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.	)	

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

On February 11, 2013, Complaint Counsel filed its Motion for Leave to File Second Amended Complaints in Docket Nos. 12-1 and 12-2 ("Motion for Leave to Amend"), requesting, *inter alia*, permission to name Craig Zucker as a Respondent both individually and in his capacity as Chief Executive Officer ("CEO") of Respondent Maxfield & Oberton Holdings, LLC ("M&O"). On February 28, 2013, Mr. Zucker filed his Opposition to Motion for Leave to Amend Complaint in CPSC Docket 12-1 ("Opposition").[1] Complaint Counsel requested and was granted leave to file this Reply. As set forth more fully below, the Opposition's strained statutory analysis fails to provide an adequate basis upon which to remove Mr. Zucker from the ambit of the responsible corporate officer doctrine that attaches to him as the central M&O figure whose actions lie at the heart of this proceeding. Moreover, Mr. Zucker's protracted statutory argument represents a distraction, not only from well-established precedent, but from the central question before the Court: whether the filing of the Second Amended Complaint in Docket 12-1

[1] Respondent Zen Magnets, LLC did not respond to the Motion for Leave to Amend. Complaint Counsel sought to amend the complaint to add a second product, Neoballs, which are distributed by Respondent Zen. Commission Rules provide that "Failure to respond to a written motion may, in the discretion of the Presiding Officer, be considered as consent to the granting of the relief sought in the motion." 16 C.F.R. § 1025.23(c).

would "unduly broaden the issues in the proceedings or cause undue delay." 16 C.F.R. § 1025.13. Mr. Zucker's argument falls well short on these points as he offers no more than the suggestion that, should the Court rule against his Opposition, he will continue to litigate the issue. That strategy aside, the issue before the Court—whether certain products constitute a substantial product hazard—remains the same regardless of Mr. Zucker's status, and his Opposition does not establish otherwise. Accordingly, Complaint Counsel's Motion for Leave to Amend should be granted.

I. The Amendment is Proper under the Rules of Adjudicative Practice and the Federal Rules of Civil Procedure

Under both the Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 1025 *et seq.*, and the Federal Rules of Civil Procedure, Complaint Counsel's Motion for Leave to Amend is properly granted. The CPSC's Rules of Practice provide that the Presiding Officer may allow "appropriate amendments and supplemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay." 16 C.F.R. § 1025.13. Adding Mr. Zucker as a Respondent does neither. As Mr. Zucker conceded in his Opposition, "the overriding issue[] before this Court [is] whether certain products identified in the original Complaint present a substantial product hazard within the meaning of the Consumer Product Safety Act...." Opp. at 18. In both the original and the Amended Complaints, that issue remains the same. Mr. Zucker's actions as CEO of M&O are integral to the issues before this Court and to the determination of whether the Subject Products present a substantial product hazard. Adding Mr. Zucker as a Respondent does not alter that fundamental fact but simply allows the Court to identify a responsible corporate official who can carry out an Order in this proceeding. The Opposition's characterization of Mr. Zucker as merely "an individual who formerly was

employed by a manufacturer," Opp. at 13, belies his central role as the M&O chief executive and founder who controlled its policies and practices, both in general and with respect to regulatory compliance. Regardless of whether Mr. Zucker is named as a Respondent, he is the responsible M&O official with respect to the issues in this proceeding, notwithstanding the Opposition's disingenuous attempt to paint him as nothing more than a former employee. Adding him as a Respondent thus does not broaden the issues before this Court in any respect.

Adding Mr. Zucker also will not cause undue delay. Discovery has not begun, and the prehearing conference at which such matters will be established has not been scheduled. Moreover, Mr. Zucker's contention that his addition as a Respondent "represents a very controversial proposition that will introduce undue delay" lacks support in the rules that govern this proceeding because the matter will be settled once the Court issues its decision. No additional exploration will be required by this Court, nor will the proceeding be delayed if Mr. Zucker wishes to pursue an appeal in the event the Court does not rule in his favor. Rulings of the Presiding Officer may not be appealed prior to the issuance of an Initial Decision except in very narrow circumstances, which are not present here. 16 C.F.R. § 1025.24(a) and (b).

Although the Federal Rules of Civil Procedure are not controlling in this matter, they are instructive, and the guidance provided by those rules also compels a finding that leave to amend the complaint should be granted.[2] The Federal Rules adopt a liberal stance towards amending pleadings, such that the court "should freely give leave when justice so requires." Fed. R. Civ. P.

