IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiff's action before this Court is an attempt to relitigate a preliminary finding in an ongoing administrative proceeding at the Consumer Product Safety Commission ("CPSC"), in the guise of bringing challenges under the Administrative Procedure Act ("APA") and U.S. Constitution. In July 2012, CPSC staff filed an administrative complaint against Plaintiff's company, alleging that ingestion of small, high-powered magnets sold by Plaintiff's company under the brand names Buckyballs and Buckycubes put children at risk for intestinal perforation, fistulas, sepsis, and death. CPSC Docket No. 12-1 at 4 (filed July 25, 2012), *available at* http://www.cpsc.gov//PageFiles/131696/maxfield1a.pdf. In the administrative complaint, CPSC staff asked the Commission to determine that Buckyballs and Buckycubes are substantial product hazards under section 15 of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064, and to order Plaintiff's company to provide remedies as set forth in that section, including stopping the sale of the products and offering

consumers a refund in exchange for returning the products. *Id.* at 10-11. In December 2012, Plaintiff's company abruptly and voluntarily cancelled its certificate of incorporation and purported to dissolve itself, and its counsel withdrew from the administrative proceeding. In February 2013, CPSC staff moved to file an amended administrative complaint naming Plaintiff as a Respondent in his individual capacity and seeking the same remedies from Plaintiff as it did from Plaintiff's company. After extensive briefing, the Administrative Law Judge ("ALJ") overseeing the proceeding granted CPSC staff's motion to amend its administrative complaint, but reserved judgment as to whether Plaintiff is subject to liability until the merits of the case have been decided. Compl. Ex. 6 at 17. The administrative case is currently in the discovery stage and no hearing on the merits has been conducted. Neither the ALJ nor the Commission has ordered Plaintiff to do anything with respect to his company's products.

Plaintiff's sole grievance is that he was named as a Respondent in an agency administrative proceeding. His attempt to circumvent the ongoing administrative proceeding and obtain immediate judicial review should be rejected because CPSC staff's actions to date are not final, do not raise purely legal issues, and have not resulted in a cognizable harm to Plaintiff. Accordingly, Plaintiff's claims are demonstrably premature and unreviewable in light of the Supreme Court's decision in *FTC v. Standard Oil Co. of California* ("*Socal*"), 449 U.S. 232 (1980), section 10 of the APA (5 U.S.C. § 704), the doctrine of ripeness based in Article III of the Constitution, and the Supreme Court precedent in *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), which prohibits a federal court from enjoining an agency enforcement action when challenges to the propriety of the agency action can be addressed in the enforcement action itself. As such, the complaint should be dismissed

pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Unless and until the CPSC reaches a final determination on the merits adverse to the Plaintiff, his claims are not justiciable in this forum.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION TO REVIEW PLAINTIFF'S COMPLAINT WHERE THE COMMISSION HAS NOT TAKEN FINAL AGENCY ACTION UNDER THE APA

A. The Commission Has Not Taken Final Agency Action Against Plaintiff.

CPSC's administrative complaint against Plaintiff does not constitute "final agency action" within the meaning of the APA, 5 U.S.C. § 704. Plaintiff has not shown, as he must, that the administrative complaint "mark[s] the consummation of the agency's decisionmaking process" and is "one by which [his] rights or obligations have been determined, or from which legal consequences will flow." *See Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotations and citations omitted); *accord Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992); *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 194-95 (4th Cir. 2013) (citing *Bennett* and *Franklin*); *Golden and Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432 (4th Cir. 2010) (same). Moreover, the Supreme Court has addressed this precise issue and held that filing an administrative complaint is not final agency action subject to judicial review. *Standard Oil*, 449 U.S. at 243.

