UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of	)	
	)	
MAXFIELD AND OBERTON HOLDINGS, LLC	)	CPSC DOCKET 12-1
ZEN MAGNETS, LLC	)	CPSC DOCKET 12-2
STAR NETWORKS USA, LLC	)	CPSC DOCKET 13-2
	)	(Consolidated)
Respondents.	)	

OPPOSITION TO MOTION FOR LEAVE TO AMEND COMPLAINT IN CPSC DOCKET 12-1

On February 11, 2013, Complaint Counsel filed a motion for leave to amend the complaint in Consumer Product Safety Commission ("CPSC" or "Commission") Docket 12-1[1] to add Craig Zucker, both in his capacity as CEO of the now-dissolved Maxfield & Oberton Holdings, LLC and as an individual. Should Buckyballs® and Buckycubes® be found by this Court to present a substantial product hazard, Complaint Counsel seeks an Order, *inter alia*, requiring Mr. Zucker personally to give public notice of the hazard and to offer consumers a refund of their purchase price for the products.

On February 21, Mr. Zucker filed a Request to Participate in the Proceeding as a Non-party Participant and Leave to File an Opposition to Complaint Counsel's Motion for Leave to Amend Complaint. On February 25, 2013, the Court granted Mr. Zucker's Request. Mr. Zucker is participating for the limited purpose of advising this Court of the substantial legal reasons why

[1] Complaint Counsel's motion also seeks to amend the complaint in CPSC Docket 12-2. Mr. Zucker takes no position with respect to that portion of Complaint Counsel's motion.

he should not be added as a party to this proceeding, either in his individual capacity or as the former Chief Executive Officer of the former entity, Maxfield and Oberton Holdings, LLC.

Complaint Counsel is asking this Court to rewrite Section 15 of the Consumer Product Safety Act ("CPSA" or "Act") to add words that are simply not present there. The proposed Amended Complaint seeks an Order under Sections 15(c) and 15(d) of the Act requiring Mr. Zucker personally to undertake several specific actions comprising a recall. But Section 15 does not authorize the Commission to issue such an order against an individual officer or director of a corporation that manufactures consumer products. By contrast, Section 21 of the statute *does* provide for individual officer or director liability for certain actions. Under well settled principles of statutory construction, when a statute includes language in one section, but omits it in another section of the same statute, the presumption is that Congress acted intentionally in crafting the different provisions. The CPSA therefore does not permit Mr. Zucker to be the subject of a recall order.

Moreover, bedrock principles of corporate law make clear that corporate officers such as Mr. Zucker are not liable for the company's obligations, even if the company has dissolved. And although Complaint Counsel relies on the "responsible corporate officer" doctrine enunciated in *United States v. Dotterweich*, 320 U.S. 277 (1943), and *United States v. Park*, 421 U.S. 658 (1975), that theory does not apply in this case. Complaint Counsel's motion must accordingly be denied.

I. This Court Does Not Have Jurisdiction Over Mr. Zucker As An Individual.

The motion to amend should be denied because it seeks to add a party over whom this court does not have jurisdiction. The CPSA is very clear in specifying the entities against whom an order requiring public notice and a product refund (hereinafter "recall" or "recall order") may

issue: it specifies that a recall order may issue only to a “manufacturer, … distributor or retailer.” 15 U.S.C. § 2064(c)-(d). That language does not provide for a recall order to issue against Mr. Zucker, who is and was in none of these categories.

Under the CPSA, a “manufacturer” is a “person who manufactures or imports a consumer product,” while a “distributor” is “a person to whom a consumer product is delivered or sold for purposes of distribution in commerce.” 15 U.S.C. § 2052(a)(8) & (11). Mr. Zucker does not fit into either of those definitions.[2] He never personally manufactured, imported, delivered, or sold Buckyballs® or Buckycubes®. He was an officer of a company—Maxfield & Oberton Holdings, LLC—that imported the product,[3] and the motion makes clear that Complaint Counsel seeks to add Mr. Zucker as a respondent precisely *because* he was an officer of that company. *See* Mem. in Support of Mot. for Leave to File Second Am. Compl. 3-6. The CPSA, however, does not provide for officer or director responsibility for recalls—and thus does not allow Complaint Counsel to obtain a recall order against Mr. Zucker.

