

EXHIBIT

1



U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Cheryl A. Falvey
General Counsel

Tel: 301-504-7642
Fax: 301-504-0403

July 20, 2012

Via Electronic and First Class Mail

Alan H. Schoem, Esq.
14809 Rolling Green Way
North Potomac, Maryland 20878

Re: Request for Statement

Dear Mr. Schoem:

Thank you for your July 17, 2012 letter to CPSC Compliance Officer Joe Williams. You state that Mr. William's letter to Brookstone concerned various types of aggregated masses of small, powerful, individual magnets and that he asked Brookstone voluntarily stop selling the magnets pending the outcome of our investigation. You further state that this communication to Brookstone is based on the fact that Maxfield and Oberton identified Brookstone as a retailer in a May 25, 2012 Full Report to the CPSC.

I can assure you that no violation of the disclosure restrictions has taken place for any section 15 information Maxfield and Oberton submitted in its Full Report. Brookstone was identified as a retailer independent from the section 15 report submitted by Maxfield and Oberton. As you know, the Commission has determined that the referenced section 6(b)(5) restrictions to not apply to information independently obtained or prepared by Commission staff. 16 C.F.R. § 1101.63(c).

Furthermore, the Commission staff has statutory authority to investigate retailers when it believes that they may be selling a product that presents a substantial product hazard. Your suggestion of intimidation by the staff is unfounded and belied by the fact that some retailers have not agreed to stop sale. As you acknowledged, the correspondence to retailers contained a generic description of magnets. While you may represent to staff that the firm, Brookstone, is selling only one type of magnet, staff has a duty to investigate fully and request information under the circumstances.

At your request, I am confirming that it is not a violation of any law administered by the CPSC for any retailer to continue to sell Buckyballs and Buckycubes. We are willing to

Alan H. Schoem, Esq.

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communicate that directly to the retailers that staff has contacted. As you note, staff requests have been for voluntary action. If a retailer continues to sell your client's product, it is not in violation of any law CPSC administers until we have obtained a court order, which is the next step in our process after the issuance of a PD, or the firm voluntarily agrees to a corrective action. The scope of administrative action needed to be taken by the agency to address the concern regarding a potential substantial product hazard is certainly minimized to the extent we can obtain voluntary corrective actions from manufacturers or retailers.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cheryl A. Falvey".

Cheryl A. Falvey

EXHIBIT

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U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Mary B. Murphy
Assistant General Counsel
Divisions of Compliance and Import Surveillance
Office of the General Counsel

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Fax: (301) 504-0403
Email: mmurphy@cpsc.gov

February 5, 2013

VIA ELECTRONIC AND CERTIFIED MAIL

MOH Liquidating Trust
c/o Julie Beth Teicher, Trustee
Erman, Teicher, Miller, Zucker & Freedman, P.C.
400 Galleria Office Centre – Suite 444
Southfield, MI 48034-2162

Re: *In re Maxfield & Oberton Holdings, LLC* (CPSC No. 12-1)

Dear Ms. Teicher:

On January 17, 2013, a Product Safety Investigator of the U.S. Consumer Product Safety Commission (CPSC or Commission) conducted an establishment inspection of Amware Fulfillment of CT, LLC's (Amware), facility located at 33 Stiles Lane, North Haven, CT. Through this inspection, our Product Safety Investigator confirmed that Amware currently possesses an unknown quantity of high-powered magnet products that were formerly the property of MOH (the MOH Inventory) and that Amware's counsel has contacted you regarding these items.

CPSC staff is unable at this point to determine whether the inventory consists of only Buckycubes and Buckyballs, or whether other MOH products, specifically Buckybars and BuckyBigs, are stored at the facility as well. The Commission has an interest in the disposition of the MOH Inventory by virtue of its mission as well as its status as a potential beneficiary of the Trust.

As you know, CPSC staff has filed an administrative lawsuit seeking a determination that Buckyballs and Buckycubes (the Subject Products), which were manufactured and distributed by MOH, present a substantial product hazard. The Complaint seeks an order that the firm be required to engage in remedial action, including offering a refund to consumers and making public notification of the hazard presented by the Subject Products. This lawsuit follows a preliminary determination by staff that the Subject Products pose a substantial risk of injury to consumers pursuant to Section 15(a) of the Consumer Product Safety Act, 15 U.S.C. § 2064(a).

Julie Beth Teicher, Trustee
Erman, Teicher, Miller, Zucker & Freedman, P.C.
400 Galleria Officentre – Suite 444
Southfield, MI 48034-2162

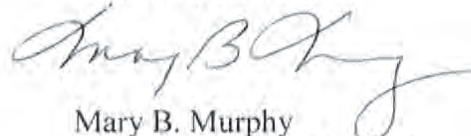
You have indicated that the Trust you are administering contains approximately \$262,000 in funds. In light of the more than 2.5 million sets of Buckyballs sold, this sum is obviously insufficient to compensate consumers if staff prevails in its action. To that end, staff requests that you, as Trustee, take possession of the inventory and determine which, if any, of the products may be sold or liquidated so that the additional funds may be placed in the Trust.

However, because staff has made a preliminary determination that Buckycubes and Buckyballs pose a substantial risk of injury to the public, we ask that you, as transferee and assignee of MOH's assets, make every effort to ensure that, when assessing whether any of the remaining inventory may be sold, no Subject Products re-enter the stream of commerce.¹

To the extent that the MOH Inventory includes products other than Buckyballs and Buckycubes, we also ask that you to make every effort to liquidate those items for the benefit of the Trust's creditors.

Thank you for your attention to this matter. If you have any questions, please feel free to contact me.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Mary B. Murphy".

Mary B. Murphy
Assistant General Counsel

¹ Any attempt by any person to distribute Buckyballs or Buckycubes in commerce within the United States could give rise to a reporting obligation under Section 15(b) of the CPSA, 15 U.S.C. § 2064(b) and/or to further legal action by Commission.

EXHIBIT

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
)	
)	
MAXFIELD AND OBERTON HOLDINGS, LLC)	CPSC DOCKET NO. 12-1
ZEN MAGNETS, LLC)	CPSC DOCKET NO. 12-2
STAR NETWORKS USA, LLC)	CPSC DOCKET NO. 13-2
)	(Consolidated)
Respondents,)	
)	

COMPLAINT COUNSEL’S MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO FILE SECOND AMENDED
COMPLAINTS IN DOCKET NOS. 12-1 AND 12-2

Complaint Counsel filed Amended Complaints against Respondent Maxfield and Oberton Holdings, LLC (“M&O”) and Zen Magnets, LLC (“Zen”) seeking a determination that that Respondents’ products (the “Subject Products”) present a substantial product hazard as that term is defined in sections 15(a)(1) and (2) of the Consumer Product Safety Act (“CPSA”), 15 U.S.C. § 2064(a)(1), (2). *See* Amended Complaints in CPSC Docket Nos. 12-1 and 12-2.