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[2] Where the Federal Rules of Civil Procedure do not conflict with an agency's rules of practice, judicial interpretation of the Federal Rules of Civil Procedure may guide the Presiding Officer's decision making. *See, e.g. In re Spring Grove Resource Recovery, Inc.*, 1995 EPA ALJ LEXIS 28 at *2 (Sept. 8, 1995) (noting that Federal Rules "often guide decision making in the administrative context" and relying upon the Federal Rules where the EPA's Rules of Practice merely stated that amendments were available only upon motion granted by the Administrative Law Judge with no further guidance); *see also In re Hoechst Celanese Corp.*, 1990 FTC LEXIS 121 at *3 (May 14, 1990) (where federal rule similar to FTC's Rules of Practice, "judicial constructions of the federal rule can be useful in interpreting the [FTC's] rules").

15(a)(2).[3] In this matter, justice requires that Complaint Counsel be permitted to add Mr. Zucker as a Respondent following the filing of a certificate of cancellation by M&O in December 2012. Subsequent to that filing, M&O counsel withdrew from this proceeding, explaining that "the company no longer exists." *See* Notice of Withdrawal of Appearance of Counsel (Dec. 27, 2012). Notwithstanding this position, M&O continues to defend itself in a case filed in the U.S. District Court for the Eastern District of California, having filed removal papers on the very same day that its counsel notified this Court of their withdrawal here.[4] Given that M&O appears to be picking and choosing when it exists for purposes of defending itself, justice requires the addition of Mr. Zucker in this case so that any Order issued by this Court may be no less meaningfully executed than that of the California Court. Moreover, the addition of Mr. Zucker is no less necessary as a result of the trust established by M&O to handle its liabilities and debts because the amount in that trust is woefully insufficient to provide compensation to even a small percentage of consumers, especially in light of the almost three million sets of Buckyballs and Buckycubes sold by M&O. M&O's actions have left potentially hundreds of thousands of consumers, including those children and their families who were injured by the product, without recourse. Justice therefore requires that the Court permit the filing of the Amended Complaint to determine whether the products are a substantial product hazard and, if so, order Mr. Zucker, as the responsible corporate officer of the company, to provide the requested relief.

The Federal Rules also support Complaint Counsel's position that the Amended Complaint would not "unduly prejudice" Mr. Zucker. *See State Teachers Ret. Bd. v. Fluor*

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[3] Addition of parties in federal court proceedings implicates Rule 20(a) and Rule 21 of the Federal Rules governing joinder of parties. In practical terms, however, there is little difference regarding the standards governing motions pursuant to Rule 15, Rule 20(a) or Rule 21, and federal courts do not separately analyze the amendment under each of the rules. *See Oneida Indian Nation of NY v. County of Oneida*, 199 F.R.D. 61, 72 (N.D.N.Y. 2000).

[4] *See* Lopez v. Maxfield and Oberton Holdings, LLC, Docket No. 1:2012-cv-0832 (E.D. Ca. 2012).

Corp., 654 F.2d 843, 856 (2d Cir. 1981). Indeed, Mr. Zucker cites no cases to support the contention that the proposed amendment would unduly prejudice him. As M&O's Chief Executive Officer, he has been on notice of this action and he will be a central witness regardless of whether he is named as a Respondent. *See, e.g. Puget Soundkeeper Alliance v. Tacoma Metals Inc.*, 2008 U.S. Dist. LEXIS 7744, Case No. C07-5227-RJB at *6-7 (W.D. Wash., Jan. 23, 2008) (joining primary owner of corporate defendant not prejudicial even at a late stage of the litigation because he "must have been aware of and involved in this ongoing litigation because of his role as a corporate officer"). Undue prejudice also cannot occur where, as here, the administrative litigation is in such an early stage that prehearing conferences have yet to occur. *See, e.g., In re Bug Bam Product, LLC*, 2010 EPA ALJ LEXIS 2 at *6 (Jan. 7, 2010); *In re Spring Grove Resource Recovery, Inc.*, 1995 EPA ALJ LEXIS 28 at *4-5.[5]

