In finding the president responsible for corporate transgressions, the Court quoted extensively from the Dotterweich decision. See Id. at 668-69. The Court explained Dotterweich, "looked to the purposes of the Act and noted that they 'touch phases of the lives and health of the people which, in the circumstances of modern industrialism, are largely beyond self-protection,'" reemphasizing that "'the only way…a corporation can act is through the individuals who act on its behalf.'" Id. at 668 (quoting Dotterweich, 320 U.S. at 280-81).

The Court noted Dotterweich found individual liability in the absence of consciousness of wrongdoing, ultimately concluding that the question of responsibility depends "'on the evidence produced at the trial…'". Id. at 669 (quoting Dotterweich, 320 U.S. at 280-81). Thus, Dotterweich and its progeny provide "…sanctions which reach and touch the individuals who execute the corporate mission." Id. at 672. While these requirements are undoubtedly demanding, "…they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them." Id.

As in Dotterweich, the Court specifically articulated that "…the charge [of the alleged violations] did not permit the jury to find guilt solely on the basis of respondent's position in the corporation; rather, it fairly advised the jury that to find guilt it must find respondent 'had a reasonable relation to the situation,' and 'by virtue of his position…had…authority and responsibility' to deal with the situation." Id. at 674. See also United States v. Ming Hong, 242 F.3d 528, 531 (4th Cir. 2001) ("[t]he gravamen of liability as a responsible corporate officer is not one's corporate title or lack thereof;

rather, the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations...".).[8]

iv. Relevant Case Law

In cases subsequent to Dotterweich and Park, courts have continued to apply the responsible corporate officer doctrine to statutes involving public health, safety, and welfare. See United States v. Osborne, 2012 WL 4483823 (N.D. Ohio 2012) (denying a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) on the grounds that an individual defendant could be found civilly liable for violations of the Clean Water Act (CWA). In so finding, the court specifically noted the CWA was a "public welfare statute."). See also United States v. Gel Spice Co., 773 F.2d 427 (2d Cir. 1985) (upholding a company president's individual liability for violations of the Federal Food, Drug, and Cosmetic Act).[9]

In United States v. USX Corp., 68 F.3d 811 (3d Cir. 1995), a case relied upon by Mr. Zucker, the Third Circuit determined the standard of liability for principal shareholders and officers of a closely held company under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Id. at 820-21. Although Congress did not directly address the issue in the statute itself, the court

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[8] Dottereich and Park dealt with criminal liability; however, the responsible corporate officer doctrine extends to civil liability. City of Newburgh v. Sarna, 690 F.Supp.2d 136, 160-61 (S.D.N.Y. 2010) ("[t]he fact that a corporate officer could be subjected to criminal punishment upon a showing of a responsible relationship to the acts of a corporation that violate health and safety statutes renders civil liability appropriate as well.") (citing United States v. Hodges X-Ray, Inc., 759 F.2d 557, 561 (6th Cir. 1985) (emphasis in original)).

[9] Additionally, in Hodges X-Ray, discussed supra, the Sixth Circuit determined the RCHSA constituted a public welfare statute. Hodges X-Ray, 759 F.2d at 559. In simplified terms, the RCHSA helped control the general public's exposure to radiation. Id. at 562.

reasoned that, as written, the statute "...does not immunize officers and directors who personally participate in liability-creating conflict." Id. at 824.

The court explained, for liability against an individual "...there must be a showing that the person sought to be held liable actually participated in the liability-creating conduct." Id. at 825. Thus, the court concluded liability could be imposed in situations where "...the officer is aware of the acceptance of materials for transport and of his company's substantial participation in the selection of the disposal facility."[10] Id. at 825.

Thus, USX Corp., cited by Mr. Zucker, seemingly supports the Commission's argument. Here, CPSC has alleged Mr. Zucker was responsible for ensuring Maxfield's compliance with applicable statutes and regulations. CPSC has further alleged Mr. Zucker personally controlled the acts and practices of Maxfield, including the importation of Buckyballs and Buckycubes. The Commission did not allege that by virtue of his corporate position Mr. Zucker was automatically liable; on the contrary, CPSC specifically alleged that he assumed responsibility. See Dotterweich, 320 U.S. at 674.

