

Hearing on Nomination of Robert Adler to be Commissioner, Consumer Product Safety Commission (Reappointment), June 11, 2014, Senate Committee on Commerce, Science, and Transportation (Questions for the Record, Sen. John Thune, Ranking Member), *available at*

http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=a6eea092-4601-465b-a6c7-3c0ee97ee752.

3. Mr. Zucker Suffered a Deprivation of His Due Process Rights.

Mr. Zucker was entitled to a fair and honest adjudicative process. As set forth above, the manner in which *In re: M&O* was litigated was far from a fair and honest process. Indeed, the mismanaged actions by CPSC staff resulted in waste and abuse that denied Mr. Zucker this right.

In this regard, all government employees, and especially government attorneys, are subject to certain basic and fundamental obligations to proceed with fairness and integrity in the administration of their duties. *See* 5 C.F.R. § 2635.101(b)(5), (8), (14) (government employees must put "forth honest effort in the performance of their duties," act "impartially" and "endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards"); *see also* 16 C.F.R. § 1030.101 ("Employees of the Consumer Product Safety Commission are subject to the Standards of Ethical Conduct, 5 CFR part 2635, which are applicable to all executive branch personnel.").[8]

Ms. Murphy and other CPSC staff failed to adhere to these obligations. Further, to the extent that their actions rose to the level of prosecutorial misconduct, such misconduct violated Mr. Zucker's Constitutional due process rights. *See* Andrew M. Hetherington, *Prosecutorial Misconduct*, 90 Geo. L.J. 1679, 1680 (May 2002) ("[R]eview of prosecutorial misconduct [] consists of a two part test: first, was the prosecutor's conduct actually improper; second, did the misconduct, taken in the context of the trial as a whole, violate the defendant's due process rights.").

IV. SECOND ALLEGATION – CPSC RETALIATED AGAINST MR. ZUCKER FOR EXERCISING HIS FIRST AMENDMENT RIGHTS.

CPSC's invocation of the responsible corporate officer doctrine was also, upon information and belief, an attempt to retaliate against Mr. Zucker for exercising his First Amendment rights. As noted above, never in the history of CPSC has an action been filed to require an officer or former officer of a company to personally conduct a recall.[9]

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[8] Government lawyers, including those at CPSC, have heightened obligations to proceed fairly and ethically. *See Freeport-McMoran Oil & Gas Co. v. FERC*, 962 F.2d 45, 47-48 (D.C. Cir. 1992) ("A government lawyer 'is the representative not of an ordinary party to a controversy,' the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, 'but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done.' *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935) . . . [A] government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission."); James E. Moliterno, *The Federal Government Lawyer's Duty to Breach of Confidentiality*, 14 Temp. Pol. & Civ. Rts. L. Rev. 633, 639 (2006) ("Courts expect that when dealing with a government lawyer, they get a more candid picture of the facts and the legal principles governing the case.").

[9] Inexplicably, CPSC made no attempt to amend its complaint to bring an action against MOH Liquidating Trust (MOH Trust), an entity established to deal with and, to the extent valid, pay

Leaving little doubt as to why Mr. Zucker was singled out for such unprecedented treatment, when seeking to add Mr. Zucker personally, CPSC presented a laundry list of Mr. Zucker's infractions, most of which are related to Mr. Zucker's interactions with and protected political speech regarding CPSC and with Congress and the public about CPSC's abuse of power.

- "Mr. Zucker met personally with a CPSC Commissioner regarding the M&O Subject Products. . . . He held a subsequent meeting on April 10, 2012, with another CPSC Commissioner and then met separately that same day with CPSC staff to discuss the M&O Subject Products." Ex. K at 3.

- "Mr. Zucker filed a report on the Subject Products in response to staff's requests for information . . . ." *Id.*

- "Mr. Zucker also corresponded personally with other CPSC staff about CPSC actions connected with the filing of the Complaint." *Id.* at 4.

- "Mr. Zucker also personally lobbied members of Congress and the President of the United States, again communicating on issues related directly, and solely, to the matter at issue here." *Id.* (citing emails to Congressional staffers and an open letter to President Obama published in the *Washington Post*).

- "Similarly, in numerous interviews on television, in print, and in internet media, Mr. Zucker has responded to Complaint Counsel's allegations on behalf of M&O." *Id.* at 5.

