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	)	CPSC DOCKET NO. 12-1
ZEN MAGNETS, LLC	)	CPSC DOCKET NO. 12-2
STAR NETWORKS USA, LLC	)	CPSC DOCKET NO. 13-2 (Consolidated)
Respondents.	)	

OPPOSITION TO MOTION FOR DETERMINATION THAT THE ORDER ADDING CRAIG ZUCKER AS A RESPONDENT CAN BE IMMEDIATELY APPEALED

On May 3, 2013, this Court granted Complaint Counsel's Motion for Leave to File Second Amended Complaints in Docket Nos. 12-1 and 12-2 ("Motion for Leave to Amend"). *See* Order dated May 3, 2013. The Second Amended Complaint in Docket 12-1 names Craig Zucker as a Respondent both individually and in his capacity as an officer of Respondent Maxfield & Oberton Holdings, LLC ("M&O").

Mr. Zucker seeks to appeal this Court's Order pursuant to Commission regulations that require a showing that the Court's 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 termination of the litigation." Zucker Mot. for Determination at 2; 16 C.F.R. § 1025.24(b)(4)(i).[1] Although there is no case law interpreting Commission regulations on interlocutory appeals, federal courts analyze such appeals by

[1] Mr. Zucker does not move to appeal the Court's Order Granting Complaint Counsel's Motion for Leave to File the Second Amended Complaints in regard to Docket 12-2, and Respondent Zen Magnets, LLC ("Zen") has not moved to appeal this Court's Order.

applying criteria that are nearly identical to the requirements set forth in 16 C.F.R. § 1025.24(b)(4)(i). *See* 28 U.S.C. § 1292(b).[2] The Sixth Circuit has interpreted § 1292(b) to mean that a request for interlocutory appeal must satisfy three distinct requirements to be successful: "(1) the order [must] involve[] a controlling question of law, (2) [there must be] a substantial ground for difference of opinion [] regarding the correctness of the decision, and (3) an immediate appeal may materially advance the ultimate termination of the litigation." *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002).

Interlocutory appeals under 28 U.S.C. § 1292(b) are "granted sparingly and only in exceptional cases." *Id.* (denying motion for interlocutory appeal from an evidentiary order in a contract case); *see also Camacho v. P.R. Ports Auth.*, 369 F.3d 570, 573 (1st Cir. 2004) ("Section 1292(b) is meant to be used sparingly, and appeals under it are, accordingly, hen's-teeth rare."); *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996) ("Section 1292(b)'s legislative history reveals that although that law was designed as a means to make an interlocutory appeal available, it is a rare exception to the final judgment rule that generally prohibits piecemeal appeals"); *White v. Nix*, 43 F.3d 374, 376 (8th Cir. 1994) ("A motion for certification [of an interlocutory appeal under § 1292(b)] must be granted sparingly, and the movant bears the heavy burden of demonstrating that the case is an exceptional one in which immediate appeal is warranted."). Courts are also reluctant to grant interlocutory appeal of pretrial procedural orders. *Caraballo-Seda v. Municipality of Hormigueros*, 395 F.3d 7, 9 (1st Cir. 2005) ("[I]n the instant case, we see no reason to depart from our general rule prohibiting interlocutory appeals from the denial of a motion to dismiss"); *Kartell v. Blue Shield of Mass.,*

[2] Case law interpreting federal rules may "guide decision making in the administrative context." *In re Spring Grove Res. Recovery, Inc.*, 1995 EPA ALJ LEXIS 28 at *2 (1995).

Inc., 687 F.2d 543, 551 (1st Cir. 1982) ("[D]enial of a request to amend a complaint is not usually appealable as an interlocutory matter.").

To prevail, Mr. Zucker must thus demonstrate (1) that this case involves a controlling question of law or policy; (2) that there is substantial ground for differences of opinion regarding the responsible corporate officer doctrine; and (3) that an immediate appeal from the ruling may materially advance the termination of the litigation. 16 C.F.R. § 1025.24(b)(4)(i). Because Mr. Zucker has not satisfied all three requirements, he is not entitled to the relief he seeks.

