IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Greenbelt Division

CRAIG ZUCKER,	)	
Brooklyn, NY 11211	)	
Kings County,	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Case No._____**
UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION	)	
4330 East West Highway	)	
Bethesda, MD 20814	)	
Montgomery County,	)	
	)	
and	)	
	)	
INEZ MOORE TENENBAUM, CHAIRMAN OF THE UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION	)	
(official capacity),	)	
4330 East West Highway	)	
Bethesda, MD 20814	)	
Montgomery County,	)	
	)	
Defendants.	)	

COMPLAINT

Plaintiff Craig Zucker ("Mr. Zucker"), through his counsel CAUSE OF ACTION, INC., a 501(c)(3) government accountability organization, files this complaint for declaratory and injunctive relief against the United States Consumer Product Safety Commission ("CPSC") and Inez Moore Tenenbaum ("Tenenbaum"), in her official capacity as Chairman of the CPSC.

Nature of the Case

1. 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 now seeks to recall and ban.

2. After driving M&O out of business, CPSC has thrown its full weight against Mr. Zucker, adding him as a respondent to an administrative adjudication seeking to require him personally to conduct a CPSC-estimated $57 million recall of M&O's Buckyballs® and Buckycubes®.

3. Mr. Zucker asks this Court to find that CPSC overreached its limited statutory authority to bring an administrative remedial action against a "manufacturer," "distributor," or "retailer" when it ignored M&O's form as a limited liability company, amended the administrative complaint against M&O to proceed against Mr. Zucker personally and wrongfully subjecting him to the CPSC's adjudicative authority.

4. Mr. Zucker further asks this Court to find that CPSC singled him out for selective administrative adjudication to deter him and other corporate officers from exercising their freedom of speech and their right to petition government officials for redress, and/or wrongly predetermined the outcome of the administrative adjudicatory process, all in violation of the First and Fifth Amendments of the United States Constitution.

Parties

5. Mr. Zucker is an individual who resides in the State of New York. He is the former General Manager of M&O.

6. CPSC is an independent regulatory commission of the United States established by the Consumer Product Safety Act ("CPSA"), 15 U.S.C. §§ 2051 *et seq.* It has an office and does business

at 4330 East West Highway, Bethesda, Maryland, 20814. CPSC's office is located in Montgomery County.

7. Inez Tenenbaum is CPSC's Chairman and she is named in her official capacity. She also has an office and does business at 4330 East West Highway, Bethesda, Maryland, 20814. Her office is also located in Montgomery County.

Jurisdiction and Venue

8. This Court has jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706.

9. Venue in this District is proper under 28 U.S.C. § 1391(b), (e).

10. The Commission's authority to proceed administratively against Mr. Zucker, and its constitutional violations, are properly before this court.

Facts

A. The Rise Of Buckyballs® And Buckycubes®™.

11. Mr. Zucker and a friend formed M&O as a Delaware limited liability company in March 2009 by filing a Certificate of Formation with the Division of Corporations of the Delaware Secretary of State.

12. Its business was to import and sell what soon became one of the most popular adult executive desk toys on the market, Buckyballs®.

13. 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 the Buckyballs® into different shapes and patterns is an entertaining way to relieve stress and exercise the mind.

14. From March to October, 2009, M&O sold Buckyballs® online on approximately three websites that predominantly featured products for adults, not children.

15. Starting in October, 2009, it began selling Buckyballs® to gift shops, bookstores, stationery stores, museum shops, and other brick-and-mortar retailers.

16. Before long, M&O had a distribution network of approximately 5,000 stores.

17. Buckyballs® were an instant top-seller. In 2011, *People Magazine* called Buckyballs® one of the five hottest trends of the year. In 2012, they appeared on the cover of the Brookstone catalog. M&O was an overwhelming success story.

18. Buckyballs® are completely safe when used as intended.

19. Like many other products, they may cause harm if ingested.

20. For this reason, M&O never marketed its products toward children.

21. When it started selling Buckyballs® to retailers, M&O labeled its products with a prominent warning:

> **Warning: Not intended for children. Swallowing of magnets may cause serious injury and require immediate medical care. Ages 13+.**

22. M&O initially marketed its products for ages 13+ because the Consumer Product Safety Improvement Act of 2008 defined a "children's toy" as a consumer product "designed or intended by the manufacturer for a child 12 years of age or younger for use by the child when the child plays." 15 U.S.C. § 2057c(g)(B); *see also* 15 U.S.C. § 2052(a)(2) (defining "children's product").

23. The age designation made it clear that Buckyballs® were not children's toys.

24. In 2009, the Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (2008)("CPSIA") made a voluntary toy standard, ASTM F963, a mandatory toy standard

enforced by CPSC. The now mandatory ASTM toy standard defined a "toy" as any object designed, manufactured, or marketed as a plaything for children under age 14.

25. Although M&O did not believe or admit either that Buckyballs® were CPSIA toys or that they violated any legally applicable safety standards, M&O changed the label age grading from 13+ to 14+ and worked with CPSC, which was then largely supportive of M&O's safety efforts, to conduct a voluntary recall of all products labeled 13+ solely to make it crystal clear that these were not intended for children.

26. M&O then went even further to create a comprehensive safety program to make it clear to everyone that its products should not fall into children's hands. The program included:

a. Changing the warning to say "**Keep Away From All Children**" and adding language to explain the exact hazard of swallowing multiple magnets;

b. Including four warnings on the packaging and carrying case and one in the instructions for use;

c. Developing a Responsible Seller Agreement to ensure that the products would not be sold in stores that sold children's products exclusively and a Responsible Sellers Notice to inform retailers who sold both children's and adult products to sell Buckyballs® only in sections with other products intended for adults, conducting compliance checks, and removing retailers that did not meet the requirements of the new program;

d. Sending retailers new signage with the warnings for use in displays; and

e. Including Responsible Seller Notices with every shipment of Buckyballs®.

27. CPSC approved M&O's comprehensive safety program in May, 2010.

28. M&O then added to its product offerings Buckycubes®, small magnetic cubes that M&O marketed and sold using the same safety program developed for Buckyballs®.

29. Buckyballs®, Buckycubes®, and offshoots like Buckyballs® Chromatics (colored Buckyballs®) comprised approximately 95% of what M&O sold. The company's very existence depended on its ability to continue to sell these products.

30. In furtherance of its safety program, M&O wrote to all of its retailers in September, 2011, reminding them not to sell to children under the age of 14 or to adults buying them for children under the age of 14.

31. In November, 2011, M&O joined with CPSC in a joint press release and video news release that reinforced the importance of keeping the products away from children and the potential consequences of misuse.

32. When the video was filmed, Defendant Tenenbaum commended M&O on its safety program.

33. In March, 2012, M&O developed a new website, www.magnetsafety.com, and created a safety video that was shown both on the new website and on M&O's main website to raise awareness and educate parents, educators, retailers, and medical professionals about the risks of letting high-powered magnets get into the hands of children.

34. That month, M&O also created new signage, further explaining why Buckyballs® and Buckycubes® were not for children. M&O sent this signage to every retailer selling its products with a request that it be clipped to the in-store display.

35. In April, 2012, M&O representatives met with CPSC commissioners and staff to educate them about its expanded safety program and to express concern about other manufacturers who were marketing similar products inappropriately.

36. The commissioners and staff offered suggestions and again commended M&O on its safety program.

37. Following that meeting, acting in part on recommendations from CPSC and in part on its own initiative, M&O expanded its safety program by:

a. Forming a medical advisory group of physicians specializing in pediatric and emergency medicine and toxicology and developing a diagnosis and treatment service announcement for medical professionals to help educate them how to recognize and treat magnet ingestion;

b. Bringing together competing companies to create an industry group called the Coalition for Magnet Safety, with the mission to "protect the public through responsible labeling, promotion, distribution, and sales of high powered, rare earth magnets intended for adult use;"

c. Petitioning ASTM International to develop a voluntary standard for the labeling and marketing of magnet products.

B. The Demise Of Buckyballs® And Buckycubes®.

38. On July 10, 2012, everything changed.

39. 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.

40. M&O responded, expressing its strong disagreement, but CPSC paid it no heed.

41. Instead, CPSC initiated an all-out effort to shut down M&O.

42. 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.

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

44. In a last-ditch effort to regain CPSC's favor and to save its business, M&O submitted a voluntary Corrective Action Plan proposing even further expansions to its safety program, including a child-resistant carrying case, possibly a bittering agent, enhanced warnings, additional retail signs, and programs to further public awareness.

45. CPSC received the plan at 4:00 p.m. on July 24, 2012.

46. On information and belief, CPSC never read that plan.

47. Instead, at 11:00 a.m. on the next day, July 25, 2012, the CPSC's executive director notified M&O's lawyer that CPSC had filed an administrative complaint against M&O, 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.

48. That proceeding is *In the Matter of Maxfield and Oberton Holdings, LLC*, CPSC Docket No. 12-1 (the "CPSC Proceeding"), and has since been consolidated with CPSC Docket Nos. 12-2 and 12-3, which are similar complaints against importers of similar products. In this on-going administrative proceeding, the very question of whether M&O's products are defective or hazardous is being adjudicated.

49. In connection with the filing of the complaint, and before M&O ever had a chance to defend itself, CPSC issued a press release and launched a media campaign announcing that it sued M&O "[i]n an effort to prevent children from suffering further harm …."

50. At all times relevant, CPSC knew the risk of harm to children from M&O's products was statistically insignificant and, relatively speaking, much less than the risk posed by common household cleaning chemicals, laundry pods or playground equipment.

51. But CPSC's mind was made up, the facts did not matter, and so the full weight of the government came down on a company that was, at all times, in compliance with the law.

52. CPSC's general counsel admitted that it was not a violation of law to sell M&O's products. *See* Ex. 1 Letter from CPSC General Counsel Cheryl A. Falvey to Alan H. Schoem, Esq. (July 20, 2012).

53. Nevertheless, CPSC pressured retailers to stop selling Buckyballs® and Buckycubes® and to issue voluntary recalls. The message was clear to all – do as CPSC says now, or pay for it later.

54. CPSC's actions had their foreseeable and intended consequence.

55. With no retailers and no product that anyone would sell in the face of CPSC's campaign of duress and intimidation, M&O was out of business in a matter of months.

56. 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 be.

57. Adding insult to injury, an assistant general counsel of CPSC wrote to the trustee of the MOH Liquidating Trust ("MOH Trust") to demand that she take possession of M&O's remaining inventory to determine what could be sold to help satisfy CPSC's claims. She added unhelpfully, "[W]e ask that you, as transferee and assignee of [M&O]'s assets, make every effort to ensure that . . . no

Subject Products re-enter the stream of commerce." *See* Ex. 2, Letter from CPSC Assistant General Counsel Mary B. Murphy to MOH Liquidating Trust (February 5, 2013).

C**. The Defendants Attack Mr. Zucker For Speaking Out.**

58. Having obliterated M&O, and having salted the earth by undermining the MOH Trust's ability to satisfy whatever claims that M&O might have left, CPSC turned its sights on Mr. Zucker.

59. On February 11, 2013, CPSC moved to amend its complaint in the CPSC Proceeding to add Mr. Zucker personally as a respondent. *See* Ex. 3, CPSC Motion for Leave to File Second Amended Complaint and Memorandum in Support (February 11, 2013).

60. The amended complaint seeks an order requiring Mr. Zucker personally to conduct a full recall of M&O's products, at an estimated cost of $57 million.

61. This would require Mr. Zucker personally to notify all distributors of M&O's products to stop distributing the products, to notify state and local public health officials, to mail notice to each distributor and retailer of M&O's products, to refund consumers the purchase price of M&O's products, to reimburse retailers for their expenses in carrying out the recall, to submit monthly reports to CPSC documenting his progress, and, for a period of five years, to keep records of his actions in conducting the recall. *See* Ex. 4, Second Amended Complaint Against Maxfield & Oberton Holdings, LLC and Craig Zucker (February 11, 2013).

62. 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.

63. Noting that M&O has now "purported" to dissolve, CPSC offered its theory that Mr. Zucker must stand in the company's shoes because he had exercised personal control over M&O's acts and practices. *See* Ex. 3 at 2.

64. Inexplicably, CPSC made no attempt to amend its complaint to bring an action against MOH Trust, the only entity with any legal responsibility to pay the claims of M&O.

65. Leaving little doubt as to why Mr. Zucker was singled out for such unprecedented treatment, 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 its 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. 3 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.*

66. CPSC played fast and loose with the facts to justify its assault on Mr. Zucker. For example, in Exhibit E to the motion to amend CPSC's complaint that was filed February 11, 2013, *available at* http://www.cpsc.gov//Global/Recalls/Recall-Lawsuits/maxfield29b.pdf (accessed Nov. 8, 2013), complaint counsel represented that the email attached at page 69 was a personal communication from Mr. Zucker. CPSC, however, doctored this Exhibit to omit the footer demonstrating that it was a

form communication sent to all persons who subscribed to Buckyballs® mailing list. The omitted footer read:

> Sorry . . . cannot be applied to previous orders or combined with other promotions.
>
> Unsubscribe swolfson@cpsc.gov from this list. | Forward this email to a friend

See Ex. 5.

67. In short, by exercising his Constitutional rights to free speech, to free association, to conduct public advocacy, and to petition government officials for redress of grievances, Mr. Zucker has been a thorn in CPSC's side and so CPSC has targeted him for retribution.

68. On information and belief, CPSC has taken 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 First and Fifth Amendments of the United States Constitution.

D. Defendants Create New Powers To Abuse Mr. Zucker.

69. CPSC's authority to adjudicate an order for remedial actions concerning a consumer product, including notice to distributors and the public and conducting a recall, is governed by 15 U.S.C. § 2064.

70. CPSC's jurisdiction is over "the manufacturer or any distributor or retailer" of the product. 15 U.S.C. § 2064(c)-(d).

71. CPSC alleges that Mr. Zucker is a manufacturer and a distributor of Buckyballs® and Buckycubes®. However, as a matter of law, Mr. Zucker is neither one.

72. A "manufacturer" is defined as a "person who manufactures or imports a consumer product," and a distributor is defined as, "a person to whom a consumer product is delivered or sold for purposes of distribution in commerce." 15 U.S.C. § 2052(a).

73. In other words, CPSA gives CPSC no adjudicative authority over individual officers of employees of a manufacturer, distributor, or retailer of the product.

74. Mr. Zucker has never personally manufactured, imported, or distributed anything. Yet, to punish him for speaking out, CPSC drives a bulldozer through the limits set by the statute's plain language via its extraordinary and unprecedented expansion of the "responsible corporate officer doctrine," also known as the "*Park* doctrine." *See United States v. Park*, 421 U.S. 658 (1975).

75. The *Park* doctrine is applied by the government only in the rarest of circumstances, usually to hold responsible corporate officers personally liable for criminal violations by the companies they oversee.

76. This extraordinary doctrine was the asserted basis for the administrative law judge's decision affirming CPSC's authority over Mr. Zucker, but it has no bearing here and it does not justify the CPSC's overreach.

77. First, 15 U.S.C. § 2064 does not authorize imposition of liability on employees of a corporate entity. Where Congress intended that such liability can be imposed under CPSA, it has specifically said so. For example, 15 U.S.C. § 2064, authorizes remedial orders only against "the manufacturer or any distributor or retailer" of the product. By contrast, 15 U.S.C. § 2070 specifically authorizes criminal liability for an "individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs" certain criminal violations set forth in the statute.

78. Second, every case in every context in which the responsible corporate officer doctrine has been applied, whether civil or criminal, has involved a predicate violation of law by the corporate entity. This is the touchstone for individual corporate officer responsibility, because society rightly expects corporate officers to ensure that their corporations do not engage in criminal conduct or other violations of law. Here, however, even CPSC admits that nothing illegal has been done. *See, e.g.*, Ex. 1, Letter from CPSC General Counsel Cheryl A. Falvey to Alan H. Schoem, Esq. (July 20, 2012) ("I am confirming that it is not a violation of any law administered by the CPSC for any retailer to continue to sell Buckyballs and Buckycubes. . . . [I]t is not in violation of any law CPSC administers until we have obtained a court order . . . or the firm voluntarily agrees to a corrective action.").

79. In no case has a corporate officer ever been held personally liable for corporate activity that was lawful when conducted.

80. Third, the remedial action that CPSC is authorized to impose upon "the manufacturer or any distributor or retailer" of a product is not a criminal sentence or even a fine or other monetary liability or penalty. It is a product recall. Practically speaking, the nature of CPSC's statutory authority remedy must be limited to the company that manufactured, distributed, or sold the product in the first place, and not to any individual employee, especially not former employees like Mr. Zucker. A product distributed by thousands of retailers over the course of almost four years, of which allegedly more than 2.5 million sets have been sold, cannot be effectively recalled by a single individual without a business organization to support him and CPSC's action against Mr. Zucker is plainly not something Congress intended to occur.