- "In 'A Letter from Our CEO: The Real Story Behind Why We're Fighting,' Mr. Zucker described at length and in detail M&O's interactions with CPSC staff, and concluded: 'We are fighting the CPSC action because we believe they are wrong.'" *Id.*

In short, on information and belief, CPSC took the unprecedented action of singling out Mr. Zucker, and naming him individually, to punish him and to deter and chill him and other corporate officers from exercising their Constitutional rights to free speech, to free association, and to petition government officials for redress contrary to the United States Constitution.

V. THIRD ALLEGATION – CPSC FAILS TO COMPLY WITH IQA AND FOIA

CPSC failed to abide by IQA guidelines in its dealings with M&O and Mr. Zucker. Specifically, on more than one occasion, CPSC made public statements that failed to include information required by the IQA and/or were inconsistent with the facts, which is prohibited by the IQA.[10]

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claims asserted against M&O. MOH Trust was, at that time, the only entity with any legal responsibility to pay the claims of M&O.

[10] The IQA requires the Office of Management and Budget (OMB) to "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity,

For example, CPSC issued a press release on July 25, 2012 with a headline stating that "CPSC Sues Maxfield & Oberton Over Hazardous Buckyballs® and Buckycubes™ Desk Toys Action prompted by ongoing harm to children from ingested magnets."[11]

While it is uncontested that CPSC sued M&O with respect to Buckyballs and Buckycubes, the clear implication of this statement is that the products were proven to be hazardous and that "ongoing harm to children" was a fact. However, these "facts" were mere allegations that were never adjudicated – yet, CPSC presented them as legal conclusions. Indeed, CPSC's claim that Buckyballs and Buckycubes presented an "ongoing harm to children" was presented without any evidence of harm to children except for a statistically insignificant number of accidental ingestion incidents. Further, CPSC failed to provide any context for the relative risk ratios about this ingestion risk.

CPSC issued another press release in April 2013 that also violated the IQA. This release, among other misstatements, stated that Buckyballs and Buckycubes "contain defects in the design, warnings and instructions, which pose a substantial risk of injury and death to children and teenagers."[12] This press release presumably was cleared by then-Chairman Tenenbaum, as required by CPSC policy[13] This time, CPSC did not indicate what constituted the alleged "defects" or disclose the performance standards needed for the design, warnings and instructions.

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utility and integrity of information (including statistical information) disseminated by Federal agencies." 44 U.S.C. § 3516 Note. Guidelines issued by the OMB mandate that agencies, including the CPSC, disseminate only accurate and objective information, supported by scientifically-sound data. *See* OMB Guidelines §§ III(2), (3), V(3), 67 Fed. Reg. 8459-60. CPSC also must identify sources of disseminated information so that the public can assess the objectivity of that information and have access to full, accurate, and transparent documentation, and error sources affecting data quality must be identified and disclosed. *See id.* at § V(3)(a), 67 Fed. Reg. at 8455-58. Although CPSC has developed its own IQA guidelines, they "substantially follow the provisions of the OMB guidelines[.]" *Information Quality Guidelines*, U.S. CONSUMER PROD. SAFETY COMM'N, *available at* http://www.cpsc.gov/Research--Statistics/Information-Quality-Guidelines (last visited July 22, 2014).

[11] Press Release, U.S. Consumer Prod. Safety Comm'n, CPSC Sues Maxfield & Oberton Over Hazardous Buckyballs® and Buckycube™ Desk Toys Action Prompted by ongoing harm to children from ingested magnets (July 25, 2012), *available at* http://www.cpsc.gov/en/Newsroom/News-Releases/2012/CPSC-Sues-Maxfield--Oberton-Over-Hazardous-Buckyballs-and-Buckycube-Desk-Toys-Action-prompted-by-ongoing-harm-to-children-from-ingested-magnets-/.

[12] Press Release, U.S. Consumer Prod. Safety Comm'n, Six Retailers Announce Recall of Buckyballs and Buckycubes High-Powered Magnet Sets Due to Ingestion Hazard (Apr. 12, 2013), *available at* http://www.cpsc.gov/en/Recalls/2013/Six-Retailers-Announce-Recall-of-Buckyballs-and-Buckycubes-High-Powered-Magnet-Sets/.