I. Mr. Zucker's Status as a Respondent is Not a Controlling Question of Law or Policy

Mr. Zucker correctly states that "[a] controlling question of law is a threshold issue which seriously affects the way that the court conducts the litigation (e.g., impacting whether or not the plaintiff has a cause of action under a particular statute)." Zucker Memo. in Support at 3, *citing Stout v. Ill. Farmers Ins. Co.,* 882 F. Supp 776, 777-778 (S.D. Ind. 1994) (denying plaintiff's motion for interlocutory appeal because "the discovery issues in the instant case do not present a controlling issue of law") (citing *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991)). Other courts have defined a controlling question of law as one that "could materially affect the outcome of the case," *City of Memphis*, 293 F.3d at 351 (6th Cir. 2002) (denying motion for interlocutory appeal from an evidentiary order in a contract case; *see also* 2 Fed. Proc., L. Ed. § 3:209 ("A legal issue is 'controlling,' for purposes of determining the appropriateness of an interlocutory appeal, if it could materially affect the outcome of the case.").

Mr. Zucker's status as a Respondent in this proceeding does not raise a controlling question of law because resolution of this issue will not seriously affect the way the Court conducts this litigation, does not affect the cause of action, and will not materially affect the

outcome of this case. As Mr. Zucker concedes, his status in the case does not represent the central issue before this Court.[3] Mr. Zucker's inclusion as a Respondent merely broadens the parties who may be held responsible for the implementation of a corrective action if the Court finds that the products present a substantial product hazard. Regardless of Mr. Zucker's status, Complaint Counsel will present evidence that the products contain a defect which because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise, creates a substantial risk of injury to the public. To that end, Complaint Counsel will still seek to depose Mr. Zucker to further develop the record regarding M&O's actions in connection with the importation, marketing, and distribution of the products in commerce, including but not limited to the efforts undertaken by individuals at M&O, including Mr. Zucker, as a responsible corporate officer, to ensure compliance with CPSC rules and regulations.[4] Similarly, with or without Mr. Zucker as a Respondent, the Court will evaluate evidence bearing on whether products imported and sold by M&O, Zen, and Star Networks USA, LLC ("Star") present a substantial product hazard under Section 15 of the Consumer Product Safety Act ("CPSA"). Including Mr. Zucker as a Respondent does not add any new products or allegations or otherwise broaden the substantive issues in this case and in no way will alter the manner in which the Court will conduct this litigation.

Mr. Zucker's participation also does not "impact[] whether or not the plaintiff has a cause of action," *Stout*, 882 F. Supp. at 778. Ultimately, this litigation focuses on the products. With or without Mr. Zucker as a Respondent, Complaint Counsel will present evidence demonstrating

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[3] "The 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." Zucker Opp. to Motion to Amend at 18.

[4] Any appeal of Mr. Zucker's status as a Respondent will be far better informed after discovery has been conducted to further illuminate Mr. Zucker's role as a responsible corporate officer at M&O.

that Buckyballs and Buckycubes, as well as the products sold by Star and Zen, present a substantial product hazard. Mr. Zucker has failed to put forth any facts to support his contention that his status as a Respondent will affect Complaint Counsel's ability to present the evidence necessary to make such a showing.

Finally, Mr. Zucker's participation as a Respondent is not a factor that "could materially affect the outcome of the case," *City of Memphis*, 293 F.3d at 351. The central issue in this case is whether aggregated masses of small, high-powered magnets present a substantial product hazard, not who is responsible for implementing a corrective action, which may include a refund to consumers and notice to the public. Mr. Zucker's status as a Respondent will only be relevant once the outcome of the case is known—and that outcome is dependent upon evidence adduced as to the products, not as to the status of the Respondents.

