THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CRAIG ZUCKER, *Plaintiff,*	*	
v.	*	
U.S. CONSUMER PRODUCT SAFETY COMMISSION, and ROBERT ADLER, in his official capacity as Acting Chairman of the U.S. Consumer Product Safety Commission, *Defendants*.	*	Civil No. 8:13-cv-03355-DKC

MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

Daniel Z. Epstein, Esq.
Cause of Action, Inc.
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: 202.499.4232
Fax: 202.330.5842
Email:daniel.epstein@causeofaction.org

Reed D. Rubinstein, Esq.
Dinsmore & Shohl, LLP
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20006
Telephone: 202.372.9120
Fax: 202.372.9141
Email: reed.rubinstein@dinsmore.com
As Counsel to Cause of Action, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

Rules

I. INTRODUCTION

Plaintiff Craig Zucker ("Mr. Zucker") hereby opposes the Motion to Dismiss ("MTD") filed by Defendants Consumer Product Safety Commission and Acting Chairman Robert Adler (collectively the "Commission").

The central issue in this case is whether the Commission has jurisdiction over Mr. Zucker under the Consumer Product Safety Act ("CPSA") solely because Mr. Zucker was an officer of a now-dissolved company, Maxfield & Oberton Holdings, LLC ("M&O") that imported and distributed magnets. The Commission grabbed this jurisdiction on February 11, 2013. As a result, Mr. Zucker, who has never been accused of violating any law, now faces personal financial, reputational and business ruin.

This Court need not wait for the Commission to finish its adjudication of magnet risks before considering "whether the agency has stayed within the bounds of its statutory authority" with respect to Mr. Zucker. *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013). Judicial review is favored when an agency is charged with acting beyond its authority. *Dart v. United States*, 848 F.2d 217, 221 (D.C. Cir. 1988). Therefore, courts have repeatedly affirmed that Article III courts have subject-matter jurisdiction over both statutory Administrative Procedure Act ("APA") and non-statutory challenges of agencies' *ultra vires* jurisdictional claims. *See generally Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 187 (D.C. Cir. 2006); 5 U.S.C. § 704; *see also Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1487-88 (D.C. Cir. 1983); *Doe v. Tenenbaum*, 900 F. Supp. 2d 572, 601 (D. Md. 2012); *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 413 (D.C. Cir. 2011); *Reliable Automatic Sprinkler Co., Inc. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 735 (D.C. Cir. 2003); *Atl. Richfield Co. ("ARCO") v. U.S. Dept of Energy*, 769 F.2d 771, 782 (D.C. Cir. 1984).

Mr. Zucker is not asking the Court to involve itself in the substance of the Commission's magnet proceedings or to second-guess the agency's product safety expertise. Instead, he asks for relief from the Commission's *ultra vires* jurisdictional overreach. As to this issue, the agency action against him is final, his administrative remedies are exhausted[1] and the matter is ripe for judicial review. And, the Commission has waived any argument for dismissal of the second claim for relief. Therefore, the Commission's motion to dismiss should be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

Although Mr. Zucker's case can be decided entirely as a matter of law, the facts leading to the Commission's unprecedented *ultra vires* jurisdictional claim against him are instructive.

Mr. Zucker was the General Manager of M&O, an importer and distributor of Buckyballs® and Buckycubes®, adult executive desktoys consisting of small magnetic spheres or cubes that can be arranged into shapes and patterns. Dkt No. 1 at ¶¶ 12-14, 28-30. Like many consumer products, Buckyballs® and Buckycubes® are completely safe when used properly, but can be dangerous if swallowed. *Id.* at ¶¶18-19. M&O marketed its products exclusively for adults, and went to great pains to label its products with warning labels and to educate the public and the medical community about the dangers of swallowing magnets. *Id.* at ¶¶ 20-27. From

[1] The Commission, correctly, does not claim Mr. Zucker's suit is barred by the exhaustion doctrine. *See Darby v. Cisneros*, 509 U.S. 137, 154 (1993) (where, as here, the APA applies, exhaustion is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review *and* the administrative action is made inoperative pending that review); Dkt No. 1 at ¶¶ 2-3, 59-67, 83-94. But even if exhaustion was required here, "the purposes of the exhaustion requirement would not be significantly advanced by postponing judicial consideration of a challenge to the [Commission's] authority..." *ARCO*, 769 F.2d at 782. Furthermore, exhaustion is not required where, as here, it is "highly unlikely that the [agency] would change its position if the case were remanded to it." *Id.* (internal citations omitted); *see also Gold Dollar Warehouse, Inc. v. Glickman*, 211 F.3d 93, 98-99 (4th Cir. 2000) ("The warehouses' argument that the regulations exceed the scope of section 1314 because they permit the USDA to impose personal liability, rather than mere collection responsibility, on the warehouses, we believe does not require exhaustion.") (emphasis omitted).