Finally, Complaint Counsel's addition of Mr. Zucker to the pleadings is not futile.[6] An amendment is only futile when the proposed amended complaint could not withstand a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See Kassner v. 2nd Ave. Deli, Inc.*, 496 F.3d 229, 244 (2d Cir. 2007). The adequacy of the proposed amended complaint is no more than is required by notice pleading. Thus, Complaint Counsel need only plead enough facts to state a claim for relief that is "plausible on its face." *See Bell Atl. Corp. v. Twombly,* 550 U.S 544, 570 (2007). The proposed Second Amended Complaint meets this standard. The proposed Second Amended Complaint alleges that Mr. Zucker (i) controlled the acts, practices, and policies of M&O; (ii) was responsible for ensuring M&O's compliance with the requirements of the CPSA;

[5] Mr. Zucker's argument that he would suffer "reputational harm" should be unavailing here, as it has been rejected as a basis for misjoinder of a proposed party in similar circumstances. *See Viada v. Osaka Health Spa, Inc.*, 235 F.R.D. 55, 61 (S.D.N.Y. 2005).

[6] Nothing in the CPSC's Rules of Practice appears to permit the Presiding Officer to review futility at this early stage of the litigation. Complaint Counsel nonetheless will respond to Mr. Zucker's claims regarding futility, should the Presiding Officer decide otherwise.

and (iii) was an importer and distributor of the Subject Products. The proposed Second Amended Complaint thus provides more than enough facts to state a plausible claim for relief pursuant to the responsible corporate officer doctrine set forth below. As such, these allegations are sufficient to withstand a motion to dismiss. *See, e.g., United States v. Osborne*, CAS No. 1:11 CV 1029, 2011 U.S. Dist. LEXIS 154516 at *18 (N.D. Ohio Dec. 11, 2011) (premature to dismiss president of corporate entities since pleadings give rise to inference that he was responsible corporate officer under the Clean Water Act).

II. The Plain Language of Section 15 of the CPSA Permits An Individual to be Held Liable for Acts of the Corporation

Faced with incontrovertible facts that establish him as the M&O corporate official most intimately involved in the issues at the heart of this matter, Mr. Zucker now seeks to avoid the responsibility that the Supreme Court has said attaches to his position by offering a cramped statutory construction of Section 15 of the CPSA. That interpretation flies in the face of well accepted principles of statutory construction and turns the plain meaning of the statute in general, and Section 15 in particular, on its head. Section 15 provides for broad individual liability that cannot be undone by Mr. Zucker's stingy view of its appropriate application.

Indeed, Mr. Zucker concedes, as he must, that Section 15 applies to individuals. Opp. at 3-4. This conclusion derives from the fact that Section 15 authorizes relief against a "manufacturer," "distributor" or "retailer" and "the word 'person' appears in the definitions.'" Opp. at 3 (citing 15 U.S.C. § 2052, which defines "manufacturer", "distributor" and "retailer" to include a "person" and 1 U.S.C. § 1 which defines "person" to include "individuals"). Mr. Zucker asserts, nevertheless, that while Section 15 applies to individuals, it does not reach Mr. Zucker because he did not personally manufacture, import, deliver or sell the Subject Products.

Opp. at 3.

Thus, in Mr. Zucker's view, Section 15 does not mean what it literally says. That is, Mr. Zucker makes the untenable assertion that, although the CPSA defines "manufacturer" as "any person who manufactures or imports a consumer product," 15 U.S.C. § 2052 (a)(11), that language must be read to exclude any person who performs those functions for a company or corporation. "Any person," Mr. Zucker argues, does not really mean "any person" but applies to a very narrow segment of individuals who "conducted business without forming a corporation or partnership." Opp. at 4. As such, Mr. Zucker inverts the broad meaning of "any" that commonly attaches to that word so that "any person" really means only a limited few. Interpreting nearly identical language in the Radiation Control for Health and Safety Act of 1968 (RCHSA), the Sixth Circuit found such a contention wholly unpersuasive, stating that "the conclusion that [Hodges, the major shareholder and president of Hodges X-Ray, Inc.] was included in [the definition of manufacturer] is *self-evident*." *United States v. Hodges X-Ray*, 759 F.2d 557, 560-61 (6th Cir. 1985) (emphasis added). It is similarly self-evident that Mr. Zucker, the chief executive officer of M&O, is included within the broad definition of manufacturer under the CPSA. Where a statute is clear on its face, the court need look no further. *See, e.g.*, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.")