81. Finally, the exercise of adjudicative authority over an individual officer of a company that CPSC concedes engaged in no illegal activity improperly rewrites CPSA. If CPSC can seek to

personally destroy a company employee or official through the unilateral expansion of its administrative jurisdiction, as it seeks to do here, then CPSA's limits on CPSC's authority are a nullity.

E. CPSC Runs A Rigged Game, Leaving Mr. Zucker Without Options.

82. Through counsel, Mr. Zucker moved to intervene in the CPSC Proceeding to oppose its motion adding him as a respondent.

83. The Administrative Law Judge ("ALJ") granted Mr. Zucker's motion but rejected his opposition. On May 3, 2013, the ALJ granted CPSC's motion for leave to file the amended complaint and added Mr. Zucker as a respondent to the CPSC Proceeding against M&O. *See* Ex. 6, Order Granting CPSC Motion for Leave to File Second Amended Complaint Against Craig Zucker (May 3, 2013). The ALJ's affirmation of CPSC's power grab violated 5 U.S.C. § 706(2)(A) because it was arbitrary, capricious, an abuse of discretion, and not in accordance with law and violated 5 U.S.C. § 706(2)(C) because it authorized CPSC to exceed its statutory jurisdiction and authority.

84. Mr. Zucker sought leave to appeal the order subjecting him to CPSC's adjudicative authority to CPSC, but this was denied him on June 19, 2013. *See* Ex. 7, Order Denying Craig Zucker's Motion to Appeal (June 19, 2013).

85. For Mr. Zucker, all further resort to CPSC's administrative process, whether through the CPSC Proceeding or elsewhere, is futile.

86. In truth, from the beginning CPSC's administrative action was an unlawful show designed to bleed first M&O and then Mr. Zucker to death, for CPSC's mind was made up and the outcome decided before the first pleading was ever filed.

87. For example, on April 12, 2013, while both the CPSC Proceeding to determine whether Buckyballs® and Buckycubes® were "defective" as a matter of law and CPSC's extraordinary motion

to name Mr. Zucker individually were both underway and ostensibly "undecided," CPSC issued a recall notice for Buckyballs® and Buckycubes®.

88. CPSC said that "in cooperation with six retailers" it was "announcing the voluntary recall of all Buckyballs and Buckycubes" because "these products contain defects in the design, warnings and instructions, which pose a substantial risk of injury and death to children and teenagers." *See* Ex. 8, CPSC, "Six Retailers Announce Recall of Buckyballs and Buckycubes High-Powered Magnet Sets Due to Ingestion Hazard (Recall 13-168)," *available at* http://www.cpsc.gov/en/Recalls/2013/Six-Retailers-Announce-Recall-of-Buckyballs-and-Buckycubes-High-Powered-Magnet-Sets/ (April 12, 2013) (accessed Nov. 10, 2013). On information and belief, Defendant Tenenbaum and all of the other Commissioners must have approved this recall and signed off on the findings related to defects, risk, and hazard, before it was announced.

89. She and the other CPSC commissioners are the final decision makers in this case and, subject only to limited review by an Article III court, they are free to do whatever they want with respect to the scope of CPSC's jurisdiction, to Buckyballs® and Buckycubes®, and to Mr. Zucker, no matter what the "independent" ALJ might find or decide.

90. Therefore, the April 12 recall notice, in which CPSC made its conclusory finding that Buckyballs® and Buckycubes® are in fact defective and pose a "substantial risk of injury and death to children and teenagers" rendered the CPSC Proceeding, which was supposed to fairly adjudicate these things, nothing more than a bad charade, for it is clear where defendants stand on the matter.

91. Mr. Zucker is now defending himself at great economic and reputational cost and risk against an out-of-control bureaucracy that, after destroying a thriving and legal business, now aims to devastate him as well.

92. Defendant Tenenbaum and the other commissioners owed Mr. Zucker, and all of the other respondents before them, a fair, objective, and level review of their causes. Instead, she and CPSC have brazenly abused their power and disregarded their public trust by assuming for themselves the authority to make up the law, to prosecute the supposed "violations," to find the facts, to render a verdict, and then to decide the sentence.

93. The defendants' conduct clearly shows that the CPSC Proceeding is nothing more than the drapery around the defendants' decision to break Mr. Zucker. Therefore, it would be manifestly unfair and incongruous to force Mr. Zucker back into the CPSC Proceeding or any other administrative process run by CPSC. There is no fairness or due process to be found there for him.

94. Mr. Zucker is trapped, facing both personal financial ruin and the destruction of his business reputation, in a rigged game that the house cannot lose and that he cannot win. This Court is his only hope for fairness and avenue of redress.

Claims For Relief

First Claim For Relief: The Administrative Procedure Act.

95. Mr. Zucker repeats paragraphs 1-94.

96. CPSC has asserted jurisdiction over Mr. Zucker individually pursuant to 15 U.S.C. § 2064, claiming that Mr. Zucker is a "manufacturer" and a "distributor" pursuant to 15 U.S.C. § 2052(a).

97. Mr. Zucker is not a "manufacturer" or a "distributor" because he has never personally manufactured, imported, or distributed any consumer products.

98. CPSC's actions against him, apparently in retaliation for the exercise of Constitutionally-protected rights, are therefore in excess of its statutory authority. CPSC has wrongfully targeted Mr. Zucker in his individual capacity, even though there was another entity, MOH Trust, that was

responsible for paying the claims against M&O and that CPSC could have made a party to the CPSC Proceeding instead.

99. Also, CPSC's attack against Mr. Zucker is based on an unprecedented expansion of the "responsible corporate officer doctrine," also known as the "*Park* doctrine." This doctrine is rarely applied, but when it is, the focus is ordinarily on holding corporate officers personally liable for *criminal violations* by the companies they oversee. In all cases, the doctrine is applied after there has been a violation of law, not in advance of any such violation. CPSC's application of the *Park* doctrine in this case goes far beyond the boundaries of its legal authority.

100. Mr. Zucker's appeal of CPSC's unprecedented action adding him as a personal respondent in the CPSC Proceeding was rejected on June 19, 2013. *See* Ex. 7. This determination is therefore final agency action.

101. Also, the defendants have predetermined the outcome of the CPSC Proceeding in all material respects and resort to their administrative process would in all likelihood be futile.

102. Also, CPSC's decision to assert authority over Mr. Zucker also determined his legal rights or obligations and resulted in immediate legal consequences by forcing him to defend an unlawful adjudicative proceeding and risk serious penalties for noncompliance.

103. Also, CPSC's decisions to assert jurisdiction and authority over Mr. Zucker, and/or to predetermine the outcome of the CPSC Proceeding were arbitrary and capricious, an abuse of discretion, not in accordance with law, in excess of CPSC's statutory jurisdiction and authority and contrary to Constitutional right for CPSC has utterly failed to provide Mr. Zucker with a fair and level review and denied him procedural and substantive due process.

104. CPSC's determination that it has jurisdiction over Mr. Zucker is a clear error on purely legal questions, including an interpretation of the statutory terms "manufacturer" and "distributor" under 15 U.S.C. § 2052(a)(11), (8) and the *ultra vires* nature of the defendants' conduct in this case.

105. Statutory construction is a question on which courts, and not administrators, are more expert and so this matter is suitable for judicial review.

106. The decision that CPSC's jurisdiction extends to Mr. Zucker is final agency action and his only proper remedy lies in this Court.

Second Claim For Relief: For Violation Of The First And Fifth Amendments To The United States Constitution.

107. Mr. Zucker repeats paragraphs 1-106.

108. Upon information and belief, as demonstrated by CPSC's allegations in its Motion for Leave to File Second Amended Complaint and Memorandum in Support (February 11, 2013), *See* Ex. 3 at 3-5, CPSC has singled out Mr. Zucker for selective administrative adjudication to punish him and to chill and deter him and other corporate officers from exercising their Constitutional rights to free speech, to free association, to publicly advocate for their companies, and to petition government officials for redress of their grievances.

109. Therefore, the defendants' actions against Mr. Zucker have the intent and the foreseeable effect of chilling and restricting the exercise of Constitutionally-protected rights in violation of the First Amendment of the United States Constitution, and to deny him due process of law under the Fifth Amendment of the United States Constitution.

110. The defendants acted under color of law.

111. Also, the defendants have predetermined the CPSC Proceeding's outcome in all material respects thereby denying Mr. Zucker substantive and procedural due process.

112. Mr. Zucker has been damaged due to the defendants' violations of his constitutional rights, and will suffer irreparable injury absent the award of a preliminary and permanent injunction prohibiting the defendants from exercising adjudicative authority over him.

Relief Requested

WHEREFORE, Mr. Zucker requests that the Court:

A. Declare that CPSC's actions with respect to Mr. Zucker, including but not limited to its assertion of jurisdiction over him as a manufacturer and distributor of consumer products distributed in commerce, are *ultra vires*, arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law and in excess of CPSC's statutory authority.

B. Declare that the defendants' selective assertion and exercise of adjudicative authority over Mr. Zucker and/or their predetermination of the CPSC Proceeding violate his rights to freedom of speech, to freedom of association, and to petition government officials for redress of grievances under the First Amendment of the Constitution and/or his right to substantive and procedural due process of law under the Fifth Amendment of the Constitution.

C. Preliminarily and permanently enjoin the defendants from asserting or exercising adjudicative authority over Mr. Zucker in his individual capacity.

D. Award Mr. Zucker his costs and reasonable attorneys' fees in defending himself before CPSC and in pursuing this action under the Equal Access to Justice Act and under such other authorities that may authorize this relief. 28 U.S.C. § 2412.

E. Order such other and further relief as deemed just and proper by the Court.

Respectfully submitted,

_____/S/_____
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Telephone: 202.372.9120
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As Counsel to Cause of Action, Inc.

November 12, 2013

EXHIBIT

1

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Cheryl A. Falvey
General Counsel

Tel: 301-504-7642
Fax: 301-504-0403

July 20, 2012

Via Electronic and First Class Mail

Alan H. Schoem, Esq.
14809 Rolling Green Way
North Potomac, Maryland 20878

Re: Request for Statement

Dear Mr. Schoem:

Thank you for your July 17, 2012 letter to CPSC Compliance Officer Joe Williams. You state that Mr. William's letter to Brookstone concerned various types of aggregated masses of small, powerful, individual magnets and that he asked Brookstone voluntarily stop selling the magnets pending the outcome of our investigation. You further state that this communication to Brookstone is based on the fact that Maxfield and Oberton identified Brookstone as a retailer in a May 25, 2012 Full Report to the CPSC.

I can assure you that no violation of the disclosure restrictions has taken place for any section 15 information Maxfield and Oberton submitted in its Full Report. Brookstone was identified as a retailer independent from the section 15 report submitted by Maxfield and Oberton. As you know, the Commission has determined that the referenced section 6(b)(5) restrictions to not apply to information independently obtained or prepared by Commission staff. 16 C.F.R. § 1101.63(c).

Furthermore, the Commission staff has statutory authority to investigate retailers when it believes that they may be selling a product that presents a substantial product hazard. Your suggestion of intimidation by the staff is unfounded and belied by the fact that some retailers have not agreed to stop sale. As you acknowledged, the correspondence to retailers contained a generic description of magnets. While you may represent to staff that the firm, Brookstone, is selling only one type of magnet, staff has a duty to investigate fully and request information under the circumstances.

At your request, I am confirming that it is not a violation of any law administered by the CPSC for any retailer to continue to sell Buckyballs and Buckycubes. We are willing to

communicate that directly to the retailers that staff has contacted. As you note, staff requests have been for voluntary action. If a retailer continues to sell your client's product, it is not in violation of any law CPSC administers until we have obtained a court order, which is the next step in our process after the issuance of a PD, or the firm voluntarily agrees to a corrective action. The scope of administrative action needed to be taken by the agency to address the concern regarding a potential substantial product hazard is certainly minimized to the extent we can obtain voluntary corrective actions from manufacturers or retailers.

Sincerely,

Cheryl A. Falvey

EXHIBIT

2

U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Mary B. Murphy
Assistant General Counsel
Divisions of Compliance and Import Surveillance
Office of the General Counsel

Tel: (301) 504-7809
Fax: (301) 504-0403
Email: mmurphy@cpsc.gov

February 5, 2013

VIA ELECTRONIC AND CERTIFIED MAIL

MOH Liquidating Trust
c/o Julie Beth Teicher, Trustee
Erman, Teicher, Miller, Zucker & Freedman, P.C.
400 Galleria Officentre – Suite 444
Southfield, MI 48034-2162

Re: *In re Maxfield & Oberton Holdings, LLC* (CPSC No. 12-1)

Dear Ms. Teicher:

On January 17, 2013, a Product Safety Investigator of the U.S. Consumer Product Safety Commission (CPSC or Commission) conducted an establishment inspection of Amware Fulfillment of CT, LLC's (Amware), facility located at 33 Stiles Lane, North Haven, CT. Through this inspection, our Product Safety Investigator confirmed that Amware currently possesses an unknown quantity of high-powered magnet products that were formerly the property of MOH (the MOH Inventory) and that Amware's counsel has contacted you regarding these items.

CPSC staff is unable at this point to determine whether the inventory consists of only Buckycubes and Buckyballs, or whether other MOH products, specifically Buckybars and BuckyBigs, are stored at the facility as well. The Commission has an interest in the disposition of the MOH Inventory by virtue of its mission as well as its status as a potential beneficiary of the Trust.

As you know, CPSC staff has filed an administrative lawsuit seeking a determination that Buckyballs and Buckycubes (the Subject Products), which were manufactured and distributed by MOH, present a substantial product hazard. The Complaint seeks an order that the firm be required to engage in remedial action, including offering a refund to consumers and making public notification of the hazard presented by the Subject Products. This lawsuit follows a preliminary determination by staff that the Subject Products pose a substantial risk of injury to consumers pursuant to Section 15(a) of the Consumer Product Safety Act, 15 U.S.C. § 2064(a).

Julie Beth Teicher, Trustee
Erman, Teicher, Miller, Zucker & Freedman, P.C.
400 Galleria Officentre – Suite 444
Southfield, MI 48034-2162

You have indicated that the Trust you are administering contains approximately $262,000 in funds. In light of the more than 2.5 million sets of Buckyballs sold, this sum is obviously insufficient to compensate consumers if staff prevails in its action. To that end, staff requests that you, as Trustee, take possession of the inventory and determine which, if any, of the products may be sold or liquidated so that the additional funds may be placed in the Trust.

However, because staff has made a preliminary determination that Buckycubes and Buckyballs pose a substantial risk of injury to the public, we ask that you, as transferee and assignee of MOH's assets, make every effort to ensure that, when assessing whether any of the remaining inventory may be sold, no Subject Products re-enter the stream of commerce.[1]

To the extent that the MOH Inventory includes products other than Buckyballs and Buckycubes, we also ask that you to make every effort to liquidate those items for the benefit of the Trust's creditors.

Thank you for your attention to this matter. If you have any questions, please feel free to contact me.

Very truly yours,

Mary B. Murphy
Assistant General Counsel

[1] Any attempt by any person to distribute Buckyballs or Buckycubes in commerce within the United States could give rise to a reporting obligation under Section 15(b) of the CPSA, 15 U.S.C. § 2064(b) and/or to further legal action by Commission.

EXHIBIT

3

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	
MAXFIELD AND OBERTON HOLDINGS, LLC	CPSC DOCKET NO. 12-1
ZEN MAGNETS, LLC	CPSC DOCKET NO. 12-2
STAR NETWORKS USA, LLC	CPSC DOCKET NO. 13-2
	(Consolidated)
Respondents.	

COMPLAINT COUNSEL'S MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINTS IN DOCKET NOS. 12-1 AND 12-2

Complaint Counsel filed Amended Complaints against Respondent Maxfield and Oberton Holdings, LLC ("M&O") and Zen Magnets, LLC ("Zen") seeking a determination that that Respondents' products (the "Subject Products") present a substantial product hazard as that term is defined in sections 15(a)(1) and (2) of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064(a)(1), (2). *See* Amended Complaints in CPSC Docket Nos. 12-1 and 12-2.