Notably, some of the cases cited by Mr. Zucker do not relate to public health or safety. For instance, Mr. Zucker relies heavily on Meyer v. Holly, 537 U.S. 280 (2003) for the proposition that liability for regulatory violations may be imposed against individuals "only where Congress has specified that such was its intent." Meyer, 537 U.S. at 287.

However, Meyer dealt with discrimination under the Fair Housing Act, a statute unrelated to public health, safety, or welfare. Id. at 282. Additionally, the Court's

[10] Thus, USX Corp. is consistent with Park, wherein the Court explained a corporate officer is not automatically liable by virtue of his corporate position. Park, 421 U.S. at 674.

discussion and reasoning hinged on the principle of vicarious liability, not the responsible corporate officer doctrine. See Id. at 283. Last, Mr. Zucker references no subsequent cases reflective of his interpretation of Meyer.

The CPSA, like the statute at issue in Dotterweich and Park, relates to the public's health and safety. United States v. Shelton Wholesale, Inc., 34 F.Supp.2d 1147, 1155 (W.D. Mo.1999) ("...the statues and regulations interpreted by the CPSC were enacted to protect the public's health and safety"). 15 U.S.C. § 2051(b)(1) (explaining one purpose of the CPSA is "to protect the public against unreasonable risks of injury associated with consumer products"). Accordingly, the rationale in Dotterweich and Park is both legally relevant and persuasive.

v. "Extraordinary Exceptions"

In his various filings, Mr. Zucker suggests that Dotterweich and Park are "extraordinary exceptions" to bedrock corporate law principles. However, a review of relevant case law suggests the responsible corporate officer doctrine has been applied throughout the federal circuits, especially in the context of public health, safety, and welfare statutes. See United States v. USX Corp., 68 F.3d 811 (3d Cir. 1995) (the Comprehensive Environmental Response, Compensation and Liability Act); United States v. Ming Hong, 242 F.3d 528 (4th Cir. 2001) (the Clean Water Act); United States v. Jorgensen, 144 F.3d 550 (8th Cir. 1998) (the Federal Meat Inspection Act); United States v. Iverson, 162 F.3d 1015 (9th Cir. 1998) (the Clean Water Act); United States v. Cattle King Packing Co. Inc., 793 F.2d 232 (10th Cir. 1986) (the Federal Meat Inspection Act); United States v. Hodges X-Ray, Inc., 759 F.2d 557 (6th Cir. 1985) (the Radiation

Control for Health and Safety Act of 1968); United States v. Poulin, 926 F.Supp. 246 (D. Mass. 1996) (the Comprehensive Drug Abuse Prevention and Control Act of 1970).

At times, the doctrine transcends what would typically be categorized as health, safety, or welfare statutes. For example, in United States v. Rachal, 473 F.2d 1338 (5th Cir. 1973), the Fifth Circuit found corporate officers individually liable for violations of the Securities Act of 1933. Id. at 1340. In Rachal, the defendants argued they should not be individually liable for securities violations, suggesting that "person" as used in the Act referred to a corporate body and not a natural person. Id. at 1341.

In rejecting defendants' contentions, the Fifth Circuit noted a similar argument had been presented and dismissed in Dotterweich. Id. at 1341. The court opined that reading the statute as suggested by defendants would construe the Securities Act with a narrow and illusory scope. Id. at 1341-42. Accordingly, the court upheld defendants' convictions for securities fraud, mail fraud, and the sale of unregistered securities pursuant to the responsible corporate officer doctrine. Id. at 1340.

The doctrine has been similarly applied to other federal statutes outside the realm of public safety. See United States v. Gulf Oil Corp., 408 F.Supp. 450 (W.D.Pa. 1975) (denying the motion of corporate president to dismiss indictments against him individually for failure of a company to pay competitors entitlements under the Federal Energy Administration program); United States v. Freed, 189 Fed. Appx. 888 (11th Cir. 2006) (upholding an individual's conviction for misdemeanor offenses in violation of Forest Service regulations).[11]

[11] Although by no means controlling for purposes of the instant proceeding, in 1991, the Iowa Supreme Court upheld shareholder liability for consumer fraud under Iowa's consumer fraud statute. State ex. rel. Miller v. Santa Rosa Sales and Mktg., Inc., 475 N.W. 2d 210 (Iowa 1991). In dismissing the shareholder's claim that the trial court should have applied the more stringent "piercing the corporate veil" analysis, the

vi. Sufficiency of the Complaint

The undersigned has not yet determined whether some, or any, sanction is warranted in the matter. At this stage in the proceeding, the undersigned need only determine whether, based on the allegations as set forth in the Complaint, Mr. Zucker is a proper respondent.