Mr. Zucker asserts that if "it is later determined by the CPSC or a reviewing court that, as a matter of law, he could not be held liable under Section 15, the final order would have to be reversed (at least as to Mr. Zucker's liability)." Zucker Memo. in Support at 4. However, the obligation of the named Respondents to provide the requested relief, if so ordered, would be determined after the merits portion of the proceeding has concluded. At that point, an Initial Decision would be either issued or imminent, and Mr. Zucker would be free to appeal by right. 16 C.F.R. § 1025.53(a) ("Any party may appeal an Initial Decision to the Commission"). After review, the Commission could then choose to reverse a decision regarding the responsible corporate officer doctrine even if it chose not to upset a holding that high-powered magnets present a substantial product hazard. On the other hand, if this Court decides in Respondents' favor on the merits, then Mr. Zucker's concern about personal liability will be moot because he

would not be subject to a judgment, further demonstrating that his request to immediately appeal this Court's ruling is premature.[5]

Mr. Zucker also argues that naming him as a Respondent under *United States v. Dotterweich*, 320 U.S. 277 (1943) and *United States v. Park*, 421 U.S. 658 (1975) represents a groundbreaking CPSC policy change. Zucker Memo. in Support at 4-6. Opinions of the Commission, however, establish clear precedent for including Mr. Zucker in this action. In *In re White Consol. Indus.*, CPSC Docket No. 75-1 (1976) (Initial Decision attached as Ex. A to Complaint Counsel's Reply in Support of Motion to Amend), the Commission named individual corporate officers as respondents in a case under Section 15 alleging that refrigerators manufactured by a corporation presented a substantial product hazard. The Presiding Officer held the corporation's officers to be individually responsible following extensive analysis under *Park* and *Dotterweich*. See Initial Decision at 34, Ex. A to Reply in Support of Motion to Amend.[6] Mr. Zucker's argument that his case is one of first impression because it involves the application of the responsible corporate officer doctrine to Section 15 of the CPSA is simply inaccurate.

Moreover, Mr. Zucker's contention that the Commission has never considered the factual scenario presented in this case is equally without basis. In fact, relying on *Park* and *Dotterweich*

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[5] In the related context of appeal from a collateral order under 28 U.S.C. § 1291, the Supreme Court has held that the fact that a defendant may incur litigation expenses is immaterial to whether an interlocutory appeal is allowed. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985) ("The possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress."); *Behrens v. Pelletier*, 516 U.S. 299, 318 (1996) ("[T]he Court has often said that the trouble, expense, and possible embarrassment associated with unnecessary litigation . . . do not justify interlocutory appeal.").

[6] Mr. Zucker's attempt to distinguish the *White* decision is unavailing. *See* Zucker Surreply to Motion to Amend at 1-7. *White* unquestionably involved the successful application of the responsible corporate officer doctrine in an action under Section 15 of the CPSA. *See White* at 34 ("[T]he principles of managerial corporate responsibility enunciated in *Park* are equally applicable to proceedings commenced under Section 15 of the Consumer Product Safety Act.").

to support its decision, the Commission affirmed *White,* a case where individuals were held responsible for acts of the corporation. *White* is on all fours with the case before this Court. *See also In re Relco, Inc.*, CPSC Docket No. 74-4, Amended Initial Decision and Order on Reopened Proceedings at 6 (1976) (attached as Exhibit B to Complaint Counsel's Reply in Support of Motion to Amend) (CEO of Relco was "properly designated to respond to any consumer claims arising out of the proceeding."). The *Relco* court held that "it is contemplated that the Commission would have the authority to place [the obligation to pay for a recall] on the person most able to bear the cost where equitable and other considerations appear to warrant such action in the public interest." *Id.*, *citing* H.R. Rpt. 92-15003 at 43 (June 20, 1972). Moreover, the Eighth Circuit has upheld the Commission's use of the responsible corporate officer doctrine in a case alleging violations of the Federal Hazardous Substances Act. *Shelton v. Consumer Prods. Safety Comm'n*, 277 F.3d 998 (8th Cir. 2002), *cert. denied*, 123 S. Ct. 514 (2002). Mr. Zucker has not identified any issue of Commission policy that is new, much less one that is so controversial that it is a proper subject of an interlocutory appeal. Instead, clear precedent demonstrates that the Commission has included individuals in Section 15 cases and the addition of Mr. Zucker falls squarely within that established framework.