Respondent M&O has now purported to dissolve as a corporate entity, *see* Notice of Withdrawal of M&O’s counsel at 1 (Dec. 27, 2012), and has not communicated with Complaint Counsel as to its status or intentions in this litigation.² Complaint Counsel has had limited communications with the Trustee for the Liquidating Trust that was

² *See also* www.getbuckyballs.com (last accessed Feb. 4, 2013) (Exhibit C) (stating that M&O stopped doing business on December 27, 2012). M&O has not provided evidence to Complaint Counsel to support its claims that it no longer exists. Further, M&O has not agreed to perform remedies that Complaint Counsel sought in the Amended Complaint, including but not limited to refunding the purchase price of the M&O Subject Products to consumers. Complaint Counsel continues to seek that relief in this proceeding.

established to wind down M&O's affairs, but she has indicated that the Trust will not appear in this litigation on M&O's behalf. *See* e-mail from Julie Beth Teicher to Complaint Counsel, with a copy to the Court (January 23, 2013, 10:38 AM) (Exhibit D). In light of this development, Complaint Counsel seeks leave to file a Second Amended Complaint against M&O to name its Chief Executive Officer ("CEO"), Craig Zucker ("Mr. Zucker"), as a Respondent, both individually and in his capacity as a responsible corporate officer.

Complaint Counsel also seeks leave to file a Second Amended Complaint against Zen to include allegations that since the filing of the Amended Complaint, Zen has been importing, distributing, and selling aggregated masses of high-powered, small rare earth magnets under the name Neoballs. The motion for amendment complies with the requirements of 16 C.F.R. § 1025.13 because the proposed Second Amended Complaints "do not unduly broaden the issues in the proceedings or cause undue delay." The Second Amended Complaints would not broaden the substantive issues in this litigation in any significant way, and any delay may not be characterized as "undue" because the amendments result directly from actions taken by Respondents after this proceeding commenced. Moreover, no discovery schedule has been set and a prehearing conference was recently scheduled for March 6, 2013.

I. Mr. Zucker is Appropriately Named as a Respondent in the Second Amended Complaint Individually and in his Capacity as CEO

Complaint Counsel moves to amend the Amended Complaint against M&O to name Mr. Zucker as a Respondent, both individually and in his capacity as CEO of

M&O, pursuant to Supreme Court precedent that permits the inclusion of an individual Respondent where, as here, the Respondent exercised personal control over the acts and practices of the corporation.

The facts in the instant case demonstrate amply that 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. Indeed, in Mr. Zucker's many communications with CPSC Commissioners and staff, he consistently identified himself as the CEO and principal decision maker of M&O. For example, on April 4, 2012, Mr. Zucker met personally with a CPSC Commissioner regarding the M&O Subject Products. *See* CPSC Public Calendar No. XXXIX, No. 26 at 3 (April 4, 2012) (Exhibit E). He held a subsequent meeting on April 10, 2012 with another CPSC Commissioner and then met separately that same day with CPSC staff to discuss the M&O Subject Products. *See* CPSC Public Calendar No. XXXIX, No. 27 at 2 (April 11, 2012) (Exhibit E). In addition, Mr. Zucker submitted formal information to the Commission on behalf of M&O. Specifically, on May 25, 2012, Mr. Zucker filed a report on the Subject Products in response to staff's requests for information pursuant to section 15(b) of the CPSA ("Full Report").³ In the Full Report, Mr. Zucker identified himself as the author of the report and as the CEO of M&O. Full Report at 1 (on file with Complaint Counsel). He stated, "Craig Zucker is responsible for the development and enforcement of Maxfield

³Pursuant to Commission regulations at 16 C.F.R. § 1101.61(b)(1), Complaint Counsel may disclose information from the Full Report in this public filing because the Commission has issued a Complaint under sections 15(c) and (d) of the CPSA alleging that the Subject Products present a substantial product hazard.

and Oberton's compliance program." Full Report at 6.⁴ Consistent with his stated responsibility for the development and enforcement of M&O's compliance program, Mr. Zucker communicated personally with CPSC compliance staff regarding CPSC actions in connection with the Subject Products. *See* e-mails from Craig Zucker to CPSC compliance officer Thomas Lee (June 19, 2012 1:58 p.m.; June 25, 2012 9:54 a.m.) (Exhibit E). Mr. Zucker also corresponded personally with other CPSC staff about CPSC actions connected to the filing of the Complaint. *See* e-mail from Craig Zucker to CPSC Spokesman Scott Wolfson (Sept. 11, 2012 1:06 p.m.) (Exhibit E) (referencing success of M&O's "Save our Balls" campaign).

In addition to his direct and repeated communications with CPSC staff and Commissioners about the very issue before this Court, Mr. Zucker also personally lobbied members of Congress and the President of the United States, again communicating on issues related directly, and solely, to the matter at issue here. *See* e-mail from Craig Zucker to staff of the U.S. Senate and U.S. House of Representatives, as well as CPSC Commissioners and CPSC staff (July 20, 2012 10:38 a.m.) (Exhibit G); open letter to President Obama, published in the *Washington Post* and other newspapers on August 2, 2012 (stating "In 2009, I started our business, creating a product called Buckyballs®") (Exhibit G).

⁴Mr. Zucker also submitted M&O's formal comment to CPSC's staff briefing package on the proposed Safety Standard for Magnet Sets. *See* Letter from Craig Zucker to CPSC Secretary Todd Stevenson, registered as a public comment on September 12, 2012, *available at* <http://www.regulations.gov/#!documentDetail;D=CPSC-2012-0050-0023> (Exhibit F).

Similarly, in numerous interviews on television, in print, and in internet media, Mr. Zucker has responded to Complaint Counsel's allegations on behalf of M&O.⁵ Those statements demonstrate that Mr. Zucker was integral to the design, manufacturing, and marketing of the M&O 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.

Indeed, M&O's own press releases identify Mr. Zucker as M&O's CEO and founder and Mr. Zucker, on numerous occasions, has presented himself as the face of Maxfield and Oberton. In "A Letter from Our CEO: The Real Story Behind Why We're Fighting," Mr. Zucker described at length and in detail M&O's interactions with CPSC staff, and concluded: "We are fighting the CPSC action because we believe they are wrong." Mr. Zucker's handwritten signature appears on the letter, and the signature block identifies him as "Co-founder, CEO, Maxfield and Oberton." *Previously available at* www.getbuckyballs.com/letter-from-ceo (last accessed October 18, 2012) (Exhibit I);⁶ *see also* press release dated August 14, 2012 (*previously available at* www.getbuckyballs.com/cpsc-complaint-arbitrary-capricious-without-merit, last

