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	)	**HON. DEAN C. METRY**
ZEN MAGNETS, LLC	)	
AND	)	
STAR NETWORKS USA, LLC	)	
	)	
	)	
Respondents.	)	
	)	

ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINTS IN DOCKET NOS. 12-1 AND 12-2

Summary

Counsel for the Consumer Product Safety Commission ("CPSC" or "Commission") seeks to amend two of three Complaints filed in the instant proceeding. Specifically, it seeks to add Craig Zucker as Respondent for Docket Number 12-1, and add a new product line of magnets for Docket Number 12-2.

Procedural Background

On February 11, 2013, CPSC filed Complaint Counsel's Motion for Leave to File Second Amended Complaints in Docket Nos. 12-1 and 12-2 ("Motion"). Complaint Counsel sought to add Craig Zucker as a Respondent in Docket No. 12-1, both in his individual capacity and as Chief Executive Officer. In Docket No. 12-2, Complaint Counsel sought to amend the Complaint against Zen Magnets, LLC to include a new product line of magnets sold under the name "Neoballs."

On February 20, 2013, Craig Zucker filed a Request to Participate in the Proceeding as Non-Party Participant and For Leave to File an Opposition to Complaint Counsel's Motion ("Request"). On February 25, 2013, the undersigned granted the Request, permitting Mr. Zucker to respond to the Motion without submitting to the jurisdiction of the court. Thereafter, on February 28, 2013, Craig Zucker filed his Opposition to Motion for Leave to Amend Complaint in CPSC Docket 12-1.

On March 1, 2013, CPSC filed Complaint Counsel's Motion for Leave to File a Reply to Mr. Zucker's Opposition to Complaint Counsel's Motion for Leave to Amend Complaint in CPSC Docket 12-1 ("Motion for Leave"). On March 4, 2013, the undersigned granted the Motion for Leave. On March 15, 2013, the Commission filed a Reply.

Subsequently, on March 20, 2013, Craig Zucker filed a Motion for Leave to file Surreply in Opposition to Complaint Counsel's Motion for Leave to Amend Complaint in CPSC Docket 12-1 ("Surreply Motion"). The undersigned issued an Order allowing Mr. Zucker to file his Surreply on April 2, 2013.

Discussion

1. The Amended Complaint in 12-1

a. CPSC's Position

Complaint Counsel explains that counsel for Respondent Maxfield and Oberton Holdings, LLC ("Maxfield") withdrew from the proceeding in December 2012, asserting Maxfield filed a Certificate of Dissolution on December 27, 2012.[1] Complaint Counsel

[1] The trustee for the liquidating trust has apparently indicated the trust will not partake in the instant litigation on behalf of Maxfield.

argues that, pursuant to the responsible corporate officer doctrine[2], it should now be permitted to add Craig Zucker as a Respondent, both in his capacity as CEO of Maxfield, and in his individual capacity.

Complaint Counsel argues 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." The Commission further suggests that Mr. Zucker "...was integral to the design, manufacturing, and marketing of the [Maxfield] 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."

Citing United States v. Dotterweich, 320 U.S. 277 (1943) and United States v. Park, 421 U.S. 658 (1975), CPSC argues Mr. Zucker may be named in both his individual capacity and as a responsible corporate officer. CPSC suggests "[a]t 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."

CPSC argues the rationale of Park and Dotterweich applies to the statutes and regulations governing the Consumer Product Safety Commission.[3] Further, Mr. Zucker's responsibility for ensuring compliance with relevant statutes and regulations, as

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[2] The doctrine presents an alternate theory of liability wherein a corporate officer may be held liable if he or she has a responsible share in the furtherance of an illegal transaction. United States v. Park, 421 U.S. 658, 670 (1975). As discussed herein, the responsible corporate officer doctrine is distinct from "piercing the corporate veil." Comm'r, Dept. of Envtl. Mgmt v. RLG, Inc., 755 N.E.2d 556, 563 (Ind. 2001) (citing United States v. Dotterweich, 320 U.S. 277, 282 (1943)).

[3] In support of this position, Complaint Counsel also cites a 1976 CPSC Initial Decision wherein the Presiding Officer applied the reasoning of Dotterweich and Park.

evidenced by his own statements and actions, renders the responsible corporate officer doctrine applicable to the instant case.