The Complaint states its basis in "Section 15 of the Consumer Product Safety Act ("CPSC"), as amended, 15 U.S.C. § 2064", a public health statute. United States v. Shelton Wholesale, Inc., 34 F.Supp.2d 1147, 1155 (W.D. Mo 1999). Additionally, the Complaint alleges, inter alia, that Mr. Zucker "is responsible for ensuring Maxfield's compliance with the CPSA…". Thus, the undersigned finds the allegations sufficient such that Mr. Zucker is a proper party to the proceeding. See United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 52-53 (1st Cir. 1991) (mere allegations that a defendant is a responsible corporate officer is insufficient to satisfy the knowledge requirement under the Resource Conservation and Recovery Act).

If, at the conclusion of the Commission's case, Mr. Zucker feels as though CPSC has failed to demonstrate that his responsibility or actions were significant enough to render him liable under the CPSA, nothing precludes Mr. Zucker from presenting a legal argument regarding the same at that juncture. However, based on the controlling legal precedent discussed above, and the allegations set forth in the Amended Complaint, the undersigned finds Mr. Zucker may properly be included as a respondent in the instant proceeding.

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court reasoned the shareholder's liability "…arose from [the shareholder's] complete control…and his over personal acts in perpetrating consumer fraud." Id. at 220 (citing United States v. Cattle King Packing Co., 793 F.2d 232, 240 (10th Cir. 1986)).

The undersigned is not unaware, and would be remiss not to note, that at the start of the instant litigation there existed a responsible corporation in Maxfield. However, for reasons unknown, the corporation apparently opted to dissolve after the CPSC filed its Complaint. Thus, this is not a case of individual and corporate liability, but rather a case of individual liability in the face of a voluntary corporate dissolution after said corporation has been charged with introducing hazardous products into the stream of commerce.[12]

2. The Amended Complaint in 12-2

CPSC also sought to amend the Complaint against Respondent Zen Magnets, LLC (Docket Number 12-2) to include a new line of magnets sold under the brand name Neoballs. The Commission suggested Neoballs are substantively identical to the high-powered, small rare earth magnets referenced in the October 15, 2012 Amended Complaint. CPSC argued that while Zen Magnets, LLC purports to sell Neoballs individually, Respondent "overtly encourages [customers] to purchase the balls in aggregate."

Pursuant to 16 C.F.R. § 1025.13, the undersigned may allow amendments which do not unduly broaden the issues in the proceeding, or cause undue delay. Zen Magnets, LLC did not respond to CPSC's Motion to Leave to File Second Amended Complaint.

[12] See Bufco Corp. v. NLRB, 147 F.3d 964, 969 (C.A.D.C. 1998) (explaining the federal common law test for piercing the corporate veil is (1) whether the shareholder and the corporation have maintained separate identities and (2) whether adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations). Here, the undersigned is not unmindful the CPSC has indirectly alleged the latter prong; namely, that Maxfield's voluntary dissolution allows it to evade potential remedial action. Notably, "[t]he responsible corporate officer doctrine is distinct from piercing the corporate veil, and explicitly expands liability beyond veil piercing." Comm'r, Dept. of Envtl. Mgmt. v. RLG, Inc., 755 N.E.2d 556, 563 (Ind. 2001) (citing United States v. Dotterweich, 320 U.S. 277, 282 (1943)). See also Kelley v. Thomas Solvent Co., 727 F.Supp. 1532, 1544 (W.D. Mich. 1989).

Finding that the Second Amended Complaint for Docket Number 12-2 does not unduly broaden the issues and will not cause undue delay, and in the absence of any objection by Zen Magnets, LLC, the undersigned hereby grants CPSC's Motion as to the Second Amended Complaint for Docket Number 12-2. See 16 C.F.R. § 1025.13

WHEREFORE,

IT IS HEREBY ORDERED THAT Complaint Counsel's Motion for Leave to File Second Amended Complaints in Docket Nos. 12-1 and 12-2 is **GRANTED.** Respondents shall file Answers to the Amended Complaints within twenty (20) days in accordance with 16 C.F.R. § 1025.12. Thereafter, the undersigned will schedule a pre-hearing conference call so that the matter may proceed.

