

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
Respondents.)	(Consolidated)
_____)	

**MEMORANDUM IN SUPPORT OF MOTION FOR DETERMINATION THAT THE
ORDER ADDING CRAIG ZUCKER AS A RESPONDENT
CAN BE IMMEDIATELY APPEALED**

By Order dated May 3, 2013, the Presiding Officer granted Complaint Counsel's motion to amend the Complaint in Docket No. 12-1 to add Craig Zucker as a respondent. In so doing, the Presiding Officer examined Section 15 of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064, and ruled that an individual officer or director of a corporation that manufactured consumer products can be held individually liable and therefore personally responsible for carrying out a recall involving products sold by the corporation that manufactured or imported the subject products. In reaching this conclusion, the Presiding Officer recognized that the matter before him 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.

The 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. As the submissions filed in connection with Complaint Counsel's motion abundantly demonstrate, and as the Presiding Officer's decision confirms, the issue also is one concerning which there are "substantial ground[s] for differences of opinion." 16 C.F.R. § 1025.24(b)(4)(i). Furthermore, an interlocutory appeal resolving these issues in Mr. Zucker's favor would also "materially advance the ultimate termination of the litigation." *Id.* Thus, this motion should be granted.

ARGUMENT

I. THE RULING INVOLVES A "CONTROLLING QUESTION OF LAW OR POLICY"

The standard for interlocutory appeals set forth in Section 1025.24(b)(4)(i) is quite similar to the standard set forth in 28 U.S.C. § 1292(b), which provides for the certification of an interlocutory appeal when the district judge "shall be of the opinion that [an] 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. . . ." 28 U.S.C. § 1292(b). Accordingly, case law from the federal courts construing Section 1292(b) is relevant here.

In granting or sustaining grants of certification for interlocutory appeal under Section 1292(b), courts have focused on two general considerations in determining whether an order presents a "controlling question of law": (1) whether the matter raises a "pure" issue of law that does not require the appellate tribunal to resolve disputed issues of fact (*e.g.*, *Sanders v. Allison Engine Co.*, 703 F.3d 930, 936 (6th Cir. 2012) ("On interlocutory appeal, our review is limited to consider[ing] only pure questions of law") (internal quotation marks omitted; alteration in original)); and (2) whether a favorable interlocutory resolution of the issue would either require reversal of a final judgment based on appealed questions or seriously affect the way the court

conducts the litigation (*see, e.g., Brown v. Hain Celestial Grp., Inc.*, No. C 11-03082 LB, 2012 WL 4364588, at *2 (N.D. Cal. Sept. 24, 2012) (issues that could “materially affect the outcome of the litigation”); *Koby v. ARS Nat’l Servs., Inc.*, Civil No. 09cv0780 JAH (JMA), 2010 WL 5249834, at *4 (S.D. Cal. Dec. 23, 2010) (“materially affect the outcome of the litigation by possibly terminating all or portions of the litigation”); *Maertín v. Armstrong World Indus., Inc.*, No. Civ. 01-5321(JBS), 2006 WL 827881, at *6 (D.N.J. Mar. 29, 2006) (“reversal . . . will result in the application of a different jurisdiction’s substantive law”)).

Thus, “[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). *See Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991).” *Stout v. Illinois Farmers Ins. Co.*, 882 F. Supp. 776, 778 (S.D. Ind. 1994); *see also, e.g., Brown*, 2012 WL 4364588, at *2 (issues that could “materially affect the outcome of litigation” are controlling) (internal quotation marks omitted). Furthermore, as explained by the Second Circuit in *Klinghoffer v. Achille Lauro Lines*, 921 F.2d 21 (2d Cir. 1990), and confirmed in a number of the above cited cases, a legal question may be “controlling” even if its resolution would not “necessarily terminate an action.” *Klinghoffer*, 921 F.2d at 24.

Under these standards, the question whether Mr. Zucker may be a respondent in this proceeding, and hence whether this Court may exercise jurisdiction over him, is a controlling question of law. For one thing, the question whether Section 15 of the CPSA authorizes the Commission to issue an order under Section 15 against an individual officer or director of a corporation that manufactures consumer products is a “pure” threshold legal question, one that can—and should—be addressed prior to the resolution of disputed facts in the record. *Cf.*

Sanders, 703 F.3d at 936 (characterizing statutory interpretation as pure question of law subject to *de novo* review on interlocutory appeal).

In addition, if there is no interlocutory appeal and Mr. Zucker is found liable in this proceeding, and 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). And a successful appeal on the controlling legal question raised here would reduce the scope of the proceedings by eliminating issues relating to Mr. Zucker's personal liability.