In addition to his contention that novel issues of first impression are present here, Mr. Zucker rests a significant portion of his policy argument on the fact that he was not given notice and an opportunity to comment before the Commission issued a press release naming M&O in a retailer recall of the subject products, claiming that Section 6(b) of the CPSA required such notification. Zucker Memo. in Support at 4-5. This argument is without merit. The requirement under Section 6(b)(1) to provide notice and an opportunity for comment prior to the public

disclosure of information does not apply where the Commission has issued a complaint in an adjudicatory proceeding, as Complaint Counsel did on July 25, 2012 regarding the M&O subject products. *See* Section 6(b)(4)(B) of the CPSA; 15 U.S.C. § 2055(b)(4)(B) ("Paragraphs (1) through (3) of this subsection shall not apply to the public disclosure of . . . information in the course of or concerning . . . an adjudicatory proceeding (which shall commence upon the issuance of a complaint)". The retailer recall concerned the exact same subject products—Buckyballs and Buckycubes—which are the subject of this adjudicatory proceeding. *See* CPSC press release, "Six Retailers Announce Recall of Buckyballs and Buckycubes High-Powered Magnet Ingestion Sets Due to Ingestion Hazard" (Apr. 12, 2013), Ex. A to Zucker Memo. in Support ("In July 2012, CPSC staff filed an administrative complaint against Maxfield & Oberton Holdings LLC"). Pursuant to this exception, the Commission was not required to notify Mr. Zucker, or anyone else, prior to issuing its press release announcing the retailer recall.

II. There is No Substantial Ground for Differences of Opinion Regarding the Validity of the Responsible Corporate Officer Doctrine

As Mr. Zucker recognizes, a difference of opinion between two parties on a contested issue is not sufficient to show that there is in fact "substantial ground for differences of opinion." Zucker Memo. in Support at 5-6; *see also Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (interlocutory appeal denied because "[a] party's strong disagreement with the Court's ruling is not sufficient for there to be a 'substantial ground for difference.'"). Instead, Mr. Zucker is required to show that there is a substantial ground for differences of opinion regarding the validity of the responsible corporate officer doctrine among the courts, or that novel issues are presented:

> To determine if a 'substantial ground for difference of opinion' exists under § 1292(b), courts must examine to what extent the controlling law is unclear. Courts traditionally will find that a substantial ground for difference of opinion exists where 'the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.'

Id.

Mr. Zucker cannot meet this standard. The responsible corporate officer doctrine is enshrined in Supreme Court case law of *Park* and *Dotterweich*, and has been applied consistently by federal courts up to this day with no controversy about its validity and no dispute among the circuits.[7] *See* Complaint Counsel's Memo. in Supp. of Motion to Amend at 6-9. The Eighth Circuit has affirmed the doctrine's use in cases involving the Commission. *Shelton v. Consumer Prods. Safety Comm'n*, 277 F.3d 998 (8th Cir. 2002), *cert. denied*, 123 S. Ct. 514 (2002). Thus there is no ground for difference of opinion among the courts about the responsible corporate officer doctrine itself, and Mr. Zucker does not identify any.

Despite the fact that Mr. Zucker cannot point to a substantial difference of opinion among the courts on this issue, he asserts that the application of the responsible corporate officer doctrine to Section 15 of the CPSA involves "novel legal issues of statutory construction, Congressional intent, and the applicability to Section 15 issues of cases arising under a variety of

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[7] *See, e.g.*, *United States v. Ming Hong*, 242 F.3d 528 (4th Cir. 2001) (owner of a wastewater treatment facility held 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 one occasion); *United States v. Gel-Spice Co.*, 773 F.2d 427 (2d Cir. 1985) (president held 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 held 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 held personally liable for the LLC's Clean Water Act violations).

statutes other than the CPSA." Zucker Memo. in Support at 6.[8] Mr. Zucker overlooks the application of the responsible corporate officer doctrine in the Section 15 context in *White*, *see supra* p. 6-7, and he does not cite any case law showing that *Park* and *Dotterweich* are inapplicable to Section 15 of the CPSA. Clearly, Mr. Zucker disagrees with this Court's May 3 opinion; that disagreement, however, is insufficient to warrant the relief he seeks.

