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).

---

[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

---

[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

---

[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

---

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.

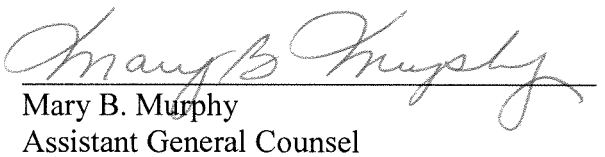
The addition of Neoballs, as well as the inclusion of some supplemental information from the Neoballs and Zen websites, are the only substantive amendments to the Second Amended Complaint against Zen. The amendment would not unduly broaden the issues because Neoballs are substantively identical to the 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