The Commission further suggests that Maxfield's dissolution does not preclude an action against Mr. Zucker individually, suggesting that case law establishes that even if an individual ceases to be a corporate officer, said individual may still be held responsible for a corporation's previous acts.

CPSC further argues Section 15 of the Consumer Product Safety Act (CPSA) "provides for broad individual liability." 15 U.S.C. § 2052. 1 U.S.C. § 1. Contrary to Mr. Zucker's assertions, Sections 21 and 19 of the CPSA, which address criminal penalties and who may be liable for committing a prohibited act, respectively, are entirely consistent with Section 15.

b. Craig Zucker's Position

Mr. Zucker contends he should not be named as Respondent in the instant proceeding. Mr. Zucker asserts, inter alia, that Section 15 of the Consumer Product Safety Act does not authorize the Commission "to issue such an order against an individual officer or director of a corporation that manufactures consumer products." Mr. Zucker further suggests "bedrock principles of corporate law make clear that corporate officers such as Mr. Zucker are not liable for the company's obligations, even if the company has dissolved."

Specifically, Mr. Zucker argues the CPSA is "very clear in specifying the entities against whom an order requiring public notice and a product refund…may be issue[d]," and Mr. Zucker does not fit any of these categories. 15 U.S.C. § 2064(c)-(d). Mr. Zucker suggests that overall statutory construction of the CPSA does not support his inclusion as

Respondent in the instant proceeding; unlike other health and safety statutes, the CPSA does not provide for individual officer or director responsibility.

Mr. Zucker further suggests that Park and Dotterweich are inapplicable in the instant case because they are "extraordinary exceptions" to established corporate law principles that an officer, director, or shareholder of a corporation is not responsible for the debts and obligations of a corporation. Mr. Zucker proffers that "limited individual liability for the obligations of a corporation is a hallmark of corporate law in the United States," asserting this principle of law should apply with full force to Maxfield, a company formed under Delaware's Limited Liability Company Act and now lawfully dissolved.

Mr. Zucker contends CPSC "...has cited no authority for what would be an unwarranted expansion of the Park line of cases to civil cases seeking to compel specific remedial actions by an individual formerly employed by a corporation against which such an order could issue." In support of this assertion, Mr. Zucker cites a litany of cases, including United States v. USX Corp., 68 F.3d 811 (3d Cir. 1995), suggesting case law demonstrates unsuccessful government attempts to "impose civil liability against an individual for actions taken by his corporate employer."

Further, in a recent case, Meyer v. Holley, 537 U.S. 280 (2003), the Supreme Court interpreted Park, Dotterweich, and their progeny to stand for the proposition that liability for regulatory violations may be imposed on corporate officers only when Congress has specifically indicated so. In the instant case, Congress has "...evinced no intent to authorize the CPSC to require [individuals such as Mr. Zucker] to conduct recalls."

Next, Mr. Zucker suggests his inclusion as Respondent in the instant proceeding will cause undue delay, noting that this issue "has never been litigated by the CPSC in the context of this statute, and the issue will introduce substantial controversy about the extent to which the CPSC can assert jurisdiction under Section 15 of the CPSA…". Further, CPSC's Amended Complaint will broaden and greatly complicate the proceeding, effectively doubling the number of issues; namely, CPSA will have to prove Mr. Zucker "took various actions relevant to this case," and that these actions render him liable under the CPSA.

Last, Mr. Zucker suggests that any amendment to the Complaint would be both futile and highly prejudicial to Mr. Zucker "…because this Court lacks jurisdiction over him and because he would suffer reputational harm if subjected to these proceedings."

c. Discussion as to the Amended Complaint in 12-1

i. Broaden the Issues or Cause Undue Delay

Pursuant to 16 C.F.R. § 1025.13, "Amendments and supplemental pleadings", the undersigned "…may allow appropriate amendments and supplemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay."

Mr. Zucker suggests "[t]he notion that an individual might be held responsible for the actions of a company for which he previously worked represents a very controversial proposition that will introduce undue delay into-and raises the potential to overwhelm-these proceedings." [4]

[4] Mr. Zucker nonetheless concedes that "[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."