The fact that the word “person” appears in the definitions of “manufacturer” and “distributor” does not alter that conclusion. “In determining the meaning of any Act of Congress, unless the context indicates otherwise[,] the word[] ‘person’ ... include[s] corporations, companies, associations, firms, [and] partnerships ... as well as individuals.” 1 U.S.C. § 1. Accordingly, when an individual *personally* manufactures or distributes consumer products, that person is potentially subject to conducting a recall where warranted under the

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[2] Although in its Admissions in this matter, Maxfield & Oberton admitted it was a distributor of the products, Maxfield & Oberton cannot be a “distributor” of the products, because the CPSA specifically states that a “manufacturer” cannot be a “distributor.” 15 U.S.C. § 2052(a)(8).

[3] The proposed Amended Complaint seeks to have Mr. Zucker added in his capacity as the CEO of this corporation. However, as discussed in greater detail, that corporation has been dissolved and Mr. Zucker is no longer its CEO.

CPSA. In other words, the plain wording of the CPSA authorizes a recall to be conducted by the manufacturer, distributor or retailer, which can in some cases be an individual who conducted business without forming a corporation or partnership. Complaint Counsel nonetheless seeks to alter this common-sense reading of the CPSA by seeking to add language that is simply not there, namely that an individual can be deemed a manufacturer or distributor whenever the Commission decides to redefine the applicable definitions to include corporate officers.

The wording and context of the CPSA also clearly indicate that the word "person" in the definition of "manufacturer" does not create personal responsibility for an individual to carry out a product recall when a valid corporate entity manufactured the product, and not the individual in his personal capacity. The CPSC's regulations implementing Section 15 of the CPSA expressly define "person" to include corporate entities. *See* 16 C.F.R. § 1115.3(d); *see also id.* § 1115.27(h) (requiring recall notices to identify a presumptively corporate manufacturer by its "legal name and the city and state of its headquarters"). Maxfield & Oberton Holdings LLC is thus the "person" that manufactured or imported Buckyballs® and Buckycubes® within the meaning of the statute. Mr. Zucker is not,[4] either in his individual capacity as a private person or

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[4] A review of other CPSA provisions demonstrates why Complaint Counsel's interpretation of the statute must be wrong and is, at least, inconsistent with common practice in conducting recalls. For example, Section 15(c)(1)(E) requires manufacturers to mail notice to "each person who is a manufacturer, distributor or retailer of such product" when the CPSC determines that a product presents a substantial product hazard. Under Complaint Counsel's interpretation, this provision would require a manufacturer to notify its employees (or perhaps just some of them) about the substantial product hazard determination, something that CPSC has never required or expected. For the same reason, the recordkeeping requirements in Sections 16(b) and 16(c) would appear to pose an independent requirement on employees or corporate officers. We are unaware of any situation where the CPSC has ever interpreted these sections of the CPSA to apply to corporate officers or other employees of a manufacturer. Yet Complaint Counsel is apparently arguing here that the term "manufacturer" in Sections 15(c) and 15(d) means something different than the same term in other parts of Section 15 and elsewhere in the statute. This cannot be correct. The same interpretation of the term "manufacturer" must apply throughout the CPSA.

in his individual capacity as the former CEO of the former entity, Maxfield and Oberton Holdings, LLC.

This conclusion is further confirmed by the fact that, unlike some other health and safety statutes, the CPSA does not provide for individual responsibility to carry out safety recalls. *Compare* 15 U.S.C. § 2064(c)(1) & (d)(1) (allowing the CPSC only to "order the manufacturer or any distributor or retailer of [a] product" to notify the public of product defects or initiate recalls), *with, e.g.*, 7 U.S.C. § 136q(b)(4) (allowing EPA to demand that "any person ... subject" to pesticide regulations facilitate recalls of pesticides); 21 U.S.C. §§ 350f & 350*l* (stating that recall orders concerning adulterated food apply to any "person that submits a registration ... for a food facility").