III. Even a Successful Appeal By Mr. Zucker Would Not Advance the Ultimate Termination of this Litigation on the Merits

If Mr. Zucker were removed as a Respondent in these proceedings, his removal would not even terminate his *personal* participation in the litigation, much less advance the *ultimate* termination of the litigation as required by Commission regulations. *See* 16 C.F.R. § 1025.24(b)(4)(i). Regardless of Mr. Zucker's status, Complaint Counsel would still seek to depose Mr. Zucker regarding M&O's importation and distribution of the subject products, meaning his personal involvement in the case would not end. His status as a Respondent therefore will have no impact on the ultimate termination of the litigation. *See White v. Nix*, 43 F.3d 374, 378-9 (8th Cir. 1994) ("When litigation will be conducted in substantially the same manner regardless of our decision, the appeal cannot be said to materially advance the ultimate termination of the litigation.").[9]

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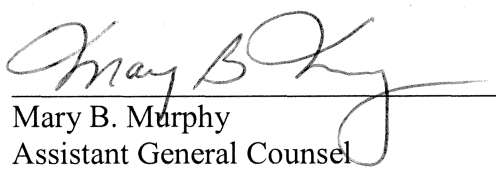
[8] Mr. Zucker cannot explain why the policy underlying the *Shelton* court's extension of *Park* and *Dotterweich* liability in an FHSA case would not be equally applicable to a Section 15 case. There is no reason set forth in Mr. Zucker's pleading, and indeed none could be reasonably advanced, that would support an argument that the responsible corporate officer doctrine applies to only some of the Commission's Acts and not others. The CPSA and the FHSA, as well as all other acts administered by the Commission, are intended to protect consumers from hazardous consumer products.

[9] Mr. Zucker is inaccurate in citing *Brown v. Hain Celestial Group, Inc.* to support his contention that the "ultimate termination of the litigation" prong may be satisfied even if "a successful appeal would not completely dispose of the case." Zucker Memo. in Support of Mot. for Determination at 7. The quote in *Brown* was in the context of the court's discussion of the first prong of the test for interlocutory appeal—controlling question of law—and not ultimate termination of the litigation. *Brown v. Hain Celestial Group, Inc.*, No. C 11-03082 LB, 2012 WL 4364588 at *3 (N.D. Cal. Sept. 24, 2012) ("[S]uccessful appeal would materially advance, though not completely dispose of, the litigation. If the court's order were reversed on appeal, it would limit the legal theories under which Plaintiffs

Contrary to Mr. Zucker's assertion that his departure "would significantly par[e] down the issues for judicial determination," Zucker Memo. in Support at 7, the opposite is true: no issues at all would be eliminated from this case, at least regarding the merits portion that will dominate these proceedings. This Court would still have to determine whether aggregated masses of small, high-powered magnets constitute a substantial product hazard under the CPSA, and Mr. Zucker's status as a Respondent has no effect on the resolution of that question.

Complaint Counsel respectfully submits that the Motion filed by Mr. Zucker fails to satisfy the criteria for entitlement to an interlocutory appeal. Although it is clear that Mr. Zucker disputes the soundness of the Court's ruling, such a disagreement falls short of the legal standard necessary for him to be entitled to the relief he seeks.

Respectfully submitted,



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could prove their case. Accordingly, the court finds that the preemption question presents a controlling question of law."). In regard to the controlling question of law prong, Complaint Counsel's legal theories under Section 15 of the CPSA would not be limited if Mr. Zucker were no longer a Respondent. *See supra* pp. 3-8.

CERTIFICATE OF SERVICE

I hereby certify that I have provided on this date, May 28, 2013, the foregoing Opposition to Craig Zucker's Motion for Determination that the Order Adding Craig Zucker as a Respondent Can Be Immediately Appealed upon the Secretary, the Presiding Officer, and all parties and participants of record in these proceedings in the following manner:

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

One copy by certified mail and one copy by electronic mail to the Presiding Officer for *In the Matter of Maxfield and Oberton Holdings, LLC and Craig Zucker, individually, and as an officer 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:

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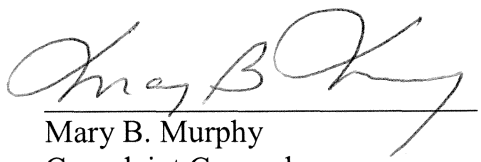

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