2010 to 2012, M&O worked closely with the Commission to develop and implement comprehensive safety programs for Buckyballs® and Buckycubes®, including enhanced warning labels; signage for retailers; a joint press release and video news release with the Commission; a website, www.magnetsafety.com, to raise awareness about magnet safety; a medical advisory group of physicians in relevant fields; the creation of an industry group, the Coalition for Magnet Safety; and a petition to ASTM International to develop a voluntary standard for magnet labeling and marketing. *Id.* at ¶¶ 22-37. Indeed, in late 2011, the Chairman of the Commission commended M&O on its safety program, sentiments that were later echoed by other Commissioners and Commission staff. *Id.* at ¶¶ 31-36.

But all of M&O's cooperation with the Commission was for naught. On July 10, 2012, the Commission's Office of Compliance abruptly changed course and issued a preliminary determination that magnets were a substantial hazard. *Id.* at ¶ 39. The Commission then moved to shut down M&O for good, contacting M&O's retailers and telling them that Buckyballs® and Buckycubes® were unsafe and "requesting" that they stop selling the products. *Id.* at ¶¶ 41-43, 53-55.

On July 25, 2012, the Commission filed an administrative complaint against M&O seeking an order to stop M&O from selling magnets and requiring a total recall of the magnets that had already been sold.[2] *Id.* at ¶ 47. The Commission conceded that it was legal to sell Buckyballs® and Buckycubes®. *Id.* at ¶ 52, Ex. 1 (sale of these "is not in violation of any law…"). Nevertheless, it pressured retailers to stop selling M&O's products. *Id.* at ¶ 53.

---

[2] *In the Matter of Maxfield and Oberton Holdings, LLC*, CPSC Docket No. 12-1 (the "CPSC Proceeding"). This has since been consolidated with CPSC Docket Nos. 12-2 and 12-3, which are similar actions against two other magnet importers. As the Commission at least tacitly acknowledges, this suit does not concern and will not affect the CPSC Proceeding's adjudication of magnet safety.

The Commission succeeded completely. Within months, M&O was out of business. *Id.* at ¶¶ 54-56. It dissolved on December 27, 2012. *Id.* at ¶ 56.

The purported goal of the Commission's administrative proceeding was to force M&O to conduct a mandatory recall, which the Commission believes will cost $57 million. *Id.* at ¶ 60. But the Commission's aggressive intimidation of retailers put M&O out of business before the administrative hearing was complete, rendering M&O incapable of conducting a recall, or even properly defending itself. And while the M&O's liquidating trust might have stepped into M&O's shoes, the Commission chose not to name the trust as a party. *Id.* at ¶ 64. Instead, the Commission actually crippled the trust's ability to contribute to any recall by directing it not to sell M&O's remaining inventory of Buckyballs® and Buckycubes® to anyone, under any conditions. *Id.* at ¶ 57.

Mr. Zucker had advocated for M&O before the Commission, Congress, and the public. *Id.* at ¶ 65. He continued to speak out and to petition public officials for relief after the CPSC Proceeding commenced. And so, the Commission decided he had to be punished. *Id.* at ¶¶ 58, 65-68.

On February 11, 2013, the Commission filed an amended complaint against Mr. Zucker in his personal capacity. The amended complaint was issued "BY ORDER OF THE COMMISSION" and signed by the Commission's Executive Director, and claimed that because Mr. Zucker was a former officer of M&O, he was also a CPSA "manufacturer," "distributor," or "retailer" and therefore personally liable for a $57 million recall under the responsible corporate officer doctrine, also known as the *Park* Doctrine. *Id.* at ¶¶ 3, 59-63. Laying bare its intent to punish Mr. Zucker for exercising his right to free speech and to petition government officials, the Commission's amended complaint expressly cited Mr. Zucker's First Amendment-protected

activities as grounds for its action. *Id.* at ¶¶ 4, 65-68, 93, 108-109. The Commission's action was unprecedented – never before had a current or former corporate officer been sued to personally conduct a recall. *Id.* at ¶ 62.

Mr. Zucker immediately moved to dismiss the amended complaint. However, the ALJ ruled for the Commission. He then rejected Mr. Zucker's request for leave to appeal. *Id.* at ¶¶ 96-100.

In this lawsuit, this Court is not being asked to determine whether magnets are unsafe. Nor is this Court being asked to take over the Commission's ongoing administrative action against M&O and other magnet-sellers. Instead, Mr. Zucker is asking only for this Court to determine that the Commission's personal jurisdiction claim against him overreaches the agency's statutory limits.