⁵ See, e.g., *Power Lunch* (CNBC television broadcast Aug. 20, 2012) (<http://www.youtube.com/watch?v=sjtAZNs-SCM>) (Exhibit H); *Your World With Neil Cavuto* (Fox News television broadcast Aug. 3, 2012) (<http://www.youtube.com/watch?v=aGjiZlkVBUA>) (Exhibit H); *Nightline: Is Proposed Recall on Magnet Toys Unfair?* (ABC television broadcast Sept. 12, 2012) (video and transcript at <http://abcnews.go.com/Health/proposed-recall-magnet-toys-unfair/story?id=17075289>) (Exhibit H). In several other interviews, Mr. Zucker identified personally with the company's litigation goals. See "Andrew Martin, *For Buckyballs Toys, Child Safety is a Growing Issue*, N.Y. Times, Aug. 16, 2012, *available at* http://www.nytimes.com/2012/08/17/business/for-buckyballs-toys-child-safety-is-a-growing-issue.html?pagewanted=all&_r=0 (Exhibit H); *Buckyballs vs. The Consumer Products Safety Commission* (Reason.com internet broadcast Sept. 12, 2012) (video and transcript at <http://reason.com/archives/2012/09/12/buckey-balls>) (Exhibit H); *The Rush Limbaugh Show* (radio broadcast July 30, 2012) (transcript and audio at http://www.rushlimbaugh.com/daily/2012/07/30/ceo_of_buckyballs_save_our_balls) (Exhibit H).
⁶ Some M&O press releases no longer appear on www.getbuckyballs.com. The press releases cited here are attached as exhibits.

accessed December 4, 2012) (Exhibit I) (also identifying Mr. Zucker as “Founder and CEO of Maxfield and Oberton”).

Moreover, in unrelated litigation in Federal court, Mr. Zucker submitted a signed, sworn declaration in support of an M&O motion. *See* Declaration of Craig Zucker in support of Maxfield & Oberton Holdings, LLC’s Request for Judicial Notice, *The Estate of Buckminster Fuller v. Maxfield & Oberton Holdings, LLC*, Case No. CV 12-2570 at Dkt. No. 13-1 (N.D. Cal. July 13, 2012) (Exhibit J). In the declaration, Mr. Zucker said “I am the Chief Executive Officer of Maxfield & Oberton Holdings, LLC . . . Unless otherwise stated, I have personal knowledge of the facts set forth herein and if called as a witness could competently testify thereto.” Decl. at 1 (Exhibit J). Mr. Zucker attached as an exhibit “a true and correct copy of the October 24, 2011 non-exclusive license granted to [M&O] by Plaintiff.” *Id.* Mr. Zucker counter-signed the Plaintiff’s licensing letter on behalf of M&O. Decl. at Exhibit 2 (Exhibit J). Mr. Zucker’s act of making a declaration on behalf of the company, as well as his demonstrated ability and practice of entering into a contract on behalf of M&O, constitute further evidence that he is responsible for M&O’s acts and practices.

A. Mr. Zucker Is a Responsible Corporate Officer Under the Doctrine Established by the Supreme Court

The facts set forth above demonstrate that Mr. Zucker is appropriately named as a Respondent in the Second Amended Complaint in his individual capacity and as a responsible corporate officer under the relevant Supreme Court precedent established in *United States v. Dotterweich*, 320 U.S. 277 (1943) and *United States v. Park*, 421 U.S. 658 (1975).

In *Park*, the Supreme Court upheld the conviction of the president of a food distributor on charges that he committed criminal violations of the Federal Food, Drug, and Cosmetic Act (“FDCA”).⁷ The charge stemmed from FDA inspections that uncovered rodent-infested food stored in the company’s warehouse. The defendant conceded at trial that he was responsible for providing sanitary conditions for food offered for sale to the public, but claimed that he had delegated that task to “dependable subordinates,” *id.* at 664, and that the company had an organizational structure that placed different individuals in charge of the company’s operation. Although he conferred with legal counsel to determine an appropriate corrective action, he made no more efforts to ensure that the remedial steps were taken or to assess whether they were effective.

To establish the defendant’s culpability, the government introduced bylaws that set forth the duties of the defendant as the CEO and presented evidence that while the defendant delegated normal operating duties, including sanitation, to others, he “retained ‘certain things, which are the big, broad, principles of the operation of the company,’ and had the ‘responsibility of seeing that they all work together.’” *Id.* at 664. The jury convicted the defendant on the grounds that he was responsible for the sanitation efforts undertaken by the company. Although the Court of Appeals reversed, the Supreme Court reinstated the District Court’s judgment on the verdict on appeal.

The *Park* Court relied on the reasoning in *United States v. Dotterweich*,⁸ where it upheld the criminal conviction of an individual corporate officer for violations of the

⁷ The government filed an Information charging both the individual defendant and the company, Acme Markets, Inc. The company entered a guilty plea prior to trial. *Park*, 421 U.S. at 661; *United States v. Park*, 499 F.2d 839, 840 (4th Cir. 1974).

⁸ In *Dotterweich*, the Supreme Court upheld the conviction of the president and general manager of a

FDCA on the grounds that the “offense is committed . . . by all who have . . . a responsible share in the furtherance of the transaction which the statute outlaws.” *Id.* at 284. The *Park* Court affirmed the *Dotterweich* rationale—that individual corporate officers can be held liable under the FDCA if their “failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of.” *Park*, 421 U.S. at 671. This rationale has been confirmed in subsequent cases, both in criminal and civil contexts, and has been applied to officers of limited liability companies (“LLCs”).⁹

Moreover, the Court observed, the reasoning of *Dotterweich* and subsequently decided cases imposes on “individuals who execute the corporate mission” a duty not just to seek out and remedy violations, “but also, and primarily, a duty to implement measures that will insure that violations will not occur.” *Park*, 421 U.S. at 672. While “[t]he requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding,” the Court reasoned, “. . . they are no more stringent than the public has the right to expect of those who voluntarily assume positions of authority

pharmaceutical company for criminal violations of the FDCA stemming from his company’s shipment of misbranded and adulterated drugs. *Dotterweich*, 320 U.S. at 278. The Court upheld the conviction of the individual defendant despite the fact that a lower court had observed that “Dotterweich had no personal connection with either shipment, but he was in general charge of the corporation’s business and had given general instructions to its employees to fill orders received from physicians.” *United States v. Buffalo Pharmacal Co.*, 131 F.2d 500, 501 (2d Cir. 1942).

⁹ See, e.g., *United States v. Ming Hong*, 242 F.3d 528 (4th Cir. 2001) (owner of a wastewater treatment facility is criminally liable for the facility’s clean water violations under *Park* and *Dotterweich* even though he had no formal title as a corporate officer, because he played a substantial role in the company’s operations, including inspecting the treatment apparatus on at least one occasion); *United States v. Gel-Spice Co.*, 773 F.2d 427 (2d Cir. 1985) (president is individually criminally culpable for widespread rodent infestation at storage facility, even though another employee managed the facility on a day-to-day basis); *TMJ Implants, Inc. v. Dept. of Health and Human Serv’s*, 584 F.3d 1290 (10th Cir. 2009) (president of a manufacturer of joint implants is individually liable for civil penalties for corporation’s failure to file medical device reports with FDA); *United States v. Osborn*, 2012 WL 1096087 at *4 (N.D. Ohio 2012) (responsible corporate officer of an LLC is personally liable for the LLC’s Clean Water Act violations).

in business enterprises whose services and products affect the health and well-being of the public that supports them.” *Id.*

At 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. “The purposes of [the Food and Drugs Act] touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection,” the *Dotterweich* Court held. *Dotterweich*, 320 U.S. at 280.