CPSC argues that the ultimate issue on which the undersigned must render a determination is whether the subject magnets present a substantial product hazard within the meaning of the Consumer Product Safety Act, and, if so what relief should be granted. The CPSC's position is reasonable. Fed. R. Civ. P. 15(a)(2) ("...a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."). See United States v. Shelton Wholesale, Inc. 34 F.Supp.2d 1147, 1155 (W.D. Mo. 1999) (explaining the CPSC is entitled to a substantial degree of deference in interpreting their regulations and implementing their objectives). See also Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (explaining remedial statutes and regulations should be construed liberally).

The inclusion of Mr. Zucker as a respondent in the instant proceeding does not unduly broaden the ultimate issue; rather, Mr. Zucker's inclusion or exclusion as a respondent is a threshold issue the undersigned must determine prior to the hearing, and, indeed, prior to the commencement of the discovery process. Whether CPSC's Motion is granted or denied, the underlying legal issue remains unchanged.

ii. The Language of the CPSA

Section 15 of the CPSA, under which the Commission seeks to require public notification and remedial action, is directed at manufacturers, distributors, and retailers. 15 U.S.C. § 2064(b). Title 15 U.S.C. § 2052 defines these three relevant terms as follows:

> The term 'manufacturer' means any person who manufactures or imports a consumer product.
> 15 U.S.C. § 2052(a)(11).
>
> The term 'distributor' means a person to whom a consumer product is delivered or sold for purposes of distribution in

> commerce, except that such term does not include a manufacturer or retailer of such product.
> 15 U.S.C. § 2052(a)(8).
>
> The term 'retailer' means a person to whom a consumer product is delivered or sold for purposes of sale or distribution by such person to a consumer.
> 15 U.S.C. § 2052(a)(13).

Mr. Zucker essentially argues that although Section 15 is applicable to a "person", he nonetheless does not fall under the purview of the statute because he did not personally manufacture, import, deliver, or sell the subject magnets. Citing 1 U.S.C. § 1, he suggests, because the CPSA does not indicate otherwise, "person", necessarily includes "corporations, companies, associations, firms…" in addition to individuals. Because the definition of "person" includes corporate entities, Maxfield must therefore constitute the "person" for purposes of the instant proceeding, not Mr. Zucker.[5] Thus, per Mr. Zucker's interpretation of the CPSA, an individual could be held liable only when said individual "…conducted business without forming a corporation or partnership."

In United States v. Hodges X-Ray, Inc., 759 F.2d 557 (6th Cir. 1985), the Sixth Circuit examined whether the Radiation Control for Health and Safety Act of 1968 (RCHSA) permitted individual liability for corporate violations. Id. at 560. RCHSA rendered it unlawful for any "manufacturer" to engage in certain actions. Id. The president and major shareholder in Hodges X-Ray similarly argued he could not be held

[5] Citing 15 U.S.C. § 2070, Mr. Zucker also argues that "Congress explicitly provided for individual director, officer and agent liability in a different provision of the CPSA- namely Section 21(b)." Thus, Mr. Zucker suggests that when Congress intended for a CPSA provision to apply to corporate officers, it explicitly stated so. However, Section 21 ("Criminal penalties") enumerates criminal penalties that may result from a knowing or willful violation of 15 U.S.C. § 2068 (Section 19 of the CPSA). Thus, the underlying purpose of Section 21 is to explain the applicable penalties, not to list potentially liable parties. 15 U.S.C. § 2068(a). See also United States v. Hodges X-Ray, Inc., 759 F.2d 557, 560 (6th Cir. 1985).

individually liable for statutory violations because he, as an individual, was not a "manufacturer."[6] Id.

In finding the president/major shareholder civilly liable, the Sixth Circuit noted the statute defined "manufacturer" as "any person engaged in the business of manufacturing, assembling, or importing of electronic products." Id. Thus, the court reasoned it was "self-evident" that the president of the corporation could constitute a "manufacturer." Id. Based on relevant case law, the court concluded that, so long as the president had a "responsible relationship to the acts of a corporation that violate health and safety statutes," the president's individual civil liability was appropriate. Id. at 561.

