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 an officer of MAXFIELD AND OBERTON HOLDINGS, LLC AND ZEN MAGNETS, LLC AND STAR NETWORKS USA, LLC	)	
	)	**HON. DEAN C. METRY**
Respondents.	)	

ORDER GRANTING IN PART, DENYING IN PART RESPONDENT CRAIG ZUCKER'S MOTION FOR A PROTECTIVE ORDER

Background

On January 31, 2014, Respondent Craig Zucker filed a Motion for a Protective Order (Motion) for the above-captioned proceeding. In the Motion, Mr. Zucker seeks to prohibit Complaint Counsel from seeking discovery regarding various financial information and information related to the dissolution of Maxfield and Oberton. On February 10, 2014, Complaint Counsel filed an Opposition to Respondent Craig Zucker's Motion for Protective Order (Opposition), arguing, inter alia, the requested information has direct bearing on the remedial action the undersigned may order, and is relevant to the determination of whether Mr. Zucker is a responsible corporate officer. Thereafter,

on February 20, 2014, Respondent Craig Zucker filed a Reply to Complaint Counsel's Opposition to Motion for a Protective Order (Reply to Opposition).

Respondent Craig Zucker's Position

In seeking a Protective Order, Mr. Zucker suggests Complaint Counsel seeks broad discovery related to matters not relevant to this proceeding, specifically:

1) The financial records of Maxfield and Oberton Holdings, LLC ("M&O"), its former managers, officers, or employees including the personal financial records of Mr. Zucker;
2) Insurance policies maintained by M&O;
3) The dissolution of M&O as a corporate entity under Delaware law; and
4) The formation of the Trust.

Mr. Zucker suggests permitting discovery of this non-relevant information will delay the proceeding, "cause and impose an undue burden and expense on all of the parties as well as non-parties, and may cause annoyance, embarrassment and oppression." He notes the Consumer Product Safety Commission (CPSC) seeks an order determining that high-powered, small rare earth magnets present a substantial product hazard. 15 U.S.C. § 2064(d). If the CPSC is able to prove the magnets present a substantial product hazard, the CPSC seeks to hold Mr. Zucker responsible under the responsible corporate officer doctrine. Mr. Zucker requests a protective order excluding certain requests from discovery, or, in the alternative, delaying discovery into these issues until a determination is rendered as to whether the magnets constitute a substantial product hazard.[1]

Mr. Zucker argues that although CPSC has characterized the proceeding as a determination of whether the product constitutes a substantial product hazard, the CPSC's discovery requests and subpoena to Julie Teicher, the trustee of the Maxfield and Oberton

[1] For instance, Request for Production No. 51 seeks "[a]ll documents relating to any compensation, benefits, or other asserts you received or were eligible to receive from M&O…".

liquidating trust, have transcended the defined scope of the proceeding. For instance, the subpoena seeks, "all accounts, entries, ledgers, budgets, or other information found in Quickbook ledgers and entries."

Mr. Zucker further asserts that the responsible corporate officer doctrine does not depend on the absence of a viable corporate entity from which to seek payment of culpability. To the contrary, in United States v. Dotterweich, 320 U.S. 277 (1943) and United States v. Park, 421 U.S. 658 (1975), cases where the responsible corporate officer doctrine was used, viable corporate entities existed. Mr. Zucker contends Complaint Counsel is conflating the concepts of the responsible corporate officer doctrine with an attempt to pierce the corporate veil and make Mr. Zucker the alter ego of the company.

Last, Mr. Zucker contends Complaint Counsel's requests for discovery into insurance policies and this dissolution of Maxfield and Oberton are irrelevant to the underlying issue of whether the magnets constitute a substantial product hazard and instead constitute a fishing expedition into items irrelevant to whether the magnets at issues constitute a substantial product hazard.

CPSC's Position

In their Opposition, Complaint Counsel argues Mr. Zucker ignores the dual nature of the proceeding; that is, in addition to determining whether the magnets pose a substantial product hazard, the undersigned must also determine a remedy that would necessarily accompany such a determination.

