

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of)
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)

MAXFIELD AND OBERTON HOLDINGS, LLC)

ZEN MAGNETS, LLC)

STAR NETWORKS USA, LLC)

Respondents.)
_____)

CPSC DOCKET 12-1

CPSC DOCKET 12-2

CPSC DOCKET 13-2

(Consolidated)

**NON-PARTY PARTICIPANT CRAIG ZUCKER'S MOTION
FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO COMPLAINT COUNSEL'S
MOTION FOR LEAVE TO AMEND COMPLAINT IN CPSC DOCKET 12-1**

Non-party participant Craig Zucker respectfully requests leave to file a brief surreply in opposition to Complaint Counsel's Motion for Leave to Amend the Complaint in Docket No. 12-

1. On March 1, 2013, Complaint Counsel moved for leave to file a reply brief in support of the Motion to Amend. This Court granted leave to file a reply on March 4, 2013, and Complaint Counsel filed the reply on March 15.

Complaint Counsel's reply cites to, and includes as exhibits, two new documents. One is the decision and order of Commissioner Constance B. Newman in *In re White Consolidated Industries, Inc.*, CPSC No. 75-1. Although Complaint Counsel's original motion to amend and memorandum in support did not cite the decision in *White*, the reply brief argues that *White* shows that "[t]he responsible corporate officer doctrine has in fact been applied to adjudicative proceedings under [CPSA] Section 15." Reply 9. In addition, Complaint Counsel's reply discusses a letter from Joseph F. Williams, a CPSC Compliance Officer, that was not discussed in Complaint Counsel's motion or original memorandum in support. Mr. Zucker has not

previously had an opportunity to address either the thirty-seven-year-old, unpublished decision in *White* or Complaint Counsel's allegations relating to the Williams letter. Accordingly, he respectfully moves for leave to file the attached surreply, which addresses those topics.

Mr. Zucker acknowledges that the rules governing this proceeding do not expressly provide for surreplies. As Complaint Counsel has recognized, however, this Court has "broad discretion ... to alter time limitations and other procedural aspects of a case, as required by the complexity of the particular matter involved." 16 C.F.R. § 1025.1. That discretion parallels the discretion possessed by federal district courts to control their own dockets. *See, e.g., Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *Menge v. AT&T, Inc.*, No. 11-cv-728, 2013 WL 537352, at *1 (D. Colo. Feb. 13, 2013). And as Complaint Counsel has further recognized, the federal courts permit surreplies "where a reply raises new arguments" (Reply 2) or relies on "'exhibits not previously submitted or discussed'" (*id.* at 2-3 (quoting *Almy v. Kickert Sch. Bus Line*, No. 08-cv-2902, 2013 WL 80367, at *15 (N.D. Ill. Jan. 7, 2013))). In fact, as illustrated by a case cited in Complaint Counsel's motion for leave to file the reply, a federal court that "relies on new materials or new arguments in a reply ... may not deny [a] motion to file a surreply." *Menge*, 2013 WL 537352, at *1 (citing *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1191-92 (10th Cir. 2006)).

Here, Complaint Counsel's reply rests in part on a previously undisclosed, unreported decision and order as well as a previously undiscussed letter, both of which were attached as exhibits to the reply. This Court thus has discretion to permit the filing of a surreply addressing these documents, and it should exercise that discretion to allow Mr. Zucker to respond to Complaint Counsel's discussion of *White* and of the Williams letter.

For these reasons, Mr. Zucker requests leave to file the attached surreply in opposition to Complaint Counsel's motion to amend the complaint in Docket No. 12-1. The undersigned counsel have contacted Complaint Counsel, who indicated that she does not object to this motion.

Respectfully submitted,

Dated: March 20, 2013

BY:

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