Despite Section 15's broad application, Mr. Zucker implicitly invokes *expressio unius est exclusio alterius*, a canon of statutory construction that instructs "when a legislature has enumerated a list or series of related items, the legislature intended to exclude similar items not specifically included in the list." *Christian Coalition of Florida, Inc. v. United States*, 662 F.3d

1182, 1193 (11th Cir. 2011). *Expressio unius* does not, however, apply when a statute, as here, is clear on its face. "*Expressio unius* serves only as an aid in discovering legislative intent when that is not otherwise manifest and can never override clear and contrary evidences of Congressional intent." *United States v. Lnu*, 575 F.3d 298, 303 (3d Cir. 2009) (internal quotation marks and citations omitted). Reliance on the *expressio unius* canon of construction is unnecessary here because Congressional intent is clear: Mr. Zucker is properly included within the reach of Section 15 of the CPSA as it plainly encompasses "any person who manufactures or imports a consumer product."[7] 15 U.S.C. § 2052(a)(11).

Furthermore, Mr. Zucker's attempt to cloud the plain meaning of Section 15 with a discussion of Section 21 of the statute misses the mark. Contrary to his suggestion, Section 21 does not enumerate the parties who are properly subject to liability. Instead, Section 21 merely sets forth the criminal penalties applicable to those parties who violate Section 19.[8] Section 19 addresses *who* may be liable for committing a prohibited act and as such, it is entirely consistent with Section 15. As with Section 15, Section 19 indicates that it is unlawful for "any person" to sell, manufacture, distribute, or import products under a variety of circumstances.[9] 15 U.S.C. § 2068(a). As such, its reach extends to manufacturers, retailers, and distributors, including corporate entities. Yet, if Mr. Zucker's view were to prevail, only individuals who personally manufactured, distributed, or imported a product outside a corporate structure could be held

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[7] Although he frames his argument as a jurisdictional inquiry, Mr. Zucker is simply attempting to argue that he, as chief executive officer of M&O, is not vicariously liable for M&O's acts. Complaint Counsel addresses this argument in detail in Sections III and IV, *infra*.

[8] The language Mr. Zucker quotes in his opposition brief, Opp. at 5, simply clarifies that both a corporation and its corporate officers may simultaneously be subject to criminal penalties for knowing and willful violations of Section 19. 15 U.S.C. § 2070(b).

[9] Even if Section 21 was structured as Mr. Zucker suggests, nearly every court that has considered this type of statutory construction argument in the context of an analogous statute—the Clean Water Act—has declined to find that responsible corporate officers are immune for *civil* violations of the Act simply because the Act specifies that responsible corporate officers are subject to *criminal* penalties. *See Stillwater of Crown Point Homeowner's Ass'n v. Kovich,* 820 F. Supp. 2d 859, 890-91 (N.D. Ind. 2011) (collecting cases).

accountable for a prohibited act, an obviously absurd result.

Because Section 15 clearly allows the Commission to issue an Order against an individual such as Mr. Zucker, amendment of the Complaint to include Mr. Zucker as a Respondent under *Park* and *Dotterweich* is appropriate.

III. Mr. Zucker is Properly Added as a Responsible Corporate Officer under *Park* and *Dotterweich*

No recognized exception to the responsible corporate officer applies to Mr. Zucker; indeed, Mr. Zucker fails to assert any such exception because it is beyond dispute that he falls squarely within its contours. Instead, Mr. Zucker posits that the doctrine simply has never been applied and could not be applied to an adjudicative proceeding under Section 15. Opp. at 11-13. Mr. Zucker is mistaken. The responsible corporate officer doctrine has in fact been applied to adjudicative proceedings under Section 15 in the past and its application here is fully consistent with the reasoning of *Park*, *Dotterweich* and their progeny. *See In re White Consol. Indus.*, CPSC Docket No. 75-1, Initial Decision at 32-34 (1976) (attached as Exhibit A).

White was a Section 15 adjudicative proceeding initiated to determine whether certain design defects in refrigerators presented a substantial product hazard that required remedial action. The complaint named two companies, Kelvinator Inc. and White Consolidated Industries, as well as three of the companies' corporate officers, as respondents. The Presiding Officer considered whether the reasoning of *Park* and *Dotterweich* supported individual liability on the part of corporate officer respondents and concluded that it did. "[T]he Presiding Officer has concluded that the principles of managerial corporate responsibility enunciated in *Park* are equally applicable to proceedings commenced under Section 15 of the [CPSA]." *White* Initial Decision at 34, Ex. A.