SO ORDERED.

Done and dated this 3rd day of May, 2013, at
Galveston, TX

DEAN C. METRY
Administrative Law Judge

EXHIBIT

7

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	)	
CRAIG ZUCKER, individually and as officer of MAXFIELD AND OBERTON HOLDINGS, LLC	)	
AND	)	**HON. DEAN C. METRY**
ZEN MAGNETS, LLC	)	
AND	)	
STAR NETWORKS USA, LLC	)	
	)	
	)	
Respondents.	)	
	)	

ORDER DENYING MOTION FOR DETERMINATION THAT THE ORDER ADDING CRAIG ZUCKER AS A RESPONDENT CAN BE IMMEDIATELY APPEALED
AND
ORDER DENYING REQUEST TO PARTICIPATE IN THE PROCEEDING AS NON-PARTY PARTICIPANTS AND FOR LEAVE TO FILE MEMORANDUM

Background

On May 3, 2013, the undersigned issued an Order Granting Complaint Counsel's Motion for Leave to File Second Amended Complaint in Docket Nos. 12-1 and 12-2 (Order). In the Order, the undersigned permitted the Consumer Product Safety Commission (CPSC) to add Craig Zucker as a Respondent in the instant proceeding, both in his individual capacity and in his capacity as Chief Executive Officer.

On May 16, 2013, Craig Zucker filed a Motion for Determination that the Order Adding Craig Zucker as a Respondent Can be Immediately Appealed (Motion for

Determination). In the Motion for Determination, Mr. Zucker argued the undersigned's Order "involves a controlling question of law or policy as to which there is substantial ground for differences in opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation." 16 C.F.R. § 1025.24(b)(4)(i).

Thereafter, on May 28, 2013, Complaint Counsel filed an Opposition to Motion for Determination that the Order Adding Craig Zucker as Respondent can be Immediately Appealed (Opposition to Motion for Determination). The Opposition to Motion for Determination contends Mr. Zucker fails to satisfy criteria requisite for an interlocutory appeal.

On May 24, 2013, the National Association of Manufacturers ("NAM"), Retail Industry Leaders Association ("RILA"), and National Retail Federation ("NRF") (Industry Participants)[1] filed a Request to Participate in the Proceeding as Non-Party Participants and for Leave to File a Memorandum in Support of the Motion for Determination that the Order Adding Craig Zucker as a Respondent can be Immediately Appealed.

On June 3, 2013, CPSC filed Complaint Counsel's Opposition to the Industry Interveners' Request to Participate in the Proceeding as Non-Party Participants and for Leave to File a Memorandum in Support of the Motion for Determination that the Order

[1] Pursuant to applicable CPSC regulations, "[a]ny person whose petition for leave to intervene is granted by the Presiding Officer shall be known as an "intervenor" and as such shall have the full range of litigating rights afforded to any other party." 16 C.F.R. § 1025.17(a)(3). In their Request to Participate, the Industry parties refer to themselves as "Industry Interveners," but indicate they seek to participate as "Non-Party Participants." See 16 C.F.R. § 1025.17(b)(3) (explaining non-party participants shall be referred to as "Participants."). While this distinction is largely moot given the determination herein, for purposes of clarity, the undersigned will nonetheless collectively refer to the National Association of Manufacturers ("NAM"), Retail Industry Leaders Association ("RILA"), and National Retail Federation ("NRF") as "Industry Participants."

Adding Craig Zucker as a Respondent can be Immediately Appealed (Opposition to Request to Participate).

(1) The Motion for Determination that the Order Adding Craig Zucker as a Respondent can be Immediately Appealed

Respondent's Argument

Respondent's Motion for Determination argues the May 3, 2013 Order involves a controlling question of law or policy for which there is a substantial ground for differences of opinion, and that an interlocutory appeal may materially advance the ultimate termination of the litigation.

In support of this assertion, Respondent suggests the May 3, 2013 Order "recognized that the matter…involved a novel legal issue that had never before been addressed or resolved under Section 15 and that required the examination of cases decided under other statutes." Respondent contends "[t]he determination that an individual officer or director of a corporation that manufactured consumer products may be held individually liable and therefore personally responsible for carrying out a recall presents both a controlling question of law and a controlling question of policy." Respondent suggests an interlocutory appeal resolving these issues would also "materially advance the ultimate termination of the litigation" in accordance with 16 C.F.R. § 1025.24(b)(4)(i).

