UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	CPSC Docket No. 12-1 CPSC Docket No. 12-2 CPSC Docket No. 13-2
MAXFIELD AND OBERTON HOLDINGS, LLC and CRAIG ZUCKER, individually and as an officer of MAXFIELD AND OBERTON HOLDINGS, LLC and ZEN MAGNETS, LLC STAR NETWORKS USA, LLC	)	Hon. Dean C. Metry Administrative Law Judge
Respondents.	)	

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT CRAIG ZUCKER'S MOTION FOR PROTECTIVE ORDER

Respondent Craig Zucker seeks a protective order prohibiting discovery concerning the financial records and insurance information of Maxfield and Oberton (M&O), the MOH Liquidating Trust (the Trust), or any other person or entity; the purported dissolution of M&O; and the formation and activities of the Trust (collectively, Financial Discovery) on the grounds that this information is not relevant to this proceeding. Alternatively, Mr. Zucker proposes extending the proceeding whereby the Court would convene a second inquiry into financial issues only after a substantial product hazard determination is made and a remedy ordered. This Court should deny Mr. Zucker's motion because financial information pertains directly to the remedy sought in this proceeding and is therefore not only a relevant inquiry but constitutes a central issue before this Court. Moreover, granting Respondent's motion would cause unnecessary delay of these proceedings and is inconsistent with principles of judicial economy.

Mr. Zucker's oft-repeated but unsupported claim that the Financial Discovery is irrelevant and "totally unrelated to this proceeding's narrow scope"[1] ignores the dual nature of the issue before this Court and artificially decouples the substantial product hazard determination from the remedy that would necessarily accompany such a determination. Suggesting that the lone area of inquiry for this Court is a substantial product hazard determination, Respondent repeatedly mischaracterizes this proceeding as limited to "evaluating the safety of a product," Memo. at 6, selectively omitting references to the remedies Complaint Counsel seeks. *Compare* Memo. at 2, 6 ("Complaint Counsel is 'seeking an order determining that . . . Buckyballs and Buckyballs, present a substantial product hazard.'"), quoting Teicher subpoena, with Second Amended Complaint at 18 (seeking substantial product hazard determination, public notice campaign, consumer refunds, retailer reimbursements, and corrective action plan).

Moreover, Mr. Zucker does not limit his request to his own records and financial information, but instead broadly seeks to prohibit discovery of financial records of M&O, the Trust, or "any other person or entity." Memo. at 9. Respondent asserts that discovery of financial information and records relating to M&O and the Trust "will not shed a single ray of light on whether the magnets at issue are substantial product hazards or whether a recall is warranted." Memo. at 8. Mr. Zucker again ignores that the CPSA also requires that a remedy must be fashioned to ameliorate any hazard. Thus, as set forth in the Second Amended Complaint, Complaint Counsel seeks not only a substantial product hazard determination but also "remedial action to protect the public from the substantial risks of injury presented by . . .

[1] Respondent Craig Zucker's Memorandum of Law in Support of Motion for Protective Order (Memo.), Jan. 31, 2014, at 3. *See also* Memo. at 3 ("Quite simply, discovery into these areas is not relevant"), (it is "plainly evident that Complaint Counsel seeks extensive discovery of items well beyond topics that are relevant), ("Complaint Counsel goes beyond the boundaries of issues relevant to this proceeding"); Memo. at 6 (Financial Discovery constitutes "unvarnished fishing expedition looking for information in no way relevant to this litigation"); Memo. at 8 ("records relating to the dissolution of M&O and the formation of the Trust are a fishing expedition").

Buckyballs . . . and Buckycubes," including public notice and consumer refunds. Second Amended Complaint at 1, 18-19. The financial wherewithal of Respondent and activities surrounding the dissolution of M&O bear directly on the remedial action the Court may order and are therefore highly relevant to the proceeding. Absent this information, this Court would be unable to base a remedial order on evidence in the record and would be left to speculate about the viability of any potential monetary relief or the effectiveness of any notice campaign.