First, the administrative complaint in this matter does not represent the consummation of CPSC's decisionmaking process. Plaintiff relies heavily on *Athlone Indus., Inc. v. CPSC*, 707 F.2d 1485, 1489 n.30 (D.C. Cir. 1983), to argue that the CPSC's jurisdictional determination is final agency action and that judicial review is proper. Opp. at 7-11. In

Athlone, the Court of Appeals for the D.C. Circuit held that a distributor of baseball pitching machines was not required to exhaust administrative remedies before bringing an action seeking to enjoin CPSC from assessing civil penalties in an administrative proceeding. 707 F.2d at 1488-89. This case is readily distinguishable from *Athlone* because there the Commission had failed to rule on, and then ultimately denied, the plaintiff's petition for mandamus, 707 F.2d at 1487 & n.11. Here, the Commission has taken no action at all against Plaintiff. Although the ALJ granted CPSC staff's motion for leave to amend its administrative complaint to add Plaintiff as a Respondent, *see* Compl. Ex. 6,[1] the Commission has not yet made any finding or issued any order regarding whether Plaintiff is appropriately named as a party in the administrative proceeding. Nor has the ALJ or the Commission made any finding that Plaintiff is a responsible corporate officer within the meaning of *United States v. Dotterweich*, 320 U.S. 277 (1943), and *United States v. Park*, 421 U.S. 658 (1975). In fact, the ALJ and Commission may never make such a finding, underscoring the fact that no final agency action has occurred.

In his order granting CPSC staff's motion to amend the administrative complaint to name Plaintiff individually, the ALJ made clear that Plaintiff's status has not been decided: "At this stage of the proceeding, the undersigned need only decide whether, based on the allegations as set forth in the Complaint, Mr. Zucker is a proper respondent." Compl. Ex. 6 at 17. The ALJ continued, "If, at the conclusion of the Commission's case, Mr. Zucker feels

[1] When the Commission promulgated its rules governing administrative proceedings, the Commission granted the ALJ sole authority to determine whether a complaint may be amended. 45 Fed. Reg. 29206, 29208 (May 1, 1980) ("procedures established by the final Rules of Practice are adequate to protect the rights of respondents. . . . In ruling upon a motion to amend or file supplemental pleadings, the presiding officer must consider any delay or prejudice to parties that may result."). The Commission itself plays no role in determining whether a complaint may be amended and thus has expressed no opinion to date on whether Plaintiff may be subject to liability as a responsible corporate officer.

as though CPSC has failed to demonstrate that his responsibility or actions were significant enough to render him liable under the CPSA, nothing prevents Plaintiff from presenting a legal argument regarding the same at that juncture." *Id.* Thus, the question of whether Plaintiff is a responsible corporate officer is currently being adjudicated, and Plaintiff cannot show that the Commission's decision-making process is complete, as required under *Bennett*, 520 U.S. at 178; *Franklin*, 505 U.S. at 797.[2]

Moreover, neither *Athlone* nor *Atl. Ritchfield Co. v. U.S. Dep't of Energy* ("*ARCO*"), 769 F.2d 771, 783-84 (D.C. Cir. 1984), on which Plaintiff also relies, were decided on the grounds of final agency action. *See Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 266 (9th Cir. 1990) (explaining that *Athlone* dealt with exhaustion and not finality, and that the statute at issue in *ARCO* did not impose a "final agency action" requirement). As Plaintiff concedes, exhaustion is not at issue in this case. Opp. at 1 n.1 ("The Commission, correctly, does not

[2] Plaintiff's Opposition contains two substantive, misleading errors – first that the Commission has made any determination with respect to Plaintiff's status, and, second, that he has been named in his personal capacity as a manufacturer or distributor within the meaning the CPSA. Opp. at 9 n.4 ("The Commission determined that Mr. Zucker was a manufacturer or distributor under 15 U.S.C. § 2064(c)-(d) . . . ."); *see also* Opp. at 8 ("[T]he Commission has definitively decided that it has personal jurisdiction over Mr. Zucker."). Both of those statements are incorrect. First, the Commission has not determined anything regarding Plaintiff's status, or even considered the matter. Instead, the ALJ, who is the fact finder in the first instance, granted CPSC staff's motion to amend its complaint to name Plaintiff as a Respondent in the administrative proceeding. Only after evaluating the evidence regarding Plaintiff's role at the company will the ALJ and then ultimately the Commission have the opportunity to determine whether or not Plaintiff is a responsible corporate officer. Second, CPSC staff has not alleged that Plaintiff personally is a manufacturer or importer of magnets. Instead, staff alleges that Plaintiff is a responsible corporate officer for the manufacturer company. Had CPSC staff wished to allege that Plaintiff himself is a manufacturer, it could have done so directly under section 15 of the CPSA without invoking the responsible corporate officer doctrine. *See* 15 U.S.C. § 2064(c)-(d) (providing for remedies against a manufacturer after an APA hearing); 15 U.S.C. § 2052(a)(11) (defining manufacturer as "any person who manufactures or imports a consumer product.").