As such, a linguistic dissection of the statutory construction of the CPSA does not answer the threshold question of whether Mr. Zucker can be named as Respondent in the instant proceeding.[7] While, as Mr. Zucker suggests, "person" for purposes of the CPSA can undoubtedly refer to a corporation, as explained by the Sixth Circuit in Hodges X-Ray, if a corporate officer has a "responsible relationship" to certain types of corporate transgressions, the individual may supplant the corporation as the "person" by virtue of the responsible corporate officer doctrine. Id.

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[6] The relevant portions of the statute read as follows: "§ 263j. Prohibited acts (a) It shall be unlawful— (1) for any manufacturer to introduce, or to deliver for introduction, into commerce, or to import into the United States, any electronic product which does not comply with an applicable standard prescribed pursuant to section 263j of this title; …
(5) for any person (A) to fail to issue a certification as required by section 263(h) of this title, or (B) to issue such a certification when such certification is not based upon a test or testing program meeting the requirements of section 263f(h) of this title or when the issue, in the exercise of due care, would have reason to know that such certification is false or misleading in a material respect." Hodges X-Ray, Inc., 759 F.2d at 560.

[7] Furthermore, CPSC statutes and regulations "…were enacted to protect the public's health and safety. Statues and regulations protecting the public health and safety are to be construed liberally." United States v. Shelton Wholesale, Inc. 34 F.Supp.2d 1147, 1155 (W.D. Mo. 1999) (explaining the court should give deference to "CPSC's chosen methods and procedures.").

Thus, the issue presently before the undersigned is whether, by virtue of his alleged actions and the nature of the statute, Mr. Zucker may be held individually responsible for the alleged CPSA transgressions. The statutory language does not answer this question; instead, the undersigned must examine the applicable case law.

iii. Dotterweich and Park

In Dotterweich, the president and general manager of a pharmaceutical company was charged with violating the Federal Food, Drug, and Cosmetic Act. Dotterweich, 320 U.S. at 278. In determining whether he could be held individually accountable for company transgressions, including the misbranding and adulteration of drugs, the Court opined the statute at issue was "...an exertion by Congress of its power to keep impure and adulterated foods and drugs out of the channels of commerce," noting the subject legislation touched "phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." Id. at 280. The Court explained:

> [b]alancing relative hardships, Congress has preferred to place [responsibility] upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless. Id. at 285.

With regards to the question of who precisely should share the liability, the Court explained:

> [i]t would be too treacherous to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation. To attempt a formula embracing the variety of conduct whereby persons may responsibly contribute in furthering a transaction forbidden by an Act of Congress, to wit, to send illicit goods across state lines, would be mischievous futility. In such matters

> the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted...[f]or present purpose it suffices to say that in what the defense characterized as 'a very fair charge' the District Court properly left the question of the responsibility of Dotterweich for the shipment to the jury, and there was sufficient evidence to support its verdict. Id. at 285.

While, to a certain degree, Dotterweich left the determination of responsibility to prosecutorial and judicial discretion, the decision made clear this discretion was not unfettered. The Court specifically explained that corporate officer liability is limited to officers with "a responsible share in the furtherance of the transaction which the statute outlaws." Id. at 284.

Notably, in Dotterweich, the statute at issue prescribed that "any person" who violated a particular provision would be guilty of a misdemeanor. Id. at 287. The statute defined person to include "an individual, partnership, corporation and association," but made no specific reference to any of the corporate officers, and the Court specifically noted there was "...no evidence...of any personal guilt on the part of the respondent." Id. at 285-87.

Approximately thirty years later, the Supreme Court revisited the responsible corporate officer doctrine in Park. In Park, the president of Acme Markets, Inc., a large national food chain, was similarly charged with violations of the Federal Food, Drug, and Cosmetic Act. Park 421 U.S. at 660-61. The Court specifically noted that the issue before it was "whether 'the manager of a corporation, as well as the corporation itself, may be prosecuted under the Federal Food, Drug, and Cosmetic Act of 1938 for the introduction of misbranded and adulterated articles into interstate commerce." Id. at 667.

In finding the president responsible for corporate transgressions, the Court quoted extensively from the Dotterweich decision. See Id. at 668-69. The Court explained Dotterweich, "looked to the purposes of the Act and noted that they 'touch phases of the lives and health of the people which, in the circumstances of modern industrialism, are largely beyond self-protection,'" reemphasizing that "'the only way...a corporation can act is through the individuals who act on its behalf.'" Id. at 668 (quoting Dotterweich, 320 U.S. at 280-81).