In support of her analysis, the Presiding Officer in *White* identified three striking similarities between that matter and the "situation confronting the Court in *Park* and *Dotterweich*." *Id.* at 32. These similarities included: (1) Section 15 of the CPSA, like Section 301 of the FDCA, concerns the distribution of offending products, (2) neither statutory provision required consciousness of wrongdoing, and (3) the CPSA, like the FDCA, "touch[es] phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." *Id.* at 33. The Presiding Officer also noted that while a Section 15 proceeding is a civil agency action rather than a criminal suit as in *Park*, this difference is "unimportant" because "the proceedings in both situations focus on past conduct." *Id.* at 33-34. *See also Hodges*, 759 F.2d at 561 ("the rationale for holding corporate officers criminally responsible for acts of the corporation, which could lead to incarceration, is even more persuasive where only civil liability is involved.").

The *White* decision is consistent with the clear precedent of *Park* and *Dotterweich* for the reasons explained in detail in Complaint Counsel's opening brief. *See* Mem. at 6-12. Contrary to Mr. Zucker's assertion, the Supreme Court's decision in *Meyer v. Holley*, 537 U.S. 280 (2003), a case that is factually distinguishable, does not alter this analysis. First, *Meyer* was a private lawsuit alleging racial discrimination under the Fair Housing Act, 42 U.S.C. §§ 3604(b), 3605(a) (FHA). *See id.* at 282. The FHA is not a public health and safety statute like the FDCA and the CPSA. Accordingly, the Supreme Court's reluctance to apply the rationale of *Park* and *Dotterweich* to the facts of *Meyer* is consistent with the rationale underlying the responsible corporate officer doctrine. Second, the plaintiffs in *Meyer* sought to hold the company's president and owner personally liable for violating the FHA on the theory that he was vicariously liable for the actions of the company's salesperson, even if they did not "direct or authorize, and

were otherwise not involved in, the unlawful ... acts." *Id.* at 284. Here, Complaint Counsel is not seeking to hold Mr. Zucker responsible for anybody's actions other than his own. He was responsible for the day-to-day operations, and he was responsible for M&O's compliance with the CPSA. Because he was personally involved and directly responsible for the proscribed activity—failing to comply with the CPSA—ordinary principles of vicarious liability are not at issue.

Not only is *Meyer* factually distinguishable, nothing in that case suggests that the responsible corporate officer doctrine is inapplicable in the instant proceeding—particularly where, as addressed in Part II, *supra*, the clear language of the CPSA supports individual liability. The legislative history of the CPSA clarifies Congress's intent to give the CPSC "an unusually wide degree of latitude to exercise its discretion" with respect to the persons who are obliged to pay for a refund that has been ordered. *See In re Relco Inc.*, CPSC Docket No. 74-4, Decision and Order at 15-16 (1976) (attached as Exhibit B) ("it is contemplated that the Commission would have the authority to place [the obligation to pay for a recall] on the person most able to bear the cost where equitable and other considerations appear to warrant such action in the public interest."), *citing* H.R. Rpt. 92-1153 at 43 (June 20, 1972).[10]

The Court in *Meyer* also emphasized that "the Department of Housing and Urban Development ... the federal agency primarily charged with implementation and administration of [the FHA] ha[d] specified that ordinary vicarious liability rules apply in this area." 537 U.S. at 287-88. Those rules did not support the extension of liability for the acts of a lone employee to

[10] In *Relco*, the Presiding Officer held that the estate of Thomas Doss, who was identified as the President, sole shareholder, Principal Operating Officer and CEO of Relco, was "properly designated to respond to any consumer claims arising out of the proceeding." *See In re Relco*, CPSC Docket No. 74-4, Amended Initial Decision and Order on Reopened Proceeding at 6 (Apr. 2, 1976), Ex. B. The prior *Relco* decision noted that there was "sufficient intertwinement between the personal finances of Mr. Doss and those of the corporation to render the Estate liable for the relief ordered herein." *See Relco* Initial Decision at 12, Ex. B.

the company's president where there was no evidence that the president was aware of or authorized those acts. By contrast, in the instant matter, the CPSC, the agency charged with implementing and administering the CPSA, clearly interprets Section 15 to authorize corporate officer liability where a corporate officer "had the responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and ... he failed to do so." *See White* Initial Decision at 34, Ex. A.

