UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	
MAXFIELD AND OBERTON HOLDINGS, LLC	CPSC DOCKET 12-1
ZEN MAGNETS, LLC	CPSC DOCKET 12-2
STAR NETWORKS USA, LLC	CPSC DOCKET 13-2
	(Consolidated)
Respondents.	

SURREPLY IN OPPOSITION TO MOTION FOR LEAVE TO AMEND COMPLAINT IN CPSC DOCKET 12-1

On February 11, 2013, Complaint Counsel filed a motion for leave to amend the complaint in Consumer Product Safety Commission ("CPSC" or "Commission") Docket 12-1 to add Craig Zucker, both in his capacity as CEO of the now-dissolved Maxfield & Oberton Holdings, LLC and as an individual. Non-party participant Craig Zucker filed an opposition on February 28, 2013, and Complaint Counsel filed a reply on March 15 with the leave of this Court.[1]

Complaint Counsel's reply attempts in vain to oppose Mr. Zucker's showing that Complaint Counsel has no legal basis to complicate these proceedings by adding Mr. Zucker as a respondent. In this brief, we will not further discuss the authorities compelling that conclusion, which were presented in our earlier brief—and which Complaint Counsel has failed to refute.

In the reply, Complaint Counsel relies for the first time on the unpublished decision and order in *In re White Consolidated Industries, Inc.*, CPSC Docket No. 75-1 (attached as Exhibit A

[1] Complaint Counsel's motion also seeks to amend the complaint in CPSC Docket 12-2. Mr. Zucker takes no position with respect to that portion of Complaint Counsel's motion.

to Complaint Counsel's reply). Specifically, Complaint Counsel argues that the decision in *White* demonstrates that "the responsible corporate officer doctrine" enunciated in *United States v. Dotterweich*, 320 U.S. 277 (1943), and *United States v. Park*, 421 U.S. 658 (1975), has been "applied to adjudicative proceedings under Section 15" of the Consumer Product Safety Act. Reply 9; *see also id.* at 10, 13. Complaint Counsel also invokes for the first time the July 10, 2012 preliminary determination letter from CPSC staff, Mr. Joseph Williams, in support of the argument that this case also involved the adjudication of "what was required for [CPSA] compliance." Reply 13 n.12. For five reasons, however, neither *White* nor the Williams letter provides a basis for granting Complaint Counsel's motion to amend.

First, Complaint Counsel seeks to add Mr. Zucker as a respondent for purposes that go far beyond the reasons *White* gave for including individual respondents. The corporate officers in *White* would simply have been responsible for "formulating and directing" the recall program on behalf of the corporation and for "notify[ing] the Commission" in the event that they left their employment with the respondent corporations. White decision 25 n.44 & 27. In short, the officers were included in order to facilitate any recall order that might issue against the ***corporation***, not to find a ***surrogate for*** the corporation. Here, by contrast, Complaint Counsel candidly admits that she seeks to force Mr. Zucker individually to conduct and pay for the recall. *See* Reply 4. *White* does not support such a drastic expansion of the *Park* doctrine.[2]

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[2] Neither does any other authority. In particular, although *In re Relco, Inc.*, CPSC Docket No.74-4, held the estate of a corporate official liable for the costs of recall proceedings, it did not do so on the basis of *Park*. Rather, the Commission concluded that the corporate veil should be pierced. *See* Reply Ex. B, Decision & Order 12 (finding that there was "a sufficient intertwinement between the personal finances of [the officer] and those of the corporation"). Complaint Counsel has not even attempted to rely on a veil-piercing or alter ego theory in this proceeding. *See* Reply at 15.

In any event, the analysis in *White* suggests that Mr. Zucker may ***not*** be added as a respondent in this proceeding. At the time *White* was decided, the individual respondents in *White* remained officers of the two active corporations that were also named as respondents in the case. *See White* decision 35. That fact was critical to the Presiding Officer's decision: *White* allowed officers to be added as respondents in their individual capacity apparently solely to ensure that the "terms of the Order ... would bind [them] in the future should [they] leave [their] present corporate employment." *White* decision 35.[3] *White* similarly contemplated the inclusion of corporate officers in their capacity as officers only insofar as the officers' current roles would make them responsible for implementing any recall imposed against the corporation. *See id.* at 34-35. By contrast, *White* concluded that an individual who was ***not currently*** an officer of a particular corporate respondent could ***not*** be included as a respondent in his corporate capacity on the basis of his prior role. *See id.* at 22.