III. ARGUMENT

A. The Standard Of Review.

The plaintiff bears the burden of establishing jurisdiction in response to a Fed. R. Civ. P. 12(b)(1) motion. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

To begin with, it is well-established that federal courts have subject-matter jurisdiction over all civil actions arising under the laws of the United States. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503 (2006) (citing 28 U.S.C. § 1331). The APA is a law of the United States that embodies a basic presumption of judicial review of final agency action. *Lee v. U.S. Citizenship & Immigration Servs.*, 592 F.3d 612, 619 (4th Cir. 2010). If APA review is proper, as it is in this case, then District Court jurisdiction under 28 U.S.C. § 1331 is certainly "common ground." *Id.*[3]

[3] Note, however, that APA § 10(c) "final agency action" is not a jurisdictional prerequisite. *Trudeau*, 465 F.3d at 183-84; see also *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 232 (4th Cir. 2008) (assuming without deciding that *Arbaugh* renders the APA's

The Court should consider the defendants' motion using a standard patterned on Fed. R. Civ. P. 12(b)(6) and "assume the truthfulness of the facts alleged." *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009). Therefore, the defendants' motion should be granted only if the material jurisdictional facts are not in dispute and it is entitled to prevail as a matter of law. *Richmond, Fredericksburg & Potomac R.R. Co., v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

B. Mr. Zucker's Challenge To The Commission's *Ultra Vires* Jurisdictional Claim Is Judicially Reviewable Now.

Mr. Zucker's challenge to the Commission's *ultra vires* jurisdictional claim is judicially reviewable now. *See Athlone*, 707 F.2d at 1487-88 ("Because we conclude that the critical issue in this case - the Commission's authority to proceed administratively - was properly before the district court, we reverse that court's ruling. Because the interests of judicial economy will be served by a decision on the merits at this time, we also reach the dispositive substantive issue, concluding that the administrative proceeding initiated by the Commission should be enjoined."); *Fort Sumter Tours, Inc. v. Andrus*, 564 F.2d 1119, 1123 (4th Cir. 1977) (concluding that the agency's "decision to deny Fort Sumter its statutory preference and to negotiate instead with Gray Line is 'final agency action …'"); *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 237 (4th Cir. 2008) (*Athlone* and *Fort Sumter* control when agency decisions have "direct and immediate legal force and practical effect on the plaintiffs"); *Trudeau*, 456 F.3d at 187. And, the Commission's jurisdictional claim is APA "final agency action." *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Therefore, the defendants' motion should be denied.

---

final agency action provision "nonjurisdictional") (internal citations omitted). Absent an express statutory command in the CPSA to the contrary, the ambit of this Court's jurisdiction is set by 28 U.S.C. § 1331. See *Arbaugh*, 546 U.S. at 503.

1. Judicial review is proper.

Athlone is persuasive authority for judicial review.

In that case, the D.C. Circuit found that an *ultra vires* challenge to the Commission's statutory authority was judicially reviewable under the APA. *Athlone*, 707 F.2d at 1489. The Commission, however, failed to distinguish, discuss or even mention *Athlone* in its motion to dismiss. This omission is troubling both because *Athlone* is the seminal case dealing with *ultra vires* challenges to agency claims of jurisdiction, and because *Athlone* dealt with a claim of jurisdiction by the Commission that is closely-related to the facts of Mr. Zucker's case.

The court in *Athlone* explained that judicial review of the Commission's decision to pursue civil penalties was appropriate for three reasons, all of which apply here. First, "the scope of the Commission's statutory authority is strictly a legal issue." *Id.* at 1489. The sole question presented by Mr. Zucker's first claim for relief is whether the Commission has statutory authority to assert jurisdiction over a former corporate officer of a now-dissolved company as a manufacturer or distributor under 15 U.S.C. § 2064(c)-(d). Consequently, determining the matter does not require "factual development or application of agency expertise." *Athlone*, 707 F.2d at 1489. And, as in *Athlone*, the Commission has failed to even allege that such development or expertise "will aid the court's decision." *Id.*

The Commission's claim that Mr. Zucker's complaint presents "inherently fact-based inquiries" MTD at 11, mischaracterizes the case. Whether magnets are a substantial hazard is not before this Court. Instead, the issue before this Court is whether the Commission has the legal authority to exercise CPSA jurisdiction over Mr. Zucker personally as a manufacturer or a distributor, and this has absolutely nothing to do with the administrative record or agency expertise.

Second, a decision by this Court on Mr. Zucker's first claim for relief will not invade any field of agency expertise or discretion. Where, as here, the dispute relates to the outer limits of an agency's legal authority, the controversy "presents issues on which courts and not [agencies] are relatively more expert." *Athlone,* 707 F.2d at 1489. And, in fact, the Commission's treatment of its jurisdictional claim over Mr. Zucker demonstrates why Article III judges ought to be responsible for determining the limits of Executive Branch agency authority.