Mr. Zucker implicitly concedes the inherent relevance of Complaint Counsel's inquiry by offering an unsupportable alternative whereby the financial basis for a remedy would only be evaluated after the Court made a substantial product hazard determination and ordered a remedy. This proposal is fundamentally flawed because the ability of the Court to order a remedy in the first place would be compromised by a lack of financial information on which to base the order. Moreover, the resultant delay would do nothing more than multiply unnecessarily the significant effort, time, and resources that have already been devoted to this proceeding.

Principles of judicial economy likewise militate against adopting Mr. Zucker's alternative approach. Prohibiting discovery of financial issues until after the hearing will most certainly require additional discovery, duplicative depositions, and wasteful briefing of issues that could be directly addressed at one hearing. Allowing Mr. Zucker at this late date to forestall discovery served on him nearly six months ago, to interfere with the subject matter of the trustee's deposition after the Presiding Officer approved Complaint Counsel's request to depose the trustee, and to thwart document production required by nonparty subpoenas after they have been duly approved by the Commission and properly served, would be an inefficient and wasteful deployment of resources at best.

Mr. Zucker's concern about discovery seeking "sensitive, private financial information," Memo. at 9, is equally without merit. These concerns are misplaced because confidential information of this nature is subject to a Protective Order which prohibits the disclosure of such information. Accordingly, because financial information is relevant to the issues before this Court, because a bifurcated process would cause undue delay and a waste of resources, and because Respondent has failed to demonstrate that justice requires a protective order prohibiting discovery of the information Complaint Counsel seeks, Complaint Counsel respectfully requests that the Court deny Mr. Zucker's motion.

LEGAL ANALYSIS

The Rules broadly allow discovery of any matter that is "within the Commission's statutory authority and is relevant to the subject matter involved in the proceedings" or "appears reasonably calculated to lead to the discovery of admissible evidence." 16 C.F.R. § 1025.31(c)(1). Courts interpreting the similar Federal Rules of Civil Procedure have held that "[t]he phrase, 'relevant to the subject matter involved in the pending action' is broadly construed to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *In re Aircrash Disaster Near Roselawn, Ind. Oct. 31, 1994*, 172 F.R.D. 295, 303 (N.D. Ill. 1997). Thus, "discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought has no possible bearing on the claims and defenses of the parties or otherwise on the subject matter of the action." *Wrangen v. Pa. Lumbermans Mut. Ins. Co.*, 593 F. Supp. 2d 1273, 1278 (S.D. Fla. 2008). A party seeking a protective order bears the burden of demonstrating good cause showing that "justice requires" such an order "to protect a party or person from annoyance,

embarrassment, competitive disadvantage, oppression, or undue burden or expense." 16 C.F.R. § 1025.31(d). Mr. Zucker has failed to meet his burden.

I. Financial Discovery is Relevant to the Remedy the Court May Order.

The Court's authority to determine whether the Subject Products constitute a substantial product hazard and to order a remedy in this matter derives from section 15 of the Consumer Product Safety Act (CPSA). 15 U.S.C. §§ 2064(c)-(f). Pursuant to section 15, a manufacturer whose product has been determined to present a substantial product hazard may be required to take a number of actions, including conducting an effective public notice campaign, 15 U.S.C. § 2064(c), providing an adequate remedy, such as payment of a full refund of the purchase price of a product, 15 U.S.C. § 2064(d)(1)(C), and reimbursing retailers for consumer costs in seeking a refund. 15 U.S.C. § 2064(e). Any remedy must be both "effective" and "appropriate." 15 U.S.C. § 2064(d)(3)(B).

To order a remedy that is effective and appropriate, this Court must assess whether a Respondent has the financial wherewithal to implement successfully such an order. For example, ordering a remedy where there are insufficient funds to cover expenses incurred by consumers would not only disserve the very consumers the remedy was designed to make whole, such a result would conflict with the statutory requirement that "[n]o charge shall be made to any person … who avails himself of any remedy provided under an order" issued by the Commission and that Respondents "shall reimburse each person … who is entitled to such a remedy for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy." 15 U.S.C. § 2064(e)(1).

