

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	CPSC DOCKET 12-1
)	CPSC DOCKET 12-2
)	CPSC DOCKET 13-2
MAXFIELD AND OBERTON HOLDINGS, LLC)	(Consolidated)
ZEN MAGNETS, LLC)	
STAR NETWORKS USA, LLC)	Hon. Dean C. Metry
)	Administrative Law Judge
Respondents.)	
)	

**RESPONDENT CRAIG ZUCKER’S MEMORANDUM OF LAW IN REPLY TO
COMPLAINT COUNSEL’S OPPOSITION TO MOTION FOR PROTECTIVE ORDER**

Respondent Craig Zucker (“Mr. Zucker”) files this Memorandum of Law in reply to Complaint Counsel’s opposition to Mr. Zucker’s motion pursuant to 16 C.F.R. § 1025.31(d), seeking a protective order.

I. Introduction

This is an action under section 15(d) of the Consumer Product Safety Act, 15 U.S.C. § 2064(d), and Mr. Zucker has filed a motion pursuant to 16 C.F.R. § 1025.31(d), seeking a protective order to prohibit Complaint Counsel’s broad ranging inquiry through discovery into a number of topics not relevant to this proceeding.

Complaint Counsel opposes the motion, arguing that the discovery sought is relevant to the issue of the proposed remedy. In its argument, Complaint Counsel mis-interprets the applicable provision of the Consumer Product Safety Act and cites cases that only tangentially apply to this issue. Consequently, Mr. Zucker files this reply.

II. Argument

As described in more detail in Mr. Zucker’s motion, in this proceeding, Complaint Counsel seeks broad discovery into a number of areas that are not relevant to this proceeding:

financial information of Maxfield and Oberton Holdings, LLC (“M&O”), Mr. Zucker and its other officers and employees; insurance information; and the dissolution of M&O and formation of the MOH Liquidating Trust (the “Trust”). In opposing Mr. Zucker’s motion, Complaint Counsel argues that this discovery is relevant to ensure that any remedy provided to consumers is both “effective” and “appropriate,” citing 15 U.S.C. § 2064(d)(3)(B). Complaint Counsel also argues that the financial information is necessary to prove that Mr. Zucker is a responsible corporate official, and cites City of Newburgh v. Sarna, 690 F.Supp.2d 136 (S.D.N.Y. 2010) and United States v. Ming Hong, 242 F.3d 528 (4th Cir. 2001) in support. Finally, Complaint Counsel argues that Mr. Zucker’s alternative proposal to bifurcate this proceeding is burdensome, inefficient and a waste of judicial resources. Complaint Counsel’s arguments are unavailing, and Mr. Zucker’s motion should be granted.

It is true that one of the purposes of this proceeding is to fashion a remedy for consumers. See 15 U.S.C. § 2064(d)(1). What is not true is that the broad, intrusive and burdensome discovery sought by Complaint Counsel is relevant to fashioning that remedy. Section 15(d)(1) of the Consumer Product Safety Act provides that if there is a determination that a product is a substantial product hazard, the Commission may order the manufacturer to provide notice of the defect and to provide a plan to repair, replace or refund the purchase price of the product. 15 U.S.C. § 2064(d)(1). Nowhere in section 15(d)(1) is there any reference to the financial viability of a firm to accomplish the notice or remedy ordered by the Commission.

In support of the relevance of its proposed discovery, instead of referring to section 15(d)(1) of the Consumer Product Safety Act, which sets forth the purpose of this proceeding, Complaint Counsel instead artfully refers to section 15(d)(3)(B) of the Consumer Product Safety Act and argues that the “effective” and “appropriate” language contained there makes the

discovery relevant. 15 U.S.C. § 2064(d)(3)(B). Section 15(d)(3) is not applicable here. Section 15(d)(3)(B) applies only after a finding of substantial product hazard, the ordering of a remedy and the approval of a plan to implement the notice and remedy: “If the Commission finds that an approved action plan is not effective or appropriate under the circumstances . . . the Commission may, by order, amend, or require amendment of, the action plan.” 15 U.S.C. § 2064(d)(3)(B). By its terms, section 15(d)(3)(B) becomes applicable only after a plan is approved, and then becomes ineffective or inappropriate. Thus, the language cited by Complaint Counsel does not apply to this proceeding by the plain language of the Consumer Product Safety Act. The language cited by Complaint Counsel is not a broad mandate to conduct an inquiry in this proceeding—the purpose of which is to determine whether a plan is required, and if so, its components—into whatever might be “effective” or “appropriate” in a plan.

Nowhere does the Consumer Product Safety Act authorize the sweeping discovery into every financial aspect of a dissolved corporation. While Complaint Counsel terms the dissolution of M&O to be “purported,” it is a matter of public record, and there is no need or relevance to inquire into the financial records of a defunct entity. Nor is there any relevance to the dissolution of M&O and the formation of the Trust. It bears repeating that Complaint Counsel has specifically disavowed reliance on any theory of piercing the corporate veil, the only theory under which the discovery sought is even arguably relevant. Reply in Support of Complaint Counsel’s Motion for Leave to File Second Amended Complaints in Docket Nos. 12-1 and 12-2, at 15. Finally, the personal financial records of Mr. Zucker or any other individual are not relevant to the fashioning of a remedy under the provisions of the Consumer Product Safety Act.