Moreover, unlike Section 1292(b), the Commission's interlocutory appeal regulation also provides for interlocutory appeals when a ruling raises a "controlling question of . . . policy," whether or not there is a controlling question of law. 16 C.F.R. § 1025.24(b)(4)(i). The question whether individual officers or directors may be held liable under Section 15 for the conduct of corporate manufacturers, and hence may be held personally responsible for carrying out recall orders, implicates significant issues of CPSC policy. The Commission itself has never adopted a policy of holding individuals personally responsible for carrying out recall orders involving the corporation that manufactured or imported the subject products. A decision to permit such liability could have broad (and unpredictable) effects on CPSC enforcement policy and practices, and on the corporate governance procedures and policies of the entities the CPSC regulates.

These crucial unresolved policy issues were brought into clearer focus after briefing was completed on Complaint Counsel's Motion to add Mr. Zucker as a Respondent. On April 12, 2013, the Commission issued a press release announcing that the very products at issue in this litigation, namely Buckyballs® and Buckycubes® imported by imported by Maxfield & Oberton LLC, "contain defects in the design, warnings, and instructions," and that six large national

retailers agreed to conduct recall of these products. See Attachment A. Applicable law requires the CPSC to provide prior notice, and an opportunity to comment, to the manufacturer or importer of products identified by a proposed CPSC press release *before* the CPSC issues the release. See 15 U.S.C. § 2055(b); 16 C.F.R. Part 1101; and *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). The CPSC did *not* notify Mr. Zucker about this press release before issuing it, even though in this very proceeding, Complaint Counsel alleges that Mr. Zucker was the manufacturer/importer of those very same products. Indeed, virtually since its inception in 1973, the CPSC has routinely submitted proposed recall press releases to the relevant manufacturers and/or importers to allow them to object to, and comment upon, the disclosure of information contained in the proposed release. Treating Mr. Zucker as a manufacturer/importer for some purposes but not others raises both important policy and legal issues that need to be resolved by the CPSC Commissioners as soon as possible.

These policy matters should be resolved now. An interlocutory appeal would provide a vehicle for addressing those concerns immediately, and could prevent the later reversal of a final judgment if the CPSC determines that such individual liability is contrary to the Commission's policies.¹

II. THE CONTROLLING ISSUE OF LAW OR POLICY IS ONE ABOUT WHICH THERE IS "SUBSTANTIAL GROUND FOR DIFFERENCES OF OPINION"

The controlling legal question and/or policy at issue here is not merely a matter about which the CPSC Staff and Mr. Zucker happen to disagree. To the contrary, the legal and policy

¹ The grounds for seeking the Commission's immediate consideration of the policy question at issue in this case are particularly compelling because it appears that the Commissioners never voted to authorize the amendment to the Complaint that added Mr. Zucker as an individual. (There is no publicly available vote sheet as there was when the Commission authorized issuance of the original Complaint.) An interlocutory appeal would thus permit the Commissioners, for likely the first time, to consider the important policy questions implicated by the Order at issue here.

question at issue here raises novel legal issues of statutory construction, Congressional intent, and the applicability to Section 15 issues of cases arising under a variety of statutes other than the CPSA. *Cf. Brown v. Hain Celestial Grp., Inc.*, No. C 11-03082 LB, 2012 WL 4364588, at *2 (N.D. Cal. Sept. 24, 2012) (substantial ground for differences of opinion commonly found when “novel and difficult questions of first impression are presented”) (internal quotation marks omitted). Thus, the controlling legal or policy issues presented here concern matters about which there are “substantial ground[s] for differences of opinion.” 16 C.F.R. § 1025.24(b)(4)(i).

Specifically, the resolution of the question whether, under Section 15 of the CPSA, Mr. Zucker may be held individually liable and legally responsible for carrying out a recall order involving the corporation that manufactured or imported the subject products requires a thorough analysis of the structure of the CPSA, including how other provisions of the CPSA besides Section 15 demonstrate that Congress carefully chose not to require corporate officers to be individually liable with regard to product recalls.