Respondent M&O has now purported to dissolve as a corporate entity, *see* Notice of Withdrawal of M&O's counsel at 1 (Dec. 27, 2012), and has not communicated with Complaint Counsel as to its status or intentions in this litigation.[2] Complaint Counsel has had limited communications with the Trustee for the Liquidating Trust that was

[2] *See also* www.getbuckyballs.com (last accessed Feb. 4, 2013) (Exhibit C) (stating that M&O stopped doing business on December 27, 2012). M&O has not provided evidence to Complaint Counsel to support its claims that it no longer exists. Further, M&O has not agreed to perform remedies that Complaint Counsel sought in the Amended Complaint, including but not limited to refunding the purchase price of the M&O Subject Products to consumers. Complaint Counsel continues to seek that relief in this proceeding.

established to wind down M&O's affairs, but she has indicated that the Trust will not appear in this litigation on M&O's behalf. *See* e-mail from Julie Beth Teicher to Complaint Counsel, with a copy to the Court (January 23, 2013, 10:38 AM) (Exhibit D). In light of this development, Complaint Counsel seeks leave to file a Second Amended Complaint against M&O to name its Chief Executive Officer ("CEO"), Craig Zucker ("Mr. Zucker"), as a Respondent, both individually and in his capacity as a responsible corporate officer.

Complaint Counsel also seeks leave to file a Second Amended Complaint against Zen to include allegations that since the filing of the Amended Complaint, Zen has been importing, distributing, and selling aggregated masses of high-powered, small rare earth magnets under the name Neoballs. The motion for amendment complies with the requirements of 16 C.F.R. § 1025.13 because the proposed Second Amended Complaints "do not unduly broaden the issues in the proceedings or cause undue delay." The Second Amended Complaints would not broaden the substantive issues in this litigation in any significant way, and any delay may not be characterized as "undue" because the amendments result directly from actions taken by Respondents after this proceeding commenced. Moreover, no discovery schedule has been set and a prehearing conference was recently scheduled for March 6, 2013.

I. Mr. Zucker is Appropriately Named as a Respondent in the Second Amended Complaint Individually and in his Capacity as CEO

Complaint Counsel moves to amend the Amended Complaint against M&O to name Mr. Zucker as a Respondent, both individually and in his capacity as CEO of

M&O, pursuant to Supreme Court precedent that permits the inclusion of an individual Respondent where, as here, the Respondent exercised personal control over the acts and practices of the corporation.

The facts in the instant case demonstrate amply that Mr. Zucker personally controlled the acts and practices of the corporation, including the importation and distribution of Buckyballs and Buckycubes, which the Second Amended Complaint alleges constitute substantial product hazards. Indeed, in Mr. Zucker's many communications with CPSC Commissioners and staff, he consistently identified himself as the CEO and principal decision maker of M&O. For example, on April 4, 2012, Mr. Zucker met personally with a CPSC Commissioner regarding the M&O Subject Products. *See* CPSC Public Calendar No. XXXIX, No. 26 at 3 (April 4, 2012) (Exhibit E). 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. *See* CPSC Public Calendar No. XXXIX, No. 27 at 2 (April 11, 2012) (Exhibit E). In addition, Mr. Zucker submitted formal information to the Commission on behalf of M&O. Specifically, on May 25, 2012, Mr. Zucker filed a report on the Subject Products in response to staff's requests for information pursuant to section 15(b) of the CPSA ("Full Report").[3] In the Full Report, Mr. Zucker identified himself as the author of the report and as the CEO of M&O. Full Report at 1 (on file with Complaint Counsel). He stated, "Craig Zucker is responsible for the development and enforcement of Maxfield

[3]Pursuant to Commission regulations at 16 C.F.R. § 1101.61(b)(1), Complaint Counsel may disclose information from the Full Report in this public filing because the Commission has issued a Complaint under sections 15(c) and (d) of the CPSA alleging that the Subject Products present a substantial product hazard.

and Oberton's compliance program." Full Report at 6.[4] Consistent with his stated responsibility for the development and enforcement of M&O's compliance program, Mr. Zucker communicated personally with CPSC compliance staff regarding CPSC actions in connection with the Subject Products. *See* e-mails from Craig Zucker to CPSC compliance officer Thomas Lee (June 19, 2012 1:58 p.m.; June 25, 2012 9:54 a.m.) (Exhibit E). Mr. Zucker also corresponded personally with other CPSC staff about CPSC actions connected to the filing of the Complaint. *See* e-mail from Craig Zucker to CPSC Spokesman Scott Wolfson (Sept. 11, 2012 1:06 p.m.) (Exhibit E) (referencing success of M&O's "Save our Balls" campaign).

In addition to his direct and repeated communications with CPSC staff and Commissioners about the very issue before this Court, 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. *See* e-mail from Craig Zucker to staff of the U.S. Senate and U.S. House of Representatives, as well as CPSC Commissioners and CPSC staff (July 20, 2012 10:38 a.m.) (Exhibit G); open letter to President Obama, published in the *Washington Post* and other newspapers on August 2, 2012 (stating "In 2009, I started our business, creating a product called Buckyballs®") (Exhibit G).

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[4]Mr. Zucker also submitted M&O's formal comment to CPSC's staff briefing package on the proposed Safety Standard for Magnet Sets. *See* Letter from Craig Zucker to CPSC Secretary Todd Stevenson, registered as a public comment on September 12, 2012, *available at* http://www.regulations.gov/#!documentDetail;D=CPSC-2012-0050-0023 (Exhibit F).

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.[5] Those statements demonstrate that Mr. Zucker was integral to the design, manufacturing, and marketing of the M&O Subject Products, including the modifications to the design of the warnings and instructions that accompanied the products, and thus integral to the matter at issue in the current proceeding.

Indeed, M&O's own press releases identify Mr. Zucker as M&O's CEO and founder and Mr. Zucker, on numerous occasions, has presented himself as the face of Maxfield and Oberton. 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." Mr. Zucker's handwritten signature appears on the letter, and the signature block identifies him as "Co-founder, CEO, Maxfield and Oberton." *Previously available at* www.getbuckyballs.com/letter-from-ceo (last accessed October 18, 2012) (Exhibit I);[6] *see also* press release dated August 14, 2012 (*previously available at* www.getbuckyballs.com/cpsc-complaint-arbitrary-capricious-without-merit, last

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[5] *See, e.g.*, *Power Lunch* (CNBC television broadcast Aug. 20, 2012) (http://www.youtube.com/watch?v=sjtAZNs-SCM) (Exhibit H); *Your World With Neil Cavuto* (Fox News television broadcast Aug. 3, 2012) (http://www.youtube.com/watch?v=aGjiZlkVBUA) (Exhibit H); *Nightline: Is Proposed Recall on Magnet Toys Unfair?* (ABC television broadcast Sept. 12, 2012) (video and transcript at http://abcnews.go.com/Health/proposed-recall-magnet-toys-unfair/story?id=17075289) (Exhibit H). In several other interviews, Mr. Zucker identified personally with the company's litigation goals. *See* "Andrew Martin, *For Buckyballs Toys, Child Safety is a Growing Issue*, N.Y. Times, Aug. 16, 2012, *available at* http://www.nytimes.com/2012/08/17/business/for-buckyballs-toys-child-safety-is-a-growing-issue.html?pagewanted=all&_r=0 (Exhibit H); *Buckyballs vs. The Consumer Products Safety Commission* (Reason.com internet broadcast Sept. 12, 2012) (video and transcript at http://reason.com/archives/2012/09/12/buckey-balls) (Exhibit H); *The Rush Limbaugh Show* (radio broadcast July 30, 2012) (transcript and audio at http://www.rushlimbaugh.com/daily/2012/07/30/ceo_of_buckyballs_save_our_balls) (Exhibit H).

[6] Some M&O press releases no longer appear on www.getbuckyballs.com. The press releases cited here are attached as exhibits.

accessed December 4, 2012) (Exhibit I) (also identifying Mr. Zucker as "Founder and CEO of Maxfield and Oberton").

Moreover, in unrelated litigation in Federal court, Mr. Zucker submitted a signed, sworn declaration in support of an M&O motion. *See* Declaration of Craig Zucker in support of Maxfield & Oberton Holdings, LLC's Request for Judicial Notice, *The Estate of Buckminster Fuller v. Maxfield & Oberton Holdings, LLC*, Case No. CV 12-2570 at Dkt. No. 13-1 (N.D. Cal. July 13, 2012) (Exhibit J). In the declaration, Mr. Zucker said "I am the Chief Executive Officer of Maxfield & Oberton Holdings, LLC . . . Unless otherwise stated, I have personal knowledge of the facts set forth herein and if called as a witness could competently testify thereto." Decl. at 1 (Exhibit J). Mr. Zucker attached as an exhibit "a true and correct copy of the October 24, 2011 non-exclusive license granted to [M&O] by Plaintiff." *Id.* Mr. Zucker counter-signed the Plaintiff's licensing letter on behalf of M&O. Decl. at Exhibit 2 (Exhibit J). Mr. Zucker's act of making a declaration on behalf of the company, as well as his demonstrated ability and practice of entering into a contract on behalf of M&O, constitute further evidence that he is responsible for M&O's acts and practices.

A. Mr. Zucker Is a Responsible Corporate Officer Under the Doctrine Established by the Supreme Court

The facts set forth above demonstrate that Mr. Zucker is appropriately named as a Respondent in the Second Amended Complaint in his individual capacity and as a responsible corporate officer under the relevant Supreme Court precedent established in *United States v. Dotterweich*, 320 U.S. 277 (1943) and *United States v. Park*, 421 U.S. 658 (1975).

In *Park*, the Supreme Court upheld the conviction of the president of a food distributor on charges that he committed criminal violations of the Federal Food, Drug, and Cosmetic Act ("FDCA").[7] The charge stemmed from FDA inspections that uncovered rodent-infested food stored in the company's warehouse. The defendant conceded at trial that he was responsible for providing sanitary conditions for food offered for sale to the public, but claimed that he had delegated that task to "dependable subordinates," *id.* at 664, and that the company had an organizational structure that placed different individuals in charge of the company's operation. Although he conferred with legal counsel to determine an appropriate corrective action, he made no more efforts to ensure that the remedial steps were taken or to assess whether they were effective.

To establish the defendant's culpability, the government introduced bylaws that set forth the duties of the defendant as the CEO and presented evidence that while the defendant delegated normal operating duties, including sanitation, to others, he "retained 'certain things, which are the big, broad, principles of the operation of the company,' and had the 'responsibility of seeing that they all work together.'" *Id.* at 664. The jury convicted the defendant on the grounds that he was responsible for the sanitation efforts undertaken by the company. Although the Court of Appeals reversed, the Supreme Court reinstated the District Court's judgment on the verdict on appeal.

The *Park* Court relied on the reasoning in *United States v. Dotterweich*,[8] where it upheld the criminal conviction of an individual corporate officer for violations of the

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[7] The government filed an Information charging both the individual defendant and the company, Acme Markets, Inc. The company entered a guilty plea prior to trial. *Park*, 421 U.S. at 661; *United States v. Park*, 499 F.2d 839, 840 (4th Cir. 1974).

[8] In *Dotterweich*, the Supreme Court upheld the conviction of the president and general manager of a

FDCA on the grounds that the "offense is committed . . . by all who have … a responsible share in the furtherance of the transaction which the statute outlaws." *Id.* at 284. The *Park* Court affirmed the *Dotterweich* rationale—that individual corporate officers can be held liable under the FDCA if their "failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of." *Park*, 421 U.S. at 671. This rationale has been confirmed in subsequent cases, both in criminal and civil contexts, and has been applied to officers of limited liability companies ("LLCs").[9]

Moreover, the Court observed, the reasoning of *Dotterweich* and subsequently decided cases imposes on "individuals who execute the corporate mission" a duty not just to seek out and remedy violations, "but also, and primarily, a duty to implement measures that will insure that violations will not occur." *Park*, 421 U.S. at 672. While "[t]he requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding," the Court reasoned, " . . . they are no more stringent than the public has the right to expect of those who voluntarily assume positions of authority

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pharmaceutical company for criminal violations of the FDCA stemming from his company's shipment of misbranded and adulterated drugs. *Dotterweich*, 320 U.S. at 278. The Court upheld the conviction of the individual defendant despite the fact that a lower court had observed that "Dotterweich had no personal connection with either shipment, but he was in general charge of the corporation's business and had given general instructions to its employees to fill orders received from physicians." *United States v. Buffalo Pharmacal Co.*, 131 F.2d 500, 501 (2d Cir. 1942).

[9] *See, e.g.*, *United States v. Ming Hong*, 242 F.3d 528 (4th Cir. 2001) (owner of a wastewater treatment facility is criminally liable for the facility's clean water violations under *Park* and *Dotterweich* even though he had no formal title as a corporate officer, because he played a substantial role in the company's operations, including inspecting the treatment apparatus on at least one occasion); *United States v. Gel-Spice Co.*, 773 F.2d 427 (2d Cir. 1985) (president is individually criminally culpable for widespread rodent infestation at storage facility, even though another employee managed the facility on a day-to-day basis); *TMJ Implants, Inc. v. Dept. of Health and Human Serv's*, 584 F.3d 1290 (10th Cir. 2009) (president of a manufacturer of joint implants is individually liable for civil penalties for corporation's failure to file medical device reports with FDA); *United States v. Osborn*, 2012 WL 1096087 at *4 (N.D. Ohio 2012) (responsible corporate officer of an LLC is personally liable for the LLC's Clean Water Act violations).

in business enterprises whose services and products affect the health and well-being of the public that supports them." *Id.*

At the heart of *Park* and *Dotterweich* lies the rationale that individual liability is properly imposed on corporate officers where the failure to comply with regulatory schemes affects the health and safety of the public. "The purposes of [the Food and Drugs Act] touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection," the *Dotterweich* Court held. *Dotterweich*, 320 U.S. at 280.

B. The Responsible Corporate Officer Doctrine Applies in Product Safety Cases and Cases Where a Corporation No Longer Exists

The rationale applies equally to statutes and regulations governing the Consumer Product Safety Commission. In *United States v. Shelton Wholesale, Inc.*, 34 F. Supp. 2d 1147 (W.D. Mo. 1999), the Commission sued two corporations that imported fireworks, alleging violations of the Federal Hazardous Substances Act ("FHSA"). After learning that "defendant corporations are closely held and run entirely by Mr. Shelton," the government moved to amend the complaint to name Mr. Shelton individually as a defendant. *See* Memo. in Supp. of Mot. to Amend at 1, *Shelton*, 34 F. Supp. 2d 1147 (W.D. Mo. 1999), No. 96-cv-06131, Dkt. No. 12, filed Feb. 20, 1997 (Exhibit K). In its successful motion, the government argued that

> Joining Mr. Shelton in his individual capacity is necessary to ensure the effectiveness of any injunctive relief that might be granted against the defendant corporations. The companies are closely held and principally operated by Mr. Shelton. If Mr. Shelton is not added as a defendant in his individual capacity, he could avoid any injunction entered against the

> defendant corporations by ***dissolving the companies*** and reincorporating them under a different name.

Id. at 3 (emphasis added). The court granted the motion. *Shelton*, Dkt. No. 20 (May 20, 1997) (Order "granting motion to amend complaint by adding Gregory P. Shelton as dft") (Exhibit K).

The *Shelton* court later granted the government's motion for summary judgment that Mr. Shelton had violated the FHSA in his individual capacity, citing *Park* and *Dotterweich*:

> Here, Mr. Shelton clearly bore a responsible relation to the activity prohibited—the importation of a banned or misbranded hazardous substance. It is undisputed that he was the sole shareholder, the chief corporate officer and that he made all the decisions for the defendant corporations relevant to the allegations in this case. Accordingly, under the reasoning of *Dotterweich* and *Park*, Mr. Shelton is liable for the importation of all eighteen products by virtue of his various corporate roles. No reasonable jury could conclude otherwise.

U.S. v. Shelton Wholesale, Inc., 1999 WL 825483 at *3 (unreported).[10] The Eighth Circuit affirmed. *Shelton v. Consumer Products Safety Comm'n*, 277 F.3d 998 (Eighth Cir. 2002), *cert. denied*, 123 S.Ct. 514 (2002).

Shelton provides further support for Complaint Counsel's position that Mr. Zucker is appropriately named as a Respondent in the Second Amended Complaint by virtue of his role as the CEO of M&O. His responsibility for ensuring that the firm complied with relevant statutes and regulations, including the Consumer Product Safety Act, as demonstrated through his own statements and actions, brings him squarely within

[10] Although the court's Order on summary judgment did not encompass a finding that the violations were knowing, *id.* at *5, the court enjoined Shelton in his individual capacity from "knowingly or recklessly importing products violative of the FHSA and/or the CPSC regulations." *Id.* The Eighth Circuit affirmed. *Shelton v. Consumer Product Safety Commission*, 277 F.3d 998 (8th Cir. 2002), *cert. denied*, 123 S.Ct. 514 (2002).

the scope of individuals contemplated by *Dotterweich*, *Park*, and *Shelton*. Thus, the proposed Second Amended Complaint comports with clear precedent, bringing Mr. Zucker appropriately before this Court.