B. The Responsible Corporate Officer Doctrine Applies in Product Safety Cases and Cases Where a Corporation No Longer Exists

The rationale applies equally to statutes and regulations governing the Consumer Product Safety Commission. In *United States v. Shelton Wholesale, Inc.*, 34 F. Supp. 2d 1147 (W.D. Mo. 1999), the Commission sued two corporations that imported fireworks, alleging violations of the Federal Hazardous Substances Act (“FHSA”). After learning that “defendant corporations are closely held and run entirely by Mr. Shelton,” the government moved to amend the complaint to name Mr. Shelton individually as a defendant. *See* Memo. in Supp. of Mot. to Amend at 1, *Shelton*, 34 F. Supp. 2d 1147 (W.D. Mo. 1999), No. 96-cv-06131, Dkt. No. 12, filed Feb. 20, 1997 (Exhibit K). In its successful motion, the government argued that

Joining Mr. Shelton in his individual capacity is necessary to ensure the effectiveness of any injunctive relief that might be granted against the defendant corporations. The companies are closely held and principally operated by Mr. Shelton. If Mr. Shelton is not added as a defendant in his individual capacity, he could avoid any injunction entered against the

defendant corporations by *dissolving the companies* and reincorporating them under a different name.

Id. at 3 (emphasis added). The court granted the motion. *Shelton*, Dkt. No. 20 (May 20, 1997) (Order “granting motion to amend complaint by adding Gregory P. Shelton as dft”) (Exhibit K).

The *Shelton* court later granted the government’s motion for summary judgment that Mr. Shelton had violated the FHSA in his individual capacity, citing *Park* and *Dotterweich*:

Here, Mr. Shelton clearly bore a responsible relation to the activity prohibited—the importation of a banned or misbranded hazardous substance. It is undisputed that he was the sole shareholder, the chief corporate officer and that he made all the decisions for the defendant corporations relevant to the allegations in this case. Accordingly, under the reasoning of *Dotterweich* and *Park*, Mr. Shelton is liable for the importation of all eighteen products by virtue of his various corporate roles. No reasonable jury could conclude otherwise.

U.S. v. Shelton Wholesale, Inc., 1999 WL 825483 at *3 (unreported).¹⁰ The Eighth Circuit affirmed. *Shelton v. Consumer Products Safety Comm’n*, 277 F.3d 998 (Eighth Cir. 2002), *cert. denied*, 123 S.Ct. 514 (2002).

Shelton provides further support for Complaint Counsel’s position that Mr. Zucker is appropriately named as a Respondent in the Second Amended Complaint by virtue of his role as the CEO of M&O. His responsibility for ensuring that the firm complied with relevant statutes and regulations, including the Consumer Product Safety Act, as demonstrated through his own statements and actions, brings him squarely within

¹⁰ Although the court’s Order on summary judgment did not encompass a finding that the violations were knowing, *id.* at *5, the court enjoined Shelton in his individual capacity from “knowingly or recklessly importing products violative of the FHSA and/or the CPSC regulations.” *Id.* The Eighth Circuit affirmed. *Shelton v. Consumer Product Safety Commission*, 277 F.3d 998 (8th Cir. 2002), *cert. denied*, 123 S.Ct. 514 (2002).

the scope of individuals contemplated by *Dotterweich*, *Park*, and *Shelton*. Thus, the proposed Second Amended Complaint comports with clear precedent, bringing Mr. Zucker appropriately before this Court.

The purported dissolution of M&O does not preclude an action against Mr. Zucker individually. Case law establishes that even if a person ceases to be a corporate officer after the violations have occurred, the individual can still be held responsible for the corporation's previous acts. In *United States v. Hodges X-Ray, Inc.*, 759 F.2d 557 (6th Cir. 1985), the Sixth Circuit held that the principal shareholder of an x-ray company was individually liable under *Park* and *Dotterweich* for violations of the Radiation Control for Health and Safety Act of 1968, even though the company's assets had been sold prior to the assessment of a civil penalty. The court specifically noted that the corporation no longer existed, but nonetheless held Mr. Hodges individually liable. *Id.* at 558 n.1 (stating that the defendant corporation is defunct). As in *Hodges*, Mr. Zucker should be held responsible for previous acts and practices of M&O regardless of M&O's purported dissolution.

Barrett Carpet Mills, Inc. v. CPSC, 635 F.2d 299 (4th Cir. 1980) does not compel a contrary conclusion. In that case, a court upheld a cease and desist order issued by the Commission against a company but refused to apply the order to the corporation's individual officer because, the court reasoned, "the violation complained of was inadvertent and not likely to recur" *Id.* at 304. In *Barrett*, the corporation's subcontractor had improperly applied fire-retardant chemicals to carpets during two production days during a sixteen-month period, which the court held was insufficient to

hold the president of the company responsible for the regulatory violations by the company. The court emphasized that the violations were “operational accidents which are not likely to occur, certainly not intentionally.” *Id.*

The facts in the instant proceeding could not be more different from those in *Barrett*—M&O imported and distributed the M&O Subject Products intentionally and on a full time basis, and Mr. Zucker fully controlled M&O’s day to day operations in importing and distributing the Subject Products. There was nothing inadvertent, rare, or unintentional in the sale and distribution by Mr. Zucker of the Subject Products at issue here. Mr. Zucker stands squarely within the definition of a responsible corporate officer set out in *Park* and *Dotterweich* and is therefore appropriately named as a Respondent in the Second Amended Complaint.

II. The Filing of the Second Amended Complaint Against Zen Is Appropriate In Order to Include All Subject Products Sold by the Company

The proposed Second Amended Complaint against Zen alleges that Zen recently began selling aggregated masses of small, high-powered magnets under the brand name “Neoballs.” According to Zen’s website, “Neoballs is a trademark of Zen Magnets LLC.” *See* www.neoballs.com (last accessed Feb. 6, 2013) (Exhibit L). Upon information and belief, Neoballs are substantively identical, in both their physical properties and in the hazard presented, to other aggregated masses of small, high-powered magnets sold by Zen.

The Neoballs website purports to sell magnets individually instead of in sets, an ill-disguised attempt to circumvent the definition of the Subject Products as aggregated

masses of high-powered, small rare earth magnets. A message on the Neoballs website states, “Due to CPSC requests, we are selling the magnets individually. However, shipping is a flat rate no matter how many neoballs you purchase, whether you buy 216, or 21,600 magnet spheres.” See <http://neoballs.com/purchase-neoballs/#> (last accessed February 6, 2013) (Exhibit L). CPSC staff has never requested that Zen sell magnets individually. A pop-up balloon over the words “CPSC requests” states “The CPSC is attempting to ban ‘Aggregates of powerful magnets’, and have requested all magnet sphere brands to stop selling. However, you can still purchase as many neoballs as you would like.” *Id.* (screen shot of pop-up balloon included at Exhibit L). However, despite its stated intent to offer the magnets on an individual basis, the site, through various promotions, overtly encourages visitors to purchase the balls in aggregate. Neoballs fall squarely within the definition of the Subject Products set forth in the Complaint, notwithstanding the company’s efforts to reclassify the product through a transparent sales strategy. The Amended Complaint seeks merely to ensure that any remedies that are applied to Respondent’s Zen Magnets product line are also applied to Neoballs.