claim Plaintiff's suit is barred by the exhaustion doctrine."). Although *Athlone* touched on the issue of finality in dicta, *see* 707 F.2d at 1489 n.30 (distinguishing *Standard Oil* and concluding that the Commission's assertion of authority by "filing of a complaint" constituted "a final determination" of its jurisdiction), its construction of the APA's finality requirement cannot be reconciled with the D.C. Circuit's more recent holding in *Aluminum Co. of Am. v. United States* ("*Alcoa*"), 790 F.2d 938, 941-42 (D.C. Cir. 1986) (denying rail shipper's petition for review of Interstate Commerce Commission decision denying rail carrier's challenge of intrastate freight rates and ICC's assertion of jurisdiction over shipper, holding that "[i]t is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding." (citing *Standard Oil*, 449 U.S. at 232));[3] *see also Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 748-749 (D.C. Cir. 1987) ("To the extent the *Athlone* court found finality . . . it seems both in direct conflict with the Supreme Court's *Socal* opinion and squarely contradicted by Justice Scalia's later (and more carefully considered) opinion in *Alcoa*.").

Final agency action is also lacking here because Plaintiff cannot establish that he has or will suffer a cognizable harm resulting from CPSC's administrative proceeding. Consistent with the holdings in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), and *Standard Oil*, agency action is final only where it has "legal force or practical effect upon [a plaintiff's] daily business other than the disruptions that accompany any major litigation," *Standard Oil*,

[3] Citing *Gulf Oil Corp. v. U.S. Dep't of Energy*, 663 F.2d 296, 312-13 (D.C. Cir. 1981), *Alcoa* recognized an exception allowing for review on "nonfinal agency actions" in "extraordinary circumstances where . . . [there is a] clear violation of law." That exception, which stems from the Supreme Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958), is inapplicable here, as explained *infra* at Section I.C.

449 U.S at 243, such as when an agency promulgates regulations that "force[ ] manufacturers to . . . change all their labels, advertisements, and promotional materials; . . . destroy stocks of printed matter; and . . . invest heavily in new printing type and new supplies[,]" or "risk serious criminal or civil penalties for noncompliance[.]" *Id.*, at 242-43 (distinguishing *Abbott Labs.*, 387 U.S. at 152-53).[4]

CPSC's administrative complaint does not have the force of an agency's regulation or adjudicatory order. Only upon conclusion of CPSC's administrative process and a finding by the Commission that Plaintiff's high-powered magnets constitute a substantial product hazard could such determination become final and Plaintiff be required to take remedial action under sections 15(c) and (d) of the CPSA, 15 U.S.C. § 2064(c) & (d). Plaintiff contends that the filing of CPSC's amended administrative complaint adding him as a Respondent "imposed a huge, concrete and immediate burden" on him, Opp. at 14, but Plaintiff has not cited any action he has been required to take to date aside from litigating the CPSC administrative

[4] Cases cited by Plaintiff are illustrative of the principles delineated in *Abbott Laboratories* and *Standard Oil* – that is, to be deemed final, agency action must have a direct effect on the complaining party's business activities. *Compare Long Term Care Partners LLC v. United States*, 516 F.3d 225, 237 n.13 (4th Cir. 2008) (Alleged "'chilling effect' of EEOC's action . . . would be too amorphous to carry much weight in an APA [final agency action] analysis.") (citing *Standard Oil*), *with Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 438 (D.C. Cir. 1986) (EPA's imposition of labeling changes on company deemed final agency action where cost of compliance was great and plaintiff faced serious civil and criminal penalties); *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 413-14 (D.C. Cir. 2011) (government contractor suffered hardship where it was required to shut down business as a result of DOT's order that contractor cease and desist from acting as a broker of air-charter services for federal government); *Fort Sumter Tours, Inc. v. Andrus*, 564 F.2d 1119, 1123-24 & n.6 (4th Cir. 1977) (National Park Service's decision to deny plaintiff's statutory preference on a contract to provide transportation to and from national monument, and to negotiate with a competing bidder, made plaintiff's legal relationship final and resulted in a costly loss of revenue for plaintiff).