The purported dissolution of M&O does not preclude an action against Mr. Zucker individually. Case law establishes that even if a person ceases to be a corporate officer after the violations have occurred, the individual can still be held responsible for the corporation's previous acts. In *United States v. Hodges X-Ray, Inc.*, 759 F.2d 557 (6th Cir. 1985), the Sixth Circuit held that the principal shareholder of an x-ray company was individually liable under *Park* and *Dotterweich* for violations of the Radiation Control for Health and Safety Act of 1968, even though the company's assets had been sold prior to the assessment of a civil penalty. The court specifically noted that the corporation no longer existed, but nonetheless held Mr. Hodges individually liable. *Id.* at 558 n.1 (stating that the defendant corporation is defunct). As in *Hodges,* Mr. Zucker should be held responsible for previous acts and practices of M&O regardless of M&O's purported dissolution.

Barrett Carpet Mills, Inc. v. CPSC, 635 F.2d 299 (4th Cir. 1980) does not compel a contrary conclusion. In that case, a court upheld a cease and desist order issued by the Commission against a company but refused to apply the order to the corporation's individual officer because, the court reasoned, "the violation complained of was inadvertent and not likely to recur . . . ." *Id.* at 304. In *Barrett*, the corporation's subcontractor had improperly applied fire-retardant chemicals to carpets during two production days during a sixteen-month period, which the court held was insufficient to

hold the president of the company responsible for the regulatory violations by the company. The court emphasized that the violations were "operational accidents which are not likely to occur, certainly not intentionally." *Id.*

The facts in the instant proceeding could not be more different from those in *Barrett*—M&O imported and distributed the M&O Subject Products intentionally and on a full time basis, and Mr. Zucker fully controlled M&O's day to day operations in importing and distributing the Subject Products. There was nothing inadvertent, rare, or unintentional in the sale and distribution by Mr. Zucker of the Subject Products at issue here. Mr. Zucker stands squarely within the definition of a responsible corporate officer set out in *Park* and *Dotterweich* and is therefore appropriately named as a Respondent in the Second Amended Complaint.

II. The Filing of the Second Amended Complaint Against Zen Is Appropriate In Order to Include All Subject Products Sold by the Company

The proposed Second Amended Complaint against Zen alleges that Zen recently began selling aggregated masses of small, high-powered magnets under the brand name "Neoballs." According to Zen's website, "Neoballs is a trademark of Zen Magnets LLC." *See* www.neoballs.com (last accessed Feb. 6, 2013) (Exhibit L). Upon information and belief, Neoballs are substantively identical, in both their physical properties and in the hazard presented, to other aggregated masses of small, high-powered magnets sold by Zen.

The Neoballs website purports to sell magnets individually instead of in sets, an ill-disguised attempt to circumvent the definition of the Subject Products as aggregated

masses of high-powered, small rare earth magnets. A message on the Neoballs website states, "Due to CPSC requests, we are selling the magnets individually. However, shipping is a flat rate no matter how many neoballs you purchase, whether you buy 216, or 21,600 magnet spheres." *See* http://neoballs.com/purchase-neoballs/# (last accessed February 6, 2013) (Exhibit L). CPSC staff has never requested that Zen sell magnets individually. A pop-up balloon over the words "CPSC requests" states "The CPSC is attempting to ban 'Aggregates of powerful magnets', and have requested all magnet sphere brands to stop selling. However, you can still purchase as many neoballs as you would like." *Id.* (screen shot of pop-up balloon included at Exhibit L). However, despite its stated intent to offer the magnets on an individual basis, the site, through various promotions, overtly encourages visitors to purchase the balls in aggregate. Neoballs fall squarely within the definition of the Subject Products set forth in the Complaint, notwithstanding the company's efforts to reclassify the product through a transparent sales strategy. The Amended Complaint seeks merely to ensure that any remedies that are applied to Respondent's Zen Magnets product line are also applied to Neoballs.

The addition of Neoballs, as well as the inclusion of some supplemental information from the Neoballs and Zen websites, are the only substantive amendments to the Second Amended Complaint against Zen. The amendment would not unduly broaden the issues because Neoballs are substantively identical to the Zen Subject Products that are already the subject of this proceeding. *See In re Wy. Tight Sands Antitrust Cases*, 121 F.R.D. 682, 685 (D. Kan. 1986) (granting plaintiff's motion to amend on the grounds that "the additional claims stem from the same basic transactions and factual allegations in

[plaintiff's] original complaint."). Similarly, the amendment would not unduly delay these proceedings because any delay may be attributed to Zen's decision to resume sale of Neoballs. Moreover, no discovery schedule has been set and a prehearing conference was recently scheduled for March 6, 2013. *See id.* at 684-85 (granting amendment when "only the first wave of discovery has been completed and the amendment to the complaint will not unduly delay the progress of said discovery"). Therefore amendment is proper under 16 C.F.R. §1025.13.

III. Conclusion

Wherefore, for the foregoing reasons, Complaint Counsel respectfully requests that the Presiding Officer permit Complaint Counsel to file the attached Second Amended Complaints and List and Summary of Documentary Evidence.

Respectfully submitted,

Mary B. Murphy
Assistant General Counsel
Division of Compliance
Office of the General Counsel
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7809

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
Bethesda, MD 20814

EXHIBIT

4

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of MAXFIELD AND OBERTON HOLDINGS, LLC and CRAIG ZUCKER, individually, and as an officer of MAXFIELD AND OBERTON HOLDINGS LLC. Respondents.	CPSC DOCKET NO. 12-1

SECOND AMENDED COMPLAINT

Nature of Proceedings

1. This is an administrative enforcement proceeding pursuant to Section 15 of the Consumer Product Safety Act ("CPSA"), as amended, 15 U.S.C. § 2064, for public notification and remedial action to protect the public from the substantial risks of injury presented by aggregated masses of high-powered, small rare earth magnets known as Buckyballs® ("Buckyballs") and Buckycubes™ ("Buckycubes") (collectively, the "Subject Products"), imported and distributed by Maxfield and Oberton Holdings, LLC ("Maxfield" or the "Firm") and Craig Zucker ("Zucker"), as Maxfield's Chief Executive Officer (collectively "Respondents").

2. This proceeding is governed by the Rules of Practice for Adjudicative Proceedings before the U.S. Consumer Product Safety Commission (the "Commission"), 16 C.F.R. § 1025.

Jurisdiction

3. This proceeding is instituted pursuant to the authority contained in Sections 15(c), (d), and (f) of the CPSA, 15 U.S.C § 2064 (c), (d) and (f).

Parties

4. Complaint Counsel is the staff of the Division of Compliance within the Office of the General Counsel of the Commission ("Complaint Counsel"). The Commission is an independent federal regulatory agency established pursuant to Section 4 of the CPSA, 15 U.S.C. § 2053.

5. Maxfield is a Delaware limited liability company with its principal place of business located at 180 Varick Street, Suite 212, New York, NY, 10014.

6. Zucker is the cofounder and Chief Executive Officer of Maxfield. As such, he controls the acts, practices and policies of the Firm.

7. Upon information and belief, at all relevant times Zucker was and is responsible for ensuring Maxfield's compliance with the requirements of the CPSA, ASTM-963-08 section 3.1.72 and its most recent version, ASTM 963-11 section 3.1.81 (the "Toy Standard"), and regulations issued thereunder.

8. Upon information and belief, Zucker resides in Brooklyn, NY.

9. Whenever this Complaint refers to any act of the Respondents, the reference shall be deemed to mean that the directors, officers, employees, or agents of the Firm, including Zucker, authorized such act while actively engaged in the management, direction, or control of the affairs of the Firm and while acting within the scope of their employment or official duties.

10. Whenever this Complaint refers to any act of the Respondents, the reference shall be deemed to mean the act of each Respondent, jointly and severally.

11. Respondents were importers and distributors of the Subject Products.

12. As importers and distributors of the Subject Products, Respondents were "manufacturers" and "distributors" of a "consumer product" that is "distributed in commerce," as those terms are defined in CPSA Sections 3(a)(5), (7), (8), and (11) of the CPSA, 15 U.S.C. §§ 2052(a)(5), (7), (8), and (11).

13. Upon information and belief, Zucker, as Maxfield's authorized representative, filed a Certificate of Cancellation for Maxfield on December 27, 2012 with the Secretary of State of Delaware.

14. Upon information and belief, Maxfield has ceased business operations.

The Consumer Product

15. Respondents imported and distributed the Subject Products in U.S. commerce and offered the Subject Products for sale to consumers for their personal use in or around a permanent or temporary household or residence, a school, and in recreation or otherwise.

16. The Subject Products consist of small, individual magnets that are packaged as aggregated masses in different sized containers holding 10, 125, and 216 small magnets, ranging in size from approximately 4.01 mm to 5.03 mm, with a variety of coatings, and a flux index greater than 50.

17. Upon information and belief, the flux of Buckyballs ranges from approximately 414 to 556kg²mm² Surface Flux Index.

18. Upon information and belief, the flux of Buckycubes ranges from approximately 204 to 288kg²mm² Surface Flux Index.

19. Upon information and belief, Buckyballs, which are small spherically shaped magnets, were introduced in U.S. commerce in March 2009 by Respondents.

20. Upon information and belief, Buckycubes, which are small cube-shaped magnets, were introduced in U.S. commerce in October 2011 by Respondents.

21. Upon information and belief, the Subject Products were manufactured by Ningo Prosperous Imp. & Exp. Co. Ltd., of Ningbo City, in China.

22. Upon information and belief, Respondents discontinued sale of the Subject Products on December 27, 2012.

23. The Subject Products were sold with a carrying case and range in retail price from approximately $19.95 to $100.00. Upon information and belief, the Subject Products could also be purchased in sets of 10 for $3.50.

24. Upon information and belief, Respondents sold more than 2.5 million sets of Buckyballs to consumers in the United States.

25. Upon information and belief, Respondents sold more than 290,000 sets of Buckycubes to consumers in the United States.

26. Upon information and belief, Respondents refused staff's requests that Respondents stop sale of the Subject Products and submit a corrective action plan for both Buckyballs and Buckycubes.

27. Upon information and belief, the Subject Products continue to be sold online to consumers in the United States through various internet sites.

28. Upon information and belief, the Subject Products continue to be sold in retail stores in the United States.

COUNT I

The Subject Products Are Substantial Product Hazards Under Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2), Because They Contain Product Defects That Create a Substantial Risk of Injury to the Public

The Subject Products Are Defective Because Their Instructions, Packaging, and Warnings Are Inadequate

29. Paragraphs 1 through 28 are hereby realleged and incorporated by reference, as though fully set forth herein.

30. A defect can occur in a product's contents, construction, finish, packaging, warnings, and/or instructions. 16 C.F.R. §1115.4.

31. A defect can occur when reasonably foreseeable consumer use or misuse, based in part on the lack of adequate instructions and safety warnings, could result in injury, even where there are no reports of injury. 16 C.F.R. §1115.4.

32. Upon information and belief, from approximately March 2009 through October 2009, Buckyballs packaging contained the following warning: "WARNING: Ages 13+ only. Do not swallow or ingest. Should one end up inside you, contact the proper authorities immediately. Discontinue use of any ball that has broken or that is in any other way damaged."

33. Upon information and belief, Respondents sold Buckyballs between March 2009 and October 2009 with no warning.

34. On or about February 2010, Buckyballs contained the following warnings: "**Warning**: Not intended for children. Swallowing of magnets may cause serious injury and require immediate medical care. **Ages 13+.**"

35. On or about March 11, 2010, the Respondents changed the packaging, warnings, instructions, and labeling on Buckyballs and later conducted a recall of the products that were labeled as 13+.

36. Upon information and belief, beginning on or around March 29, 2010, Maxfield began executing "Responsible Seller Agreements" with some of its retailers.

37. The "Responsible Seller Agreements" purported, in part, to restrict the sales of the Subject Products to stores that did not primarily sell toys, and and required the reseller to agree to display the Subject Products with products intended for consumers ages 14 and over.

38. On May 27, 2010, the Commission and the Firm jointly issued a press release announcing the recall: *Buckyballs® High Powered Magnets Sets Recalled by Maxfield and Oberton Due to Violation of Federal Toy Standard.*

39. At the time of the recall, the Respondents knew of at least two incidents involving ingestions of Buckyballs.

40. Upon information and belief, in connection with the recall of Buckyballs labeled for 13+, Respondents relabeled Buckyballs in an attempt to remove it from the scope of the mandatory provisions of ASTM International F963-8, *Standard Consumer Safety Specification for Toy Safety*.

41. Upon information and belief, Respondents changed the Buckyballs warning on or about March 2010 to state: "**Warning**: Not intended for children. Swallowing of magnets may cause serious injury and require immediate medical care. Ages 14+."

42. Upon information and belief, the Respondents implemented a second change to the warnings on Buckyballs in 2010 so that the warnings read: "Warning: Keep Away from All

Children! Do not put in nose or mouth. Swallowed magnets can stick to intestines causing serious injury or death. Seek immediate medical attention if magnets are swallowed or inhaled."

43. Upon information and belief, these warnings were present on Buckyballs sold by the Respondents until December 27, 2012.

44. Upon information and belief, since their introduction into commerce in October 2011, Buckycubes have displayed a warning on their packaging that states: "Warning: Keep Away from All Children! Do not put in nose or mouth. Swallowed magnets can stick to intestines causing serious injury or death. Seek immediate medical attention if magnets are swallowed or inhaled."

45. Since Buckyballs were introduced into commerce in 2009, numerous incidents involving ingestions by children under the age of 14 have occurred.

46. Upon information and belief, on or about January 28, 2010, a 9-year-old boy used Buckyballs to mimic tongue and lip piercings and accidentally ingested seven magnets. He was treated at an emergency room.

47. Upon information and belief, on or about September 5, 2010, a 12-year-old girl accidentally swallowed two Buckyballs magnets. She sought medical treatment at a hospital, including x-rays and monitoring for infection and damage to her gastrointestinal tract.

48. Upon information and belief, on or about December 23, 2010, a 3-year-old girl ingested eight Buckyballs magnets she found on a refrigerator in her home, and required surgery to remove the magnets. The magnets had caused intestinal and stomach perforations and had also become embedded in the girl's trachea and esophagus.

49. Upon information and belief, on or about January 6, 2011, a 4-year-old boy suffered intestinal perforations after ingesting three Buckyballs magnets that he thought were chocolate candy because they looked like the decorations on his mother's wedding cake.

50. By November 2011, the Commission was aware of approximately 22 reports of ingestions of high-powered, small, spherically shaped magnets.

51. On November 11, 2011, the Commission, in conjunction with Respondents, issued a public safety alert to warn the public further of the dangers of the ingestion of rare earth magnets like the Subject Products.

52. Ingestion incidents, however, continue to occur.

53. Since the safety alert, the Commission has received dozens of reports of children ingesting Buckyballs magnets. Many of these children required medical treatment, including surgical intervention.

54. The Commission also received dozens of other reports of children ingesting products that are substantially similar to the Buckyballs magnets but may be manufactured and/or sold by firms other than the Respondent.

55. Upon information and belief, on or about January 17, 2012, a 10-year-old girl accidentally ingested two Buckyballs magnets after using them to mimic a tongue piercing. The magnets became embedded in her large intestine, and she underwent x-rays, CT scans, endoscopy, and an appendectomy to remove them. The girl's father had purchased Buckyballs for her at the local mall.

56. All warnings on the Subject Products are inadequate and defective because the warnings do not and cannot communicate effectively to consumers, including parents and caregivers, the hazard associated with the Subject Products and magnet ingestions.

57. Because the warnings on the Subject Products and/or the websites where the Subject Products were offered for sale are inadequate and defective, parents will continue to give children the Subject Products or allow children to have access to the Subject Products.

58. Upon information and belief, as Maxfield is no longer in business, retailers of the Subject Products are not bound by the Responsible Seller Agreements and are thus able to sell to children and in toy stores, making it even more likely that children will gain access to the Subject Products.

59. Children cannot and do not appreciate the hazard, and it is foreseeable that children will mouth the magnets, swallow the magnets, or, in the case of adolescents and teens, use the magnets to mimic body piercings. These uses can and do result in injury.

60. All warnings on the packaging of the Subject Products are inadequate and defective because the packaging on which the warnings are written is often discarded, such that consumers will be unable review the warnings on the packaging prior to foreseeable uses of the Subject Products. These uses can and do result in injury.

61. All warnings in the instructions included with the Subject Products are inadequate and defective because the instructions are not necessary for the use of the product and are often discarded. Because the instructions are unnecessary and are often discarded, consumers likely will not review the warnings contained in the instructions prior to foreseeable uses of the Subject Products. These uses can and do result in injury.

62. All warnings on the Subject Products are inadequate and defective because once the Subject Products are removed from the packaging and/or the carrying case prior to foreseeable uses of the Subject Products, the magnets themselves display no warnings, and the small size of the individual magnets precludes the addition of warnings on the product. These uses can and do result in injury.