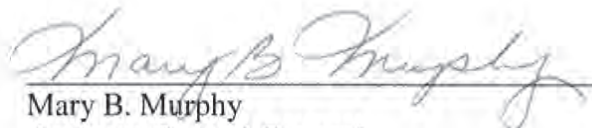
The addition of Neoballs, as well as the inclusion of some supplemental information from the Neoballs and Zen websites, are the only substantive amendments to the Second Amended Complaint against Zen. The amendment would not unduly broaden the issues because Neoballs are substantively identical to the Zen Subject Products that are already the subject of this proceeding. See *In re Wy. Tight Sands Antitrust Cases*, 121 F.R.D. 682, 685 (D. Kan. 1986) (granting plaintiff’s motion to amend on the grounds that “the additional claims stem from the same basic transactions and factual allegations in

[plaintiff's] original complaint."). Similarly, the amendment would not unduly delay these proceedings because any delay may be attributed to Zen's decision to resume sale of Neoballs. Moreover, no discovery schedule has been set and a prehearing conference was recently scheduled for March 6, 2013. *See id.* at 684-85 (granting amendment when "only the first wave of discovery has been completed and the amendment to the complaint will not unduly delay the progress of said discovery"). Therefore amendment is proper under 16 C.F.R. §1025.13.

III. Conclusion

Wherefore, for the foregoing reasons, Complaint Counsel respectfully requests that the Presiding Officer permit Complaint Counsel to file the attached Second Amended Complaints and List and Summary of Documentary Evidence.

Respectfully submitted,



Mary B. Murphy
Assistant General Counsel
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Jennifer Argabright, Trial Attorney
Richa Shyam Dasgupta, Trial Attorney
Leah Wade, Trial Attorney

Complaint Counsel
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EXHIBIT

4

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
)	
MAXFIELD AND OBERTON HOLDINGS, LLC)	CPSC DOCKET NO. 12-1
)	
and)	
)	
CRAIG ZUCKER, individually, and as an officer)	
of MAXFIELD AND OBERTON HOLDINGS LLC.))	
)	
Respondents.)	
)	

SECOND AMENDED COMPLAINT

Nature of Proceedings

1. This is an administrative enforcement proceeding pursuant to Section 15 of the Consumer Product Safety Act (“CPSA”), as amended, 15 U.S.C. § 2064, for public notification and remedial action to protect the public from the substantial risks of injury presented by aggregated masses of high-powered, small rare earth magnets known as Buckyballs® (“Buckyballs”) and Buckycubes™ (“Buckycubes”) (collectively, the “Subject Products”), imported and distributed by Maxfield and Oberton Holdings, LLC (“Maxfield” or the “Firm”) and Craig Zucker (“Zucker”), as Maxfield’s Chief Executive Officer (collectively “Respondents”).

2. This proceeding is governed by the Rules of Practice for Adjudicative Proceedings before the U.S. Consumer Product Safety Commission (the “Commission”), 16 C.F.R. § 1025.

Jurisdiction

3. This proceeding is instituted pursuant to the authority contained in Sections 15(c), (d), and (f) of the CPSA, 15 U.S.C § 2064 (c), (d) and (f).

Parties

4. Complaint Counsel is the staff of the Division of Compliance within the Office of the General Counsel of the Commission (“Complaint Counsel”). The Commission is an independent federal regulatory agency established pursuant to Section 4 of the CPSA, 15 U.S.C. § 2053.

5. Maxfield is a Delaware limited liability company with its principal place of business located at 180 Varick Street, Suite 212, New York, NY, 10014.

6. Zucker is the cofounder and Chief Executive Officer of Maxfield. As such, he controls the acts, practices and policies of the Firm.

7. Upon information and belief, at all relevant times Zucker was and is responsible for ensuring Maxfield’s compliance with the requirements of the CPSA, ASTM-963-08 section 3.1.72 and its most recent version, ASTM 963-11 section 3.1.81 (the “Toy Standard”), and regulations issued thereunder.

8. Upon information and belief, Zucker resides in Brooklyn, NY.

9. Whenever this Complaint refers to any act of the Respondents, the reference shall be deemed to mean that the directors, officers, employees, or agents of the Firm, including Zucker, authorized such act while actively engaged in the management, direction, or control of the affairs of the Firm and while acting within the scope of their employment or official duties.

10. Whenever this Complaint refers to any act of the Respondents, the reference shall be deemed to mean the act of each Respondent, jointly and severally.

11. Respondents were importers and distributors of the Subject Products.

12. As importers and distributors of the Subject Products, Respondents were “manufacturers” and “distributors” of a “consumer product” that is “distributed in commerce,” as those terms are defined in CPSA Sections 3(a)(5), (7), (8), and (11) of the CPSA, 15 U.S.C. §§ 2052(a)(5), (7), (8), and (11).

13. Upon information and belief, Zucker, as Maxfield’s authorized representative, filed a Certificate of Cancellation for Maxfield on December 27, 2012 with the Secretary of State of Delaware.

14. Upon information and belief, Maxfield has ceased business operations.

The Consumer Product

15. Respondents imported and distributed the Subject Products in U.S. commerce and offered the Subject Products for sale to consumers for their personal use in or around a permanent or temporary household or residence, a school, and in recreation or otherwise.

16. The Subject Products consist of small, individual magnets that are packaged as aggregated masses in different sized containers holding 10, 125, and 216 small magnets, ranging in size from approximately 4.01 mm to 5.03 mm, with a variety of coatings, and a flux index greater than 50.

17. Upon information and belief, the flux of Buckyballs ranges from approximately 414 to 556kg²mm² Surface Flux Index.

18. Upon information and belief, the flux of Buckycubes ranges from approximately 204 to 288kg²mm² Surface Flux Index.

19. Upon information and belief, Buckyballs, which are small spherically shaped magnets, were introduced in U.S. commerce in March 2009 by Respondents.

20. Upon information and belief, Buckycubes, which are small cube-shaped magnets, were introduced in U.S. commerce in October 2011 by Respondents.

21. Upon information and belief, the Subject Products were manufactured by Ningbo Prosperous Imp. & Exp. Co. Ltd., of Ningbo City, in China.

22. Upon information and belief, Respondents discontinued sale of the Subject Products on December 27, 2012.

23. The Subject Products were sold with a carrying case and range in retail price from approximately \$19.95 to \$100.00. Upon information and belief, the Subject Products could also be purchased in sets of 10 for \$3.50.

24. Upon information and belief, Respondents sold more than 2.5 million sets of Buckyballs to consumers in the United States.

25. Upon information and belief, Respondents sold more than 290,000 sets of Buckycubes to consumers in the United States.

26. Upon information and belief, Respondents refused staff's requests that Respondents stop sale of the Subject Products and submit a corrective action plan for both Buckyballs and Buckycubes.