proceeding, which is not itself a cognizable burden under *Standard Oil*.[5] Moreover, as Plaintiff acknowledges, his company voluntarily ceased importing and selling high-powered magnets even before CPSC sought to name him as a Respondent in its administrative action. Compl. ¶¶ 47-56, 59. Thus, naming Plaintiff as a Respondent could not itself have had any immediate or binding effect on Plaintiff's business initiatives.[6]

Because the ALJ's order granting CPSC staff's motion to file an amended complaint does not reflect the consummation of the administrative process, impose legal consequences, or determine rights or obligations, it does not constitute final agency action under the long-standing authority of *Standard Oil*. 449 U.S. at 243-44 ("the expense and annoyance of litigation is part of the social burden of living under government."); *Eastman Kodak Co.*, 704 F.2d at 1322 ("[T]his burden is different in kind and legal effect from the burdens which have been considered in determining final agency action.") (citing *Standard Oil*, 449 U.S. at 242).[7] Accordingly, as explained below, Plaintiff's claims are unreviewable at this time.

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[5] The ALJ recently ruled that certain documents are discoverable because they are relevant to the question of whether Plaintiff is a responsible corporate officer. *See* Order Granting in Part, Denying in Part Respondent Craig Zucker's Motion for a Protective Order at 6-9, CPSC Dockets 12-1, 12-2, and 13-2 (consolidated) (March 26, 2014), *available at* http://www.cpsc.gov//Global/Recalls/Recall-Lawsuits/Ordera.pdf. Plaintiff's compliance with that order creates no concrete hardship other than that associated with having to litigate in an administrative proceeding, which has been held insufficient as a matter of law to trigger judicial review. *Standard Oil*, 449 U.S at 243; *Eastman Kodak Co. v. Mossinghoff*, 704 F.2d 1319, 1322 (4th Cir. 1983).

[6] Notably, the two other Respondent companies in the administrative proceeding remain in business and continue to sell small, high-powered magnets, thus illustrating that the filing of an administrative complaint does not itself impose legal consequences or determine rights or obligations.

[7] Plaintiff's unsupported statement that the "real lesson of *Standard Oil* is that courts should evaluate, on a case by case basis, whether the agency's administrative process is so burdensome and abusive that judicial review is warranted," Opp. at 14-15 n.7, is untethered to anything in the decision itself. The *Standard Oil* Court held that filing an administrative complaint is not final agency action, and did not qualify its decision based on company size,

B. The APA Bars Review Of Agency Action That Is Not Final.

Section 10 of the APA, 5 U.S.C. § 704, bars review of non-final action, unless such action is made reviewable by separate statute. *Long Term Care*, 516 F.3d at 233 & n.10. Plaintiff contends that the Supreme Court's holding in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) (Title VII's employee-numerosity requirement was an element of a Title VII claim and not a jurisdictional requirement), renders the APA's "final agency action" provision non-jurisdictional. *See* Opp. at 5 n.3. But in *Long Term Care*, the Court of Appeals for the Fourth Circuit "assume[d] without deciding that the *Arbaugh* rule applies equally to statutory 'final agency action' under the APA . . . rendering [it] nonjurisdictional", 516 F.3d at 232, and the Court of Appeals has yet to explicitly extend the holding of *Arbaugh* to cases brought under the APA. Indeed, well after *Arbaugh* and *Long Term Care* were decided, the Fourth Circuit affirmed the dismissal of a case "for lack of subject matter jurisdiction" where the agency action was not final within the meaning of the APA. *Golden and Zimmerman*, 599 F.3d at 433 ("we hold that the ATF's publication of the 2005 edition of the Reference Guide and FAQ F13 did not constitute final agency action reviewable in court, and, accordingly, we affirm the district court's order dismissing this case for lack of subject matter jurisdiction.").