Still another problem with Complaint Counsel's argument is that when Congress intended to apply a provision of the CPSA to corporate officers, Congress explicitly stated its intent in the specific wording of the provision. In particular, Congress *explicitly* provided for individual director, officer and agent liability in a different provision of the CPSA—namely Section 21(b). *See* 15 U.S.C. § 2070. Because Congress did so, it is clear under well settled principles of statutory construction that Congress did *not* extend the CPSA's recall jurisdiction to a product manufacturer's corporate officers: "When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 671 (2008) (internal quotation marks omitted), *superseded by statute on other grounds as stated in Boone v. MountainMade Found.*, 684 F. Supp. 2d 1, 9 n.9 (D.D.C. 2010); *accord, e.g.*, *Carcieri v. Salazar*, 555 U.S. 379, 389-90 (2009). Thus, "the inclusion of an express [provision, here regarding individual director, officer

and agent liability in Section 21], combined with the absence of anything similar in [Section 15] suggests that Congress did not intend to include" individual director, officer or agent responsibility in Section 15. *Allison Engine Co.*, 553 U.S. at 671.

Complaint Counsel's argument is also inconsistent with a second canon of statutory interpretation. Under the "rule of lenity," any ambiguities in the statutory and regulatory requirements must be resolved in favor of Mr. Zucker. This well established doctrine mandates that where there is an ambiguity, a statute only applies to conduct *clearly* covered. The rule of lenity applies even when, as here, a statute is construed in a civil setting, when the statute has criminal applications. *E.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 11, n.8 (2004); *United States v. Thompson/Ctr. Arms. Co.*, 504 U.S. 505, 517-18 (1992). The CPSA carries criminal sanctions. 15 U.S.C. § 2070. As a result, even if CPSA were ambiguous as to whether Mr. Zucker can be subject to a recall order—and it is not—the ambiguity would have to be resolved against Complaint Counsel's position.

II. Established Principles of Corporate Law Compel Denial of Complaint Counsel's Motion.

Under well established principles of corporate law in the United States, an officer, director or shareholder of a corporation is not responsible for the debts or obligations of the corporation. *See Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1021 (7th Cir. 1995) ("Corporations are liable for the acts of their officers and directors, not the other way around."). And when a company elects to dissolve, its assets and liabilities dissolve with the company, subject to state law regarding continuing liabilities. Complaint Counsel cites the extraordinary exception to these two principles that was established by the *Dotterweich* and *Park* line of cases (*see Dotterweich*, 320 U.S. 277; *Park*, 421 U.S. 658), but as we will show below,

the exception carved by those cases is not applicable to a proceeding seeking an order under Section 15 of the CPSA.

"The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception." *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-03 (1960). Thus, when a statute is silent about extending vicarious liability to officers or owners of a corporation, there is an inference that Congress intended to apply the ordinary rules about liability. The United States Supreme Court "has applied unusually strict rules [for vicarious liability] only where Congress has specified that such was its intent." *Meyer v. Holley*, 537 U.S. 280, 287 (2003) (citing to *Park* and *Dotterweich*). The Court has also held that, even when a statute's objectives demonstrate an "overriding societal priority," those objectives do not alter the traditional rules on vicarious liability. *Id.* at 290 (internal quotation marks omitted).

In short, limited individual liability for the obligations of a corporation is a hallmark of corporate law in the United States. *See United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 191 F. Supp. 2d 17 (D.D.C. 2002), *aff'd*, 322 F. 3d 738 (D.C. Cir. 2003) (noting the distinction between limited definition of an "employer" as opposed to other provisions of the same statute which imposed liability on "any person," the Court refused to find that liability attached to the majority shareholder, even though the statute at issue, the False Claims Act, was deemed a broad remedial statute designed to prevent fraud against the federal government). That general rule applies with full force to Maxfield & Oberton, which was formed under Delaware's Limited Liability Company Act. *See, e.g.*, Proposed Second Am. Compl. in No. 12-1, ¶ 5. And that Act provides that "no member or manager of a limited liability company shall be obligated personally for any ... debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the ... company." 6 Del. C. § 18-303(a); *see also*

Great Lakes Chem. Corp. v. Monsanto Co., 96 F. Supp. 2d 376, 391-92 (D. Del. 2000) ("[T]he Delaware Limited Liability Company Act permits a member in an LLC to be an active participant in management and still to retain limited liability."). As discussed above, Complaint Counsel seeks to subject Mr. Zucker to the recall process solely because he acted as the CEO of Maxfield & Oberton. *See* Mem. in Support of Mot. for Leave to File Second Am. Compl. 3-6. Neither Delaware law nor general corporate-law standards provide any basis for that action.