Complaint Counsel cites two cases in support of its position that Mr. Zucker's and M&O's financial records are relevant to a determination whether Mr. Zucker is a responsible corporate official and liable to conduct a notice and remedy campaign ordered by the Commission. Neither is applicable to this case. City of Newburgh v. Sarna, 690 F.Supp.2d 136 (S.D.N.Y. 2010), involved an action under the Clean Water Act against a number of defendants, including an assertion that an individual was a responsible corporate official subject to personal liability under that act. The individual filed a motion to dismiss, which was denied. While the court held that discovery could continue on the individual's role in the corporate entities, the court did not address at all whether the financial records of the company and the individual were relevant to that inquiry. In United States v. Ming Hong, 242 F.3d 528 (4th Cir. 2001), the court was reviewing the appeal of a criminal conviction under the Clean Water Act in which the government proceeded under the responsible corporate official doctrine, and the defendant denied that he had any authority over the offending corporate entity. In that context, the court considered evidence of the individual's control of corporate operations, but again did not address at all whether the financial records of the company or individual were relevant to the proceeding, let alone condone the types of sweeping inquiries sought here.

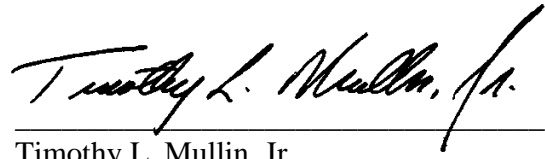
In this case, there is hardly any mystery as to Mr. Zucker's role at M&O. Mr. Zucker has already responded to written discovery on this topic, and has provided to Complaint Counsel a copy of the corporate operating agreement outlining the duties and responsibilities of Mr. Zucker. Neither case cited by Complaint Counsel stands for the proposition that broad, intrusive discovery into personal and corporate financial records is relevant in this case to whether Mr. Zucker is subject to liability under the responsible corporate official doctrine.

Complaint Counsel's argument that the records are subject to a protective order if they are produced does not provide much solace. Although protection of confidential financial records from the public view may be accomplished by the protective order, the protective order does not provide protection from the review of irrelevant information by Complaint Counsel and others who might be granted access. No person should have their personal financial records scrutinized by anyone, even if those looking are prohibited from further disclosure, unless they are relevant to an issue in the proceeding. Moreover, the protective order merely protects against further dissemination of those records. It does not protect against the significant burden imposed on the parties in locating, producing and reviewing them.

Finally, Complaint Counsel argues that Mr. Zucker's alternative proposal that in the event the Presiding Officer finds that the relevance of these documents may become apparent at a later point, that discovery into these areas be bifurcated until such time as there is a finding of a substantial product hazard, the ordering of a remedy, and a finding that Mr. Zucker is liable under the responsible corporate officer doctrine. For the reasons outlined above, it is difficult to imagine the relevance of these areas of inquiry. Moreover, application of the responsible corporate officer doctrine here would be an unprecedented expansion of liability under the Consumer Product Safety Act. While Mr. Zucker does not believe the topics sought in discovery are in any way relevant to this proceeding, the substantial burden imposed on all of the parties could be postponed until the relevance becomes apparent by bifurcating this proceeding and taking up this discovery at a later time.

IV. Conclusion

Based on the discussion above, Respondent Craig Zucker respectfully requests that his Motion for Protective Order be granted.



Timothy L. Mullin, Jr.
MILES & STOCKBRIDGE P.C.
100 Light Street
Baltimore, MD 21202
410-385-3641 (direct dial)
410-385-3700 (fax)
tmullin@MilesStockbridge.com

Co-Counsel for Respondent, Craig Zucker

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of February, 2014, copies of **Respondent Craig Zucker's Memorandum of Law in Reply to Complaint Counsel's Opposition to Motion for Protective Order** was sent by the service method indicated:

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
Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
tstevenson@cpsc.gov

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 UA, LLC*, CPSC Docket No. 13-2:

The Honorable Dean C. Metry
U.S. Coast Guard
U.S. Courthouse
601 25th Street, Suite 508A
Galveston, TX 77550
Janice.M.Emig@uscg.mil

One copy by electronic mail (by agreement) to Complaint Counsel:

Mary B. Murphy
Complaint Counsel and Assistant General Counsel
Division of Compliance
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
mmurphy@cpsc.gov

Jennifer C. Argabright, Trial Attorney
jargabright@cpsc.gov
Mary Claire G. Claud, Trial Attorney
mcclaud@cpsc.gov
Daniel Vice, Trial Attorney
dvice@cpsc.gov

Complaint Counsel
Division of Compliance
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

One copy by electronic mail (by agreement) to counsel for Respondents Zen Magnets, LLC and Star Networks USA, LLC:

David C. Japha
The Law Offices of David C. Japha, P.C.
950 S. Cherry Street, Suite 912
Denver, CO 80246
davidjapha@japhalaw.com

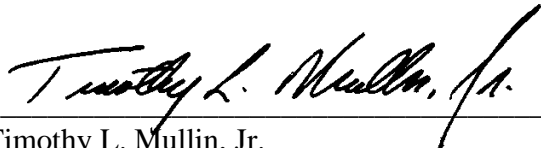
One copy by electronic mail (by agreement) to co-counsel for Craig Zucker:

Erika Z. Jones
Mayer Brown LLP
1999 K Street, N.W.
Washington, DC 20006
ejones@mayerbrown.com

John R. Fleder
Hyman, Phelps & McNamara, P.C.
700 Thirteenth Street, N.W.
Suite 1200
Washington, DC 20005
jfleder@hpm.com

One copy by electronic mail (by agreement) to counsel for MOH Liquidating Trust:

Paul M. Laurenza
PLaurenza@dykema.com
Joshua H. Joseph
JJoseph@dykema.com
Dykema Gossett PLLC
Franklin Square Building
1300 I Street, N.W., Suite 300 West
Washington, DC 20005



Timothy L. Mullin, Jr.