The Commission's jurisdictional claim contradicts the CPSA's plain language and is utterly disconnected from the statutory structure. To begin with, Congress has explicitly allowed for individual liability in other sections of the CPSA, clearly distinguishing between "manufacturers" and "distributors" on the one hand, and individual corporate officers on the other hand. *See, e.g.*, 15 U.S.C. § 2070 (authorizing liability for "an individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs" certain criminal violations of section 15 U.S.C. § 2068). If an officer were to authorize the sale, manufacture, or distribution of a consumer product that has already been deemed to present a substantial product hazard, for example, then that officer can be held individually liable under the CPSA. *See* 15 U.S.C. § 2070; *see also* 15 U.S.C. § 2068. But nothing in the CPSA provides for individual officer liability for acts *prior* to a formal finding of a substantial product hazard. In fact, jurisdiction to order a recall of a product not previously found to be defective only exists with respect to the manufacturer or distributer itself. 15 U.S.C. § 2064. Nevertheless, the Commission has definitively decided that it has personal jurisdiction over Mr. Zucker in this

case.[4] *See* Dkt No. 1 Ex. 4 at 21 (complaint against Mr. Zucker "ISSUED BY ORDER OF THE COMMISSION").

Third, "it is highly unlikely that the Commission would change its position if the case were remanded to it." *Athlone*, 707 F.2d at 1489. In this case, as in *Athlone*, the "Commission filed the complaint [against the petitioner] in the first place, presumably on the basis of its conclusion that it had jurisdiction." *Id.*; Dkt No. 1 Ex. 4 at 21. The ALJ upheld the Commission's position, rejected Mr. Zucker's request for an interlocutory appeal of that decision to the Commission, and ordered the litigation to proceed with Mr. Zucker as a named respondent. Consequently, it is clear that resort to the agency would in all likelihood be futile, indeed, it already has proved to be futile and "the cause of overall efficiency will not be served by postponing judicial review." *Athlone*, 707 F.2d at 1489.

Nothing here requires this Court to examine whether Buckyballs® or Buckycubes® present a substantial product hazard, much less second-guess the Commission's safety determination. However, the Commission's jurisdictional claim against Mr. Zucker is final, *see* Dkt No. 1 Ex. 4 at 21, Ex. 6 and Ex. 7, and it is doing him grievous, immediate and concrete harm. *Id.* at ¶¶ 2-4, 58-68, 83-86, 93-94. Thus, this Court should not wait to take up the merits of Mr. Zucker's *ultra vires* challenge or deny him judicial review. *See City of Arlington*, 133 S. Ct. at 1874 ("Where Congress has established a clear line, the agency cannot go beyond it; and

---

[4] The Commission determined that Mr. Zucker was a manufacturer or distributor under 15 U.S.C. § 2064(c)-(d) through an unprecedented expansion of the *Park* Doctrine, which the Supreme Court has cabined by saying that the vicarious liability of individual corporate officers applies "only where Congress specified that such was its intent." *Meyer v. Holley*, 537 U.S. 280, 287 (2003) (*citing United States v. Dotterweich*, 320 U.S. 277 (1943) and *United States v. Park*, 421 U.S. 658 (1975)). Congress did not specify, in the CPSA or anywhere else, that it intended corporate officers to be vicariously liable because a company imported and sold magnets legally or because that officer exercised protected First Amendment rights. But such is the Commission's claim.

where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow."); *see also ARCO*, 769 F.2d at 782.[5]

2. The Commission's jurisdictional determination is "final agency action."

As a general matter, two conditions must be satisfied for APA "final agency action." First, the action must mark the "consummation" of the agency's decision-making process. "And second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow." *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 194-95 (4th Cir. 2013) (citations omitted). "The core question is whether the agency has completed its decision-making process and whether the result will directly affect the parties." *Id.* at 195 ("Here, the Corps made a final determination for purposes of the APA when it announced formal approval of the revised project in September 2000. That approval, not the Corps' subsequent activities in carrying it out, was the final agency action.") (citation and emphasis omitted).

By this test, the Commission's jurisdictional determination is APA final agency action. First, the Commission's decision to take jurisdiction over Mr. Zucker individually "marked the consummation of its decision-making process." Dkt No. 1 Ex. 4 at 21 (complaint alleging jurisdiction "ISSUED BY ORDER OF THE COMMISSION"); *Doe*, 900 F. Supp. 2d at 601; *see*

---

[5] According to the court:

> Our reasoning … applies equally to ARCO's assault on the power of the Department of Energy to adjudicate questions concerning remedial orders and impose discovery sanctions in the course of that adjudication. The scope of the Secretary's statutory authority is strictly a legal issue, and '[n]o factual development or application of agency expertise will aid the court's decision.' Additionally, because we are 'relatively more expert' to ascertain the meaning of statutory terms, we would not impermissibly displace agency skill or invade the field of agency discretion.

ARCO, 769 F.2d at 782 (citations omitted).

also Athlone, 707 F.2d at 1489. Second, there is no question that this action determined Mr. Zucker's "rights or obligations" and is one from which "legal consequences will flow." *Doe*, 900 F. Supp. 2d at 603. Mr. Zucker is now subject to the Commission's adjudicatory jurisdiction. He is suffering direct and concrete personal, financial and reputational harm. Dkt No. 1 at ¶¶ 93-94. He must choose "between complying with allegedly *ultra vires* discovery orders – and thus revealing materials that otherwise would remain confidential – and flouting the orders and facing the consequences." *See, e.g., Reliable Automatic Sprinkler Co., Inc.*, 324 F.3d at 735. And, the very same Commission that by order issued the personal liability complaint will decide if Mr. Zucker, who has not broken any relevant law, must pay $57 million. Dkt No. 1 at ¶¶ 60-61, Ex. 4 at 21.