Even when a corporation is judgment-proof, an officer or investor cannot be held liable for the obligations of the corporation in the absence of evidence or allegations that the corporation's insolvency was the result of undercapitalization or other fraud by an individual officer or investor. *See Siewick*, , 191 F. Supp. 2d at 22 n.5 ("There is some suggestion that the corporation may be judgment-proof. However, there is no allegation or evidence that this is the result of undercapitalization or other fraud by the decedent, making plaintiff's potential inability to execute a monetary judgment against the corporation a condition created by the underlying, time-honored purpose of the law limiting liability by incorporation, rather than an inequity.") (internal citation omitted).

Complaint Counsel appears to dispute (or question) the validity of the dissolution of Maxfield & Oberton. There is no factual basis to dispute the dissolution. The company has, in fact, dissolved, and in accordance with Delaware law, it has formed a liquidating trust to carry out the remaining obligations of the dissolved company. *See* Certificate of Dissolution, copy attached as Ex. A. Complaint Counsel is well aware of this fact, because she has filed a letter with the liquidating trust requesting the trust to sell its assets (including other magnetic products that would be banned under the CPSC's pending rulemaking (*see* 77 Fed. Reg. 53,781 (Sept. 4, 2012))) in order to add funds to the trust. *See* Letter from Complaint Counsel to MOH

Liquidating Trust dated February 5, 2013, copy attached as Ex. B; *see also* Letter from CPSC Trial Attorney to MOH Liquidating Trust dated January 18, 2013, copy attached as Ex. C.

These principles of corporate law are illustrated by numerous cases in which the government has unsuccessfully attempted to impose civil liability against an individual for actions taken by his corporate employer. Many of these unsuccessful efforts have occurred when the government was seeking to protect the public health and safety.

In *United States v. USX Corp.*, 68 F.3d 811 (3d Cir. 1995), for example, the government sought to hold an individual named White jointly liable under Section 107 of CERCLA for response costs incurred by the United States at a hazardous waste site. White was also a partner in a joint venture with the corporate defendant. White had formed the company along with one other person 30 years earlier, was the president of the company, and owned half its stock. The company refused to participate in the remediation sought by the government. As a result, the government sued two companies and others including White.

The statutory provision in question limited liability to those *persons* who accept hazardous substances for transport and have a substantial input into selecting the disposal site. 42 U.S.C. § 9607(a)(4). The government contended that Congress intended to impose liability "on those who control the affairs of a responsible corporation, irrespective of whether those in control actually participate in the liability-creating conduct." *USX Corp.*, 68 F.3d at 822. The court found that CERCLA is to be construed liberally to effectuate its goals. *Id.* Nevertheless, the court ruled that in light of the limited liability that protects corporate officers who do not actually participate in liability-creating conduct, there must be a basis in the statute itself, beyond its general purpose, to support the conclusion that Congress intended to impose liability on those who control the corporation's day-to-day activities. *Id.*

The court further ruled that Congress could have specified that a majority shareholder or officer of a corporation engaged in the waste handling business is personally responsible. And the court concluded that its disagreement with the government over the meaning of the statute was not inconsistent with CERCLA's purpose of making those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

Similarly, in *People v. Commonwealth Edison Co.*, 490 F. Supp. 1145 (N.D. Ill. 1980), the court ruled that a corporate officer could not be sued under a Clean Air Act provision which authorized suits against "any person," where "person" was defined in the statute to include individuals. The plaintiff alleged that because a corporate officer was an individual, he was therefore a person. The Court ruled that individual corporate officers were exempt from liability. *Accord People v. Celotex Corp*., 516 F. Supp. 716 (C.D. Ill. 1981).