CPSC's Argument

In the Opposition to Motion for Determination, CPSC argues Mr. Zucker's status as a Respondent in the instant proceeding is not a controlling question of law or policy, suggesting his inclusion does not represent the central issue before the undersigned, and an appeal by Mr. Zucker would not advance the ultimate termination of this litigation on

the merits. CPSC further suggests there is no substantial ground for differences in opinion as to application of the responsible corporate officer doctrine.

Discussion

The applicable regulations set forth the standard governing interlocutory appeals from rulings issued by the Presiding Officer. The regulations state, in relevant part:

> Interlocutory appeals…may proceed only upon motion to the Presiding Officer and a determination by the Presiding Officer in writing that the ruling involves a controlling question of law or policy as to which there is substantial ground for differences of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation, or that subsequent review will be an inadequate remedy. 16 C.F.R. § 1025.24(b)(4)(i).

Thus, the undersigned may permit the interlocutory appeal only if the issue "involves a controlling question of law or policy as to which there is substantial ground for differences of opinion" and an immediate appeal of the issue "may materially advance the ultimate termination of the litigation" or "subsequent review will be an inadequate remedy."

Here, Mr. Zucker argues the undersigned should permit the interlocutory appeal because the issue (1) "involves a controlling question of law or policy as to which there is substantial ground for differences of opinion" and (2) an immediate appeal "may materially advance the ultimate termination of the litigation."

The standard for interlocutory appeals set forth in CPSC regulations mirrors the standard set forth at 28 U.S.C. § 1292, "Interlocutory decisions." Title 28 U.S.C. § 1292 states, in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of

> law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.
> 28 U.S.C. § 1292(b).

Interlocutory appeals should be granted scarcely. In re City of Memphis, 293 F.3d 345, 350 (6th Cir. 2002) ("Review under § 1292(b) is granted sparingly and only in exceptional cases."); In re Cement Antitrust Litigation, 673 F.2d 1010, 1026 (9th Cir. 1982) (explaining unique circumstances must be present to depart from the general policy of postponing review until after a final judgment.); Control Data Corp. v. International Business Machines Corp., 421 F.2d 323, 325 (8th Cir. 1970) ("Permission to allow interlocutory appeals should…be granted sparingly and with discrimination.").

Along these same lines, courts must construe the requirements set forth in § 1292 strictly, as only "exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 25 (2d Cir. 1990) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978)). See also Milbert v. Bison Laboratories, Inc., 260 F.2d 431, 435 (3d Cir. 1958) ("[T]he conditions precedent to the granting by this court of permission to appeal which are laid down by the new section 1292(b) are to be strictly construed and applied.").

a. Materially Advance the Ultimate Termination of the Litigation

i. Mr. Zucker's Position

Mr. Zucker suggests resolution of the issue will materially advance the ultimate termination of the litigation as required by 16 C.F.R. § 1025.24(b)(4)(i). In support of this assertion, Mr. Zucker cites, inter alia, Brown v. Hain Celestial Group, Inc., 2012 WL

4364588 (N.D. Cal. 2012), suggesting an interlocutory appeal is appropriate when said appeal "would significantly par[e] down the issues for judicial determination." Mr. Zucker suggests a review of the undersigned's May 3, 2013 Order would both simplify the issues to be tried and "determine the appropriateness of a class action or limit the class." Koby v. ARS Nat'l Servs., Inc., 2010 WL 5249834 (S.D. Cal. 2010).

ii. CPSC's Position

By contrast, CPSC suggests the opposite is true. Citing White v. Nix, 43 F.3d 374 (8th Cir. 1994), CPSC contends Mr. Zucker's status as Respondent will have no impact on the ultimate termination of the litigation. CPSC contends an interlocutory appeal will not pare down the issues for the hearing; on the contrary, the undersigned will "still have to determine whether aggregated masses of small, high-powered magnets constitute a substantial product hazard under the CPSA…".

iii. Analysis

Courts have interpreted "advance the ultimate termination of the litigation," to mean that interlocutory review is appropriate only in rare situations where a decision as to a particular issue might avoid protracted and expensive litigation. Mazzella v. Stineman, 472 F.Supp. 432, 436 (D.C.Pa. 1979) (quoting Milbert v. Bison Laboratories, Inc., 260 F.2d 431, 433 (3d Cir. 1958)); Ahrenholz v. Board of Trustees of Univ. of Illinois, 219 F.3d 674, 675-77 (7th Cir. 2000) (explaining the issue must have the potential to "head off protracted, costly litigation" and resolution of the issue must promise to "speed up the litigation.").