In addition, it is important to compare the CPSA as a whole to other statutes that have been at issue in cases in which courts have considered whether *United States v. Dotterweich*, 320 U.S. 277 (1943), and *United States v. Park*, 421 U.S. 658 (1975), support the imposition of personal liability on individual officers or agents based on corporate actions. The Presiding Officer determined that these two cases support Complaint Counsel’s efforts to add Mr. Zucker personally as a respondent. It is crucial however that the Presiding Officer also concluded that the language of the CPSA does *not* answer the question of Mr. Zucker’s potential liability. The so-called Responsible Corporate Officer Doctrine that emanates from these two Supreme Court cases is not some free-flowing independent basis to hold a corporate officer liable. Instead, as the Supreme Court in *Dotterweich* recognized, the wording of the applicable statute governs the

question of whether the Responsible Corporate Officer Doctrine can be applied under that statute. *See Dotterweich*, 320 U.S. at 281-83. The statute at issue in those cases made “any person” violating the law subject to criminal sanctions. In contrast, Section 15 of the CPSA applies only to persons who act as manufacturers, distributors or retailers. That crucial distinction, among other things, provides a substantial ground for differences of opinion concerning whether *Park* and *Dotterweich* apply to Mr. Zucker.

Finally, this case requires consideration of the relationship between the principal cases relied upon by Complaint Counsel (and discussed in the Order) and basic principles of corporate law. These are all matters about which there are substantial grounds for differences of opinion. For these reasons, this factor also supports the certification of an immediate appeal.

III. AN “IMMEDIATE APPEAL OF THE RULING MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION”

An immediate appeal may “materially advance the ultimate termination of the litigation” even if a successful appeal would not completely dispose of the case. *See Brown v. Hain Celestial Grp., Inc.*, No. C 11-03082 LB, 2012 WL 4364588, at *3 (N.D. Cal. Sept. 24, 2012) (stating that the “weight of authority” supports certification “where a successful appeal would materially advance, though not completely dispose of, the litigation”). Thus, when a successful interlocutory appeal “would significantly par[e] down the issues for judicial determination,” an interlocutory appeal should be permitted. *Id.* at *5; *see also Koby v. ARS Nat’l Servs., Inc.*, Civ. No. 09cv0780 JAH (JMA), 2010 WL 5249834, at *4 (S.D. Cal. Dec. 23, 2010) (interlocutory appeal would “materially advance the litigation” because it “will likely simplify the issues to be tried and may determine the appropriateness of a class action or limit the class”). Both of these criteria are present here: an interlocutory appeal would eliminate the need to weigh the evidence

and to consider issues concerning whether Mr. Zucker's "responsibility or actions were significant enough to render him liable under the CPSA." Order at 17.

IV. ALLOWING AN IMMEDIATE APPEAL FROM THE RULING WILL NOT DELAY THE PROCEEDINGS NOR IS IT INCONSISTENT WITH THE PUBLIC INTEREST IN PROMPT RESOLUTION

Finally, allowing the interlocutory appeal will not delay the proceedings before this Court and is not inconsistent with the public interest in a rapid resolution of this matter. Mr. Zucker does not seek to delay the case about the products.

Nor is granting this motion inconsistent with the public interest in a prompt resolution of the case and the question of whether a recall of the products is warranted under the Consumer Product Safety Act since Mr. Zucker is not seeking a stay of the proceeding. Furthermore, the CPSC continues to pursue voluntary corrective action as reflected in its announcement that several retailers have agreed to recall and repurchase the subject magnets from consumers. *See* Attachment A.

CONCLUSION

The Order permitting the amendment of the Complaint in Docket Number 12-1 raises issues of first impression about whether an individual former officer or director of a corporate manufacturer may be held personally and individually liable under Section 15 of the CPSA and be personally responsible for carrying out a recall order involving the corporation that manufactured or imported the subject products. As such, the "ruling involves a controlling question of law or policy as to which there is substantial ground for differences of opinion." 16 C.F.R. § 1025.24(b)(4)(i). As also demonstrated above, "an immediate appeal from the ruling may materially advance the ultimate termination of the litigation . . ." *Id.*

For these reasons, Craig Zucker respectfully moves this Court for a determination that the question whether individual officers may be held individually liable under CPSA Section 15 and

hence legally responsible for carrying out a recall order involving the corporation that manufactured or imported the subject products is 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.

Respectfully submitted,

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ATTACHMENT A



Recalls

Six Retailers Announce Recall of Buckyballs and Buckycubes High-Powered Magnet Sets Due to Ingestion Hazard

Recall date: April 12, 2013

Recall number: 13-168

Recall Summary

Name of product:

Buckyballs and Buckycubes high-powered magnet sets

Hazard:

These products contain defects in the design, warnings and instructions, which pose a substantial risk of injury and death to children and teenagers.