In *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1300-01 (5th Cir. 1976), the court had to determine an individual's personal liability to pay the costs of a restoration order. The court ruled that a corporate officer may not be held civilly liable for a corporate violation of the Rivers and Harbors Act unless either the Act itself authorizes such liability, or there are sufficient allegations and proof to permit negation of the corporate form. The court additionally ruled that the statute, 33 U.S.C. § 406, did not provide that an officer of a corporation was personally liable on any subsequent civil judgment obtained against the corporation. The court explicitly rejected the argument that *Park* should be applied in that case as a basis to impose liability.

Finally, the court in *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047 (10th Cir. 1993), denied piercing of the corporate veil regarding enforcement of an NLRB order against the owner

of a corporation where there was no evidence that the individual committed fraud either in the formulation of the corporation or the misuse of the corporate form. The court reached that conclusion even though the individual violated many corporate formalities, including by commingling corporate assets with personal assets and carelessly conducting business under the corporate name. *See also NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 341-42 (6th Cir. 1990) (refusing to enforce NLRB order against former officers of a company even though the company ceased operations without paying all of its debts).

Complaint Counsel's Motion implies that there is a presumption in favor of extending responsibility for carrying out recalls to the officers, directors or employees of product manufacturers. But this is simply not true. There is no general presumption in American law that individuals are responsible for the obligations of their corporate employers. To the contrary, the general presumption is that individuals are not responsible for the obligations of their corporate employers, except in the rare instances in which Congress has explicitly provided otherwise.

III. *The Dotterweich and Park Line of Cases Does Not Extend To This Proceeding.*

Complaint Counsel seeks to add Mr. Zucker to this proceeding, citing *United States v. Dotterweich*, 320 U.S. 277 (1943), *United States v. Park*, 421 U.S. 658 (1975), and cases that have relied on those two decisions.

Dotterweich and *Park* both involved whether a responsible corporate officer could be liable for violations of the Federal Food, Drug and Cosmetic Act pursuant to a provision now codified at 21 U.S.C. § 333(a)(1). That statute provides explicitly for liability for *any person* violating one of its provisions. *Dotterweich* held that a responsible officer of a corporation

subject to the Act could be subject to criminal penalties for violations of the Act, and *Park* confirmed that holding.

The comparable provisions of the CPSA are Section 20 (15 U.S.C. § 2069), which provides for penalties against "any person" committing certain violations, and Section 21 (15 U.S.C. § 2070), which provides for penalties against any "individual director, officer, or agent of a corporation" who is found to have committed certain violations.

But this Court is not being asked to adjudicate whether Mr. Zucker committed any violation of Sections 20 or 21 of CPSA; nor could this Court be asked to do so. *See Athlone Indus., Inc. v. CPSC*, 707 F.2d 1485 (D.C. Cir. 1983) (CPSC actions for penalties under the CPSA may be brought only in federal district court). Rather, this Court is being asked to determine whether the subject products present a substantial product hazard, and if so, to issue an appropriate order pursuant to an entirely different provision of the CPSA, namely Section 15, which does *not* contain the "individual director, officer or agent" language found elsewhere in the Act. Since the CPSA provides in Section 15 that such an order may be issued only to a manufacturer, retailer or distributor of such products, the *Park* line of cases cannot apply in this proceeding. In this case, the starting point, and indeed the ending point, of the inquiry is the statutory language chosen by Congress, not an amorphous policy argument that lacks any statutory underpinning.

Complaint Counsel invokes *Park* and *Dotterweich* for the "rationale that individual liability is properly imposed on corporate officers where *the failure to comply with regulatory schemes* affects the health and safety of the public." Mem. in Support of Mot. for Leave to File Second Am. Compl. 9 (emphasis added). Rather than supporting Complaint Counsel's position, this argument demonstrates yet another reason why an amendment cannot be permitted, namely

because the amendment would be futile. There has been no finding that any person has "fail[ed] to comply with regulatory schemes" in this case. To the contrary, the then General Counsel of the Commission confirmed to Maxfield & Oberton's counsel in July 2012, shortly before this proceeding commenced that "it is not a violation of any law administered by the CPSC for any retailer to continue to sell Buckyballs and Buckycubes. … If a retailer continues to sell your client's product, it is not in violation of any law CPSC administers until we have obtained a court order, which is the next step in our process …." Copy attached as Ex. D.