CPSC further argues Mr. Zucker seeks a protective order not only for his own financial information, but also "broadly seeks to prohibit discovery of financial records of M&O, the Trust, or 'any other person or entity,'" thus ignoring the fact that "a remedy

must be fashioned to ameliorate any hazard." CPSC contends the undersigned could only speculate as to the viability of any ordered remedy absent financial information. Counsel suggests Mr. Zucker "…implicitly concedes the inherent relevance of Complaint Counsel's inquiry by offering an unsupportable alternative whereby the financial basis for a remedy would only be evaluated after the Court made a substantial product hazard determination and ordered a remedy." CPSC suggests that bifurcation would be burdensome, inefficient, and a waste of judicial resources.

CPSC also argues the financial information is not only relevant to the remedy in the instant case, but is also relevant to the determination of whether Mr. Zucker is a responsible corporate officer. In this regard, Complaint Counsel argues "Courts have long recognized that an officer's control of a corporation's finances and involvement in directing purchases and sales may demonstrate that such a person is a responsible corporate officer."

Last, CPSC suggests Mr. Zucker's concern about "sensitive, private financial information" is misplaced, as confidential information is already the subject of a Protective Order which prohibits the disclosure of such information.

Discussion

At the offset, the undersigned notes the applicable regulations provide for broad discovery. Title 16 C.F.R. § 1025.31 states as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is within the Commission's statutory authority and is relevant to the subject matter involved in the proceedings…It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to

> the discovery of admissible evidence. 16 C.F.R. § 1025.31(c).

Thus, a party may seek discovery so long as it is relevant or may lead to the discovery of admissible evidence. In this instant case, CPSC seemingly alleges the financial information sought is relevant for two reasons: (1) the undersigned needs the subject financial information in order to arrive at an appropriate remedy, and (2) the financial discovery is relevant to the determination of whether Mr. Zucker is a responsible corporate officer, as alleged.

a. Remedy

In support of its contention that the financial information at issue is relevant to fashioning a remedy, CPSC cites 15 U.S.C. § 2064(d)(3)(B), alleging any remedy the undersigned might issue must be both "effective" and "appropriate." However, as noted by Respondent in his Reply to Opposition, the cited provision, 15 U.S.C. § 2064(d)(3)(B), references the plan a person who receives an order under 15 U.S.C. § 2064(d)(1) submits after a remedy is ordered. Title 15 U.S.C. § 2064(d)(3)(B) does not, as alleged, require the undersigned to consider finances when determining an appropriate remedy. See 15 U.S.C. § 2064(d)(1)(A)-(C).

CPSC also alleges the undersigned must consider financial information because:

> [O]rdering a remedy where there are insufficient funds to cover expenses incurred by customers would not only disserve the very consumers the remedy was designed to make whole, such as result would conflict with the statutory requirements that "[n]o charge shall be made to any person…who avails himself of any remedy provided under an order"…15 U.S.C. § 2064(e)(1).

However, CPSC does not explain how a company's insufficient funds would create a "charge" for a person wishing to avail themselves of a financially unfeasible remedy. CPSC provides no further legal authority for its position that finances should dictate any potential remedy the undersigned might issue. Absent a more particularized showing or legal argument, the undersigned will not permit discovery into Mr. Zucker's personal finances.

b. Responsible Corporate Officer Doctrine

CPSC also alleges that if the undersigned determines the subject magnets constitute a substantial product hazard, Mr. Zucker should be responsible for any ordered remedy by virtue of the responsible corporate officer doctrine. United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Park, 421 U.S. 658 (1975). Complaint Counsel alleges that in order to show Mr. Zucker qualifies as a responsible corporate officer, CPSC will have to demonstrate he had a responsible share in the furtherance of the development, manufacture, importation, marketing, and sale of the subject rare earth magnets. See Dotterweich, 320 U.S. at 284.

In United States v. Ming Hong, 242 F.3d 528 (4th Cir. 2001), the Fourth Circuit affirmed a finding of liability under the responsible corporate officer doctrine for violations of the Clean Water Act (CWA). In so holding, the court noted the defendant, James Ming Hong, acquired and operated a wastewater treatment facility, and operated the same under the company name Avion Environmental Group (Avion). Id. at 529. In finding Mr. Hong liable for the discharge of untreated wastewater, the court determined ample evidence supported the magistrate's holding that Mr. Hong had authority to prevent the illegal discharges. Id. at 531-32.