The Court noted Dotterweich found individual liability in the absence of consciousness of wrongdoing, ultimately concluding that the question of responsibility depends "'on the evidence produced at the trial...'". Id. at 669 (quoting Dotterweich, 320 U.S. at 280-81). Thus, Dotterweich and its progeny provide "...sanctions which reach and touch the individuals who execute the corporate mission." Id. at 672. While these requirements are undoubtedly demanding, "...they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them." Id.

As in Dotterweich, the Court specifically articulated that "...the charge [of the alleged violations] did not permit the jury to find guilt solely on the basis of respondent's position in the corporation; rather, it fairly advised the jury that to find guilt it must find respondent 'had a reasonable relation to the situation,' and 'by virtue of his position...had...authority and responsibility' to deal with the situation." Id. at 674. See also United States v. Ming Hong, 242 F.3d 528, 531 (4th Cir. 2001) ("[t]he gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof;

rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations...".).[8]

iv. Relevant Case Law

In cases subsequent to Dotterweich and Park, courts have continued to apply the responsible corporate officer doctrine to statutes involving public health, safety, and welfare. See United States v. Osborne, 2012 WL 4483823 (N.D. Ohio 2012) (denying a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) on the grounds that an individual defendant could be found civilly liable for violations of the Clean Water Act (CWA). In so finding, the court specifically noted the CWA was a "public welfare statute."). See also United States v. Gel Spice Co., 773 F.2d 427 (2d Cir. 1985) (upholding a company president's individual liability for violations of the Federal Food, Drug, and Cosmetic Act).[9]

In United States v. USX Corp., 68 F.3d 811 (3d Cir. 1995), a case relied upon by Mr. Zucker, the Third Circuit determined the standard of liability for principal shareholders and officers of a closely held company under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Id. at 820-21. Although Congress did not directly address the issue in the statute itself, the court

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[8] Dottereich and Park dealt with criminal liability; however, the responsible corporate officer doctrine extends to civil liability. City of Newburgh v. Sarna, 690 F.Supp.2d 136, 160-61 (S.D.N.Y. 2010) ("[t]he fact that a corporate officer could be subjected to criminal punishment upon a showing of a responsible relationship to the acts of a corporation that violate health and safety statutes renders civil liability appropriate as well.") (citing United States v. Hodges X-Ray, Inc., 759 F.2d 557, 561 (6th Cir. 1985) (emphasis in original)).

[9] Additionally, in Hodges X-Ray, discussed supra, the Sixth Circuit determined the RCHSA constituted a public welfare statute. Hodges X-Ray, 759 F.2d at 559. In simplified terms, the RCHSA helped control the general public's exposure to radiation. Id. at 562.

reasoned that, as written, the statute "...does not immunize officers and directors who personally participate in liability-creating conflict." Id. at 824.

The court explained, for liability against an individual "...there must be a showing that the person sought to be held liable actually participated in the liability-creating conduct." Id. at 825. Thus, the court concluded liability could be imposed in situations where "...the officer is aware of the acceptance of materials for transport and of his company's substantial participation in the selection of the disposal facility."[10] Id. at 825.

Thus, USX Corp., cited by Mr. Zucker, seemingly supports the Commission's argument. Here, CPSC has alleged Mr. Zucker was responsible for ensuring Maxfield's compliance with applicable statutes and regulations. CPSC has further alleged Mr. Zucker personally controlled the acts and practices of Maxfield, including the importation of Buckyballs and Buckycubes. The Commission did not allege that by virtue of his corporate position Mr. Zucker was automatically liable; on the contrary, CPSC specifically alleged that he assumed responsibility. See Dotterweich, 320 U.S. at 674.

Notably, some of the cases cited by Mr. Zucker do not relate to public health or safety. For instance, Mr. Zucker relies heavily on Meyer v. Holly, 537 U.S. 280 (2003) for the proposition that liability for regulatory violations may be imposed against individuals "only where Congress has specified that such was its intent." Meyer, 537 U.S. at 287.