Thus, just a few days before this matter was initiated, the Commission's top lawyer confirmed in writing to counsel for Maxfield & Oberton the obvious truth about the regulatory scheme, namely that the manufacturer could *legally* sell Buckyballs® and Buckycubes® absent a court order finding that the products present a substantial product hazard. At least as to the allegation in the Complaint that the Subject Products violated the toy standard, this letter is fatal, because it acknowledges that the CPSC did not consider the products to violate any safety standards.

In a case involving the recall authority of the National Highway Traffic and Motor Vehicle Safety Act, a statute with many similarities to CPSA, the D.C. Circuit held that "a manufacturer cannot be found to be out of compliance with a standard if [the regulatory agency] has failed to give fair notice of what is required by the standard. And absent notice, there can be no recall based solely on noncompliance." *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998); *see also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012).

Complaint Counsel has cited no authority for what would be an unwarranted expansion of the *Park* line of cases to civil cases seeking to compel specific remedial actions by an individual formerly employed by a corporation against which such an order could issue. Mr.

Zucker acknowledges that there are a few civil cases that have applied *Park* when the government has sought civil penalties. There are even a few cases that have applied *Park* when the government has sought an injunction seeking to force an individual to comply with regulatory requirements in the future. However, Mr. Zucker is aware of no case that has applied *Park* to a product recall matter and of no case that has applied *Park* to require a former officer of a corporation to be enjoined for activities that were taken by a now-defunct corporation. Thus, each of the cases cited by Complaint Counsel is simply inapplicable to this case, particularly because of the specific statutory language applicable here.[5]

Moreover, contrary to Complaint Counsel's construal of *Park* and *Dotterweich* as support for a broad proposition that liability may be imposed on corporate officers for failures to comply with health or safety regulations, the Supreme Court recently read those cases to stand for the simpler, and much narrower, proposition that liability for regulatory violations may be imposed on corporate officers "only where Congress has specified that such was its intent." *Meyer*, 537 U.S. at 287. Those cases, then, do not establish a broad principle of individual employee or officer vicarious liability for violations of statutes that relate to health and safety, but rather make the imposition of such liability a question of Congressional intent and statutory interpretation.

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[5] Complaint Counsel attempts to establish responsibility for Mr. Zucker by asserting that he exercised "personal control" over the company, and by citing various actions that he allegedly took on behalf of the company. Some of the representations of his actions as the former CEO are correct and some are not. However, none of the representations make any difference, because all of the assertions are of actions that are unremarkable for a corporate officer. For example, he did, indeed, request to meet and met with CPSC Commissioners; he signed correspondence; he granted media interviews; and he took other steps in the ordinary course of business as the CEO of the company. Other representations are not correct: for example, he did not design the products; he did not personally import them. He was not "integral" to the manufacturing of the products. Until this proceeding commenced, he did not manage day-to-day marketing activities, nor was he the "face" of the company. Again, however, none of these representations matter to this case. The CPSA does not provide that a recall order can be issued against an individual who used to be employed by a consumer product manufacturer. The *Park* line of cases simply do not reach this far, no matter what actions Mr. Zucker undertook as the former CEO.

To the extent that cases decided prior to the Supreme Court's *Meyer* decision stand for a broader reading of the impact of *Park* and *Dotterweich*, those cases can no longer be relied upon. In any event, what is at issue here is not an attempt to make Mr. Zucker *liable* for any *violation*, but rather to impose the burden of conducting a recall upon him. As we have shown, the CPSA does *not* provide that a recall order can be imposed on an individual who was employed by a consumer product manufacturer, and Congress certainly evinced no intent to authorize the CPSC to require such individuals to conduct recalls.

As discussed above, the cases cited by Complaint Counsel are unavailing. They did not involve orders for specific performance of a recall, such as the order sought by Complaint Counsel in this case.