Title 28 U.S.C. § 1292(b) "is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation." Mazzella v. Stineman, 472

F.Supp. at 435 (quoting Milbert v. Bison Laboratories, Inc., 260 F.2d 431, 433 (3d Cir. 1958)). When litigation will be conducted in substantially the same manner regardless of how the issue is decided, the interlocutory appeal cannot be said to materially advance the ultimate termination of the litigation. In re City of Memphis, 293 F.3d 345, 351 (6th Cir. 2002) (quoting White v. Nix, 43 F.3d 374, 378-79 (8th Cir. 1994)).

Here, the underlying substance of the litigation does not hinge on the issue of Mr. Zucker's inclusion as a Respondent. Notably, in his Opposition to Complaint Counsel's Motion to Amend the Complaint, Mr. Zucker himself conceded "[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," acknowledging his inclusion as a party is not the essence of the instant proceeding. Thus, regardless of Mr. Zucker's inclusion, the parties must still litigate, and the undersigned must still determine, whether the subject magnets constitute substantial product hazards.

Along these same lines, the undersigned has not determined whether some, or any, sanction is warranted in the matter; if the undersigned finds the products do not present a substantial product hazard, no sanction will be imposed on Mr. Zucker in the final judgment.[2] See Caraballo-Seda v. Municipality of Homigueros, 395 F.3d 7, 9 (1st Cir. 2005) (explaining interlocutory appeals from denials of motions to dismiss are generally not granted).

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[2] The undersigned is not unmindful that Mr. Zucker may incur costs associated with this litigation. However, the undersigned has already thoroughly considered the arguments presented by both sides and rendered a determination on the issue. The trouble and expense that may be associated with litigation are not sufficient to warrant an interlocutory appeal. See Behrens v. Pelletier, 516 U.S. 299, 318 (1996).

The undersigned cannot certify the issue for interlocutory appeal absent a showing that resolution of the issue would "advance the ultimate termination of the litigation." 16 C.F.R. § 1025.24(b)(4)(i). See Ahrenholz v. Board of Trustees of Univ. of Illinois, 219 F.3d 674, 676 (7th Cir. 2000) (explaining that unless all criteria are satisfied, an interlocutory appeal is not permitted). As discussed, Mr. Zucker has failed to make such a showing. Accordingly, the Motion must be denied.

(2) The Request to Participate in the Proceeding as Non-Party Participants and for Leave to File Memorandum

Argument of the Industry Participants

In the May 24, 2013 filing entitled "Request to Participate in the Proceeding as Non-Party Participants and for Leave to File a Memorandum in Support of the Motion for Determination that the Order Adding Craig Zucker as a Respondent can be Immediately Appealed," (Request to Participate) the Industry Participants request leave to participate in the proceedings pursuant to 16 C.F.R. § 1025.17(b), explaining they seek "to provide the Court with their (and their members) views and arguments as to why Craig Zucker's motion for a determination…should be granted."

Attached to the Request to Participate is a "Memorandum In Support of Zucker's Request for Interlocutory Determination of Status as a Proper Party to Proceeding" (Memorandum) which argues, inter alia, the undersigned's "Decision is clearly erroneous as a matter of law," explaining the decision has "far-reaching, negative policy implications to large and small businesses alike which, if allowed to stand, will substantially change and degrade established Commission practice and federal product safety policy."

The Memorandum suggests "[i]ndividual officers and employees of corporations have not for decades been included as, or considered to be, responsible parties to the various Section 15 obligations," arguing the undersigned's May 3, 2013 Order "flies in the face of historic interpretations of Section 15, but also the value, tradition, and history of the use of corporate entities as a highly productive economic organization…".

