

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of)	
)	
MAXFIELD AND OBERTON HOLDINGS, LLC)	CPSC DOCKET 12-1
ZEN MAGNETS, LLC)	CPSC DOCKET 12-2
STAR NETWORKS USA, LLC)	CPSC DOCKET 13-2
)	(Consolidated)
)	
Respondents)	
)	

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

The National Association of Manufacturers (“NAM”), Retail Industry Leaders Association (“RILA”), and National Retail Federation (“NRF”) (hereafter, “Industry Interveners”) respectfully request 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).¹ NAM is the preeminent US manufacturers association as well as the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. RILA is the trade association of the world’s largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers. NRF is the world’s largest retail trade association and the voice of retail worldwide, NRF represents retailers of all types and sizes, including chain restaurants and industry partners, from the United States and more than 45 countries abroad.

The Industry Interveners 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

¹ Counsel for the Commission was contacted about this request for leave to participate via telephone on May 23, 2013, and stated that she would not consent to their request.

that the order adding Mr. Zucker as a Respondent can be immediately appealed should be granted.

No other party in this proceeding can adequately represent the Industry Interveners (and their members) interests in connection with this motion. Their members would be uniquely affected by the outcome of this motion. The Industry Interveners' 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).

Granting this motion will not unreasonably delay these proceedings. The Industry Interveners are filing their memorandum in support of Mr. Zucker's motion contemporaneously with this motion.

For these reasons, and in order to place its (and its members) views before the Court, the Industry Interveners request leave to participate as non-party Participants in these proceedings, and for their memorandum in support to be considered along with Mr. Zucker's motion and any opposition thereto.

Dated: May 24, 2013

Respectfully submitted:

Lee Bishop /cc

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ORDER

This matter having come before this Court on the Request of the National Association of Manufacturers (“NAM”), Retail Industry Leaders Association (“RILA”), and National Retail Federation (“NRF”) (hereafter, “Industry Interveners”) to participate as non-party Participants for the purpose of filing a memorandum in support of Mr. Zucker’s motion, providing 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, it is on this ____ day of _____, 2013,

ORDERED that the Industry Interveners’ Request is GRANTED. Industry Interveners may participate in this proceeding as non-party Participants, and their memorandum in support of Mr. Zucker’s motion for a determination that the order adding Mr. Zucker as a Respondent can be immediately appealed will be accepted for consideration by this Court.

The Honorable Dean C. Metry
Administrative Law Judge
Presiding Officer

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2013, a true and correct copy of the foregoing 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 was served first class, postage prepaid, U.S. Mail on the Secretary of the U.S. Consumer Product Safety Commission, the Presiding Officer, and all parties and participants of record in these proceedings in the following manner:

Original and three copies by U.S. mail, and one copy by electronic mail, to the Secretary of the U.S. Consumer Product Safety Commission, Todd A. Stevenson.

One copy by U.S. mail and one copy by electronic mail to the Presiding Officer for *In the Matter of Maxfield and Oberton Holdings, LLC*, CPSC Docket No. 12-1; *In the Matter of Zen Magnets, LLC*, CPSC Docket No. 12-2, and *In the Matter of Star Networks USA, LLC*, CPSC Docket No 13-2:

The Honorable Dean C. Metry
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One copy by U.S. mail and one copy by electronic mail to Complaint Counsel:

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**MEMORANDUM IN SUPPORT OF ZUCKER’S REQUEST FOR INTERLOCUTORY
DETERMINATION OF STATUS AS PROPER PARTY TO PROCEEDING**

The National Association of Manufacturers (“NAM”), the Retail Industry Leaders Association (“RILA”), and National Retail Federation (“NRF”) (hereafter, the “Industry Interveners”) are interested non-parties to the above-captioned proceeding. The Industry Interveners are the nation’s leading trade associations of product manufacturers and retailers, both large and small, many of which have regular interactions with the CPSC. They regularly submit comments to the Commission on proposed rules and policy issues, meet with the CPSC Chairman, Commissioners and staff, and testify before Congress in their leading role as representatives of America’s manufacturers and retailers and their expertise and interest in CPSC law, policy and practice. The Industry Interveners do not intervene in individual compliance matters unless important policy issues are at stake. That is the situation in this case.

The Industry Interveners strongly support Mr. Zucker’s request for immediate Commission review of the Presiding Officer’s decision granting the Staff’s request to amend the complaint to add him as a party (hereafter, the “Decision”). Respectfully, the Industry Interveners strongly believe that the Decision is clearly erroneous as a matter of law. 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. We urge that Mr. Zucker's request be granted.