63. All warnings on the Subject Products are inadequate and defective because the magnets are shared and used among various consumers, including children, after the packaging and instructions are discarded; thus, many consumers of the products will have no exposure to any warnings prior to using the Subject Products. These uses can and do result in injury.

64. All warnings displayed on the carrying cases are inadequate and defective because consumers are unlikely after each use to disassemble configurations made with the Subject Products, many of which are elaborate and time-consuming to create, to return the Subject Products to the carrying case or to put the Subject Products out of the reach of children.

65. The effectiveness of the warnings on the Subject Products is diminished further by the advertising and marketing of the Subject Products.

66. In 2009, Respondents advertised Buckyballs as, *inter alia,* a "toy" and as an "amazing magnetic toy." The advertisements encouraged consumers to use Buckyballs for games, use them to hold items to a refrigerator, and "[w]ear them as jewelry," stating "the fun never ends with Buckyballs." In small print, the advertisement cautioned that the products should not be "given to a [sic] children age 12 or below."

67. Upon information and belief, a video appearing in Respondents' 2009 advertisement shows a consumer using Buckyballs magnets to simulate a tongue piercing.

68. Upon information and belief, Respondents advertised and marketed Buckyballs by comparing Buckyballs' appeal to other children's products, such as Erector sets, Hula Hoops, the Slinky, and Silly Putty.

69. Upon information and belief, some Internet retailers that sold the Subject Products did not display any age recommendations or promoted erroneous age recommendations on their websites.

70. Upon information and belief, despite making no significant design or other physical changes to Buckyballs since their introduction in 2009, Respondents subsequently attempted to rebrand Buckyballs as, *inter alia,* an adult "executive" desk toy and/or stress reliever, among other things, and Respondents marketed and advertised Buckeyballs as such.

71. The advertising and marketing of the Subject Products conflict with the claimed 14+ age grade label on the Subject Products.

72. Because the advertising and marketing of the Subject Products conflict with the age label, the effectiveness of the age label is diminished.

73. The advertising and marketing of Subject Products conflict with the stated warnings on the Subject Products.

74. Because the advertising and marketing conflict with the stated warnings, the effectiveness of the warnings is diminished.

75. No warnings or instructions could be devised that would effectively communicate the hazard so that the warnings and instructions could be understood and heeded by consumers and reduce the number of magnet ingestion incidents.

76. Because of the lack of adequate instructions and safety warnings, a substantial risk of injury presents as a result of the foreseeable use and misuse of the Subject Products.

The Subject Products Are Defective Because Substantial Risk of Injury Arises as a Result of the Magnet's Operation and Use and the Failure of the Subject Products to Operate as Intended

77. A design defect can be present if the risk of injury occurs as a result of the operation or use of the product or due to a failure of the product to operate as intended. 16 C.F.R. § 1115.4.

78. The Subject Products contain a design defect because they present a risk of injury as a result of their operation and/or use.

79. Upon information and belief, the Subject Products have been advertised and marketed by the Respondents to both children and adults. As a direct result of such marketing and promotion, the Subject Products have been, and currently are, used by both children and adults.

80. The risk of injury occurs as a result of the use of the Subject Products by adults, who give the Subject Products to children, or allow children to have access to the Subject Products.

81. The risk of injury occurs as a result of the foreseeable use and/or misuse of the Subject Products by children.

82. The Subject Products contain a design defect because they fail to operate as intended and present a substantial risk of injury to the public.

83. Upon information and belief, Respondent contends that the Subject Products are "desktoys" or manipulatives that provide stress relief and other benefits to adults only.

84. The Subject Products are intensely appealing to children due to the Subject Products' tactile features, small size, and highly reflective, shiny, and colorful metallic coatings.

85. The Subject Products are also appealing to children because they are smooth, unique, and make a soft snapping sound as they are manipulated.

86. The Subject Products also move in unexpected, incongruous ways, as the poles on the magnets move to align properly, which can evoke a degree of awe and amusement among children, enticing them to play with the Subject Products.

87. Upon information and belief, Respondents' independent tester reported that the "appropriate age grade" for Buckyballs is "over 8 years of age."

88. Despite the Respondents' current age label, and irrespective of Respondents' assertions regarding the proper uses for the Subject Products, the Subject Products do not operate as intended because they are intensely appealing to, and often are played with, by children.

89. The defective design of the Subject Products poses a risk of injury because parents and caregivers buy the Subject Products for children and/or allow children to play with the Subject Products.

The Type of Risk of Injury Renders the Subject Products Defective

90. The risk of injury associated with a product may render the product defective. 16 C.F.R. § 1115.4.

91. Upon information and belief, the Subject Products have low utility to consumers.

92. Upon information and belief, the Subject Products are not necessary to consumers.

93. The nature of the risk of injury includes serious, life-threatening, and long-term health conditions that can result when magnets attract to each other through intestinal walls, causing harmful tissue compression that can lead to perforations, fistulas, and other gastrointestinal injuries.

94. Children, a vulnerable population protected by the CPSA, are exposed to the risk of injury associated with the Subject Products.

95. The risk of injury associated with the ingestion of the Subject Products is neither obvious, nor intuitive.

96. Warnings and instructions cannot adequately mitigate the risk of injury associated with ingesting the Subject Products.

97. Children mouthing and ingesting the Subject Products is foreseeable.

98. Respondents promoted the use of the Subject Products to mimic tongue piercings. Such use by children is foreseeable.

99. The type of risk of injury renders the Subject Products defective.

The Subject Products Create a Substantial Risk of Injury to the Public

100. The Subject Products pose a risk of magnet ingestion by children below the age of 14, who may, consistent with developmentally appropriate behavior, place a single magnet or numerous magnets in their mouth.

101. The risk of ingestion also exists when adolescents and teens use the product to mimic piercings of the mouth, tongue, and cheek and accidentally swallow the magnets.

102. If two or more of the magnets are ingested and the magnetic forces of the magnets pull them together, the magnets can pinch or trap the intestinal walls or other digestive tissue

between them, resulting in acute and long-term health consequences. Magnets that attract through the walls of the intestines result in progressive tissue injury, beginning with local inflammation and ulceration, progressing to tissue death, then perforation, or fistula formation. Such conditions can lead to infection, sepsis, and death.

103. Ingestion of more than one magnet often requires medical intervention, including endoscopic or surgical procedures.

104. Because the initial symptoms of injury from magnet ingestion are nonspecific and may include nausea, vomiting, and abdominal pain, caretakers, parents, and medical professionals may easily mistake these nonspecific symptoms for other common gastrointestinal upsets and erroneously believe that medical treatment is not immediately required, thereby delaying potentially critical treatment.

105. Medical professionals may not be aware of the dangers posed by ingestion of the Subject Products and the corresponding need for immediate evaluation and monitoring. A delay of surgical intervention or other medical treatment due to the patient's presentation with nonspecific symptoms and/or a lack of awareness by medical personnel of the dangers posed by multiple magnet ingestion can exacerbate life-threatening internal injuries.

106. Magnets that become affixed to each other through the gastrointestinal walls and are not removed surgically may result in intestinal perforations that can lead to necrosis, the formation of fistulas, or ultimately, perforation of the bowel and leakage of toxic bowel contents into the abdominal cavity. These conditions can lead to serious injury and possibly even death.

107. Endoscopic and surgical procedures may also be complicated in cases of multiple magnet ingestion due to the attraction of the magnets to the metal equipment used to retrieve the magnets.

108. Children who undergo surgery to remove multiple magnets from their gastrointestinal tract are also at risk for long-term health consequences, including intestinal scarring, nutritional deficiencies due to loss of portions of the bowel, and, in the case of girls, fertility problems.

109. The Subject Products contain defects in packaging, warnings, and instructions, which can create a substantial risk of injury to the public.

110. The Subject Products contain defects in design that pose a substantial risk of injury.

111. The type of risk of injury posed by the Subject Products creates a substantial risk of injury.

112. Therefore, because the Subject Products are defective and create a substantial risk of injury, the Subject Products present a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. §2064(a)(2).

Count 2

The Subject Products Are Substantial Product Hazards Under Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1)

113. Paragraphs 1 through 112 are hereby realleged and incorporated by reference, as though fully set forth herein.

114. Upon information and belief, Respondents' independent tester reported that the "appropriate age grade" for Buckyballs is "over 8 years of age."

115. Upon information and belief, each of the Subject Products is an object designed, manufactured, and/or marketed as a plaything for children under 14 years of age, and therefore, each of the Subject Products that was imported and/or otherwise distributed in commerce after August 16, 2009, is a "toy," as that term is defined in the Toy Standard.

116. As toys, and as toys intended for use by children under 14 years of age, as addressed in the Toy Standard, the Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, were and are covered by the Toy Standard.

117. Pursuant to the Toy Standard, a magnet that has a flux index greater than 50 and that is a small object, as determined by the Toy Standard, is a "hazardous magnet."

118. The Toy Standard prohibits toys from containing a loose as-received hazardous magnet.

119. The Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, consist of and contain loose as-received hazardous magnets. As a result, the Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, fail to comply with the Toy Standard.

120. On May 27, 2010, the Commission, in cooperation with Respondents, and in conjunction with corrective action, announced that Buckyballs failed to comply with the Toy Standard because they were sold for children under the age of 14.

121. The Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, create a substantial risk of injury to the public.

122. Because the Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, fail to comply with the Toy Standard and create a substantial risk of injury to the public, they are substantial product hazards as the term "substantial product hazard" is defined in Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1).

Relief Sought

Wherefore, in the public interest, Complaint Counsel request that the Commission:

A. Determine that the Subject Products present a "substantial product hazard" within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2), and/or present a "substantial product hazard" within the meaning of Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1).C.

B. Determine that extensive and effective public notification under Section 15(c) of the CPSA, 15 U.S.C. § 2064(c), is required to adequately protect children from the substantial product hazard presented by the Subject Products, and order Respondents under Section 15(c) of the CPSA, 15 U.S.C. § 2064(c) to:

(1) Cease importation and distribution of the Subject Products;

(2) Notify all persons who transport, store, distribute, or otherwise handle the Subject Products, or to whom such products have been transported, sold, distributed, or otherwise handled, to cease distribution of the products immediately;

(3) Notify appropriate state and local public health officials;

(4) Give prompt public notice of the defects in the Subject Products, including the incidents and injuries associated with ingestion, including posting clear and

conspicuous notice on websites operated by Respondents, and providing notice to any third party website on which Respondents has placed the Subject Products for sale, and provide further announcements in languages other than English and on radio and television;

(5) Mail notice to each distributor or retailer of the Subject Products; and

(6) Mail notice to every known person to whom the Subject Products were delivered or sold;

C. Determine that action under Section 15(d) of the CPSA, 15 U.S.C. § 2064(d), is in the public interest, and additionally, order Respondents to:

(1) Refund consumers the purchase price of the Subject Products;

(2) Make no charge to consumers and reimburse consumers for any reasonable and foreseeable expenses incurred in availing themselves of any remedy provided under any Commission Order issued in this matter, as provided by Section 15 U.S.C. § 2064(e)(1);

(3) Reimburse retailers for expenses in connection with carrying out any Commission Order issued in this matter, including the costs of returns, refunds, and/or replacements, as provided by Section 15(e)(2) of the CPSA, 15 U.S.C. § 2064(e)(2);

(4) Submit a plan satisfactory to the Commission, within ten (10) days of service of the Final Order, directing that actions specified in Paragraphs B(1) through (6) and C(1) through (3) above be taken in a timely manner;

(5) To submit monthly reports, in a format satisfactory to the Commission,

documenting the progress of the corrective action program;

(6) For a period of five (5) years after issuance of the Final Order in this matter, to keep records of Respondents' actions taken to comply with Paragraphs B(1) through (6) and C(1) through (5) above, and supply these records to the Commission for the purpose of monitoring compliance with the Final Order;

(7) For a period of five (5) years after issuance of the Final Order in this matter, to notify the Commission at least sixty (60) days prior to any change in Respondents' business (such as incorporation, dissolution, assignment, sale, or petition for bankruptcy), which results in, or is intended to result in, the emergence of a successor corporation, going out of business, or any other change that might affect compliance obligations under a Final Order issued by the Commission in this matter; and

D. Order that Respondents shall take other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA.

ISSUED BY ORDER OF THE COMMISSION:

Dated this 11 day of February, 2013

BY: Kenneth R. Hinson
Executive Director

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Tel: (301) 504-7808

EXHIBIT

5

From: Craig Zucker [redacted] **On Behalf Of** Craig Zucker
Sent: Tuesday, September 11, 2012 1:06 PM
To: Wolfson, Scott
Subject: A Special Thanks from Buckyballs' CEO

Hey :

Thanks so much for making Thursday's "SaveOnBalls" promo our biggest ever and for helping us continue the fight to Save Our Balls.

Just wanted to let you know that Buckybars and Bucky Bigs are now back in stock and that I've extened the **60% OFF everything** promo through Sunday Sept. 16th at www.getbuckyballs.com.

Thanks,

Craig

Sent from my iPhone

Craig Zucker <cjzucker@gmail.com>

[Test] A Special Thanks from Buckyballs' CEO

Craig Zucker <cz@getbuckyballs.com> Tue, Sep 11, 2012 at 1:06 PM
Reply-To: Craig Zucker <cz@getbuckyballs.com>
To: cjzucker@gmail.com

Hey :

Thanks so much for making Thursday's "SaveOnBalls" promo our biggest ever and for helping us continue the fight to Save Our Balls.

Just wanted to let you know that Buckybars and Bucky Bigs are now back in stock and that I've extened the **60% OFF everything** promo through Sunday Sept. 16th at www.getbuckyballs.com.

Thanks,

Craig

Sent from my iPhone

EXHIBIT

6

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	**CPSC Docket No: 12-1** **CPSC Docket No: 12-2** **CPSC Docket No: 13-2**
MAXFIELD AND OBERTON HOLDINGS, LLC **AND** **ZEN MAGNETS, LLC** **AND** **STAR NETWORKS USA, LLC**	**HON. DEAN C. METRY**
Respondents.	

ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINTS IN DOCKET NOS. 12-1 AND 12-2

Summary

Counsel for the Consumer Product Safety Commission ("CPSC" or "Commission") seeks to amend two of three Complaints filed in the instant proceeding. Specifically, it seeks to add Craig Zucker as Respondent for Docket Number 12-1, and add a new product line of magnets for Docket Number 12-2.

Procedural Background

On February 11, 2013, CPSC filed Complaint Counsel's Motion for Leave to File Second Amended Complaints in Docket Nos. 12-1 and 12-2 ("Motion"). Complaint Counsel sought to add Craig Zucker as a Respondent in Docket No. 12-1, both in his individual capacity and as Chief Executive Officer. In Docket No. 12-2, Complaint Counsel sought to amend the Complaint against Zen Magnets, LLC to include a new product line of magnets sold under the name "Neoballs."

On February 20, 2013, Craig Zucker filed a Request to Participate in the Proceeding as Non-Party Participant and For Leave to File an Opposition to Complaint Counsel's Motion ("Request"). On February 25, 2013, the undersigned granted the Request, permitting Mr. Zucker to respond to the Motion without submitting to the jurisdiction of the court. Thereafter, on February 28, 2013, Craig Zucker filed his Opposition to Motion for Leave to Amend Complaint in CPSC Docket 12-1.

On March 1, 2013, CPSC filed Complaint Counsel's Motion for Leave to File a Reply to Mr. Zucker's Opposition to Complaint Counsel's Motion for Leave to Amend Complaint in CPSC Docket 12-1 ("Motion for Leave"). On March 4, 2013, the undersigned granted the Motion for Leave. On March 15, 2013, the Commission filed a Reply.

Subsequently, on March 20, 2013, Craig Zucker filed a Motion for Leave to file Surreply in Opposition to Complaint Counsel's Motion for Leave to Amend Complaint in CPSC Docket 12-1 ("Surreply Motion"). The undersigned issued an Order allowing Mr. Zucker to file his Surreply on April 2, 2013.

Discussion

1. The Amended Complaint in 12-1

a. CPSC's Position

Complaint Counsel explains that counsel for Respondent Maxfield and Oberton Holdings, LLC ("Maxfield") withdrew from the proceeding in December 2012, asserting Maxfield filed a Certificate of Dissolution on December 27, 2012.[1] Complaint Counsel

[1] The trustee for the liquidating trust has apparently indicated the trust will not partake in the instant litigation on behalf of Maxfield.

argues that, pursuant to the responsible corporate officer doctrine[2], it should now be permitted to add Craig Zucker as a Respondent, both in his capacity as CEO of Maxfield, and in his individual capacity.