The Memorandum further contends that "those unusual situations discussed in the Decision regarding case law on the 'responsible corporate officer' doctrine are not relevant to the procedural posture of this case." The Memorandum also argues the undersigned's May 3, 2013 Order "undermines the product safety mission of the CPSC and manufacturers," and will create confusion.

The Memorandum concludes by suggesting the undersigned's Order:

> [M]ust be reviewed immediately by the Commission, which can determine not only the law but the broad policy implications. The Industry [Participants] urge that Mr. Zucker's motion be granted, so that the full Commission may consider this significant and precedent-setting action promptly within the larger context of policy implications to the Commission, to businesses and to consumers of this determination.

CPSC's Argument

In the June 3, 2013 Opposition, CPSC suggests the Industry Participants do not qualify as non-party participants, and, even if they did, the applicable regulations do not contemplate pre-hearing briefing by non-party participants. The Opposition suggests, inter alia, the Industry Participants fail to provide any explanation as to how the underlying issue of whether the subject magnets present a substantial product hazard will impact the Industry Participants in any way.

While the Industry Participants assert their members will be "uniquely affected" by the outcome of Mr. Zucker's Motion for Determination, CPSC suggests the filing does not explain how Participants will be impacted. Furthermore, the Memorandum merely repeats Mr. Zucker's arguments regarding the responsible corporate officer doctrine; it fails to even address the required elements for an interlocutory appeal as set forth by 16 C.F.R. § 1025.24.

Discussion

a. The Interlocutory Appeal

The bulk of the Industry's submission is the Memorandum, ostensibly filed in support of Mr. Zucker's request for an interlocutory appeal, and thus entitled "Memorandum in Support of Zucker's Request for Interlocutory Determination of Status as Proper Party to Proceeding." However, the Memorandum focuses not on the standard for interlocutory appeals as set forth in 16 C.F.R. § 1025.24, but rather on why the undersigned's Order is incorrect from both a legal and policy perspective. In fact, the Memorandum fails to discuss, or even mention, the applicable requirements for interlocutory appeals set forth at 16 C.F.R. § 1025.24.[3]

The only question presently before the undersigned at this juncture is whether, pursuant to the standards set forth at 16 C.F.R. § 1025.24, Mr. Zucker has demonstrated that an interlocutory appeal is appropriate; the Memorandum neglects to even mention 16 C.F.R. § 1025.24 or 28 U.S.C. § 1292(b). Thus, although the Memorandum purports to

[3] In essence, the Industry Participants present legal arguments more appropriate for the previous stage of the proceeding, when the parties presented argument as to whether Mr. Zucker could properly be included as a Respondent. The undersigned ruled on this issue in the May 3, 2013 Order; the sole issue presently before the undersigned is whether an interlocutory appeal on the issue is warranted.

support Mr. Zucker's request for an immediate appeal, it presents no specific argument on the issue.

b. Request to Participate as a Non-Party Participant

The first (non-Memorandum) portion of the filing requests "leave to participate in these proceedings as non-parties with an interest in the proceedings, pursuant to the Commission's regulations, 16 C.F.R. § 1025.17(b)." To this end, the Participants summarize their composition and their purpose, explaining they "seek leave to participate in order to provide the Court with their (and their members) views and arguments as to why Craig Zucker's motion for a determination that the order adding Mr. Zucker as a Respondent can be immediately appealed should be granted." Thus, as written, the filing indicates the Industry Participants wish to participate solely for the purpose of filing the attached Memorandum regarding the interlocutory appeal.

The filing explains the "members would be uniquely affected by the outcome of this motion," and suggests that "participation would be consistent with the Commission's rules favoring participation in adjudications, particularly when the person's participation 'can be expected to assist the Presiding Officer and the Commission in rendering a fair and equitable resolution' of the issues. 16 C.F.R. § 1025.17(e)."

The applicable regulations explain that:

> Any person who desires to participate in the proceedings as a non-party shall file with the Secretary a request to participate in the proceedings and shall serve a copy of such request on each party to the proceedings.
> 16 C.F.R. § 1025.17(b).