The Commission cites *Reliable Automatic* to argue that Mr. Zucker is "preemptively challeng[ing] the Government's jurisdiction before the Government has taken any action to enforce the law against him." MTD at 9 (*quoting Reliable Automatic*, 324 F.3d at 732). But the basis for the court's holding in *Reliable Automatic* was that so "long as Reliable retains the opportunity to convince the agency that it lacks jurisdiction over Reliable's sprinkler heads, it makes no sense for a court to intervene." *Reliable Automatic*, 324 F.3d at 733. Thus, *Athlone*, *ARCO* and *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430 (D.C. Cir. 1986), the three leading cases involving *ultra vires* jurisdictional challenges, did not control. In this case, however, the agency's mind is made up and this Court is the only place for Mr. Zucker to go to challenge its jurisdictional overreach. *See* Dkt No. 1 at ¶¶ 82-94, Ex. 4 at 21, Ex. 6 and Ex. 7. Therefore, judicial review is proper. *Accord Long Term Care*, 516 F.3d at 237 n. 13.[6]

[6] The court's focus on the availability of administrative remedies suggests that *Reliable Automatic* might best be conceived of as an exhaustion case. But exhaustion is not an issue in Mr. Zucker's case. *See supra* note 1.

In *Athlone*, as in this case, the Commission cited *Fed. Trade Comm'n v. Standard Oil Co. of California ("SoCal")*, 449 U.S. 232, 239 (1980), to immunize itself from judicial review. But as *Athlone* made clear, *Standard Oil* does not apply when the Commission claims jurisdiction beyond its statutory authority.

> In *Standard Oil* the Court held that a plaintiff could not attack the FTC's motive in filing an administrative complaint until the administrative proceeding was completed, ruling that the FTC's decision to issue the complaint was not 'final agency action' within the meaning of 5 U.S.C. § 704 (1976). The Court stressed that the agency's "averment of 'reason to believe' that [plaintiff] was violating the Act [was] not a definitive statement of position." The present case is, in that respect, distinguishable. By filing a complaint in the present case, the Commission, for all practical purposes, made a final determination that such proceedings were within its statutory jurisdiction.... Thus, with respect to the issue we address, the Commission has taken a definitive position, and Standard Oil is not controlling.

Athlone, 707 F.2d at 1489 n.30 (citations omitted).

The Commission claims that Mr. Zucker's position "is almost exactly that of SoCal in *Standard Oil*." MTD at 8. But the analogy is false and fails. As *Athlone* itself explains, Standard Oil did not involve an agency's misinterpretation of a jurisdictional provision or an assertion of jurisdiction over a party that was not subject to the agency's authority. *Athlone*, 707 F.2d at 1489 n.30.

The D.C. Circuit's decision in *CSI*, 637 F.3d at 408 is persuasive authority.

CSI's plaintiff was an air-charter broker for federal agencies. The Department of Transportation sent a letter stating that the plaintiff was an "unauthorized indirect air carrier,"

In any event, *Reliable Automatic* is factually inapposite. First, the question presented there was whether the statutory term "consumer product" included sprinkler heads. *Reliable Automatic*, 324 F.3d at 734. In other words, the focus was on the products that the Commission could regulate, and not who was subject to the Commission's jurisdiction. Second, the question presented in that case was not "purely legal" because "the application of the statutory term to the sprinkler heads would clearly involve the resolution of factual issues and the creation of a record." *Id.* In this case, the CPSA jurisdictional question does not require resolution of disputed facts or creation of an administrative record.

ordered it to stop doing business and threatened enforcement action if it failed to voluntarily do so. The plaintiff petitioned for relief alleging, as Mr. Zucker does here, that the government acted beyond its statutory authority.

The threshold issue before the court there was, as it is here, whether the matter was fit for judicial review. The government argued there, as it has here, that *Standard Oil* mandated dismissal. But the government failed. As the D.C. Circuit held:

> *Standard Oil* differs from the present case in three key respects. First, unlike in this case, the FTC in *Standard Oil* did not definitively state its legal position.... Second, ... *Standard Oil* did not raise a purely legal question that was amenable to immediate judicial review. Whether Socal had violated the law – and whether there was a "reason to believe" it had – depended on a large body of unresolved facts, best sorted out by the FTC with its expertise and fact-finding capability. In the presence of disputed facts, the case did not present a fully crystallized "legal issue ... fit for judicial resolution." Granting Socal's petition for review would have been premature: it would have caused "interference with the proper functioning of the agency and [imposed] a burden [on] the courts." Here, by contrast, we face a clean question of statutory interpretation with no disputed facts.... Third, the FTC's enforcement action against Socal did not impose the same magnitude of hardship that DOT has imposed on CSI. As the Supreme Court explained, the FTC's tentative determination that Socal might be violating the antitrust laws had no significant "effect upon [Socal's] daily business." Here, however, DOT's legal position cast a shadow over CSI's customer relationships, tainted almost every aspect of its long-term planning, and impaired the company's ability to fend off competitors. Indeed, the very purpose of DOT's legal pronouncements, accomplished with six other companies, was to prompt CSI to shut down its operations….
>
> It is clear from *Standard Oil* that courts should take care not to inject themselves into fact-bound agency proceedings that have yet to produce any definitive legal conclusions. But this is not such a case. DOT took a definitive legal position denying the right of GSA contractors to continue operating without certification from the agency. This order imposed a substantial burden on CSI, and the disputed statutory authority underlying the order is fully fit for judicial review without further factual development.

CSI, 637 F.3d at 412-13 (citations omitted).

Here, the government has taken a definitive legal position that it has personal jurisdiction over Mr. Zucker under the CPSA. Dkt No. 1 at ¶¶ 59-64, 81, 89, Ex. 4 at 21, Ex. 6 and Ex. 7.

The statutory authority for the Commission's claim is "a clean question" that does not require agency expertise to sort out "a large body of unresolved facts." And, the Commission's legal position has imposed a huge, concrete and immediate burden on Mr. Zucker. The government has cast a dark shadow over all aspects of his life, hamstringing his ability to plan for or pursue any new business or personal ventures and threatening him with total financial and reputational ruin. Dkt No. 1 at ¶¶ 2-4, 59-63, 82-86, 93-94. Burdening and punishing Mr. Zucker, after all, was the Commission's goal. *See id.* at ¶¶4, 67-68, 98.

Courts should take care not to inject themselves into fact-bound agency proceedings that have yet to produce any definitive legal conclusions. But this is not such a case. The Commission has taken a definitive and final legal position regarding the limits of its CPSA jurisdiction over Mr. Zucker. This decision has very significant legal consequences and has had a direct and concrete impact on Mr. Zucker. Finally, the disputed statutory authority is fully fit for judicial review without further factual development. Consequently, judicial review is proper. *Accord CSI*, 637 F.3d at 413; *Athlone*, 707 F.2d at 1489; *Fort Sumter*, 564 F.2d at 1123; *see also Long Term Care*, 516 F. 3d at 238.[7]

[7] In *Long Term Care*, the court distinguished between the "disruptions that accompany any major litigation" and those agency decisions with direct and immediate legal force and practical effect on the plaintiff. Where, as here, the agency's actions are final and the burden is heavy, review is presumed absent clear evidence to the contrary. *See Long Term Care*, 516 F.3d at 233 *citing Leedom v. Kyne*, 358 U.S. 184 (1958) and *Bd. of Governors of the Fed. Res. Syst. v. MCorp. Fin., Inc.*, 502 U.S. 32, 43 (1991) ("Kyne stands for the familiar proposition that only upon a showing of clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."). Indeed, the court in *Long Term Care* explained that "the immediate impact of the EEOC's jurisdictional decision" was "at best, tenuous" because any administrative action would be against OPM not LTC Partners. *Id*. at 237. In other words, there was no "tangible, immediate effect on LTC Partners." *See Long Term Care*, 516 F.3d at 237 n.13 (citations omitted). Here of course, the Commission's assertion of jurisdiction is reviewable because it "indisputably had direct and immediate legal force and practical effect" on Mr. Zucker. *Id*.

C. Judicial Review Does Not Interfere With The CPSC Proceeding.

The Commission relies on *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950), to argue that judicial review of the Commission's jurisdiction over Mr. Zucker will somehow constitute undue judicial interference with the Commission's internal decision-making process. But the Commission's argument and reliance on *Ewing* is misplaced.

To begin with, the Supreme Court has held that *Ewing* "is hardly authority for cutting off the well-established jurisdiction of the federal courts to hear, in appropriate cases, suits under the Declaratory Judgment Act and the Administrative Procedure Act challenging final agency action of the kind present here." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The Commission's reading of *Ewing* "would preclude any and all pre-enforcement declaratory challenges," but *Ewing* "does not reach so far." *Farm-to-Consumer Legal Def. Fund v. Sebelius,* 734 F. Supp. 2d 668, 698 (N.D. Iowa 2010).

Moreover, the Commission's jurisdictional over-reach in this case is especially damaging to a small business entrepreneur like Mr. Zucker. There is no doubt that Standard Oil of California (SoCal) – one of the largest oil companies in the world – was well-positioned to defend itself against the FTC's unfair competition claims. *See F.T.C.*, 449 U.S. at 243-244. Not surprisingly, the Supreme Court, found that "mere litigation expense" did not justify immediate review for SoCal. *Id*. at 244. But the Court did not hold that this finding was an "across-the-board" bright-line rule. For Mr. Zucker and other entrepreneurs, the calculus of agency over-reach is very different than it was for SoCal. When an individual is caught in the chains of an over-reaching agency, a delay in judicial review can often be fatal.