Even if final agency action were not jurisdictional, this Court can evaluate "final agency action" under Fed. R. Civ. P. 12(b)(6), as Plaintiff himself concedes. Opp. at 6-7. In those Circuits where "final agency action" is not deemed jurisdictional, courts have readily dismissed APA actions for failure to state a claim when final agency action has not yet occurred. *See, e.g., Trudeau v. FTC*, 456 F.3d 178, 188-89 (D.C. Cir. 2006). Thus Plaintiff's

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nor did it invite lower courts to review the degree of burden administrative litigation would impose on a given respondent. Plaintiff cites no language from *Standard Oil*, or any authority, to the contrary. *Id.*

claims under the APA must be dismissed under Rule 12(b)(1) for the reasons stated above, or, alternatively, under Rule 12(b)(6).[8]

C. Plaintiff's Claims Do Not Fit Within Any Exception Allowing Review.

Plaintiff's claims do not fit within any exception to the rule barring review of non-final agency action. Relying on cases that are not binding on this Court, Plaintiff argues that he may bring his action to enjoin the CPSC under two exceptions to the APA's "final agency action" requirement based on his assertion that the agency has acted *ultra vires* and violated his constitutional rights. Opp. at 1, 7 and 18 (citing *Athlone, Trudeau,* and *Griffith v. FLRA,* 842 F.2d 487, 492 (D.C. Cir. 1988)). The exceptions Plaintiff seeks to extend, and the cases upon which he relies, do not compel review here.

Trudeau and *Griffith* follow the Supreme Court's 56 year-old decision in *Leedom v. Kyne,* 358 U.S. 184 (1958), recognizing the possibility of judicial review when an agency has acted *ultra vires*, even where a right of review has not been conferred by statute. *Griffith,* 842 F.2d at 492-93 (citing *Leedom*); *Trudeau,* 456 F.2d at 190 (citing *Griffith*). However, both cases confirm that such review "is intended to be of extremely limited scope." *Id.* The Court of Appeals for the Fourth Circuit has on several occasions explained the strict limitations of *Leedom*'s exception. *Long Term Care*, 516 F.3d at 233 (citing *Leedom*, 358 U.S. at 188-90, and additional cases). The exception is "properly invoked only where the absence of federal court jurisdiction over an agency action 'would wholly deprive' the aggrieved party 'of a meaningful and adequate means of vindicating its statutory rights.'" *Id.* (quoting *Bd. of Governors, Fed. Reserve Sys. v. MCorp Fin., Inc.,* 502 U.S. 32, 43 (1991)).

[8] In addition, as explained in Sections II and III below, this Court also lacks jurisdiction over Plaintiff's claims – including constitutional claims – because they are not ripe and are an impermissible attempt to enjoin agency enforcement activity.

To determine whether the *Leedom* exception provides grounds for judicial review in a particular case, courts in the Fourth Circuit are to "conduct a cursory review of the merits to determine if the agency acted clearly beyond the boundaries of its authority." *Id.* at 234 (internal quotations and citations omitted). "If the agency offered a plausible interpretation of the relevant statute, . . . *Leedom* jurisdiction will not lie." *Id.*

As was the case in *Long Term Care*, the *Leedom* exception provides no basis for judicial review here because Plaintiff cannot show that the agency's interpretation of the responsible corporate officer doctrine violates a clear statutory mandate, or that it deprives him of an adequate means of vindicating his rights. First, Plaintiff offers no authority that prohibits CPSC staff from applying the Supreme Court's *Park* and *Dotterweich* decisions to allege that Plaintiff is a responsible corporate officer. Indeed, CPSC staff provided ample authority to support the ALJ's order granting CPSC staff's motion for leave to file the second amended complaint adding Plaintiff as a Respondent. *See* Compl. Ex. 6.[9] Second, if and