Likewise, discovery concerning insurance policies and their scope of coverage is critical to ensuring that consumers receive an adequate remedy, particularly if the Respondents' finances

alone could not cover such a remedy. Indeed, the Federal Rules of Civil Procedure recognize that documents concerning insurance coverage are not only relevant, but presumptively so and therefore require that such documents be disclosed by all parties as a mandatory initial disclosure. *See* Fed. R. Civ. Pro. 26(a)(1)(A)(iv). Although the Rules here do not require such initial disclosures, the Federal Rules' presumptive determination of relevancy is instructive.

Because Financial Discovery is necessary to fulfill section 15's mandate to order an effective and appropriate remedy for any substantial product hazard, the requested documents are relevant and Mr. Zucker's motion should be denied.

II. The Financial Discovery is Relevant to Determine Whether Mr. Zucker is a Responsible Corporate Officer.

The Court determined previously that Mr. Zucker is a proper Respondent at this stage of the proceeding and that he may be liable under the CPSA if the evidence shows he is a responsible corporate officer pursuant to *United States v. Dotterweich*, 320 U.S. 277 (1943) and *United States v. Park*, 421 U.S. 658 (1975). Order, May 3, 2013. As explained in *Dotterweich*, a responsible corporate officer is one who has "a responsible share in the furtherance of the transaction" at issue. *Dotterweich*, 320 U.S. at 284. The transactions at issue here are the development, manufacture, importation, marketing, and sale of the Subject Products. Complaint Counsel thus served discovery on Mr. Zucker seeking information about his control of M&O's finances as well as his and M&O's financial documents that would demonstrate his involvement in transactions concerning the Subject Products.

Courts have recognized that an officer's control of a corporation's finances and involvement in directing purchases and sales may demonstrate that such a person is a responsible corporate officer. *See, e.g., City of Newburgh v. Sarna*, 690 F. Supp. 2d 136 (S.D.N.Y. 2010); *United States v. Ming Hong*, 242 F.3d 528 (4th Cir. 2001). In *Newburgh*, the Court ruled that in

determining whether the Clean Water Act can be enforced against a person under the responsible corporate officer doctrine, the officer's "role in the entities named as defendants is a matter to be fleshed out during discovery." *Newburgh*, 690 F. Supp. 2d at 163. Such discovery could reveal information about the officer's control over "the corporate defendants and whether they are able to fund any remedial actions that may be required." *Id.* at 162. Financial discovery and documents showing financial transfers between the company and the officer can also reveal the officer's stake in the company, with a large ownership interest or close financial control further supporting a finding that the person is a responsible corporate officer. *See id.* Likewise, in *Ming Hong*, the court emphasized that financial discovery is relevant to determining whether a person is a responsible corporate officer. There, the Court looked at evidence of an officer's specific actions relating to corporate finances to determine that he was responsible under the Clean Water Act, including his role in negotiating a lease, participating in corporate purchase decisions, developing marketing strategies, and controlling the payment of a firm's expenses. *Ming Hong* at 529-32. Such "evidence supported a finding that Hong was in control of [the firm's] finances" and that he was therefore a responsible corporate officer. *Id.* at 532.

Similarly, documents concerning Mr. Zucker's financial and legal involvement in the purported dissolution of M&O and the creation of the MOH Liquidating Trust during the pendency of this proceeding may demonstrate Mr. Zucker's role as a responsible corporate officer. Complaint Counsel will be required to prove that Mr. Zucker's "responsibility or actions were significant enough to render him liable under the CPSA…." Order, May 3, 2013, at 17. Mr. Zucker's control of M&O's finances and his role in its purported dissolution are relevant to determining his control over the operations of the company. As this Court recognized, "for reasons unknown," after the filing of this proceeding, M&O "apparently opted to dissolve…."