Mr. Zucker's reliance on *Shelton* and *Barrett* as authority for why the responsible corporate officer doctrine does not apply to him is similarly misplaced. In *Shelton*, the court did not premise its holding that the responsible corporate officer doctrine applied to Mr. Shelton, the sole shareholder and chief corporate officer of Shelton Wholesale, Inc., solely on his personal involvement in importing certain fireworks. *See Shelton*, 1999 U.S. Dist. LEXIS 15980, at *5-*11 (W.D. Mo. Sept. 21, 1999). Instead, the court analyzed several *independent* theories of liability including that Mr. Shelton: (1) personally imported violative fireworks, *id.* at *5; (2) participated in the importation of violative fireworks by virtue of his position, *id.* at *8, and (3) "made all the decisions for the defendant corporations relevant to the allegations in this case" and thus was a responsible corporate officer under the reasoning of *Park* and *Dotterweich*, *id.* at *9-11. Any suggestion that Mr. Shelton's personal importation of fireworks was a prerequisite to the court's holding that the responsible corporate officer doctrine applied must be rejected.[11]

As set forth in Complaint Counsel's opening brief, *Barrett*, a case involving a cease and desist order issued under the Flammable Fabrics Act (FFA), similarly fails to support Mr. Zucker's position. In *Barrett*, the conduct at issue involved the inadvertent violation by a

[11] Although Mr. Zucker's personal involvement in importing and distributing the Subject Products is not necessary to establish his individual liability, Complaint Counsel believes that the facts developed through discovery in this matter will show that Mr. Zucker was personally involved in these activities.

contractor during two days of a 16-month period of manufacture. *See* Mem. at 11-12. Furthermore, *White* explicitly held that mandatory recall orders pursuant to Section 15 are "more closely akin" to civil penalties than to cease and desist orders. *See White* Initial Decision at 25, Ex. A. The presiding officer reasoned that "[w]ith cease and desist orders or prospective injunctions, 'future corporate activities are the sole concern.'" *Id.* at 24-26. By contrast, Section 15 orders "focus on corporate activities, the ill effects of which they seek to remedy by requiring action aimed with precision at the very persons who suffered those past effects." *Id.* at 24-25. *White* also emphasized that unlike cease and desist orders, "no similar promise of future forbearance from unlawful conduct is expressly authorized by the statutory language of Section 15..." *Id.* at 25. Due to these differences, "there need be little fear that the Section 15 order could constitute the 'brand for life'"—a concern that motivated the FTC decisions that the court relied on in *Barrett*. *See White* Initial Decision at 26, Ex. A (citing *Doyle v. FTC*, 356 F.2d 381, 385 (5th Cir. 1966)). Thus, *Barrett* does not preclude application of the responsible corporate officer doctrine here.[12]

For the reasons explained here and in Complaint Counsel's opening brief, see Mem. at 6-12, the responsible corporate officer doctrine applies to this proceeding under Section 15. The

[12] Mr. Zucker alleges "there has been no finding that any person has 'failed to comply with regulatory schemes'" and that he lacked fair notice of what was required for compliance, thus the responsible corporate officer doctrine should not apply. Opp. at 12-13. This proceeding, however, *is* the procedural mechanism by which Complaint Counsel seeks to establish that Buckyballs and Buckycubes (the "Subject Products") constitute substantial product hazards that warrant remedial action pursuant to Section 15. The suggestion that the responsible corporate officer doctrine requires resolution of this proceeding *before* Mr. Zucker can be named as a respondent is completely unsupported by the case law. *See, e.g., Park*, 421 U.S. 658, at 660-61 (both Acme Markets Inc. and its chief executive officer John Park were named as defendants in the government's suit alleging violations of the FDCA). Moreover, Mr. Zucker has had more than fair notice of what was required for compliance. Commission staff repeatedly notified M&O and Mr. Zucker that staff made a preliminary determination that the Subject Products constitute substantial product hazards and accordingly believed that M&O should immediately cease distribution of the Subject Products and undertake a consumer level recall. *See* Letter from Joseph F. Williams, CPSC Compliance Officer, to Alan H. Schoem, counsel for M&O (July 10, 2012) (attached as Exhibit C). Mr. Zucker had unambiguous notice of what was required for compliance and refused to voluntarily undertake corrective action. His company's refusal to do so is the very reason the administrative proceeding was instituted.

