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.