27. Upon information and belief, the Subject Products continue to be sold online to consumers in the United States through various internet sites.

28. Upon information and belief, the Subject Products continue to be sold in retail stores in the United States.

COUNT 1

The Subject Products Are Substantial Product Hazards Under
Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2), Because They Contain
Product Defects That Create a Substantial Risk of Injury to the Public

The Subject Products Are Defective Because
Their Instructions, Packaging, and Warnings Are Inadequate

29. Paragraphs 1 through 28 are hereby realleged and incorporated by reference, as though fully set forth herein.

30. A defect can occur in a product's contents, construction, finish, packaging, warnings, and/or instructions. 16 C.F.R. §1115.4.

31. A defect can occur when reasonably foreseeable consumer use or misuse, based in part on the lack of adequate instructions and safety warnings, could result in injury, even where there are no reports of injury. 16 C.F.R. §1115.4.

32. Upon information and belief, from approximately March 2009 through October 2009, Buckyballs packaging contained the following warning: "WARNING: Ages 13+ only. Do not swallow or ingest. Should one end up inside you, contact the proper authorities immediately. Discontinue use of any ball that has broken or that is in any other way damaged."

33. Upon information and belief, Respondents sold Buckyballs between March 2009 and October 2009 with no warning.

34. On or about February 2010, Buckyballs contained the following warnings:
"**Warning:** Not intended for children. Swallowing of magnets may cause serious injury and require immediate medical care. **Ages 13+.**"

35. On or about March 11, 2010, the Respondents changed the packaging, warnings, instructions, and labeling on Buckyballs and later conducted a recall of the products that were labeled as 13+.

36. Upon information and belief, beginning on or around March 29, 2010, Maxfield began executing “Responsible Seller Agreements” with some of its retailers.

37. The “Responsible Seller Agreements” purported, in part, to restrict the sales of the Subject Products to stores that did not primarily sell toys, and required the reseller to agree to display the Subject Products with products intended for consumers ages 14 and over.

38. On May 27, 2010, the Commission and the Firm jointly issued a press release announcing the recall: *Buckyballs® High Powered Magnets Sets Recalled by Maxfield and Oberton Due to Violation of Federal Toy Standard*.

39. At the time of the recall, the Respondents knew of at least two incidents involving ingestions of Buckyballs.

40. Upon information and belief, in connection with the recall of Buckyballs labeled for 13+, Respondents relabeled Buckyballs in an attempt to remove it from the scope of the mandatory provisions of ASTM International F963-8, *Standard Consumer Safety Specification for Toy Safety*.

41. Upon information and belief, Respondents changed the Buckyballs warning on or about March 2010 to state: “**Warning:** Not intended for children. Swallowing of magnets may cause serious injury and require immediate medical care. Ages 14+.”

42. Upon information and belief, the Respondents implemented a second change to the warnings on Buckyballs in 2010 so that the warnings read: “Warning: Keep Away from All

Children! Do not put in nose or mouth. Swallowed magnets can stick to intestines causing serious injury or death. Seek immediate medical attention if magnets are swallowed or inhaled.”

43. Upon information and belief, these warnings were present on Buckyballs sold by the Respondents until December 27, 2012.

44. Upon information and belief, since their introduction into commerce in October 2011, Buckycubes have displayed a warning on their packaging that states: “Warning: Keep Away from All Children! Do not put in nose or mouth. Swallowed magnets can stick to intestines causing serious injury or death. Seek immediate medical attention if magnets are swallowed or inhaled.”

45. Since Buckyballs were introduced into commerce in 2009, numerous incidents involving ingestions by children under the age of 14 have occurred.

46. Upon information and belief, on or about January 28, 2010, a 9-year-old boy used Buckyballs to mimic tongue and lip piercings and accidentally ingested seven magnets. He was treated at an emergency room.

47. Upon information and belief, on or about September 5, 2010, a 12-year-old girl accidentally swallowed two Buckyballs magnets. She sought medical treatment at a hospital, including x-rays and monitoring for infection and damage to her gastrointestinal tract.

48. Upon information and belief, on or about December 23, 2010, a 3-year-old girl ingested eight Buckyballs magnets she found on a refrigerator in her home, and required surgery to remove the magnets. The magnets had caused intestinal and stomach perforations and had also become embedded in the girl’s trachea and esophagus.

49. Upon information and belief, on or about January 6, 2011, a 4-year-old boy suffered intestinal perforations after ingesting three Buckyballs magnets that he thought were chocolate candy because they looked like the decorations on his mother's wedding cake.

50. By November 2011, the Commission was aware of approximately 22 reports of ingestions of high-powered, small, spherically shaped magnets.

51. On November 11, 2011, the Commission, in conjunction with Respondents, issued a public safety alert to warn the public further of the dangers of the ingestion of rare earth magnets like the Subject Products.

52. Ingestion incidents, however, continue to occur.

53. Since the safety alert, the Commission has received dozens of reports of children ingesting Buckyballs magnets. Many of these children required medical treatment, including surgical intervention.

54. The Commission also received dozens of other reports of children ingesting products that are substantially similar to the Buckyballs magnets but may be manufactured and/or sold by firms other than the Respondent.

55. Upon information and belief, on or about January 17, 2012, a 10-year-old girl accidentally ingested two Buckyballs magnets after using them to mimic a tongue piercing. The magnets became embedded in her large intestine, and she underwent x-rays, CT scans, endoscopy, and an appendectomy to remove them. The girl's father had purchased Buckyballs for her at the local mall.

56. All warnings on the Subject Products are inadequate and defective because the warnings do not and cannot communicate effectively to consumers, including parents and caregivers, the hazard associated with the Subject Products and magnet ingestions.

57. Because the warnings on the Subject Products and/or the websites where the Subject Products were offered for sale are inadequate and defective, parents will continue to give children the Subject Products or allow children to have access to the Subject Products.

58. Upon information and belief, as Maxfield is no longer in business, retailers of the Subject Products are not bound by the Responsible Seller Agreements and are thus able to sell to children and in toy stores, making it even more likely that children will gain access to the Subject Products.

59. Children cannot and do not appreciate the hazard, and it is foreseeable that children will mouth the magnets, swallow the magnets, or, in the case of adolescents and teens, use the magnets to mimic body piercings. These uses can and do result in injury.

60. All warnings on the packaging of the Subject Products are inadequate and defective because the packaging on which the warnings are written is often discarded, such that consumers will be unable review the warnings on the packaging prior to foreseeable uses of the Subject Products. These uses can and do result in injury.

61. All warnings in the instructions included with the Subject Products are inadequate and defective because the instructions are not necessary for the use of the product and are often discarded. Because the instructions are unnecessary and are often discarded, consumers likely will not review the warnings contained in the instructions prior to foreseeable uses of the Subject Products. These uses can and do result in injury.

62. All warnings on the Subject Products are inadequate and defective because once the Subject Products are removed from the packaging and/or the carrying case prior to foreseeable uses of the Subject Products, the magnets themselves display no warnings, and the small size of the individual magnets precludes the addition of warnings on the product. These uses can and do result in injury.