As such, the real lesson of *Standard Oil* is that courts should evaluate, on a case by case basis, whether the agency's administrative process is so burdensome and abusive that judicial review is warranted without more. Any other interpretation hollows out the judiciary's ability to check Executive Branch abuses, ignores the practical impact of bureaucratic power and contradicts the Supreme Court's repeated admonition that judicial review of agency action should not be restricted absent clear and convincing evidence that Congress intended to do so. *See Bd. of Governors*, 502 U.S. at 43 (citation omitted).

Ewing is also factually distinguishable. *Ewing* sought judicial review of an agency's decision of probable cause to initiate product condemnation proceedings. Not surprisingly, the Court declined to interfere in an agency process that had barely begun and over which the agency plainly had authority, saying "[t]he determination of probable cause in and of itself had no binding legal consequence…." *Ewing*, 339 U.S. at 600.

The same, however, cannot be said here. Mr. Zucker's *ultra vires* jurisdictional challenge presents a purely legal question of statutory interpretation. *See CSI*, 637 F.3d at 412. As such, there is "not the slightest danger that judicial review will disrupt the orderly process of administrative decisionmaking." *Ciba-Geigy*, 801 F.2d at 437. Also, the Commission's decision to assert personal jurisdiction over Mr. Zucker carries immediate legal consequences and is exactly the kind of binding action that warrants judicial review. *See ARCO*, 769 F.2d at 781.[8]

D. Mr. Zucker's Claims Are Ripe.

A case is ripe when it involves an administrative decision that has been formalized and its effects felt in a concrete way by the challenging parties. *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 665 (4th Cir. 1997). "A controversy is sufficiently particularized and final if it is at least a firm and perhaps binding adoption of a position by the agency with regard to a course of conduct on the part of a member of the regulated industry which does not require further administrative action other than the possible imposition of sanctions." *Id.* at 668 (citations omitted). The

[8] According to the court:

> Were ARCO attacking the merits of the administrative decisions to impose discovery sanctions, we might agree with the District Court that ARCO's action was premature. What ARCO is challenging, however, is the very power of the Department of Energy to issue remedial orders and to levy such sanctions. For the reasons that follow, we conclude that ARCO's claims were not barred by the exhaustion doctrine, and were ripe for judicial review.

ARCO, 769 F.2d at 780-781 (citations omitted).

effects test asks the court to determine "whether hardship will fall to the parties upon withholding court consideration" and to consider the cost to the parties of delaying judicial review. *Id.*,(*citing Fort Sumter*, 564 F.2d at 1124).

The Commission says Mr. Zucker's case is not ripe because the "question of whether Buckyballs® and Buckycubes® are a substantial product hazard as well as the determination of Plaintiff Zucker's individual liability are inherently fact-based inquiries" that have not yet been completed. MTD at 11. But that is not the question before this Court. The question here is simply whether the Commission has statutory authority to do what it has done to Mr. Zucker. On this the Commission's decision has already been made and there are no future contingencies. Dkt No. 1 Ex. 4 at 21 (complaint "ISSUED BY ORDER OF THE COMMISSION"), Ex. 6 and Ex. 7.

The Commission also claims this case is not ripe because "Plaintiff also fails to establish that withholding judicial review now will cause him hardship – the second element of the ripeness test. Indeed, the only 'hardship' Plaintiff will suffer in the absence of immediate review is that attendant to participating in the administrative process itself." MTD at 11.[9] However, the Commission's *ultra vires* exercise of jurisdiction in this case is, without more, hardship enough

[9] Perhaps to confuse matters, the government conflates exhaustion, finality and ripeness. The finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). In this case, the government does not claim Mr. Zucker has administrative options left open to him through which he can challenge the Commission's jurisdictional claim, so exhaustion is off the table. *See supra* note 1; *see also Darby*, 509 U.S. at 153-54 (exhaustion is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review *and* the administrative action is made inoperative pending that review). The Commission's jurisdictional claim is certainly final. Dkt No. 1 Ex. 4 at 21, Ex. 6 and Ex. 7. Therefore, this case is ripe for review.

to justify judicial review. *See Athlone,* 707 U.S. at 1489; *Fort Sumter,* 564 F.2d at 1124; *CSI*, 637 F.3d at 412; *ARCO,* 769 F.2d at 781. Because judicial review is favored when an agency is charged with acting beyond its authority, *Dart*, 848 F.2d at 221, even where "Congress is understood generally to have precluded review, the Supreme Court has found an implicit but narrow exception, closely paralleling the historic origins of judicial review for agency actions in excess of jurisdiction." *Griffith v. FLRA*, 842 F.2d 487, 492 (D.C. Cir. 1988). Pursuant to this case law, "judicial review is available when an agency acts *ultra vires*," even if a statutory cause of action is lacking. *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1173 (D.C. Cir. 2003).