[9] Although *Dotterweich* and *Park* dealt with violations of the Food, Drug, and Cosmetic Act, as the Chamber of Commerce points out in its amicus curiae brief, "courts have expanded the responsible corporate officer doctrine in other contexts of the law . . . based on the relevant statute and underlying policy concerns." Amicus Brief, Docket No. 33 at 3-4 (listing cases). *See, e.g., United States v. Ming Hong*, 242 F.3d 528, 531-532 (4th Cir. 2001) (affirming conviction of a defendant under the responsible corporate officer doctrine where defendant's company violated the Clean Water Act); *United States v. Shelton Wholesale, Inc. and Greg Shelton*, No. 96-6131-CV-SJ-6, 1999 WL 825483, at *3-*5 (W.D. Mo. 1999) (granting in part CPSC's motion for summary judgment against corporation's sole shareholder because "under the reasoning of *Dotterweich* and *Park*, Mr. Shelton is liable for the importation of all eighteen products by virtue of his various corporate roles . . . ," but denying civil penalties because the question of whether such violations were "knowing," as required under the Federal Hazardous Substances Act, could not be determined as a matter of law on summary judgment), *aff'd on other grounds, Shelton v. CPSC*, 277 F.3d 998 (8th Cir. 2002), *cert. denied*, 537 U.S. 1000 (2002). In light of such precedent, Plaintiff cannot demonstrate that the CPSC's application of the responsible corporate officer doctrine to section 15 of the CPSA is legally implausible. *See Long Term Care*, 516 F.3d at 233 (*Leedom* exception does not apply where the agency offers "a plausible interpretation of the relevant statute").

when the Commission issues a Final Decision and Order at the end of the administrative process, Plaintiff will have the opportunity to seek judicial review in federal district court. 5 U.S.C. § 704. *Leedom* thus provides no grounds for this Court to review Plaintiff's claims.[10]

The APA's "final agency action" requirement is also not trumped by Plaintiff's assertion that CPSC staff's action against him violates his First Amendment and due process rights. The Court of Appeals for the Fourth Circuit has previously declined judicial review of constitutional claims where an administrative proceeding was not final. *See J.P. Stevens Emps. Educ. Comm. v. NLRB*, 582 F.2d 326, 328-29 (4th Cir. 1978). In *J.P. Stevens*, a committee of employees opposing the activities of the Textile Workers Union attempted to intervene in an NLRB unfair labor practice proceeding. 582 F.2d at 327-28. The district court denied the committees' motion for a preliminary injunction to stay the NLRB proceeding, concluding it lacked jurisdiction to compel intervention. *Id.* The Court of Appeals affirmed, holding that, "although the Committee's allegations of denial of due process and rights of association and petition may not be transparently frivolous, this . . . does not warrant stopping the Board in its tracks." *Id.* at 329. According to the Court of

[10] Plaintiff cites *Athlone* in support of his argument that challenges to an agency's *ultra vires* assertion of jurisdiction are reviewable prior to the completion of the administrative process. Opp. at 7, 11. But in *Athlone*, Congress had recently amended the CPSA to provide that the Commission could not assess civil penalties administratively, 707 F.2d at 1490 (citing 15 U.S.C. § 2069(b), (c) (Supp. V 1981)), and the Commission nevertheless attempted to do so. *Id.* at 1488-90. Because the *Leedom* exception applies when there is a clear violation of a statutory mandate, 358 U.S. at 188-90; *accord Long Term Care*, 516 F.3d at 233 (citing *Leedom* and additional cases), the *Athlone* court had ample grounds to review the Commission's action. Here, however, Plaintiff does not challenge CPSC's authority to bring an action under section 15 of the CPSA alleging that high powered magnets are a substantial product hazard, and Congress has not amended the CPSA to make the responsible corporate officer doctrine of *Park* and *Dotterweich* inapplicable.

Appeals, "[a]ny constitutional claims urged by the Committee can be properly reviewed by this court after termination of the lawful Board proceedings." *Id.*[11]

The same reasoning applies here, as Plaintiff will have the opportunity to raise any alleged constitutional claim at the conclusion of the administrative process. Thus, Plaintiff's constitutional claims afford no basis for circumventing the APA's statutory bar precluding judicial review of non-final agency action. *Cf. Angelex LTD. v. United States*, 723 F.3d 500, 508 (4th Cir. 2013) (denying review of Coast Guard's decision to detain vessel and impose bond requirement on owner of vessel, holding that an "attempt at turning this matter into a constitutional challenge does not make the matter reviewable").

Because CPSC staff's naming of Plaintiff as a Respondent in its administrative complaint does not constitute final agency action, and Plaintiff's claims do not fall within any exception to the rule barring judicial review of non-final agency action, the complaint must be dismissed.

II. PLAINTIFF'S COMPLAINT IS UNRIPE

Plaintiff's claims must also be dismissed for lack of ripeness. Plaintiff cannot satisfy either prong of the two-part test set forth in *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), requiring a showing of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration" for an agency action to be ripe for review.