63. All warnings on the Subject Products are inadequate and defective because the magnets are shared and used among various consumers, including children, after the packaging and instructions are discarded; thus, many consumers of the products will have no exposure to any warnings prior to using the Subject Products. These uses can and do result in injury.

64. All warnings displayed on the carrying cases are inadequate and defective because consumers are unlikely after each use to disassemble configurations made with the Subject Products, many of which are elaborate and time-consuming to create, to return the Subject Products to the carrying case or to put the Subject Products out of the reach of children.

65. The effectiveness of the warnings on the Subject Products is diminished further by the advertising and marketing of the Subject Products.

66. In 2009, Respondents advertised Buckyballs as, *inter alia*, a “toy” and as an “amazing magnetic toy.” The advertisements encouraged consumers to use Buckyballs for games, use them to hold items to a refrigerator, and “[w]ear them as jewelry,” stating “the fun never ends with Buckyballs.” In small print, the advertisement cautioned that the products should not be “given to a [sic] children age 12 or below.”

67. Upon information and belief, a video appearing in Respondents’ 2009 advertisement shows a consumer using Buckyballs magnets to simulate a tongue piercing.

68. Upon information and belief, Respondents advertised and marketed Buckyballs by comparing Buckyballs' appeal to other children's products, such as Erector sets, Hula Hoops, the Slinky, and Silly Putty.

69. Upon information and belief, some Internet retailers that sold the Subject Products did not display any age recommendations or promoted erroneous age recommendations on their websites.

70. Upon information and belief, despite making no significant design or other physical changes to Buckyballs since their introduction in 2009, Respondents subsequently attempted to rebrand Buckyballs as, *inter alia*, an adult "executive" desk toy and/or stress reliever, among other things, and Respondents marketed and advertised Buckyballs as such.

71. The advertising and marketing of the Subject Products conflict with the claimed 14+ age grade label on the Subject Products.

72. Because the advertising and marketing of the Subject Products conflict with the age label, the effectiveness of the age label is diminished.

73. The advertising and marketing of Subject Products conflict with the stated warnings on the Subject Products.

74. Because the advertising and marketing conflict with the stated warnings, the effectiveness of the warnings is diminished.

75. No warnings or instructions could be devised that would effectively communicate the hazard so that the warnings and instructions could be understood and heeded by consumers and reduce the number of magnet ingestion incidents.

76. Because of the lack of adequate instructions and safety warnings, a substantial risk of injury presents as a result of the foreseeable use and misuse of the Subject Products.

The Subject Products Are Defective Because Substantial Risk of Injury
Arises as a Result of the Magnet's Operation and Use and the
Failure of the Subject Products to Operate as Intended

77. A design defect can be present if the risk of injury occurs as a result of the operation or use of the product or due to a failure of the product to operate as intended. 16 C.F.R. § 1115.4.

78. The Subject Products contain a design defect because they present a risk of injury as a result of their operation and/or use.

79. Upon information and belief, the Subject Products have been advertised and marketed by the Respondents to both children and adults. As a direct result of such marketing and promotion, the Subject Products have been, and currently are, used by both children and adults.

80. The risk of injury occurs as a result of the use of the Subject Products by adults, who give the Subject Products to children, or allow children to have access to the Subject Products.

81. The risk of injury occurs as a result of the foreseeable use and/or misuse of the Subject Products by children.

82. The Subject Products contain a design defect because they fail to operate as intended and present a substantial risk of injury to the public.

83. Upon information and belief, Respondent contends that the Subject Products are "desktoys" or manipulatives that provide stress relief and other benefits to adults only.

84. The Subject Products are intensely appealing to children due to the Subject Products' tactile features, small size, and highly reflective, shiny, and colorful metallic coatings.

85. The Subject Products are also appealing to children because they are smooth, unique, and make a soft snapping sound as they are manipulated.

86. The Subject Products also move in unexpected, incongruous ways, as the poles on the magnets move to align properly, which can evoke a degree of awe and amusement among children, enticing them to play with the Subject Products.

87. Upon information and belief, Respondents' independent tester reported that the "appropriate age grade" for Buckyballs is "over 8 years of age."

88. Despite the Respondents' current age label, and irrespective of Respondents' assertions regarding the proper uses for the Subject Products, the Subject Products do not operate as intended because they are intensely appealing to, and often are played with, by children.

89. The defective design of the Subject Products poses a risk of injury because parents and caregivers buy the Subject Products for children and/or allow children to play with the Subject Products.

The Type of Risk of Injury Renders the Subject Products Defective

90. The risk of injury associated with a product may render the product defective. 16 C.F.R. § 1115.4.

91. Upon information and belief, the Subject Products have low utility to consumers.

92. Upon information and belief, the Subject Products are not necessary to consumers.

93. The nature of the risk of injury includes serious, life-threatening, and long-term health conditions that can result when magnets attract to each other through intestinal walls, causing harmful tissue compression that can lead to perforations, fistulas, and other gastrointestinal injuries.

94. Children, a vulnerable population protected by the CPSA, are exposed to the risk of injury associated with the Subject Products.

95. The risk of injury associated with the ingestion of the Subject Products is neither obvious, nor intuitive.

96. Warnings and instructions cannot adequately mitigate the risk of injury associated with ingesting the Subject Products.

97. Children mouthing and ingesting the Subject Products is foreseeable.

98. Respondents promoted the use of the Subject Products to mimic tongue piercings. Such use by children is foreseeable.

99. The type of risk of injury renders the Subject Products defective.

The Subject Products Create a Substantial Risk of Injury to the Public

100. The Subject Products pose a risk of magnet ingestion by children below the age of 14, who may, consistent with developmentally appropriate behavior, place a single magnet or numerous magnets in their mouth.

101. The risk of ingestion also exists when adolescents and teens use the product to mimic piercings of the mouth, tongue, and cheek and accidentally swallow the magnets.

102. If two or more of the magnets are ingested and the magnetic forces of the magnets pull them together, the magnets can pinch or trap the intestinal walls or other digestive tissue

between them, resulting in acute and long-term health consequences. Magnets that attract through the walls of the intestines result in progressive tissue injury, beginning with local inflammation and ulceration, progressing to tissue death, then perforation, or fistula formation. Such conditions can lead to infection, sepsis, and death.

103. Ingestion of more than one magnet often requires medical intervention, including endoscopic or surgical procedures.

104. Because the initial symptoms of injury from magnet ingestion are nonspecific and may include nausea, vomiting, and abdominal pain, caretakers, parents, and medical professionals may easily mistake these nonspecific symptoms for other common gastrointestinal upsets and erroneously believe that medical treatment is not immediately required, thereby delaying potentially critical treatment.

105. Medical professionals may not be aware of the dangers posed by ingestion of the Subject Products and the corresponding need for immediate evaluation and monitoring. A delay of surgical intervention or other medical treatment due to the patient's presentation with nonspecific symptoms and/or a lack of awareness by medical personnel of the dangers posed by multiple magnet ingestion can exacerbate life-threatening internal injuries.