This case is ripe and review is proper.

E. The Commission Waives Its Chance To Argue For Dismissal Of Mr. Zucker's Second Claim for Relief.

The Commission's motion to dismiss does not mention Mr. Zucker's second claim for relief arising from the Commission's retaliatory violations of his First and Fifth Amendment Rights. The government has thus waived any arguments for dismissal of this claim. *Pueschel v. Peters*, 340 F. App'x 858, 861 (4th Cir. 2009) ("Whatever the merits of the FAA's exhaustion argument, we find that it was waived when the FAA failed to raise the argument in its original motion to dismiss").

However, the second claim for relief stands even if there was no waiver. Claims for declaratory relief for First Amendment violations are permissible even if the APA provides a separate remedy. *See e.g., Trudeau,* 456 F.3d at 187 ("In sum, we hold that APA § 702's waiver of sovereign immunity permits not only Trudeau's APA cause of action, but his nonstatutory and First Amendment actions as well.... The district court therefore had subject-matter jurisdiction to hear Trudeau's suit under 28 U.S.C. § 1331...."); *Jarita Mesa Livestock Grazing Ass'n v. U.S.*

Forest Serv., 921 F. Supp. 2d 1137, 1203 (D.N.M. 2013) ("Moreover, even if the APA provides a separate remedy for the Plaintiffs' alleged constitutional violations, 'the existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate.'").

The Supreme Court has long recognized that "the Government may not retaliate for exercising First Amendment speech rights." *Wilkie v. Robbins*, 551 U.S. 537, 555 (2007). This is because "a bedrock First Amendment principle is that citizens have a right to voice dissent from government policies." *Tobey v. Jones*, 706 F.3d 379, 391 (4th Cir. 2013). Moreover, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *Dixon v. D.C.*, 394 F.2d 966, 968 (D.C. Cir. 1968) ("[T]he Government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances"). And while "[s]ome official actions adverse to such a speaker might well be unexceptionable if taken on other grounds," when there is clear evidence that the "nonretaliatory grounds are in fact insufficient to provoke the adverse consequences," the Supreme Court has made it clear that "retaliation is subject to recovery as the but-for cause of official action offending the Constitution." *Hartman*, 547 U.S. at 256.

The Commission's purported justifications for claiming jurisdiction over Mr. Zucker show that its unprecedented action was tainted by unlawful animus. The amended complaint's reliance on Mr. Zucker's speech (including his satirical treatment of bureaucratic overreach and irrationality) before the Commission, the public, and Congress to justify personal liability strongly makes a plausible case of unlawful retaliation. Dkt No.1 at ¶¶ 58-68. The

Commission's decision to pursue Mr. Zucker, but not the liquidating trust, the only entity with actual legal responsibility for M&O's affairs, only buttresses Mr. Zucker's case. *Id.* at ¶ 57.

Mr. Zucker maintains, and the Commission has failed to dispute, that the communications cited in the amended complaint were constitutionally-protected speech. When other plaintiffs have made similarly plausible claims of agency retaliation, courts have held that they were entitled to pursue declaratory and injunctive relief under the First Amendment, separately from the APA.

> The Plaintiffs' facts have nudged a conclusion from possible to plausible that the 2010 Decision Notice was made in retaliation for the Plaintiffs' exercise of their First Amendment right to petition the government for redress. The Court may entertain Plaintiffs' second request for declaratory and injunctive relief, which requests the Court to declare the enforcement of the 2010 Decision Notice unconstitutional, because such a judgment would resolve an actual controversy between the parties. The Plaintiffs may bring this claim under the Court's federal question jurisdiction, separately from the APA, as this claim for equitable relief arises under the Constitution, and the United States has waived its sovereign immunity from such suits.

Jarita Mesa, 921 F. Supp. 2d at 1205. The reasoning of the District Court in *Jarita Mesa* ought to apply here with equal force. Consequently, this Court has jurisdiction over Mr. Zucker's second claim for relief.

IV. CONCLUSION

For the forgoing reasons, the defendants' motion to dismiss should be denied.

Respectfully submitted,

/s/ Daniel Z. Epstein
Daniel Z. Epstein, Esq.
Cause of Action, Inc.
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: 202.499.4232
Fax: 202.330.5842
Email:daniel.epstein@causeofaction.org

/s/ Reed D. Rubinstein
Reed D. Rubinstein, Esq.
Dinsmore & Shohl, LLP
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20006
Telephone: 202.372.9120
Fax: 202.372.9141
Email: reed.rubinstein@dinsmore.com
As Counsel to Cause of Action, Inc.

CERTIFICATE OF SERVICE

This is to confirm that a copy of the foregoing MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS was electronically filed on February, 28 2014. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system, and the filing may be accessed through that system.

/s/ Reed D. Rubinstein
Reed D. Rubinstein