Manufacturers, retailers, and the Commission have interpreted for decades the term "person" in the various definitional sections of Section 15 to refer to the corporate entity responsible for manufacturing, importing, distributing and retailing a consumer product, where such corporations exist. Individual officers and employees of corporations have not for decades been included as, or considered to be, responsible parties to the various Section 15 obligations. Thus, this Decision not only 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 in which a critical aspect is the maintenance of individual protection from liability except in the most extraordinary and clearly defined situations.

Respectfully, those unusual situations discussed in the Decision regarding the case law on the "responsible corporate officer" doctrine are not relevant to the procedural posture of this case. The "responsible corporate officer" doctrine is an equitable remedy that acts to avoid the normal protections afforded by the corporate form to company officers only in those extraordinary situations in which their wrongdoing has taken them out of the protections provided by that form. The equities do not support setting aside all the protections of the business entity where there has not been alleged or pleaded any arguable "wrongdoing" on the part of the individual. In this case, Mr. Zucker directed the actions of a limited liability corporation that marketed a legal product. Further, he relied repeatedly on CPSC guidance about marketing and labeling of the product in doing so. Then CPSC staff changed its mind. To now suggest that Mr. Zucker should be exposed to potential personal liability, and the attendant costs

of defending himself, as a result, is inequitable in the extreme given the procedural posture of this case.

The Decision also undermines the product safety mission of the CPSC and manufacturers. It is the role of the Commission to determine not only the legal propriety of adding an individual officer as a respondent in this proceeding but to determine from a policy level what the implications will be for carrying out the Commission's critical missions.

Of course, companies – and their leaders involved in product safety decisions – have the legal right to contest the legitimacy of a CPSC demand for a recall. If executives can be made personally legally responsible in a Section 15 complaint and have to “build a record” to avoid personal liability for recalls, the result is the effective elimination of a legal right of a company to contest a recall. Only perverse incentives to avoid involvement or responsibility, or to potentially implicate less senior individuals in the company, are created by this action.

It is unnecessary for Mr. Zucker to be included as a party to properly adjudicate the issue of whether the products at issue are “substantial product hazards” and should be recalled. Once that decision has been reached, and if Mr. Zucker is determined to have improperly avoided his legal responsibilities regarding that Commission decision, it may be appropriate to consider adding him as a party to the proceeding. But the factual and legal predicate for that extraordinary step is not yet presented.

Aside from being contrary to the equities of the current case, the Decision will affect even the most basic of obligations under the CPSA.

For example, Section 1115.11 of the CPSC Guidelines provides that the knowledge of employees can be imputed to the “firm” for a determination of the timeliness of reporting. The Decision effectively makes this provision irrelevant, as the Decision provides that the knowledge

of each employee is all that is needed to support a requirement to report. In many companies, the responsibility for product safety compliance rests with numerous persons, from the product safety engineer to the head of product safety to the officer in charge of manufacturing, technology or quality, to the CEO. If each "person" in the corporate chain of responsibility is individually responsible for the obligation to report, it may be impossible to determine when the legal obligation begins.

Similarly, this new interpretation of "person" will create confusion in the interpretation of Section 6(b). That section obligates the Commission to notify a "manufacturer" if it intends to release information which can identify a particular product or manufacturer, and to allow the "manufacturer" to object or propose language to be included in the release of information. If individual employees are now to be considered to be "manufacturers," presumably they must be provided notice and allowed the opportunity to comment and object. These important policy questions deserve the considered view of the Commission in a rulemaking, not simply a ruling in the context of a single adjudication.

The Commission has urged - and the Industry Intervenors have supported - the notion that company officers and senior staff should participate actively in product safety matters, and take a personal interest in compliance and safety. Responsible companies have done so, and it is normal practice within progressive companies for senior management to participate in decisions regarding reporting under Section 15. Yet, an unfortunate result of the decision determining that a CEO who did just that can be individually named in a Section 15 proceeding could be to discourage this active participation. The net result may be that corporate officers will delegate product safety responsibility to lower-level employees to reduce a senior manager's personal

liability. Indeed, it is this type of detrimental effect that the corporate form is intended to prevent.

The Industry Interveners and their member companies work hard with the CPSC to promote product safety and to increase the rigor of internal corporate product safety processes. Respectfully, the Industry Interveners support the request based on its view that this Decision is likely to undermine these efforts and disturb long and carefully-developed interpretations and expectations. It must be reviewed immediately by the Commission, which can determine not only the law but the broad policy implications. The Industry Interveners 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.

Dated: May 24, 2013

Respectfully submitted:

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National Retail Federation*

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2013, a true and correct copy of the foregoing Memorandum in Support of Zucker's Request for Interlocutory Determination of Status as Proper Party to Proceeding was served first class, postage prepaid, U.S. Mail on the Secretary of the U.S. Consumer Product Safety Commission, the Presiding Officer, and all parties and participants of record in these proceedings in the following manner:

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