The court noted that even though Mr. Hong "went to great lengths to avoid being formally associated with Avion," he nonetheless substantially controlled corporate operations. Id. at 532. The court noted that Mr. Hong:

> [W]as involved in the purchase of the filtration system and as aware, in advance, that the filtration media would quickly be depleted if used as Hong intended. And, the evidence supported a finding that Hong was in control of Avion's finances and refused to authorize payment for additional filtration media. Id. (Emphasis added).

In the Opposition, CPSC alleges the court in Ming Hong "emphasized that financial discovery is relevant to determining whether a person is a responsible corporate officer," suggesting the court examined Mr. Hong's participation in corporate purchase decisions, development of marketing strategies, and his control of the payment of a firm's expenses. Ming Hong, 242 F.3d at 529-32. While CPSC's assertions may be true, it is important to note the court did not examine or discuss Mr. Hong's personal finances. Rather, the court focused on whether or not he qualified as a responsible corporate officer by virtue of his corporate actions, including his control of Avion's finances. Id. at 532.

CPSC also seemingly alleges City of Newburgh v. Sarna, 690 F.Supp.2d 136 (S.D.N.Y. 2010) stands for the proposition that Mr. Zucker's personal financial information is relevant to the instant proceeding. Specifically, Complaint Counsel asserts:

> [T]he Court ruled that in determining whether the Clean Water Act can be enforced against a person under the responsible corporate officer doctrine, the officers "role in the entities names as defendants is a matter to be fleshed out during discovery." *Newburgh,* 690 F. Supp. 2d at 163. Such discovery could reveal information about the officer's control over "the corporate defendants and whether they are

able to fund any remedial actions that may be required."
Id. at 162.

Thus, in Newburgh, as in Ming Hong, the court placed particular emphasis on the corporate officer's role at the subject company; the court did not discuss or analyze the corporate officer's finances apart from the company.[2] In fact, neither the relevant case law nor CPSC provides any explanation as to how Mr. Zucker's personal finances unrelated to Maxfield and Oberton could have any bearing on whether his corporate role was significant enough to warrant responsibility under the responsible corporate officer doctrine, assuming liability is found. See Park 421 U.S. at 673-74.

While financial information related to Maxfield and Oberton may be relevant, CPSC has failed to demonstrate how or why financial items related solely to Mr. Zucker should be discoverable. For instance, while documents showing financial transfers between Maxfield and Oberton and Mr. Zucker may be relevant to demonstrate Mr. Zucker's stake in the company, CPSC has not explained how personal items such as Mr. Zucker's "securities account statements, including but not limited to brokerage, annuities, life insurance, IRA, KEOGH, 401K, or thrift savings account…" will shed any light on his role with Maxfield and Oberton and the subject magnets.[3] Absent a more particularized showing of relevance to the instant proceeding, the undersigned will not

[2] To the extent CPSC intends to suggest Newburgh stands for the proposition that the undersigned needs Mr. Zucker's financial information to fashion an appropriate remedy, the undersigned notes Newburgh spoke to the remedial provisions of the Clean Water Act. See Newburgh, 690 F. Supp. 2d at 162. As discussed above, CPSC has failed to provide any definitive legal authority to suggest the undersigned needs Mr. Zucker's financial information to order a remedy under the Consumer Product Safety Act.

[3] Along these lines, the formation of the Trust may be relevant to show Mr. Zucker's stake and role in the company.

permit CPSC to seek discovery related to Mr. Zucker's personal financial items when these items have no apparent link to Maxfield and Oberton.[4]

As the company's accounts and finances may be relevant, CPSC may seek discovery on all requested company financial information, including the financial records of Maxfield and Oberton, insurance policies maintained by Maxfield and Oberton, information regarding the dissolution of Maxfield and Oberton, and the formation of the Trust. 16 C.F.R. § 1025.31(c).

Thus, Mr. Zucker's Motion is granted only insofar as it relates only to his personal financial information apart from Maxfield and Oberton.

WHEREFORE,

IT IS HEREBY ORDERED THAT Mr. Zucker's Motion for a Protective Order is **GRANTED IN PART.**

SO ORDERED.

Done and dated this 26th day of March, 2014, at Galveston, TX

DEAN C. METRY
Administrative Law Judge

[4] For instance, items (a)-(f) of Request for Production No. 46 are not relevant to the instant proceeding. Items (g)-(j), and Requests for Production No. 49, 50, and 51, which relate to the company's finances, may have relevance and are therefore discoverable.