Commission has invoked the doctrine in previous cases, and presiding officers have concluded that imposition of liability under that theory was appropriate. Mr. Zucker implicitly concedes that he cannot assert any recognized exceptions to the responsible corporate officer doctrine. Accordingly, the Presiding Officer should grant the Motion for Leave to Amend for the purpose of adding Mr. Zucker as a defendant.

IV. Principles of Corporate Law Do Not Compel Denial of Complaint Counsel's Motion for Leave to Amend

As Mr. Zucker readily concedes, the responsible corporate officer doctrine serves as an exception to the general propositions of corporate law that limit the liability of officers and shareholders and terminate the liability of a company upon dissolution. Opp. at 6 (acknowledging that the responsible corporate officer doctrine is an "exception to these two principles"). Accordingly, because the responsible corporate officer doctrine applies here, the authorities he cites in Section II of his brief, *see* Opp. at 6-11, are simply inapposite. Furthermore, the cases that Mr. Zucker relies on are distinguishable for other reasons.

Specifically, many of the cases that Mr. Zucker relies on do not concern health and safety statutes such as the FDCA and the CPSA and do not address the applicability of the responsible corporate officer doctrine. *See NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-03 (1960) (addressing liability under the National Labor Relations Act);[13] *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047 (10th Cir. 1993) (same); *NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331 (6th Cir. 1990) (same); *Great Lakes Chemical Corp. v. Monsanto Co.*, 96 F. Supp. 2d 376 (D. Del. 2000) (addressing violations of securities laws in a lawsuit between private parties); *United States ex rel. Siewick v. Jamieson Sci. & Eng'g Inc.*, 191 F. Supp. 2d 17 (D.D.C. 2002) (addressing liability for wrongful termination under the False Claims Act). Indeed, all but one of

[13] *Deena Artware* also predates the Supreme Court's decision in *Park*.

these decisions address the requirements for piercing the corporate veil.

Mr. Zucker's discussion of these cases thus does not advance resolution of the matter at issue here because Complaint Counsel is not asserting alter ego liability as a basis for naming Mr. Zucker as a Respondent. The court's analysis in the remaining decision, *Great Lakes*, is completely irrelevant to the issues presented here because the court there was analyzing whether interests in a limited liability company ("LLC") constituted securities for the purposes of the federal securities law. *See Great Lakes*, 96 F. Supp. 2d at 376. This question turned in part on whether the member of an LLC depends "solely on the profits of others." *Id.* at 390-91.[14] The propriety of adding an individual as a responsible corporate officer was not addressed in that case.

In addition to providing a litany of cases that are inapposite, Mr. Zucker relies on *United States v. USX,* which involved the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). *See United States v. USX*, 68 F.3d 811 (3d Cir. 1995). This case actually supports Complaint Counsel's position. *USX* held that while corporate officers are not liable solely on the basis of their positions within the defendant corporation, they need not personally engage in the liability-creating conduct in order to be held responsible. *See id.* at 814. Instead, "an officer who has authority to control disposal decisions should not escape liability ... when he or she has actual knowledge [that a subordinate has engaged in violative conduct] and, effectively, acquiesces in the subordinate's actions." *Id.* at 825. The court's holding is remarkably similar to the Supreme Court's enunciation of the responsible corporate officer doctrine in *Park. See* 421 U.S. at 673-74 (corporate officer liable if he had "responsibility and

[14] *Citizens Elec. Corp. v. Bituminous Fire & Ins. Co.*, 68 F.3d 1016 (7th Cir. 1995), also fails to advance his argument. Not only is the portion of the court's decision that Mr. Zucker cites dicta, the court in *Citizens Electric* actually held that the district court should not have addressed the individual liability of the corporate defendants because they settled the claims through a consent judgment. *Id.* at 1019-21.

authority either to prevent in the first instance, or promptly to correct, the violation complained of, and ... he failed to do so.") Complaint Counsel's proposed Second Amended Complaint clearly alleges that Mr. Zucker was responsible for ensuring M&O's compliance with all CPSA statutes and regulations, *see* Second Amend. Compl. ¶¶ 6-7. The proposed complaint also alleges that Mr. Zucker authorized the acts of all M&O employees, agents, and representatives that contributed to the distribution of the Subject Products in commerce, *id.* ¶ 9. Thus even under the reasoning of *USX*, the proposed Second Amended Complaint properly alleges individual liability against Mr. Zucker.