This is true even with respect to the two cases involving the CPSC. In *United States v. Shelton Wholesale, Inc.*, No. 96-6131-CV-SJ-6, 1999 WL 825483 at *3 (W.D. Mo. Sept. 21, 1999) (unreported), *aff'd sub nom. Shelton v. CPSC*, 277 F.3d 998 (8th Cir. 2002), the Commission was seeking civil penalties for violations of the fireworks regulation adopted pursuant to the Federal Hazardous Substances Act, and an injunction against further importation of noncompliant fireworks. The Court found that the individual, Mr. Shelton, could be personally liable for the civil penalties where he had *personally* imported many of the noncompliant products in his own name. No such allegation of Mr. Zucker's personal involvement is contained in the Amended Complaint. Moreover, this case interpreted the broad "any person" statutory language that was at issue in *Park* and *Dotterweich*. Finally, *Shelton* did not involve a recall, so it does not support the novel position taken by the CPSC here—namely, that an individual who formerly was employed by a manufacturer could be held responsible for personally carrying out a recall.

The other CPSC case cited by Complaint Counsel, *Barrett Carpet Mills, Inc. v. CPSC*, 635 F. 2d 299 (4th Cir. 1980), is particularly instructive and, indeed, supports Mr. Zucker. In *Barrett Carpet*, the CPSC found a violation of the Flammable Fabrics Act with respect to certain carpet and issued a cease-and-desist order against the carpet manufacturer. The cease-and-desist order included a provision obligating Mr. Roy Barrett, the President of the company, personally to carry out the requirements of the order. The Fourth Circuit reversed this portion of the Commission's order, holding that there was no reason to apply the order to an individual who is an officer of a corporation "unless the Commission can show some reason for including an officer other than the mere fact that he is an officer." *Id.* at 304. The Court reviewed numerous cases involving cease-and-desist orders issued by the Federal Trade Commission in which a corporate officer was personally included in the order, and found all of them to be distinguishable from the CPSC's order against Mr. Barrett. Complaint Counsel has cited no evidence that Mr. Zucker "conducted the affairs of the business as though no corporation had existed," nor does Complaint Counsel allege that Mr. Zucker engaged in any "deceptive and unfair practices [of the type] perpetrated in the cases in which the officers of the corporate respondent have been included in the cease-and-desist order." *Id*. And as to the likelihood that the complained-of conduct will recur, there is no reasonable likelihood that Mr. Zucker will engage in importing or selling Buckyballs® and Buckycubes® in the future.

IV. Other Factors Clearly Require Denial of Complaint Counsel's Motion

In addition to the plain text of CPSA, fundamental principles of corporate law, and the limits on the *Park* doctrine described above, four other factors also compel denial of Complaint Counsel's motion. *First*, if Mr. Zucker is added to the case, he will surely be obligated to expend considerable resources to defend the case. While that course would be appropriate if Mr. Zucker

were a proper respondent, it is surely not appropriate when Mr. Zucker cannot, as a matter of law, be subject to a recall order regardless of any facts that Complaint Counsel might present.

It is small consolation that if Mr. Zucker prevails before the agency, or successfully challenges a Commission order in court, he can (and likely will) seek attorneys' fees under the Equal Access to Justice Act ("EAJA"). *See* 5 U.S.C. § 704 (an agency that conducts an adversary adjudication shall award to the prevailing party attorneys' fees and expenses unless the position of the agency was substantially justified); *see also* 28 U.S.C. § 2412(b) & (d) (authorizing attorneys' fees when a party prevails in a lawsuit against the federal government). This is small consolation because EAJA would only compensate Mr. Zucker after he has spent considerable money defending the action (assuming he is not thrown into bankruptcy as a result of the proceeding) and would not compensate Mr. Zucker either for his own time spent defending against this action or for the substantial worry and stress that this action is imposing on him.

Second, while we believe that there are *no* facts that CPSC could prove that would establish a valid legal basis for including Mr. Zucker in this case under the *Park* line of cases or otherwise, the proposed Amended Complaint, and indeed, Complaint Counsel's Motion fall woefully short of setting forth any such basis.