However, Meyer dealt with discrimination under the Fair Housing Act, a statute unrelated to public health, safety, or welfare. Id. at 282. Additionally, the Court's

[10] Thus, USX Corp. is consistent with Park, wherein the Court explained a corporate officer is not automatically liable by virtue of his corporate position. Park, 421 U.S. at 674.

discussion and reasoning hinged on the principle of vicarious liability, not the responsible corporate officer doctrine. See Id. at 283. Last, Mr. Zucker references no subsequent cases reflective of his interpretation of Meyer.

The CPSA, like the statute at issue in Dotterweich and Park, relates to the public's health and safety. United States v. Shelton Wholesale, Inc., 34 F.Supp.2d 1147, 1155 (W.D. Mo.1999) ("...the statues and regulations interpreted by the CPSC were enacted to protect the public's health and safety"). 15 U.S.C. § 2051(b)(1) (explaining one purpose of the CPSA is "to protect the public against unreasonable risks of injury associated with consumer products"). Accordingly, the rationale in Dotterweich and Park is both legally relevant and persuasive.

v. "Extraordinary Exceptions"

In his various filings, Mr. Zucker suggests that Dotterweich and Park are "extraordinary exceptions" to bedrock corporate law principles. However, a review of relevant case law suggests the responsible corporate officer doctrine has been applied throughout the federal circuits, especially in the context of public health, safety, and welfare statutes. See United States v. USX Corp., 68 F.3d 811 (3d Cir. 1995) (the Comprehensive Environmental Response, Compensation and Liability Act); United States v. Ming Hong, 242 F.3d 528 (4th Cir. 2001) (the Clean Water Act); United States v. Jorgensen, 144 F.3d 550 (8th Cir. 1998) (the Federal Meat Inspection Act); United States v. Iverson, 162 F.3d 1015 (9th Cir. 1998) (the Clean Water Act); United States v. Cattle King Packing Co. Inc., 793 F.2d 232 (10th Cir. 1986) (the Federal Meat Inspection Act); United States v. Hodges X-Ray, Inc., 759 F.2d 557 (6th Cir. 1985) (the Radiation

Control for Health and Safety Act of 1968); United States v. Poulin, 926 F.Supp. 246 (D. Mass. 1996) (the Comprehensive Drug Abuse Prevention and Control Act of 1970).

At times, the doctrine transcends what would typically be categorized as health, safety, or welfare statutes. For example, in United States v. Rachal, 473 F.2d 1338 (5th Cir. 1973), the Fifth Circuit found corporate officers individually liable for violations of the Securities Act of 1933. Id. at 1340. In Rachal, the defendants argued they should not be individually liable for securities violations, suggesting that "person" as used in the Act referred to a corporate body and not a natural person. Id. at 1341.

In rejecting defendants' contentions, the Fifth Circuit noted a similar argument had been presented and dismissed in Dotterweich. Id. at 1341. The court opined that reading the statute as suggested by defendants would construe the Securities Act with a narrow and illusory scope. Id. at 1341-42. Accordingly, the court upheld defendants' convictions for securities fraud, mail fraud, and the sale of unregistered securities pursuant to the responsible corporate officer doctrine. Id. at 1340.

The doctrine has been similarly applied to other federal statutes outside the realm of public safety. See United States v. Gulf Oil Corp., 408 F.Supp. 450 (W.D.Pa. 1975) (denying the motion of corporate president to dismiss indictments against him individually for failure of a company to pay competitors entitlements under the Federal Energy Administration program); United States v. Freed, 189 Fed. Appx. 888 (11th Cir. 2006) (upholding an individual's conviction for misdemeanor offenses in violation of Forest Service regulations).[11]

[11] Although by no means controlling for purposes of the instant proceeding, in 1991, the Iowa Supreme Court upheld shareholder liability for consumer fraud under Iowa's consumer fraud statute. State ex. rel. Miller v. Santa Rosa Sales and Mktg., Inc., 475 N.W. 2d 210 (Iowa 1991). In dismissing the shareholder's claim that the trial court should have applied the more stringent "piercing the corporate veil" analysis, the

vi. Sufficiency of the Complaint

The undersigned has not yet determined whether some, or any, sanction is warranted in the matter. At this stage in the proceeding, the undersigned need only determine whether, based on the allegations as set forth in the Complaint, Mr. Zucker is a proper respondent.