Finally, Mr. Zucker cites two decisions in which courts declined to hold corporate officers liable for civil violations of environmental statutes on the grounds that the corresponding statutory provisions for criminal liability expressly applied to corporate officers while the provisions for civil liability did not. *See United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976) and *People v. Commonwealth Edison Co.*, 490 F. Supp. 1145 (N.D. Ill. 1980). As explained in *Stillwater of Crown Point Homeowner's Ass'n v. Kovich,* 820 F. Supp. 2d 859, 890-91 (N.D. Ind. 2011), these decisions do not represent the weight of the authority. *See also United States v. Osborne*, 2012 U.S. Dist. LEXIS 44742, at *11 (N.D. Ohio March 30, 2012) ("every other federal district court to expressly address the issue [has found] that the responsible corporate officer doctrine applies in cases, such as this one, seeking civil remedies for CWA violations.") (internal citations omitted); *United States v. Pollution Abatement Servs. of Oswego Inc.*, 763 F.2d 133, 134-35 (2d Cir. 1985) (declining to follow *Sexton Cove* and permitting corporate officer liability for civil violations of the act where a corporate officer is directly responsible for statutorily proscribed activity). Accordingly, the court in *Stillwater* similarly rejected the argument that the explicit application of the responsible corporate officer

doctrine in the Clean Water Act to criminal penalties precludes its application to civil cases. *Stillwater*, 820 F. Supp. 2d at 892-93.

In doing so, the court was particularly persuaded by the reasoning of *Hodges X-Ray*. *See Hodges*, 759 F.2d at 560-61 (RCHSA "defines the term 'manufacturer' as 'any *person* engaged in the business of manufacturing'...Since Hodges was the major shareholder and president of Hodges X-Ray Inc., the conclusion that he was included in this definition is self-evident") (emphasis in original). The court in *Stillwater* also noted that "[o]ne of the key factors courts have relied upon to hold a person liable under the doctrine is whether the individual held himself out to the regulatory agency as the primary contact for compliance issues." *Stillwater*, 820 F. Supp. 2d at 892. This is precisely what Complaint Counsel has alleged with respect to Mr. Zucker, who communicated regularly with Compliance staff beginning with the 2010 recall and on a frequent basis thereafter leading up to the filing of the administrative complaint. *See* proposed Amended Compl. ¶¶ 6-7; Mem. at 2-4. Accordingly, the weight of the authority and the reasoning of *Hodges X-Ray* and *Stillwater* militate in favor of granting Complaint Counsel's motion.

CONCLUSION

The amended complaint alleges that Mr. Zucker (i) controlled the acts, practices and policies of M&O; (ii) was responsible for ensuring M&O's compliance with the requirements of the CPSA; and (iii) was an importer and distributor of the Subject Products, providing more than enough facts to state a plausible claim for relief. When deciding a motion to dismiss, the court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the pleader. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). As noted above the CPSC has

successfully applied the responsible corporate officer doctrine to impose responsibility for recalling a substantial product hazard on corporate officers of a firm. *See infra* at 9-10. Moreover, the amended pleading contains allegations of direct involvement by Mr. Zucker in the importation and distribution of the Subject Product, making him responsible for a recall on that basis. These allegations are more than enough to withstand a motion to dismiss. *See, e.g., United States v. Osborne*, 2011 U.S. Dist. LEXIS 154516 at *18 (N.D. Ohio 2011) (premature to dismiss president of corporate entities since pleadings give rise to inference that he was responsible corporate officer under the Clean Water Act).

For these reasons, Complaint Counsel's Motion for Leave to Amend should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have provided on this date, March 15, 2013, the foregoing Reply in Support of Complaint Counsel's Motion to File Second Amended Complaints in Dockets 12-1 and 12-2 upon the Secretary, the Presiding Officer, and all parties and participants of record in these proceedings in the following manner:

Original and three copies by hand delivery, and one copy by electronic mail, to the Secretary of the U.S. Consumer Product Safety Commission: Todd A. Stevenson

One copy by certified mail and one copy by electronic mail to the Presiding Officer for *In the Matter of Maxfield and Oberton Holdings, LLC*, CPSC Docket No. 12-1, *In the Matter of Zen Magnets, LLC*, CPSC Docket No. 12-2, and *In the Matter of Star Networks USA, LLC*, CPSC Docket No. 13-2:

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