In Paragraph 6 of the proposed Amended Complaint, Complaint Counsel asserts that Mr. Zucker is the CEO who controlled the acts of the company. This appears to be the only specific assertion in the proposed Amended Complaint relating to what the CPSC believes Mr. Zucker did (as opposed to what the "respondents" generally did). This is inadequate in terms of setting forth a basis of alleging that Mr. Zucker actually performed acts that justify including him in the case. Although there are other statements about his purported involvement in Complaint

Counsel's legal memorandum (some of which we address above in Footnote 6), these statements in that memorandum cannot remedy an inadequate proposed amended complaint. Moreover, as discussed above, the statements asserting that Mr. Zucker was "integral to the design, manufacturing and marketing" of the products is wrong. In fact, Complaint Counsel does not allege that Mr. Zucker knew or believed that anything was wrong with the product. The Motion to Amend the Complaint should therefore be denied because it fails to plead necessary facts to support a claim against Mr. Zucker.

Third, under the Commission's procedural rules, the amendment of a complaint is permitted only when the amendment will not "unduly broaden the issues in the proceedings or cause undue delay." 16 C.F.R. § 1025.13. The notion that an individual might be held responsible for the actions of a company for which he previously worked represents a very controversial proposition that will introduce undue delay into—and raises the potential to overwhelm—these proceedings.

The 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. Complaint Counsel is asking this Court to enlarge the issues to include whether a former officer of a manufacturer is a person against whom such a remedial order may issue. Granting the motion to amend the Complaint would surely "broaden the issues" and "cause undue delay" in this matter. Indeed, to counsel's knowledge, this issue has never been litigated by the CPSC in the context of this statute, and the issue will introduce substantial controversy about the extent to which the CPSC can assert jurisdiction under Section 15 of the CPSA over individuals who hold (or held) responsible positions in corporate manufacturers that

are subject to the jurisdiction of the CPSC. Thus, because the proposed amendment would unduly broaden (and greatly complicate) the issues, the motion to amend should be denied.

Fourth, Complaint Counsel would also be unable to amend the Complaint under the standards contained in the Federal Rules of Civil Procedure. We recognize, of course, that this case is governed by the Commission's rules rather than the rules applicable in federal court. Nevertheless, we address the corresponding federal rule regarding amending complaints because the policy considerations applicable to amendments in courts are virtually the same as those set forth in the Commission's rules.[6]

Federal Rule of Civil Procedure 15(a)(2) permits liberal amendments to complaints filed in federal court "when justice so requires." But courts will deny a motion to amend a complaint when the amendment would be futile, namely, when the amendment, if granted, could not have subsequently survived a motion to dismiss. *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). Courts also deny motions to amend when "allowance of the amendment" would cause "undue prejudice to the opposing party." *Id.* at 182. Both of these factors are present here: Complaint Counsel's proposed amendment would be futile for all of the reasons discussed above. It would also be highly prejudicial to force Mr. Zucker to defend this action, both because this Court lacks jurisdiction over him and because he would suffer reputational harm if subjected to these proceedings. Given the strong similarity of the policy considerations underlying Rule 15 and the Commission's rules, Complaint Counsel's motion to amend should be denied for this reason as well.

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[6] Complaint Counsel noted as much in Footnote 1 of the Memorandum In Support of Motion for Leave to File Amended Complaint filed in this case on September 18, 2012.

V. Conclusion

Complaint Counsel has failed to cite to even a single case that actually supports the extraordinary and improper relief they are seeking via an amendment to the Complaint. We have shown that there is a presumption in American law in favor of finding that a corporation's obligations do not ordinarily extend personally to its officers or directors. We have also shown that the *Park* line of cases, which creates a limited exception to this presumption, is applicable only upon showing of specific Congressional intent to apply the statutory provision to corporate officers and directors, a showing which cannot be made with respect to Section 15 of CPSA.

Because it would be futile to allow Complaint Counsel to amend the Complaint to include Mr. Zucker as a respondent, he should not be put through the time and expense of defending a case that cannot ultimately succeed against him.

For the above reasons, Mr. Zucker respectfully moves this Court to deny the motion of Complaint Counsel to add him as a party to this proceeding.

Respectfully submitted,

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