Complaint Counsel argues Mr. Zucker "personally controlled the acts and practices of the corporation, including the importation and distribution of Buckyballs and Buckycubes, which the Second Amended Complaint alleges constitute substantial product hazards." The Commission further suggests that Mr. Zucker "…was integral to the design, manufacturing, and marketing of the [Maxfield] Subject Products, including the modifications to the design of the warnings and instructions that accompanied the products, and thus integral to the matter at issue in the current proceeding."

Citing United States v. Dotterweich, 320 U.S. 277 (1943) and United States v. Park, 421 U.S. 658 (1975), CPSC argues Mr. Zucker may be named in both his individual capacity and as a responsible corporate officer. CPSC suggests "[a]t the heart of Park and Dotterweich lies the rationale that individual liability is properly imposed on corporate officers where the failure to comply with regulatory schemes affects the health and safety of the public."

CPSC argues the rationale of Park and Dotterweich applies to the statutes and regulations governing the Consumer Product Safety Commission.[3] Further, Mr. Zucker's responsibility for ensuring compliance with relevant statutes and regulations, as

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[2] The doctrine presents an alternate theory of liability wherein a corporate officer may be held liable if he or she has a responsible share in the furtherance of an illegal transaction. United States v. Park, 421 U.S. 658, 670 (1975). As discussed herein, the responsible corporate officer doctrine is distinct from "piercing the corporate veil." Comm'r, Dept. of Envtl. Mgmt v. RLG, Inc., 755 N.E.2d 556, 563 (Ind. 2001) (citing United States v. Dotterweich, 320 U.S. 277, 282 (1943)).

[3] In support of this position, Complaint Counsel also cites a 1976 CPSC Initial Decision wherein the Presiding Officer applied the reasoning of Dotterweich and Park.

evidenced by his own statements and actions, renders the responsible corporate officer doctrine applicable to the instant case.

The Commission further suggests that Maxfield's dissolution does not preclude an action against Mr. Zucker individually, suggesting that case law establishes that even if an individual ceases to be a corporate officer, said individual may still be held responsible for a corporation's previous acts.

CPSC further argues Section 15 of the Consumer Product Safety Act (CPSA) "provides for broad individual liability." 15 U.S.C. § 2052. 1 U.S.C. § 1. Contrary to Mr. Zucker's assertions, Sections 21 and 19 of the CPSA, which address criminal penalties and who may be liable for committing a prohibited act, respectively, are entirely consistent with Section 15.

b. Craig Zucker's Position

Mr. Zucker contends he should not be named as Respondent in the instant proceeding. Mr. Zucker asserts, inter alia, that Section 15 of the Consumer Product Safety Act does not authorize the Commission "to issue such an order against an individual officer or director of a corporation that manufactures consumer products." Mr. Zucker further suggests "bedrock principles of corporate law make clear that corporate officers such as Mr. Zucker are not liable for the company's obligations, even if the company has dissolved."

Specifically, Mr. Zucker argues the CPSA is "very clear in specifying the entities against whom an order requiring public notice and a product refund…may be issue[d]," and Mr. Zucker does not fit any of these categories. 15 U.S.C. § 2064(c)-(d). Mr. Zucker suggests that overall statutory construction of the CPSA does not support his inclusion as

Respondent in the instant proceeding; unlike other health and safety statutes, the CPSA does not provide for individual officer or director responsibility.

Mr. Zucker further suggests that Park and Dotterweich are inapplicable in the instant case because they are "extraordinary exceptions" to established corporate law principles that an officer, director, or shareholder of a corporation is not responsible for the debts and obligations of a corporation. Mr. Zucker proffers that "limited individual liability for the obligations of a corporation is a hallmark of corporate law in the United States," asserting this principle of law should apply with full force to Maxfield, a company formed under Delaware's Limited Liability Company Act and now lawfully dissolved.

Mr. Zucker contends CPSC "…has cited no authority for what would be an unwarranted expansion of the Park line of cases to civil cases seeking to compel specific remedial actions by an individual formerly employed by a corporation against which such an order could issue." In support of this assertion, Mr. Zucker cites a litany of cases, including United States v. USX Corp., 68 F.3d 811 (3d Cir. 1995), suggesting case law demonstrates unsuccessful government attempts to "impose civil liability against an individual for actions taken by his corporate employer."

Further, in a recent case, Meyer v. Holley, 537 U.S. 280 (2003), the Supreme Court interpreted Park, Dotterweich, and their progeny to stand for the proposition that liability for regulatory violations may be imposed on corporate officers only when Congress has specifically indicated so. In the instant case, Congress has "…evinced no intent to authorize the CPSC to require [individuals such as Mr. Zucker] to conduct recalls."

Next, Mr. Zucker suggests his inclusion as Respondent in the instant proceeding will cause undue delay, noting that this issue "has never been litigated by the CPSC in the context of this statute, and the issue will introduce substantial controversy about the extent to which the CPSC can assert jurisdiction under Section 15 of the CPSA…". Further, CPSC's Amended Complaint will broaden and greatly complicate the proceeding, effectively doubling the number of issues; namely, CPSA will have to prove Mr. Zucker "took various actions relevant to this case," and that these actions render him liable under the CPSA.

Last, Mr. Zucker suggests that any amendment to the Complaint would be both futile and highly prejudicial to Mr. Zucker "…because this Court lacks jurisdiction over him and because he would suffer reputational harm if subjected to these proceedings."

c. Discussion as to the Amended Complaint in 12-1

i. Broaden the Issues or Cause Undue Delay

Pursuant to 16 C.F.R. § 1025.13, "Amendments and supplemental pleadings", the undersigned "…may allow appropriate amendments and supplemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay."

Mr. Zucker suggests "[t]he notion that an individual might be held responsible for the actions of a company for which he previously worked represents a very controversial proposition that will introduce undue delay into-and raises the potential to overwhelm-these proceedings."[4]

[4] Mr. Zucker nonetheless concedes that "[t]he overriding issues before this Court are whether certain products identified in the original Complaint present a substantial product hazard within the meaning of the Consumer Product Safety Act, and whether a remedial order for specific relief should be issued to the manufacturer of those products."

CPSC argues that the ultimate issue on which the undersigned must render a determination is whether the subject magnets present a substantial product hazard within the meaning of the Consumer Product Safety Act, and, if so what relief should be granted. The CPSC's position is reasonable. Fed. R. Civ. P. 15(a)(2) ("...a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."). See United States v. Shelton Wholesale, Inc. 34 F.Supp.2d 1147, 1155 (W.D. Mo. 1999) (explaining the CPSC is entitled to a substantial degree of deference in interpreting their regulations and implementing their objectives). See also Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (explaining remedial statutes and regulations should be construed liberally).

The inclusion of Mr. Zucker as a respondent in the instant proceeding does not unduly broaden the ultimate issue; rather, Mr. Zucker's inclusion or exclusion as a respondent is a threshold issue the undersigned must determine prior to the hearing, and, indeed, prior to the commencement of the discovery process. Whether CPSC's Motion is granted or denied, the underlying legal issue remains unchanged.

ii. The Language of the CPSA

Section 15 of the CPSA, under which the Commission seeks to require public notification and remedial action, is directed at manufacturers, distributors, and retailers. 15 U.S.C. § 2064(b). Title 15 U.S.C. § 2052 defines these three relevant terms as follows:

> The term 'manufacturer' means any person who manufactures or imports a consumer product.
> 15 U.S.C. § 2052(a)(11).
>
> The term 'distributor' means a person to whom a consumer product is delivered or sold for purposes of distribution in

> commerce, except that such term does not include a manufacturer or retailer of such product.
> 15 U.S.C. § 2052(a)(8).
>
> The term 'retailer' means a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer.
> 15 U.S.C. § 2052(a)(13).

Mr. Zucker essentially argues that although Section 15 is applicable to a "person", he nonetheless does not fall under the purview of the statute because he did not personally manufacture, import, deliver, or sell the subject magnets. Citing 1 U.S.C. § 1, he suggests, because the CPSA does not indicate otherwise, "person", necessarily includes "corporations, companies, associations, firms…" in addition to individuals. Because the definition of "person" includes corporate entities, Maxfield must therefore constitute the "person" for purposes of the instant proceeding, not Mr. Zucker.[5] Thus, per Mr. Zucker's interpretation of the CPSA, an individual could be held liable only when said individual "…conducted business without forming a corporation or partnership."

In United States v. Hodges X-Ray, Inc., 759 F.2d 557 (6th Cir. 1985), the Sixth Circuit examined whether the Radiation Control for Health and Safety Act of 1968 (RCHSA) permitted individual liability for corporate violations. Id. at 560. RCHSA rendered it unlawful for any "manufacturer" to engage in certain actions. Id. The president and major shareholder in Hodges X-Ray similarly argued he could not be held

[5] Citing 15 U.S.C. § 2070, Mr. Zucker also argues that "Congress explicitly provided for individual director, officer and agent liability in a different provision of the CPSA- namely Section 21(b)." Thus, Mr. Zucker suggests that when Congress intended for a CPSA provision to apply to corporate officers, it explicitly stated so. However, Section 21 ("Criminal penalties") enumerates criminal penalties that may result from a knowing or willful violation of 15 U.S.C. § 2068 (Section 19 of the CPSA). Thus, the underlying purpose of Section 21 is to explain the applicable penalties, not to list potentially liable parties. 15 U.S.C. § 2068(a). See also United States v. Hodges X-Ray, Inc., 759 F.2d 557, 560 (6th Cir. 1985).

individually liable for statutory violations because he, as an individual, was not a "manufacturer."[6] Id.

In finding the president/major shareholder civilly liable, the Sixth Circuit noted the statute defined "manufacturer" as "any person engaged in the business of manufacturing, assembling, or importing of electronic products." Id. Thus, the court reasoned it was "self-evident" that the president of the corporation could constitute a "manufacturer." Id. Based on relevant case law, the court concluded that, so long as the president had a "responsible relationship to the acts of a corporation that violate health and safety statutes," the president's individual civil liability was appropriate. Id. at 561.

As such, a linguistic dissection of the statutory construction of the CPSA does not answer the threshold question of whether Mr. Zucker can be named as Respondent in the instant proceeding.[7] While, as Mr. Zucker suggests, "person" for purposes of the CPSA can undoubtedly refer to a corporation, as explained by the Sixth Circuit in Hodges X-Ray, if a corporate officer has a "responsible relationship" to certain types of corporate transgressions, the individual may supplant the corporation as the "person" by virtue of the responsible corporate officer doctrine. Id.

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[6] The relevant portions of the statute read as follows: "§ 263j. Prohibited acts (a) It shall be unlawful— (1) for any manufacturer to introduce, or to deliver for introduction, into commerce, or to import into the United States, any electronic product which does not comply with an applicable standard prescribed pursuant to section 263j of this title; …
(5) for any person (A) to fail to issue a certification as required by section 263(h) of this title, or (B) to issue such a certification when such certification is not based upon a test or testing program meeting the requirements of section 263f(h) of this title or when the issue, in the exercise of due care, would have reason to know that such certification is false or misleading in a material respect." Hodges X-Ray, Inc., 759 F.2d at 560.

[7] Furthermore, CPSC statutes and regulations "…were enacted to protect the public's health and safety. Statues and regulations protecting the public health and safety are to be construed liberally." United States v. Shelton Wholesale, Inc. 34 F.Supp.2d 1147, 1155 (W.D. Mo. 1999) (explaining the court should give deference to "CPSC's chosen methods and procedures.").

Thus, the issue presently before the undersigned is whether, by virtue of his alleged actions and the nature of the statute, Mr. Zucker may be held individually responsible for the alleged CPSA transgressions. The statutory language does not answer this question; instead, the undersigned must examine the applicable case law.

iii. Dotterweich and Park

In Dotterweich, the president and general manager of a pharmaceutical company was charged with violating the Federal Food, Drug, and Cosmetic Act. Dotterweich, 320 U.S. at 278. In determining whether he could be held individually accountable for company transgressions, including the misbranding and adulteration of drugs, the Court opined the statute at issue was "…an exertion by Congress of its power to keep impure and adulterated foods and drugs out of the channels of commerce," noting the subject legislation touched "phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." Id. at 280. The Court explained:

> [b]alancing relative hardships, Congress has preferred to place [responsibility] upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless. Id. at 285.

With regards to the question of who precisely should share the liability, the Court explained:

> [i]t would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress, to wit, to send illicit goods across state lines, would be mischievous futility. In such matters

> the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted…[f]or present purpose it suffices to say that in what the defense characterized as 'a very fair charge' the District Court properly left the question of the responsibility of Dotterweich for the shipment to the jury, and there was sufficient evidence to support its verdict. Id. at 285.

While, to a certain degree, Dotterweich left the determination of responsibility to prosecutorial and judicial discretion, the decision made clear this discretion was not unfettered. The Court specifically explained that corporate officer liability is limited to officers with "a responsible share in the furtherance of the transaction which the statute outlaws." Id. at 284.

Notably, in Dotterweich, the statute at issue prescribed that "any person" who violated a particular provision would be guilty of a misdemeanor. Id. at 287. The statute defined person to include "an individual, partnership, corporation and association," but made no specific reference to any of the corporate officers, and the Court specifically noted there was "…no evidence…of any personal guilt on the part of the respondent." Id. at 285-87.

Approximately thirty years later, the Supreme Court revisited the responsible corporate officer doctrine in Park. In Park, the president of Acme Markets, Inc., a large national food chain, was similarly charged with violations of the Federal Food, Drug, and Cosmetic Act. Park 421 U.S. at 660-61. The Court specifically noted that the issue before it was "whether 'the manager of a corporation, as well as the corporation itself, may be prosecuted under the Federal Food, Drug, and Cosmetic Act of 1938 for the introduction of misbranded and adulterated articles into interstate commerce." Id. at 667.

In finding the president responsible for corporate transgressions, the Court quoted extensively from the Dotterweich decision. See Id. at 668-69. The Court explained Dotterweich, "looked to the purposes of the Act and noted that they 'touch phases of the lives and health of the people which, in the circumstances of modern industrialism, are largely beyond self-protection,'" reemphasizing that "'the only way…a corporation can act is through the individuals who act on its behalf.'" Id. at 668 (quoting Dotterweich, 320 U.S. at 280-81).

The Court noted Dotterweich found individual liability in the absence of consciousness of wrongdoing, ultimately concluding that the question of responsibility depends "'on the evidence produced at the trial…'". Id. at 669 (quoting Dotterweich, 320 U.S. at 280-81). Thus, Dotterweich and its progeny provide "…sanctions which reach and touch the individuals who execute the corporate mission." Id. at 672. While these requirements are undoubtedly demanding, "…they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them." Id.

As in Dotterweich, the Court specifically articulated that "…the charge [of the alleged violations] did not permit the jury to find guilt solely on the basis of respondent's position in the corporation; rather, it fairly advised the jury that to find guilt it must find respondent 'had a reasonable relation to the situation,' and 'by virtue of his position…had…authority and responsibility' to deal with the situation." Id. at 674. See also United States v. Ming Hong, 242 F.3d 528, 531 (4th Cir. 2001) ("[t]he gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof;

rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations...".).[8]

iv. Relevant Case Law

In cases subsequent to Dotterweich and Park, courts have continued to apply the responsible corporate officer doctrine to statutes involving public health, safety, and welfare. See United States v. Osborne, 2012 WL 4483823 (N.D. Ohio 2012) (denying a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) on the grounds that an individual defendant could be found civilly liable for violations of the Clean Water Act (CWA). In so finding, the court specifically noted the CWA was a "public welfare statute."). See also United States v. Gel Spice Co., 773 F.2d 427 (2d Cir. 1985) (upholding a company president's individual liability for violations of the Federal Food, Drug, and Cosmetic Act).[9]

In United States v. USX Corp., 68 F.3d 811 (3d Cir. 1995), a case relied upon by Mr. Zucker, the Third Circuit determined the standard of liability for principal shareholders and officers of a closely held company under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Id. at 820-21. Although Congress did not directly address the issue in the statute itself, the court

[8] Dottereich and Park dealt with criminal liability; however, the responsible corporate officer doctrine extends to civil liability. City of Newburgh v. Sarna, 690 F.Supp.2d 136, 160-61 (S.D.N.Y. 2010) ("[t]he fact that a corporate officer could be subjected to criminal punishment upon a showing of a responsible relationship to the acts of a corporation that violate health and safety statutes renders civil liability appropriate as well.") (citing United States v. Hodges X-Ray, Inc., 759 F.2d 557, 561 (6th Cir. 1985) (emphasis in original)).

[9] Additionally, in Hodges X-Ray, discussed supra, the Sixth Circuit determined the RCHSA constituted a public welfare statute. Hodges X-Ray, 759 F.2d at 559. In simplified terms, the RCHSA helped control the general public's exposure to radiation. Id. at 562.

reasoned that, as written, the statute "…does not immunize officers and directors who personally participate in liability-creating conflict." Id. at 824.