In ruling on requests to participate as a participant, the Presiding Officer may consider, among other things:

> (1) The nature and extent of the person's alleged interest in the proceedings;
>
> (2) The possible effect of any final order which may be entered in the proceedings on the person's interest; and
>
> (3) The extent to which the person's participation can be expected to assist the Presiding Officer and the Commission in rendering a fair and equitable resolution of all matters in controversy in the proceedings.
>
> The Presiding Officer may deny a request to participate if he/she determines that the person's participation cannot reasonably be expected to assist the Presiding Officer or the Commission in rendering a fair and equitable resolution of matters in controversy in the proceedings or if he/she determines that the person's participation would unduly broaden the issues in controversy or unduly delay the proceedings.
> 16 C.F.R. § 1025.17(e).

As discussed, the filing indicates the Industry Participants seek leave to participate to provide the undersigned "views and arguments as to why Craig Zucker's motion for a determination that the order adding Mr. Zucker as a Respondent can be immediately appealed should be granted," and asserts "[the] members would be uniquely affected by the outcome of this motion." See 16 C.F.R. § 1025.17(b)(2). Thus, the "nature and extent" of the Participants' interest pursuant to 16 C.F.R. § 1025.17(e)(1) is apparently limited to whether the interlocutory appeal should be permitted.

However, as discussed, the attached Memorandum provides no legal argument relevant to the issue presently before the undersigned. The Memorandum also fails to address how the undersigned's decision to allow or disallow an interlocutory appeal "uniquely affects" the Industry. See 16 C.F.R. § 1025.17(e)(1). Accordingly, it is unclear as to how the Memorandum would assist the undersigned in rendering a

determination on the instant issue.[4] 16 C.F.R. § 1025.17(e)(3). Accordingly, the Request to Participate in the Proceeding as Non-Party Participants and for Leave to File Memorandum is denied.

ORDER

WHEREFORE,

IT IS HEREBY ORDERED THAT the Motion for Determination that the Order Adding Craig Zucker as a Respondent can be Immediately Appealed is **DENIED.**

IT IS FURTHER ORDERED THAT the Request to Participate in the Proceeding as Non-Party Participants and for Leave to File Memorandum is **DENIED.**

SO ORDERED.

Done and dated this 19th day of June, 2013, at Galveston, TX

DEAN C. METRY
Administrative Law Judge

[4] The undersigned is very mindful of "the Commission's mandate…and its affirmative desire to afford interested persons, including consumers and consumer organizations, as well as government entities, an opportunity to participate in the agency's regulatory processes, including adjudicative proceedings." 16 C.F.R. § 1025.17(e). However, the filing fails to address both the relevant interlocutory appeal standard and the criteria set forth at 16 C.F.R. § 1025.17(e)(1)-(3). In essence, the filing is not germane at this stage in the proceeding; the filing may have been legally relevant one stage earlier in the proceeding, or, were the undersigned to find a legal basis for the interlocutory appeal, one stage later.

EXHIBIT

8

UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION

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

Recall date: April 12, 2013

Recall number: 13-168

Name of product:

Buckyballs and Buckycubes high-powered magnet sets

Hazard:

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

Consumer Contact:

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

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

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

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

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

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

Report an Incident Involving this Product

Description

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

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

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

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

- Barnes & Noble, toll-free at (855) 592-2993 or online at www.barnesandnoble.com and click on "Product Recalls"
- Bed Bath & Beyond, toll-free at (800) 462-3966 or online at www.bedbathandbeyond.com and select "Safety and Recalls" under Customer Service, then click on Recall Information
- Brookstone, toll-free at (866) 576-7337 or online at www.brookstone.com and click on "Recall Information" under Shop Brookstone
- Participating Hallmark retailers, toll-free at (800) 425-5627 or online at http://www.hallmark.com/recall-product/
- Marbles the Brain Store, toll-free at (877) 527-2460 or online at www.marblesthebrainstore.com
- ThinkGeek, toll-free at (888) 433-5788 or online at www.thinkgeek.com/buckyballs/index.shtml

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

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

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

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

CPSC is charged with protecting the public from unreasonable risks of injury or death associated with the use of the thousands of consumer products under the agency's jurisdiction. Deaths, injuries and property damage from consumer product incidents cost the nation more than $900 billion annually. CPSC is committed to protecting consumers and families from products that pose a fire, electrical, chemical or mechanical hazard. CPSC's work to ensure the safety

of consumer products - such as toys, cribs, power tools, cigarette lighters and household chemicals - contributed to a decline in the rate of deaths and injuries associated with consumer products over the past 30 years.

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

Buckyballs sets

Buckyballs sets

Buckycubes sets