Order, May 3, 2013, at 18. Mr. Zucker's role in this dissolution is relevant to determining his responsibility and "liability in the face of a voluntary corporate dissolution after said corporation has been charged with introducing hazardous products into the stream of commerce." *Id.*

Mr. Zucker also asserts that the Financial Discovery served on him, M&O, the Trust, and any other person should be prohibited because it seeks "sensitive, private financial information." Memo. at 9. Mr. Zucker's concern is unfounded, however, because the Court has already approved a protective order to ensure that financial records are protected from public disclosure. *See* Protective Order, ¶ 1(c). The Protective Order allows discovery to proceed while protecting Mr. Zucker's interest in privacy. *See Vollert v. Summa Corp.*, 389 F. Supp. 1348, 1352 (D. Haw. 1975) (allowing discovery of financial information where a party's privacy can be protected by keeping documents from public view: "This court is sensitive to defendant's concern in maintaining the confidentiality of its financial condition. This confidentiality can be accomplished by placing controls on plaintiff's use of the discovered information. … Thus, in the absence of a showing of actual prejudice, defendant must disclose the information sought.").

Because Financial Discovery is relevant to a determination of whether Mr. Zucker is a responsible corporate officer, his motion should be denied.

III. **Bifurcation Would Be Burdensome, Inefficient, and Waste Judicial Resources**.

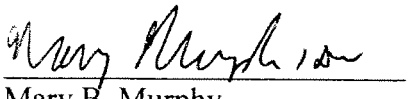
Mr. Zucker argues in the alternative that if the Court denies his motion, this case should be bifurcated, with the Court first determining whether the Subject Products are a substantial product hazard, ordering a remedy, and deciding whether Mr. Zucker is "responsible for implementing that remedy." Memo. at 9. After these issues are decided, discovery apparently would be reopened and another hearing held concerning the financial information Mr. Zucker

now seeks to preclude from discovery. Such a bifurcation would be inefficient, burdensome, and waste judicial resources.

Although Mr. Zucker was served with Complaint Counsel's discovery request in August 2013, he is only now seeking a protective order to avoid the Financial Discovery. Likewise, Mr. Zucker is challenging nonparty discovery sought via subpoenas that have already been duly approved by the Commission. Indeed, Mr. Zucker even seeks to limit Financial Discovery on nonparty Jake Bronstein who has not claimed any burden in responding to a subpoena issued to him on January 23, 2014. *See* Memo. at 6. Mr. Bronstein was served with the subpoena for such information and chose not to seek to limit or quash such subpoena. *See* 16 C.F.R. § 1025.38(g) (requiring that motions to limit or quash subpoena be filed within five days of service). Recognizing the inefficiency in bifurcation, courts strongly disfavor splitting cases in two and specifically have rejected efforts to delay discovery of a party's financial information. *See, e.g., Ward v. Estaleiro Itajai S/A*, 541 F. Supp. 2d 1344, 1353 (S.D. Fla. 2008) (allowing for discovery of defendants' financial worth, holding: "Chief among the characteristics of federal litigation is the principle, with few exceptions, that a case is to be tried as a single unit and not broken into piecemeal trials. To effectuate this deliberate choice on the part of Congress in favor of once-and-for-all litigation as to all issues, the Federal Rules allow for broad discovery."); *Mid Continent Cabinetry, Inc. v. George Koch Sons, Inc.*, 130 F.R.D. 149, 152 (D. Kan. 1990) (granting motion to compel financial discovery, because "to deny discovery of net worth until plaintiff can make a showing of a *prima facie* case at trial would only lead to delay and confusion while plaintiff reviews the information for the first time").

CONCLUSION

Mr. Zucker has not met his burden to show that justice requires entering a protective order prohibiting the Financial Discovery. Mr. Zucker's motion should be denied.



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February 10, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have provided on this date, February 10, 2014, Complaint Counsel's Opposition to Respondent Craig Zucker's Motion for Protective Order upon the Secretary, the Presiding Officer, and all parties and participants of record in these proceedings in the following manner:

Original and two copies by hand delivery to the Secretary of the U.S. Consumer Product Safety Commission: Todd A. Stevenson.

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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