The court explained, for liability against an individual "…there must be a showing that the person sought to be held liable actually participated in the liability-creating conduct." Id. at 825. Thus, the court concluded liability could be imposed in situations where "…the officer is aware of the acceptance of materials for transport and of his company's substantial participation in the selection of the disposal facility."[10] Id. at 825.

Thus, USX Corp., cited by Mr. Zucker, seemingly supports the Commission's argument. Here, CPSC has alleged Mr. Zucker was responsible for ensuring Maxfield's compliance with applicable statutes and regulations. CPSC has further alleged Mr. Zucker personally controlled the acts and practices of Maxfield, including the importation of Buckyballs and Buckycubes. The Commission did not allege that by virtue of his corporate position Mr. Zucker was automatically liable; on the contrary, CPSC specifically alleged that he assumed responsibility. See Dotterweich, 320 U.S. at 674.

Notably, some of the cases cited by Mr. Zucker do not relate to public health or safety. For instance, Mr. Zucker relies heavily on Meyer v. Holly, 537 U.S. 280 (2003) for the proposition that liability for regulatory violations may be imposed against individuals "only where Congress has specified that such was its intent." Meyer, 537 U.S. at 287.

However, Meyer dealt with discrimination under the Fair Housing Act, a statute unrelated to public health, safety, or welfare. Id. at 282. Additionally, the Court's

[10] Thus, USX Corp. is consistent with Park, wherein the Court explained a corporate officer is not automatically liable by virtue of his corporate position. Park, 421 U.S. at 674.

discussion and reasoning hinged on the principle of vicarious liability, not the responsible corporate officer doctrine. See Id. at 283. Last, Mr. Zucker references no subsequent cases reflective of his interpretation of Meyer.

The CPSA, like the statute at issue in Dotterweich and Park, relates to the public's health and safety. United States v. Shelton Wholesale, Inc., 34 F.Supp.2d 1147, 1155 (W.D. Mo.1999) ("…the statues and regulations interpreted by the CPSC were enacted to protect the public's health and safety"). 15 U.S.C. § 2051(b)(1) (explaining one purpose of the CPSA is "to protect the public against unreasonable risks of injury associated with consumer products"). Accordingly, the rationale in Dotterweich and Park is both legally relevant and persuasive.

v. "Extraordinary Exceptions"

In his various filings, Mr. Zucker suggests that Dotterweich and Park are "extraordinary exceptions" to bedrock corporate law principles. However, a review of relevant case law suggests the responsible corporate officer doctrine has been applied throughout the federal circuits, especially in the context of public health, safety, and welfare statutes. See United States v. USX Corp., 68 F.3d 811 (3d Cir. 1995) (the Comprehensive Environmental Response, Compensation and Liability Act); United States v. Ming Hong, 242 F.3d 528 (4th Cir. 2001) (the Clean Water Act); United States v. Jorgensen, 144 F.3d 550 (8th Cir. 1998) (the Federal Meat Inspection Act); United States v. Iverson, 162 F.3d 1015 (9th Cir. 1998) (the Clean Water Act); United States v. Cattle King Packing Co. Inc., 793 F.2d 232 (10th Cir. 1986) (the Federal Meat Inspection Act); United States v. Hodges X-Ray, Inc., 759 F.2d 557 (6th Cir. 1985) (the Radiation

Control for Health and Safety Act of 1968); United States v. Poulin, 926 F.Supp. 246 (D. Mass. 1996) (the Comprehensive Drug Abuse Prevention and Control Act of 1970).

At times, the doctrine transcends what would typically be categorized as health, safety, or welfare statutes. For example, in United States v. Rachal, 473 F.2d 1338 (5th Cir. 1973), the Fifth Circuit found corporate officers individually liable for violations of the Securities Act of 1933. Id. at 1340. In Rachal, the defendants argued they should not be individually liable for securities violations, suggesting that "person" as used in the Act referred to a corporate body and not a natural person. Id. at 1341.

In rejecting defendants' contentions, the Fifth Circuit noted a similar argument had been presented and dismissed in Dotterweich. Id. at 1341. The court opined that reading the statute as suggested by defendants would construe the Securities Act with a narrow and illusory scope. Id. at 1341-42. Accordingly, the court upheld defendants' convictions for securities fraud, mail fraud, and the sale of unregistered securities pursuant to the responsible corporate officer doctrine. Id. at 1340.

The doctrine has been similarly applied to other federal statutes outside the realm of public safety. See United States v. Gulf Oil Corp., 408 F.Supp. 450 (W.D.Pa. 1975) (denying the motion of corporate president to dismiss indictments against him individually for failure of a company to pay competitors entitlements under the Federal Energy Administration program); United States v. Freed, 189 Fed. Appx. 888 (11th Cir. 2006) (upholding an individual's conviction for misdemeanor offenses in violation of Forest Service regulations).[11]

[11] Although by no means controlling for purposes of the instant proceeding, in 1991, the Iowa Supreme Court upheld shareholder liability for consumer fraud under Iowa's consumer fraud statute. State ex. rel. Miller v. Santa Rosa Sales and Mktg., Inc., 475 N.W. 2d 210 (Iowa 1991). In dismissing the shareholder's claim that the trial court should have applied the more stringent "piercing the corporate veil" analysis, the

vi. Sufficiency of the Complaint

The undersigned has not yet determined whether some, or any, sanction is warranted in the matter. At this stage in the proceeding, the undersigned need only determine whether, based on the allegations as set forth in the Complaint, Mr. Zucker is a proper respondent.

The Complaint states its basis in "Section 15 of the Consumer Product Safety Act ("CPSC"), as amended, 15 U.S.C. § 2064", a public health statute. United States v. Shelton Wholesale, Inc., 34 F.Supp.2d 1147, 1155 (W.D. Mo 1999). Additionally, the Complaint alleges, inter alia, that Mr. Zucker "is responsible for ensuring Maxfield's compliance with the CPSA…". Thus, the undersigned finds the allegations sufficient such that Mr. Zucker is a proper party to the proceeding. See United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 52-53 (1st Cir. 1991) (mere allegations that a defendant is a responsible corporate officer is insufficient to satisfy the knowledge requirement under the Resource Conservation and Recovery Act).

If, at the conclusion of the Commission's case, Mr. Zucker feels as though CPSC has failed to demonstrate that his responsibility or actions were significant enough to render him liable under the CPSA, nothing precludes Mr. Zucker from presenting a legal argument regarding the same at that juncture. However, based on the controlling legal precedent discussed above, and the allegations set forth in the Amended Complaint, the undersigned finds Mr. Zucker may properly be included as a respondent in the instant proceeding.

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court reasoned the shareholder's liability "…arose from [the shareholder's] complete control…and his over personal acts in perpetrating consumer fraud." Id. at 220 (citing United States v. Cattle King Packing Co., 793 F.2d 232, 240 (10th Cir. 1986)).

The undersigned is not unaware, and would be remiss not to note, that at the start of the instant litigation there existed a responsible corporation in Maxfield. However, for reasons unknown, the corporation apparently opted to dissolve after the CPSC filed its Complaint. Thus, this is not a case of individual and corporate liability, but rather a case of individual liability in the face of a voluntary corporate dissolution after said corporation has been charged with introducing hazardous products into the stream of commerce.[12]

2. The Amended Complaint in 12-2

CPSC also sought to amend the Complaint against Respondent Zen Magnets, LLC (Docket Number 12-2) to include a new line of magnets sold under the brand name Neoballs. The Commission suggested Neoballs are substantively identical to the high-powered, small rare earth magnets referenced in the October 15, 2012 Amended Complaint. CPSC argued that while Zen Magnets, LLC purports to sell Neoballs individually, Respondent "overtly encourages [customers] to purchase the balls in aggregate."

Pursuant to 16 C.F.R. § 1025.13, the undersigned may allow amendments which do not unduly broaden the issues in the proceeding, or cause undue delay. Zen Magnets, LLC did not respond to CPSC's Motion to Leave to File Second Amended Complaint.

[12] See Bufco Corp. v. NLRB, 147 F.3d 964, 969 (C.A.D.C. 1998) (explaining the federal common law test for piercing the corporate veil is (1) whether the shareholder and the corporation have maintained separate identities and (2) whether adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations). Here, the undersigned is not unmindful the CPSC has indirectly alleged the latter prong; namely, that Maxfield's voluntary dissolution allows it to evade potential remedial action. Notably, "[t]he responsible corporate officer doctrine is distinct from piercing the corporate veil, and explicitly expands liability beyond veil piercing." Comm'r, Dept. of Envtl. Mgmt. v. RLG, Inc., 755 N.E.2d 556, 563 (Ind. 2001) (citing United States v. Dotterweich, 320 U.S. 277, 282 (1943)). See also Kelley v. Thomas Solvent Co., 727 F.Supp. 1532, 1544 (W.D. Mich. 1989).

Finding that the Second Amended Complaint for Docket Number 12-2 does not unduly broaden the issues and will not cause undue delay, and in the absence of any objection by Zen Magnets, LLC, the undersigned hereby grants CPSC's Motion as to the Second Amended Complaint for Docket Number 12-2. See 16 C.F.R. § 1025.13

WHEREFORE,

IT IS HEREBY ORDERED THAT Complaint Counsel's Motion for Leave to File Second Amended Complaints in Docket Nos. 12-1 and 12-2 is **GRANTED.** Respondents shall file Answers to the Amended Complaints within twenty (20) days in accordance with 16 C.F.R. § 1025.12. Thereafter, the undersigned will schedule a pre-hearing conference call so that the matter may proceed.

SO ORDERED.

Done and dated this 3rd day of May, 2013, at Galveston, TX

DEAN C. METRY
Administrative Law Judge

EXHIBIT

7

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	**CPSC Docket No: 12-1**
	)	**CPSC Docket No: 12-2**
	)	**CPSC Docket No: 13-2**
MAXFIELD AND OBERTON HOLDINGS, LLC	)	
AND	)	
CRAIG ZUCKER, individually and as officer of MAXFIELD AND OBERTON HOLDINGS, LLC	)	
AND	)	**HON. DEAN C. METRY**
ZEN MAGNETS, LLC	)	
AND	)	
STAR NETWORKS USA, LLC	)	
	)	
Respondents.	)	

ORDER DENYING MOTION FOR DETERMINATION THAT THE ORDER ADDING CRAIG ZUCKER AS A RESPONDENT CAN BE IMMEDIATELY APPEALED
AND
ORDER DENYING REQUEST TO PARTICIPATE IN THE PROCEEDING AS NON-PARTY PARTICIPANTS AND FOR LEAVE TO FILE MEMORANDUM

Background

On May 3, 2013, the undersigned issued an Order Granting Complaint Counsel's Motion for Leave to File Second Amended Complaint in Docket Nos. 12-1 and 12-2 (Order). In the Order, the undersigned permitted the Consumer Product Safety Commission (CPSC) to add Craig Zucker as a Respondent in the instant proceeding, both in his individual capacity and in his capacity as Chief Executive Officer.

On May 16, 2013, Craig Zucker filed a Motion for Determination that the Order Adding Craig Zucker as a Respondent Can be Immediately Appealed (Motion for

Determination). In the Motion for Determination, Mr. Zucker argued the undersigned's Order "involves a controlling question of law or policy as to which there is substantial ground for differences in opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation." 16 C.F.R. § 1025.24(b)(4)(i).

Thereafter, on May 28, 2013, Complaint Counsel filed an Opposition to Motion for Determination that the Order Adding Craig Zucker as Respondent can be Immediately Appealed (Opposition to Motion for Determination). The Opposition to Motion for Determination contends Mr. Zucker fails to satisfy criteria requisite for an interlocutory appeal.

On May 24, 2013, the National Association of Manufacturers ("NAM"), Retail Industry Leaders Association ("RILA"), and National Retail Federation ("NRF") (Industry Participants)[1] filed a Request to Participate in the Proceeding as Non-Party Participants and for Leave to File a Memorandum in Support of the Motion for Determination that the Order Adding Craig Zucker as a Respondent can be Immediately Appealed.

On June 3, 2013, CPSC filed Complaint Counsel's Opposition to the Industry Interveners' Request to Participate in the Proceeding as Non-Party Participants and for Leave to File a Memorandum in Support of the Motion for Determination that the Order

[1] Pursuant to applicable CPSC regulations, "[a]ny person whose petition for leave to intervene is granted by the Presiding Officer shall be known as an "intervenor" and as such shall have the full range of litigating rights afforded to any other party." 16 C.F.R. § 1025.17(a)(3). In their Request to Participate, the Industry parties refer to themselves as "Industry Interveners," but indicate they seek to participate as "Non-Party Participants." See 16 C.F.R. § 1025.17(b)(3) (explaining non-party participants shall be referred to as "Participants."). While this distinction is largely moot given the determination herein, for purposes of clarity, the undersigned will nonetheless collectively refer to the National Association of Manufacturers ("NAM"), Retail Industry Leaders Association ("RILA"), and National Retail Federation ("NRF") as "Industry Participants."

Adding Craig Zucker as a Respondent can be Immediately Appealed (Opposition to Request to Participate).

(1) The Motion for Determination that the Order Adding Craig Zucker as a Respondent can be Immediately Appealed

Respondent's Argument

Respondent's Motion for Determination argues the May 3, 2013 Order involves a controlling question of law or policy for which there is a substantial ground for differences of opinion, and that an interlocutory appeal may materially advance the ultimate termination of the litigation.

In support of this assertion, Respondent suggests the May 3, 2013 Order "recognized that the matter…involved a novel legal issue that had never before been addressed or resolved under Section 15 and that required the examination of cases decided under other statutes." Respondent contends "[t]he determination that an individual officer or director of a corporation that manufactured consumer products may be held individually liable and therefore personally responsible for carrying out a recall presents both a controlling question of law and a controlling question of policy." Respondent suggests an interlocutory appeal resolving these issues would also "materially advance the ultimate termination of the litigation" in accordance with 16 C.F.R. § 1025.24(b)(4)(i).

CPSC's Argument

In the Opposition to Motion for Determination, CPSC argues Mr. Zucker's status as a Respondent in the instant proceeding is not a controlling question of law or policy, suggesting his inclusion does not represent the central issue before the undersigned, and an appeal by Mr. Zucker would not advance the ultimate termination of this litigation on

the merits. CPSC further suggests there is no substantial ground for differences in opinion as to application of the responsible corporate officer doctrine.

Discussion

The applicable regulations set forth the standard governing interlocutory appeals from rulings issued by the Presiding Officer. The regulations state, in relevant part:

> Interlocutory appeals…may proceed only upon motion to the Presiding Officer and a determination by the Presiding Officer in writing that the ruling involves a controlling question of law or policy as to which there is substantial ground for differences of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation, or that subsequent review will be an inadequate remedy. 16 C.F.R. § 1025.24(b)(4)(i).

Thus, the undersigned may permit the interlocutory appeal only if the issue "involves a controlling question of law or policy as to which there is substantial ground for differences of opinion" and an immediate appeal of the issue "may materially advance the ultimate termination of the litigation" or "subsequent review will be an inadequate remedy."

Here, Mr. Zucker argues the undersigned should permit the interlocutory appeal because the issue (1) "involves a controlling question of law or policy as to which there is substantial ground for differences of opinion" and (2) an immediate appeal "may materially advance the ultimate termination of the litigation."

The standard for interlocutory appeals set forth in CPSC regulations mirrors the standard set forth at 28 U.S.C. § 1292, "Interlocutory decisions." Title 28 U.S.C. § 1292 states, in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of

> law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.
> 28 U.S.C. § 1292(b).

Interlocutory appeals should be granted scarcely. In re City of Memphis, 293 F.3d 345, 350 (6th Cir. 2002) ("Review under § 1292(b) is granted sparingly and only in exceptional cases."); In re Cement Antitrust Litigation, 673 F.2d 1010, 1026 (9th Cir. 1982) (explaining unique circumstances must be present to depart from the general policy of postponing review until after a final judgment.); Control Data Corp. v. International Business Machines Corp., 421 F.2d 323, 325 (8th Cir. 1970) ("Permission to allow interlocutory appeals should…be granted sparingly and with discrimination.").