White thus implies that, once an official leaves a corporation, the official may not be forced to participate as a respondent in ***any*** capacity. And Mr. Zucker is no longer an executive of Maxfield & Oberton Holdings, LLC, the corporate respondent. In fact, Mr. Zucker could not possibly have any current, ongoing role with the company, because Maxfield & Oberton has dissolved.[4] *See* Opp'n to Mot. to Amend, Ex. A. As a result, and contrary to Complaint

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[3] As noted above, the only post-employment responsibility imposed on the individuals was the obligation to notify the CPSC if they were to leave current positions. The decision in *White* does not explain why this obligation was imposed, but it is fair to speculate that the CPSC wanted to ensure that the Commission was informed about any later-arising need to identify the new executives in the corporation who would be responsible for implementing any recall obligation imposed on the corporation.

[4] Complaint Counsel asserts that Maxfield & Oberton "appears to be picking and choosing when it exists for purposes of defending itself." Reply 4. That is not true. Maxfield & Oberton no longer exists at all, and by definition, the company can no longer "pick[] or choose" anything. In particular, the California litigation discussed in the Reply is being handled by an insurance

Counsel's assertions, *White* indicates that Mr. Zucker may ***not*** be added as a respondent in this matter.

Second, the individual corporate officers in *White* were never actually made responsible for taking any action. The decision in *White* concluded that "[t]here [was] not sufficient evidence ... to support a finding that the product defect [at issue] present[ed] a substantial risk of injury to the public." *White* decision 91. As a result, "[n]o action on the part of any of the Respondents"—either corporate or individual—"[was] required." *White* order ¶ 13. Any decision to force Mr. Zucker to bear individual responsibility for overseeing and conducting a recall would thus be entirely unprecedented.

Third, the initial decision in *White* rests largely on *Park* and *Dotterweich* themselves. But as Mr. Zucker has previously demonstrated, statutory provisions of the Consumer Product Safety Act ("CPSA") not addressed in *White* demonstrate that Congress did not intend for individual officers to be legally responsible for carrying out recall orders issued against the corporation that manufactured or imported the subject products. *Park* and *Dotterweich* therefore cannot be properly extended to make current, let alone former, corporate officers legally responsible for personally carrying out recalls initiated under Section 15, as the numerous post-*White* court rulings discussed in Mr. Zucker's opposition, including *Meyer v. Holley*, 537 U.S. 280 (2003), illustrate.

Fourth, in light of the ultimate conclusion that the products at issue did not present a substantial product hazard, the Presiding Officer's decision in *White* to include individual corporate executives as respondents cannot be viewed as precedent supporting Complaint Counsel's position here. Any reasoning that is "unnecessary to [a] Court's holdings" necessarily

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company, not the defunct Maxfield & Oberton. Neither the defunct Maxfield & Oberton nor Mr. Zucker have any control over the insurance company's litigation strategy.

constitutes non-binding, gratuitous *dicta*. *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 592 n.5 (1993). The discussion in *White* concerning the propriety of including corporate officers as respondents was unquestionably unnecessary to the ultimate holding that no recall was warranted. In fact, because none of the respondents was required to take any action, the Presiding Officer had no need to discuss the propriety of including ***any*** particular respondent in the case.[5]

Fifth, even if *White* supported the extension of the *Park* doctrine to this matter—and it does not—Complaint Counsel would nevertheless be unable to satisfy the standards for a motion to amend. Contrary to Complaint Counsel's assertion, adding Mr. Zucker to this case would significantly "broaden the issues before this Court." Reply 3 (internal quotation marks omitted). Complaint Counsel concedes that, as things stand, the only "issue before the Court" is "whether certain products constitute a substantial product hazard." Reply 2. If Mr. Zucker is added as a respondent, however, this Court would also have to decide two additional issues—one related to Mr. Zucker's role and conduct when he was an officer of M&O, and another related to whether there has been any violation of the law related to the importation and distribution of the subject products—neither of which is necessary for the adjudication of whether the subject products contain a "substantial product hazard," but both of which would be fact-intensive and vigorously disputed by Mr. Zucker.

As to Mr. Zucker's role and conduct, the *Park* doctrine extends only to those who have "authority with respect to the conditions that formed the basis of the alleged violations." *Park*,

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[5] It bears noting that the unpublished analysis in *White* was never reviewed by any judicial officer. Because respondents prevailed on the merits, the administrative decision was never appealed to an Article III court. Furthermore, the decision itself was not written by an Administrative Law Judge; rather, "the Commission formally designated" one of its own Commissioners "as Presiding Officer" in *White*. *White* decision 3.