106. Magnets that become affixed to each other through the gastrointestinal walls and are not removed surgically may result in intestinal perforations that can lead to necrosis, the formation of fistulas, or ultimately, perforation of the bowel and leakage of toxic bowel contents into the abdominal cavity. These conditions can lead to serious injury and possibly even death.

107. Endoscopic and surgical procedures may also be complicated in cases of multiple magnet ingestion due to the attraction of the magnets to the metal equipment used to retrieve the magnets.

108. Children who undergo surgery to remove multiple magnets from their gastrointestinal tract are also at risk for long-term health consequences, including intestinal scarring, nutritional deficiencies due to loss of portions of the bowel, and, in the case of girls, fertility problems.

109. The Subject Products contain defects in packaging, warnings, and instructions, which can create a substantial risk of injury to the public.

110. The Subject Products contain defects in design that pose a substantial risk of injury.

111. The type of risk of injury posed by the Subject Products creates a substantial risk of injury.

112. Therefore, because the Subject Products are defective and create a substantial risk of injury, the Subject Products present a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. §2064(a)(2).

Count 2

The Subject Products Are Substantial Product Hazards Under Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1)

113. Paragraphs 1 through 112 are hereby realleged and incorporated by reference, as though fully set forth herein.

114. Upon information and belief, Respondents' independent tester reported that the "appropriate age grade" for Buckyballs is "over 8 years of age."

115. Upon information and belief, each of the Subject Products is an object designed, manufactured, and/or marketed as a plaything for children under 14 years of age, and therefore, each of the Subject Products that was imported and/or otherwise distributed in commerce after August 16, 2009, is a "toy," as that term is defined in the Toy Standard.

116. As toys, and as toys intended for use by children under 14 years of age, as addressed in the Toy Standard, the Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, were and are covered by the Toy Standard.

117. Pursuant to the Toy Standard, a magnet that has a flux index greater than 50 and that is a small object, as determined by the Toy Standard, is a "hazardous magnet."

118. The Toy Standard prohibits toys from containing a loose as-received hazardous magnet.

119. The Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, consist of and contain loose as-received hazardous magnets. As a result, the Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, fail to comply with the Toy Standard.

120. On May 27, 2010, the Commission, in cooperation with Respondents, and in conjunction with corrective action, announced that Buckyballs failed to comply with the Toy Standard because they were sold for children under the age of 14.

121. The Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, create a substantial risk of injury to the public.

122. Because the Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, fail to comply with the Toy Standard and create a substantial risk of injury to the public, they are substantial product hazards as the term “substantial product hazard” is defined in Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1).

Relief Sought

Wherefore, in the public interest, Complaint Counsel request that the Commission:

A. Determine that the Subject Products present a “substantial product hazard” within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2), and/or present a “substantial product hazard” within the meaning of Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1).C.

B. Determine that extensive and effective public notification under Section 15(c) of the CPSA, 15 U.S.C. § 2064(c), is required to adequately protect children from the substantial product hazard presented by the Subject Products, and order Respondents under Section 15(c) of the CPSA, 15 U.S.C. § 2064(c) to:

- (1) Cease importation and distribution of the Subject Products;
- (2) Notify all persons who transport, store, distribute, or otherwise handle the Subject Products, or to whom such products have been transported, sold, distributed, or otherwise handled, to cease distribution of the products immediately;
- (3) Notify appropriate state and local public health officials;
- (4) Give prompt public notice of the defects in the Subject Products, including the incidents and injuries associated with ingestion, including posting clear and

conspicuous notice on websites operated by Respondents, and providing notice to any third party website on which Respondents has placed the Subject Products for sale, and provide further announcements in languages other than English and on radio and television;

(5) Mail notice to each distributor or retailer of the Subject Products; and

(6) Mail notice to every known person to whom the Subject Products were delivered or sold;

C. Determine that action under Section 15(d) of the CPSA, 15 U.S.C. § 2064(d), is in the public interest, and additionally, order Respondents to:

(1) Refund consumers the purchase price of the Subject Products;

(2) Make no charge to consumers and reimburse consumers for any reasonable and foreseeable expenses incurred in availing themselves of any remedy provided under any Commission Order issued in this matter, as provided by Section 15 U.S.C. § 2064(e)(1);

(3) Reimburse retailers for expenses in connection with carrying out any Commission Order issued in this matter, including the costs of returns, refunds, and/or replacements, as provided by Section 15(e)(2) of the CPSA, 15 U.S.C. § 2064(e)(2);

(4) Submit a plan satisfactory to the Commission, within ten (10) days of service of the Final Order, directing that actions specified in Paragraphs B(1) through (6) and C(1) through (3) above be taken in a timely manner;

(5) To submit monthly reports, in a format satisfactory to the Commission,

documenting the progress of the corrective action program;

(6) For a period of five (5) years after issuance of the Final Order in this matter, to keep records of Respondents' actions taken to comply with Paragraphs B(1) through (6) and C(1) through (5) above, and supply these records to the Commission for the purpose of monitoring compliance with the Final Order;

(7) For a period of five (5) years after issuance of the Final Order in this matter, to notify the Commission at least sixty (60) days prior to any change in Respondents' business (such as incorporation, dissolution, assignment, sale, or petition for bankruptcy), which results in, or is intended to result in, the emergence of a successor corporation, going out of business, or any other change that might affect compliance obligations under a Final Order issued by the Commission in this matter; and

D. Order that Respondents shall take other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA.

ISSUED BY ORDER OF THE COMMISSION:

Dated this 11 day of February, 2013



BY: Kenneth R. Hinson
Executive Director

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EXHIBIT

5

From: Craig Zucker [REDACTED] **On Behalf Of** Craig Zucker
Sent: Tuesday, September 11, 2012 1:06 PM
To: Wolfson, Scott
Subject: A Special Thanks from Buckyballs' CEO

Hey :

Thanks so much for making Thursday's "SaveOnBalls" promo our biggest ever and for helping us continue the fight to Save Our Balls.

Just wanted to let you know that Buckybars and Bucky Bigs are now back in stock and that I've extened the **60% OFF everything** promo through Sunday Sept. 16th at www.getbuckyballs.com.

Thanks,

Craig

Sent from my iPhone



Craig Zucker <cjzucker@gmail.com>

[Test] A Special Thanks from Buckyballs' CEO

Craig Zucker <cz@getbuckyballs.com>

Tue, Sep 11, 2012 at 1:06 PM

Reply-To: Craig Zucker <cz@getbuckyballs.com>

To: cjzucker@gmail.com

Hey :

Thanks so much for making Thursday's "SaveOnBalls" promo our biggest ever and for helping us continue the fight to Save Our Balls.

Just wanted to let you know that Buckybars and Bucky Bigs are now back in stock and that I've extened the **60% OFF everything** promo through Sunday Sept. 16th at www.getbuckyballs.com.

Thanks,

Craig

Sent from my iPhone

Sorry... cannot be applied to previous orders or combined with other promotions.
[Unsubscribe](#) cjzucker@gmail.com from this list. | [Forward](#) this email to a friend

EXHIBIT

6

**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 doctrine², 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

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 Env’tl. 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.

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. Statutes 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.