Along these same lines, courts must construe the requirements set forth in § 1292 strictly, as only "exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 25 (2d Cir. 1990) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978)). See also Milbert v. Bison Laboratories, Inc., 260 F.2d 431, 435 (3d Cir. 1958) ("[T]he conditions precedent to the granting by this court of permission to appeal which are laid down by the new section 1292(b) are to be strictly construed and applied.").

a. Materially Advance the Ultimate Termination of the Litigation

i. Mr. Zucker's Position

Mr. Zucker suggests resolution of the issue will materially advance the ultimate termination of the litigation as required by 16 C.F.R. § 1025.24(b)(4)(i). In support of this assertion, Mr. Zucker cites, inter alia, Brown v. Hain Celestial Group, Inc., 2012 WL

4364588 (N.D. Cal. 2012), suggesting an interlocutory appeal is appropriate when said appeal "would significantly par[e] down the issues for judicial determination." Mr. Zucker suggests a review of the undersigned's May 3, 2013 Order would both simplify the issues to be tried and "determine the appropriateness of a class action or limit the class." Koby v. ARS Nat'l Servs., Inc., 2010 WL 5249834 (S.D. Cal. 2010).

ii. CPSC's Position

By contrast, CPSC suggests the opposite is true. Citing White v. Nix, 43 F.3d 374 (8th Cir. 1994), CPSC contends Mr. Zucker's status as Respondent will have no impact on the ultimate termination of the litigation. CPSC contends an interlocutory appeal will not pare down the issues for the hearing; on the contrary, the undersigned will "still have to determine whether aggregated masses of small, high-powered magnets constitute a substantial product hazard under the CPSA…".

iii. Analysis

Courts have interpreted "advance the ultimate termination of the litigation," to mean that interlocutory review is appropriate only in rare situations where a decision as to a particular issue might avoid protracted and expensive litigation. Mazzella v. Stineman, 472 F.Supp. 432, 436 (D.C.Pa. 1979) (quoting Milbert v. Bison Laboratories, Inc., 260 F.2d 431, 433 (3d Cir. 1958)); Ahrenholz v. Board of Trustees of Univ. of Illinois, 219 F.3d 674, 675-77 (7th Cir. 2000) (explaining the issue must have the potential to "head off protracted, costly litigation" and resolution of the issue must promise to "speed up the litigation.").

Title 28 U.S.C. § 1292(b) "is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation." Mazzella v. Stineman, 472

F.Supp. at 435 (quoting Milbert v. Bison Laboratories, Inc., 260 F.2d 431, 433 (3d Cir. 1958)). When litigation will be conducted in substantially the same manner regardless of how the issue is decided, the interlocutory appeal cannot be said to materially advance the ultimate termination of the litigation. In re City of Memphis, 293 F.3d 345, 351 (6th Cir. 2002) (quoting White v. Nix, 43 F.3d 374, 378-79 (8th Cir. 1994)).

Here, the underlying substance of the litigation does not hinge on the issue of Mr. Zucker's inclusion as a Respondent. Notably, in his Opposition to Complaint Counsel's Motion to Amend the Complaint, Mr. Zucker himself conceded "[t]he overriding issues before this Court are whether certain products identified in the original Complaint present a substantial product hazard within the meaning of the Consumer Product Safety Act, and whether a remedial order for specific relief should be issued to the manufacturer of those products," acknowledging his inclusion as a party is not the essence of the instant proceeding. Thus, regardless of Mr. Zucker's inclusion, the parties must still litigate, and the undersigned must still determine, whether the subject magnets constitute substantial product hazards.

Along these same lines, the undersigned has not determined whether some, or any, sanction is warranted in the matter; if the undersigned finds the products do not present a substantial product hazard, no sanction will be imposed on Mr. Zucker in the final judgment.[2] See Caraballo-Seda v. Municipality of Homigueros, 395 F.3d 7, 9 (1st Cir. 2005) (explaining interlocutory appeals from denials of motions to dismiss are generally not granted).

[2] The undersigned is not unmindful that Mr. Zucker may incur costs associated with this litigation. However, the undersigned has already thoroughly considered the arguments presented by both sides and rendered a determination on the issue. The trouble and expense that may be associated with litigation are not sufficient to warrant an interlocutory appeal. See Behrens v. Pelletier, 516 U.S. 299, 318 (1996).

The undersigned cannot certify the issue for interlocutory appeal absent a showing that resolution of the issue would "advance the ultimate termination of the litigation." 16 C.F.R. § 1025.24(b)(4)(i). See Ahrenholz v. Board of Trustees of Univ. of Illinois, 219 F.3d 674, 676 (7th Cir. 2000) (explaining that unless all criteria are satisfied, an interlocutory appeal is not permitted). As discussed, Mr. Zucker has failed to make such a showing. Accordingly, the Motion must be denied.

(2) The Request to Participate in the Proceeding as Non-Party Participants and for Leave to File Memorandum

Argument of the Industry Participants

In the May 24, 2013 filing entitled "Request to Participate in the Proceeding as Non-Party Participants and for Leave to File a Memorandum in Support of the Motion for Determination that the Order Adding Craig Zucker as a Respondent can be Immediately Appealed," (Request to Participate) the Industry Participants request leave to participate in the proceedings pursuant to 16 C.F.R. § 1025.17(b), explaining they seek "to provide the Court with their (and their members) views and arguments as to why Craig Zucker's motion for a determination…should be granted."

Attached to the Request to Participate is a "Memorandum In Support of Zucker's Request for Interlocutory Determination of Status as a Proper Party to Proceeding" (Memorandum) which argues, inter alia, the undersigned's "Decision is clearly erroneous as a matter of law," explaining the decision has "far-reaching, negative policy implications to large and small businesses alike which, if allowed to stand, will substantially change and degrade established Commission practice and federal product safety policy."

The Memorandum suggests "[i]ndividual officers and employees of corporations have not for decades been included as, or considered to be, responsible parties to the various Section 15 obligations," arguing the undersigned's May 3, 2013 Order "flies in the face of historic interpretations of Section 15, but also the value, tradition, and history of the use of corporate entities as a highly productive economic organization…".

The Memorandum further contends that "those unusual situations discussed in the Decision regarding case law on the 'responsible corporate officer' doctrine are not relevant to the procedural posture of this case." The Memorandum also argues the undersigned's May 3, 2013 Order "undermines the product safety mission of the CPSC and manufacturers," and will create confusion.

The Memorandum concludes by suggesting the undersigned's Order:

> [M]ust be reviewed immediately by the Commission, which can determine not only the law but the broad policy implications. The Industry [Participants] urge that Mr. Zucker's motion be granted, so that the full Commission may consider this significant and precedent-setting action promptly within the larger context of policy implications to the Commission, to businesses and to consumers of this determination.

CPSC's Argument

In the June 3, 2013 Opposition, CPSC suggests the Industry Participants do not qualify as non-party participants, and, even if they did, the applicable regulations do not contemplate pre-hearing briefing by non-party participants. The Opposition suggests, inter alia, the Industry Participants fail to provide any explanation as to how the underlying issue of whether the subject magnets present a substantial product hazard will impact the Industry Participants in any way.

While the Industry Participants assert their members will be "uniquely affected" by the outcome of Mr. Zucker's Motion for Determination, CPSC suggests the filing does not explain how Participants will be impacted. Furthermore, the Memorandum merely repeats Mr. Zucker's arguments regarding the responsible corporate officer doctrine; it fails to even address the required elements for an interlocutory appeal as set forth by 16 C.F.R. § 1025.24.

Discussion

a. The Interlocutory Appeal

The bulk of the Industry's submission is the Memorandum, ostensibly filed in support of Mr. Zucker's request for an interlocutory appeal, and thus entitled "Memorandum in Support of Zucker's Request for Interlocutory Determination of Status as Proper Party to Proceeding." However, the Memorandum focuses not on the standard for interlocutory appeals as set forth in 16 C.F.R. § 1025.24, but rather on why the undersigned's Order is incorrect from both a legal and policy perspective. In fact, the Memorandum fails to discuss, or even mention, the applicable requirements for interlocutory appeals set forth at 16 C.F.R. § 1025.24.[3]

The only question presently before the undersigned at this juncture is whether, pursuant to the standards set forth at 16 C.F.R. § 1025.24, Mr. Zucker has demonstrated that an interlocutory appeal is appropriate; the Memorandum neglects to even mention 16 C.F.R. § 1025.24 or 28 U.S.C. § 1292(b). Thus, although the Memorandum purports to

[3] In essence, the Industry Participants present legal arguments more appropriate for the previous stage of the proceeding, when the parties presented argument as to whether Mr. Zucker could properly be included as a Respondent. The undersigned ruled on this issue in the May 3, 2013 Order; the sole issue presently before the undersigned is whether an interlocutory appeal on the issue is warranted.

support Mr. Zucker's request for an immediate appeal, it presents no specific argument on the issue.

b. Request to Participate as a Non-Party Participant

The first (non-Memorandum) portion of the filing requests "leave to participate in these proceedings as non-parties with an interest in the proceedings, pursuant to the Commission's regulations, 16 C.F.R. § 1025.17(b)." To this end, the Participants summarize their composition and their purpose, explaining they "seek leave to participate in order to provide the Court with their (and their members) views and arguments as to why Craig Zucker's motion for a determination that the order adding Mr. Zucker as a Respondent can be immediately appealed should be granted." Thus, as written, the filing indicates the Industry Participants wish to participate solely for the purpose of filing the attached Memorandum regarding the interlocutory appeal.

The filing explains the "members would be uniquely affected by the outcome of this motion," and suggests that "participation would be consistent with the Commission's rules favoring participation in adjudications, particularly when the person's participation 'can be expected to assist the Presiding Officer and the Commission in rendering a fair and equitable resolution' of the issues. 16 C.F.R. § 1025.17(e)."

The applicable regulations explain that:

> Any person who desires to participate in the proceedings as a non-party shall file with the Secretary a request to participate in the proceedings and shall serve a copy of such request on each party to the proceedings.
> 16 C.F.R. § 1025.17(b).

In ruling on requests to participate as a participant, the Presiding Officer may consider, among other things:

> (1) The nature and extent of the person's alleged interest in the proceedings;
>
> (2) The possible effect of any final order which may be entered in the proceedings on the person's interest; and
>
> (3) The extent to which the person's participation can be expected to assist the Presiding Officer and the Commission in rendering a fair and equitable resolution of all matters in controversy in the proceedings.
>
> The Presiding Officer may deny a request to participate if he/she determines that the person's participation cannot reasonably be expected to assist the Presiding Officer or the Commission in rendering a fair and equitable resolution of matters in controversy in the proceedings or if he/she determines that the person's participation would unduly broaden the issues in controversy or unduly delay the proceedings.
> 16 C.F.R. § 1025.17(e).

As discussed, the filing indicates the Industry Participants seek leave to participate to provide the undersigned "views and arguments as to why Craig Zucker's motion for a determination that the order adding Mr. Zucker as a Respondent can be immediately appealed should be granted," and asserts "[the] members would be uniquely affected by the outcome of this motion." See 16 C.F.R. § 1025.17(b)(2). Thus, the "nature and extent" of the Participants' interest pursuant to 16 C.F.R. § 1025.17(e)(1) is apparently limited to whether the interlocutory appeal should be permitted.

However, as discussed, the attached Memorandum provides no legal argument relevant to the issue presently before the undersigned. The Memorandum also fails to address how the undersigned's decision to allow or disallow an interlocutory appeal "uniquely affects" the Industry. See 16 C.F.R. § 1025.17(e)(1). Accordingly, it is unclear as to how the Memorandum would assist the undersigned in rendering a

determination on the instant issue.[4] 16 C.F.R. § 1025.17(e)(3). Accordingly, the Request to Participate in the Proceeding as Non-Party Participants and for Leave to File Memorandum is denied.

ORDER

WHEREFORE,

IT IS HEREBY ORDERED THAT the Motion for Determination that the Order Adding Craig Zucker as a Respondent can be Immediately Appealed is **DENIED.**

IT IS FURTHER ORDERED THAT the Request to Participate in the Proceeding as Non-Party Participants and for Leave to File Memorandum is **DENIED.**

SO ORDERED.

Done and dated this 19th day of June, 2013, at Galveston, TX

DEAN C. METRY
Administrative Law Judge

[4] The undersigned is very mindful of "the Commission's mandate…and its affirmative desire to afford interested persons, including consumers and consumer organizations, as well as government entities, an opportunity to participate in the agency's regulatory processes, including adjudicative proceedings." 16 C.F.R. § 1025.17(e). However, the filing fails to address both the relevant interlocutory appeal standard and the criteria set forth at 16 C.F.R. § 1025.17(e)(1)-(3). In essence, the filing is not germane at this stage in the proceeding; the filing may have been legally relevant one stage earlier in the proceeding, or, were the undersigned to find a legal basis for the interlocutory appeal, one stage later.

EXHIBIT

8

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION

Six Retailers Announce Recall of Buckyballs and Buckycubes High-Powered Magnet Sets Due to Ingestion Hazard

Recall date: April 12, 2013

Recall number: 13-168

Name of product:

Buckyballs and Buckycubes high-powered magnet sets

Hazard:

These products contain defects in the design, warnings and instructions, which pose a substantial risk of injury and death to children and teenagers.

Consumer Contact:

Barnes & Noble, toll-free at (855) 592-2993 , www.barnesandnoble.com

Bed Bath & Beyond, toll-free at (800) 462-3966, www.bedbathandbeyond.com

Brookstone, toll-free at (866) 576-7337 or online at www.brookstone.com

Participating Hallmark retailers, toll-free at (800) 425-5627 or online at www.hallmark.com/recall-product/

Marbles the Brain Store, toll-free at (877) 527-2460 or online at www.marblesthebrainstore.com

ThinkGeek, toll-free at (888) 433-5788 or online at www.thinkgeek.com/buckyballs/index.shtml

Report an Incident Involving this Product

Description

WASHINGTON, D.C.-- The U.S. Consumer Product Safety Commission (CPSC), in cooperation with six retailers, is announcing the voluntary recall of all Buckyballs and Buckycubes high-powered magnet sets sold by these companies. CPSC continues to warn that these products contain defects in the design, warnings and instructions, which pose a substantial risk of injury and death to children and teenagers.

Imported by Maxfield & Oberton LLC, of New York, N.Y., Buckyballs and Buckycubes consist of sets of numerous, small, high-powered magnets. These sets vary in the number of magnets included and come in a variety of colors. Individual magnets in the set are about 5 millimeters in diameter. Individual magnets in Buckyballs are spherical and individual magnets in Buckycubes are cube-shaped.

About three million sets of Buckyballs and Buckycubes have been sold in U.S. retail stores nationwide and online since 2010 for between $5 and $100.

Consumers should take the high-powered magnet sets and all associated individual magnets away from children and teenagers and contact the retailer from which they purchased the product to obtain instructions for their remedy:

- Barnes & Noble, toll-free at (855) 592-2993 or online at www.barnesandnoble.com and click on "Product Recalls"
- Bed Bath & Beyond, toll-free at (800) 462-3966 or online at www.bedbathandbeyond.com and select "Safety and Recalls" under Customer Service, then click on Recall Information
- Brookstone, toll-free at (866) 576-7337 or online at www.brookstone.com and click on "Recall Information" under Shop Brookstone
- Participating Hallmark retailers, toll-free at (800) 425-5627 or online at http://www.hallmark.com/recall-product/
- Marbles the Brain Store, toll-free at (877) 527-2460 or online at www.marblesthebrainstore.com
- ThinkGeek, toll-free at (888) 433-5788 or online at www.thinkgeek.com/buckyballs/index.shtml

These retailers have agreed to participate because Maxfield & Oberton has refused to participate in the recall of all Buckyballs and Buckycubes.

In July 2012, CPSC staff filed an administrative complaint against Maxfield & Oberton Holdings LLC, of New York, N.Y., after discussions with the company and its representatives failed to result in a voluntary recall plan that CPSC staff considered to be adequate to address the very serious hazard posed by these products. This type of legal action against a company is rare, as CPSC has filed only four administrative complaints in the past 11 years.

CPSC has received 54 reports of children and teens ingesting this product, with 53 of these requiring medical interventions.

The U.S. Consumer Product Safety Commission (CPSC) is still interested in receiving incident or injury reports that are either directly related to this product recall or involve a different hazard with the same product. Please tell us about your experience with the product on SaferProducts.gov

CPSC is charged with protecting the public from unreasonable risks of injury or death associated with the use of the thousands of consumer products under the agency's jurisdiction. Deaths, injuries and property damage from consumer product incidents cost the nation more than $900 billion annually. CPSC is committed to protecting consumers and families from products that pose a fire, electrical, chemical or mechanical hazard. CPSC's work to ensure the safety

of consumer products - such as toys, cribs, power tools, cigarette lighters and household chemicals - contributed to a decline in the rate of deaths and injuries associated with consumer products over the past 30 years.

To report a dangerous product or a product-related injury go online to www.SaferProducts.gov or call CPSC's Hotline at (800) 638-2772 or teletypewriter at (301) 595-7054 for the hearing impaired. Consumers can obtain news release and recall information at www.cpsc.gov, on Twitter @OnSafety or by subscribing to CPSC's free e-mail newsletters.

Buckyballs sets

Buckyballs sets

Buckycubes sets