[13] *See* Clearance Procedures For Providing Information To The Public Directives (Jan. 16, 2003) ("Drafts [of releases] are provided to all Commissioners offices. Final clearance must be obtained from the Office of the Chairman."), *available at* http://www.cpsc.gov/en/About-CPSC/Policies-Statements-and-Directives/Clearance-Procedures-For-Providing-Information-To-The-Public-Directives-/.

CPSC also never put the alleged risk posed by Buckyballs and Buckycubes in context and offered no metrics for evaluating its claims or for explaining why these products were allegedly more dangerous to children than other products on the market.[14]

Again, only last week, in announcing the voluntary recall of Buckyballs and Buckycubes pursuant to the settlement agreement with Mr. Zucker, CPSC repeated the same inaccurate claim, on its recall website and in press releases regarding "defects in the design, warnings and instructions, which pose a substantial risk of injury and death to children and teenagers."[15] These new releases were presumably cleared by current Acting Chairman Adler.[16] And today, CPSC's communication director, Scott Wolfson, inappropriately, and inaccurately tweeted that Buckyballs are "hazardous." Exhibit M.

Similarly, CPSC failed for months to respond to a FOIA request for records relating to the investigation and prosecution of M&O and Mr. Zucker in connection with *In re: M&O*. After receiving no response to its request for months (in violation of the statutory deadline), CoA was forced to file a FOIA lawsuit against CPSC on April 1, 2014. *See* Exhibit N. Following the filing of the lawsuit, CPSC began producing responsive records, but, even then, CPSC has to date produced only a small portion of the requested records.[17]

VI. CONCLUSION

When moving to amend the original Complaint in *In re: M&O*, on two separate occasions, CPSC falsely represented to the ALJ that the proposed amendments had been authorized by the Commission. By making these misrepresentations, Mr. Hinson, Ms. Murphy and potentially Ms. Tenenbaum and/or Mr. Adler usurped the Commission's prerogative to authorize claims and name respondents in an adjudicatory proceeding. These actions of waste, abuse and mismanagement resulted in the Commission expending considerable resources to litigate issues and claims not authorized by the Commission as required by the Commission's Rules of Practice. In reliance on the material misrepresentations, the ALJ authorized both amendments to the original Complaint. This violated Mr. Zucker's due process rights, forcing him to expend

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[14] CPSC's IQA violations were the subject of a Petition for Disclosure and Correction, and subsequent Appeal. Exhibit O. The Petition and Appeal were withdrawn pursuant to a settlement agreement between Mr. Zucker and CPSC.

[15] *See* http://www.buckyballsrecall.com/; Buckyballs and Buckycubes Refunds Now Available Through BuckyballsRecall.com; Recall To Refund Will Last Until Jan. 2015 (July 17, 2014), *available at* http://www.prnewswire.com/news-releases/buckyballs-and-buckycubes-refunds-now-available-through-buckyballsrecallcom-recall-to-refund-will-last-until-jan-2015-267515111.html.

[16] *See supra*, note 13.

[17] Among the documents produced by CPSC is a letter from a CPSC staffer to three outside child safety advocates discussing Mr. Zucker and Buckyballs. *See* Exhibit P (letter from Jonathan Midgett to Gary Smith, Nancy Cowles, and Rachel Weintraub). Such discussions may violate prohibitions on ex-parte communications under the Administrative Procedure Act and CPSC Rules of Practice. *See* 5 U.S.C. § 557(d); 16 C.F.R. § 1025.68.

considerable funds in the defense of claims not authorized by the Commission, including his individual liability.

Further, in seeking to add Mr. Zucker personally as a respondent, CPSC's focus on Mr. Zucker's First Amendment activities in speaking out against CPSC action, strongly suggests a retaliatory intent.

Finally, CPSC has an obligation to make accurate statements and provide timely disclosures. In connection with *In re: M&O*, CPSC failed to do so, thereby violating the IQA and FOIA.

For these reasons, CoA respectfully requests a full investigation into this matter. We look forward to discussing the above with you, and can provide any additional information as needed. Please do not hesitate to contact us via Aram A. Gavoor at 202-499-2427 or aram.gavoor@causeofaction.org, or Josh Schopf at 202-499-2420 or josh.schopf@causeofaction.org.

Sincerely,

DANIEL Z. EPSTEIN
EXECUTIVE DIRECTOR