Consumer Contact:

Barnes & Noble, toll-free at (855) 592-2993 , www.barnesandnoble.com

Bed Bath & Beyond, toll-free at (800) 462-3966, www.bedbathandbeyond.com

Brookstone, toll-free at (866) 576-7337 or online at www.brookstone.com

Participating Hallmark retailers, toll-free at (800) 425-5627 or online at www.hallmark.com/recall-product/

Marbles the Brain Store, toll-free at (877) 527-2460 or online at www.marblesthebrainstore.com

ThinkGeek, toll-free at (888) 433-5788 or online at www.thinkgeek.com/buckyballs/index.shtml

[Report an Incident Involving this Product](#)

Recall Details

Description

WASHINGTON, D.C.-- The U.S. Consumer Product Safety Commission (CPSC), in cooperation with six retailers, is announcing the voluntary recall of all Buckyballs and Buckycubes high-powered magnet sets sold by these companies. CPSC continues to warn that these products contain defects in the design, warnings and instructions, which pose a substantial risk of injury and death to children and teenagers.

Imported by Maxfield & Oberton LLC, of New York, N.Y., Buckyballs and Buckycubes consist of sets of numerous, small, high-powered magnets. These sets vary in the number of magnets included and come in a variety of colors. Individual magnets in the set are about 5 millimeters in diameter. Individual magnets in Buckyballs are spherical and individual magnets in Buckycubes are cube-shaped.

About three million sets of Buckyballs and Buckycubes have been sold in U.S. retail stores nationwide and online since 2010 for between \$5 and \$100.

Consumers should take the high-powered magnet sets and all associated individual magnets away from children and teenagers and contact the retailer from which they purchased the product to obtain instructions for their remedy:

- Barnes & Noble, toll-free at (855) 592-2993 or online at www.barnesandnoble.com and click on "Product Recalls"
- Bed Bath & Beyond, toll-free at (800) 462-3966 or online at www.bedbathandbeyond.com and select "Safety and Recalls" under Customer Service, then click on Recall Information
- Brookstone, toll-free at (866) 576-7337 or online at www.brookstone.com and click on "Recall Information" under Shop Brookstone
- Participating Hallmark retailers, toll-free at (800) 425-5627 or online at <http://www.hallmark.com/recall-product/>

- Marbles the Brain Store, toll-free at (877) 527-2460 or online at www.marblesthebrainstore.com
- ThinkGeek, toll-free at (888) 433-5788 or online at www.thinkgeek.com/buckyballs/index.shtml

These retailers have agreed to participate because Maxfield & Oberton has refused to participate in the recall of all Buckyballs and Buckycubes.

In July 2012, CPSC staff filed an administrative complaint against Maxfield & Oberton Holdings LLC, of New York, N.Y., after discussions with the company and its representatives failed to result in a voluntary recall plan that CPSC staff considered to be adequate to address the very serious hazard posed by these products. This type of legal action against a company is rare, as CPSC has filed only four administrative complaints in the past 11 years.

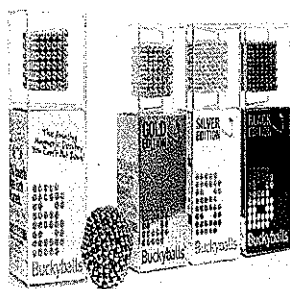
CPSC has received 54 reports of children and teens ingesting this product, with 53 of these requiring medical interventions.

The U.S. Consumer Product Safety Commission (CPSC) is still interested in receiving incident or injury reports that are either directly related to this product recall or involve a different hazard with the same product. Please tell us about your experience with the product on SaferProducts.gov

CPSC is charged with protecting the public from unreasonable risks of injury or death associated with the use of the thousands of consumer products under the agency's jurisdiction. Deaths, injuries and property damage from consumer product incidents cost the nation more than \$900 billion annually. CPSC is committed to protecting consumers and families from products that pose a fire, electrical, chemical or mechanical hazard. CPSC's work to ensure the safety of consumer products - such as toys, cribs, power tools, cigarette lighters and household chemicals - contributed to a decline in the rate of deaths and injuries associated with consumer products over the past 30 years.

To report a dangerous product or a product-related injury go online to www.SaferProducts.gov or call CPSC's Hotline at (800) 638-2772 or teletypewriter at (301) 595-7054 for the hearing impaired. Consumers can obtain news release and recall information at www.cpsc.gov, on Twitter @OnSafety or by subscribing to CPSC's free e-mail newsletters.

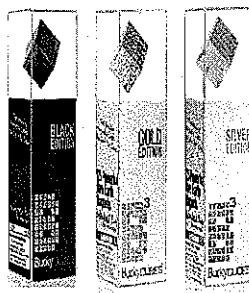
Recall Images



Buckyballs sets



Buckyballs sets



Buckycubes sets