The Complaint states its basis in "Section 15 of the Consumer Product Safety Act ("CPSC"), as amended, 15 U.S.C. § 2064", a public health statute. United States v. Shelton Wholesale, Inc., 34 F.Supp.2d 1147, 1155 (W.D. Mo 1999). Additionally, the Complaint alleges, inter alia, that Mr. Zucker "is responsible for ensuring Maxfield's compliance with the CPSA…". Thus, the undersigned finds the allegations sufficient such that Mr. Zucker is a proper party to the proceeding. See United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 52-53 (1st Cir. 1991) (mere allegations that a defendant is a responsible corporate officer is insufficient to satisfy the knowledge requirement under the Resource Conservation and Recovery Act).

If, at the conclusion of the Commission's case, Mr. Zucker feels as though CPSC has failed to demonstrate that his responsibility or actions were significant enough to render him liable under the CPSA, nothing precludes Mr. Zucker from presenting a legal argument regarding the same at that juncture. However, based on the controlling legal precedent discussed above, and the allegations set forth in the Amended Complaint, the undersigned finds Mr. Zucker may properly be included as a respondent in the instant proceeding.

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court reasoned the shareholder's liability "…arose from [the shareholder's] complete control…and his over personal acts in perpetrating consumer fraud." Id. at 220 (citing United States v. Cattle King Packing Co., 793 F.2d 232, 240 (10th Cir. 1986)).

The undersigned is not unaware, and would be remiss not to note, that at the start of the instant litigation there existed a responsible corporation in Maxfield. However, for reasons unknown, the corporation apparently opted to dissolve after the CPSC filed its Complaint. Thus, this is not a case of individual and corporate liability, but rather a case of individual liability in the face of a voluntary corporate dissolution after said corporation has been charged with introducing hazardous products into the stream of commerce.[12]

2. The Amended Complaint in 12-2

CPSC also sought to amend the Complaint against Respondent Zen Magnets, LLC (Docket Number 12-2) to include a new line of magnets sold under the brand name Neoballs. The Commission suggested Neoballs are substantively identical to the high-powered, small rare earth magnets referenced in the October 15, 2012 Amended Complaint. CPSC argued that while Zen Magnets, LLC purports to sell Neoballs individually, Respondent "overtly encourages [customers] to purchase the balls in aggregate."

Pursuant to 16 C.F.R. § 1025.13, the undersigned may allow amendments which do not unduly broaden the issues in the proceeding, or cause undue delay. Zen Magnets, LLC did not respond to CPSC's Motion to Leave to File Second Amended Complaint.

[12] See Bufco Corp. v. NLRB, 147 F.3d 964, 969 (C.A.D.C. 1998) (explaining the federal common law test for piercing the corporate veil is (1) whether the shareholder and the corporation have maintained separate identities and (2) whether adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations). Here, the undersigned is not unmindful the CPSC has indirectly alleged the latter prong; namely, that Maxfield's voluntary dissolution allows it to evade potential remedial action. Notably, "[t]he responsible corporate officer doctrine is distinct from piercing the corporate veil, and explicitly expands liability beyond veil piercing." Comm'r, Dept. of Envtl. Mgmt. v. RLG, Inc., 755 N.E.2d 556, 563 (Ind. 2001) (citing United States v. Dotterweich, 320 U.S. 277, 282 (1943)). See also Kelley v. Thomas Solvent Co., 727 F.Supp. 1532, 1544 (W.D. Mich. 1989).

Finding that the Second Amended Complaint for Docket Number 12-2 does not unduly broaden the issues and will not cause undue delay, and in the absence of any objection by Zen Magnets, LLC, the undersigned hereby grants CPSC's Motion as to the Second Amended Complaint for Docket Number 12-2. See 16 C.F.R. § 1025.13

WHEREFORE,

IT IS HEREBY ORDERED THAT Complaint Counsel's Motion for Leave to File Second Amended Complaints in Docket Nos. 12-1 and 12-2 is **GRANTED.** Respondents shall file Answers to the Amended Complaints within twenty (20) days in accordance with 16 C.F.R. § 1025.12. Thereafter, the undersigned will schedule a pre-hearing conference call so that the matter may proceed.

SO ORDERED.

Done and dated this 3rd day of May, 2013, at
Galveston, TX

DEAN C. METRY
Administrative Law Judge