421 U.S. at 674; *see also White* decision at 32. Complaint Counsel alleges that Mr. Zucker fulfills this role and took various actions relevant to this case—but if Mr. Zucker is added as a respondent, Complaint Counsel will need to ***prove*** those allegations. *See Park*, 421 U.S. at 673. Because, despite Complaint Counsel's *ipse dixit*, "Mr. Zucker's actions and conduct as CEO of M&O" are ***not*** "integral to" whether the "Subject Products present a substantial product hazard" (Reply 2), and are otherwise irrelevant in this Section 15 proceeding, adding Mr. Zucker as a respondent would effectively double the number of issues in the case, and add factual disputes that are unnecessary to resolve in order to decide the central issue in the case, which "remains the same regardless of Mr. Zucker's status." *Id.*

This new issue will also "cause undue delay" in the proceeding. 16 C.F.R. § 1025.13. Determining the factual issues raised by *Park* would, of course, consume judicial time, as well as the time of the parties. Litigating this issue has apparently already resulted in the postponement of a prehearing conference in this case. As a result, even if *White* could have supported the inclusion of Mr. Zucker as a respondent in the initial complaint, it would not provide a sufficient ground for granting Complaint Counsel's motion to amend.

Furthermore, Complaint Counsel's reply also discloses for the first time that she intends to litigate yet another new and irrelevant issue if Mr. Zucker is made a respondent in this proceeding. The reply cites, and attaches as an exhibit, a letter from Joseph F. Williams, a CPSC Compliance Officer. *See* Reply 13 n.12. Complaint Counsel alleges that letter provided "a preliminary determination that the Subject Products constitute substantial product hazards" and "unambiguous notice of what was required for compliance." *Id.* As a result, Compliant Counsel now alleges that Mr. Zucker "was personally involved and directly responsible for ... failing to comply with the CPSA." Reply 11; *see also* Reply 12.

That allegation is untrue: There cannot possibly have been a violation of the CPSA concerning Buckyballs® or Buckycubes®, because the Commission has not issued ***any*** order pertaining to those products. In fact, the Commission's General Counsel confirmed shortly before instituting this proceeding that the products at issue could be legally sold until and unless this Court determines that the products constitute a substantial product hazard. *See* Opp'n, Ex. D. Moreover, it is settled law that the staff's preliminary determination of a substantial product hazard is not the action of the Commission, nor is it a final action creating any duties on manufacturers. Thus, the letter from the Compliance Officer to Mr. Zucker's counsel (Reply 13 n.12) could not have provided any notice of a ***violation***. As stated in *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 729 (D.C. Cir. 2003), "[t]he Act makes it clear that the Commission has no authority to coercively regulate products before first conducting a formal, on-the-record adjudication. It is undisputed here that the Commission has yet to issue a complaint; it has yet to authorize or conduct a hearing; it has yet to determine conclusively its jurisdiction to regulate; it has yet to determine whether the sprinkler heads present a 'substantial product hazard'; and it has yet to issue any compliance orders against Reliable. CPSC has merely conducted an investigation and issued a letter requesting voluntary compliance. This does not constitute final agency action and is therefore unreviewable." So there is absolutely no legal foundation for Complaint Counsel's assertion of an alleged failure to comply with the CPSA.

In addition to being untrue, Complaint Counsel's allegation that the CPSA has been violated raises complicated issues of law and fact that are not even colorably relevant to this proceeding. The only issue here is the one Complaint Counsel seeks to prejudge by citing the Williams letter—namely, whether the products present a substantial product hazard. Because

Complaint Counsel's new allegations have nothing to do with that question, they would greatly expand the issues in this case. Moreover, any attempt by Complaint Counsel to prove those allegations would unduly delay the resolution of whether the products at issue present a substantial product hazard by requiring both extensive discovery and the determination of irrelevant and strongly disputed questions of fact and law.

For the above reasons and the reasons stated in his original Opposition, Mr. Zucker respectfully moves this Court to deny the motion of Complaint Counsel to add him as a party to this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2013, a true and correct copy of the foregoing Surreply in Opposition to Motion For Leave to Amend Complaint in CPSC Docket 12-1 was served first class, postage prepaid, U.S. Mail on the Secretary of the U.S. Consumer Product Safety Commission, the Presiding Officer, and all parties and participants of record in these proceedings in the following manner:

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

One copy by U.S. mail and one copy by electronic mail to the Presiding Officer for *In the Matter 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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