Plaintiff's claims are demonstrably unfit for judicial decision. As discussed above, Plaintiff seeks to challenge agency action that is clearly non-final. *See Standard Oil*, 449

[11] Plaintiff's reliance on *Trudeau* is misplaced. There, the Court of Appeals for the D.C. Circuit assumed, without deciding, that Trudeau's claims "satisfied the [final agency action] requirement of § 704" before deciding that they, including Trudeau's First Amendment claim, failed to state a claim upon which relief could be granted. 456 F.3d at 190-91.

U.S. at 242. Plaintiff relies heavily upon *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660 (4th Cir. 1997), *see* Opp. at 16, but that case is unpersuasive here. In *Arch Mineral*, a mining corporation brought an action for declaratory and injunctive relief to preclude the Department of Interior's Office of Surface Mining Reclamation and Enforcement ("OSM") from linking the corporation in OSM's "Applicant/Violator System" database to a company which owed fees and penalties to OSM. 104 F.3d at 666. The corporation, Arch Mineral, received a letter from OSM indicating Arch Mineral was the presumed controller of the delinquent company. *Id.* at 663. Arch Mineral's response failed to persuade OSM, which sent another letter advising Arch Mineral that it would be entered into the system within 30 days if OSM did not receive sufficient information demonstrating that the corporation was not the controller of the delinquent company. *Id.* at 666. The corporation informed OSM it had no additional evidence, and filed suit to enjoin OSM from entering it in connection with the delinquent company in OSM's database. *Id.*

The CPSC administrative process has not progressed to the "degree of certainty" present in *Arch Mineral*, where the agency could list the corporation on its delinquent-party database without notice, a listing with real, tangible consequences. *Id.* at 668. As explained in CPSC's opening brief and above, the outcome of the administrative proceeding is undetermined. The ALJ has not yet concluded that Plaintiff's high powered magnets constitute a substantial product hazard. Before reaching a decision on this question, CPSC staff will have to present, and the ALJ will have to consider, substantial evidence. In the event the ALJ finds that Plaintiff's magnets are a substantial product hazard, the ALJ would also have to make a determination of appropriate relief (which may or may not include an

order against Plaintiff himself). The Commission would have to uphold the ALJ's conclusions.[12]

The facts supporting hardship were also substantially more compelling in *Arch Mineral* than in the instant action. There, the corporation and its subsidiaries faced the prospect of being blocked from obtaining new permits, and the cancelation of pending projects. 104 F.3d at 668-69. Here, Plaintiff contends that the administrative court's "exercise of jurisdiction in this case is, without more, hardship enough to justify judicial review." Opp. at 17-18. But the hardship attendant to participating in the administrative process itself has long deemed insufficient to warrant judicial intervention. *See Standard Oil*, 449 U.S. at 244; *Eastman Kodak*, 704 F.2d at 1324-25 (rejecting claim that Kodak would "suffer serious hardship" absent immediate judicial review due to "trouble and expense" of relitigating issue all over again, noting that "the expense and annoyance of litigation is 'part of the social burden of living under government.'") (quoting *Standard Oil*, 449 U.S. at 244) (internal citation omitted). Absent a showing that the administrative process would directly impact Plaintiff in a manner similar to the "punitive consequences" faced by Arch Mineral, *see* 104 F.3d at 668, Plaintiff cannot satisfy the hardship prong of the ripeness test articulated in *Abbott Labs*.

[12] Likewise, Plaintiff's complaint does not raise purely legal issues. To the contrary, both the question of whether Buckyballs and Buckycubes are a substantial product hazard as well as the determination of Plaintiff Zucker's individual liability are inherently fact-based inquiries. On the latter issue, a fact finder will have to consider records from Plaintiff's company, as well as other forms of evidence, to determine whether his corporate role was significant enough to warrant personal responsibility under the responsible corporate officer doctrine. *Park*, 421 U.S. 673-74. Indeed, as indicated above, the ALJ recently held that certain financial documents are discoverable because they are relevant to the question of whether Plaintiff is a responsible corporate officer, thus further evidencing the factual nature of this inquiry. *See* Order Granting in Part, Denying in Part Respondent Craig Zucker's Motion for a Protective Order at 6-9, CPSC Dockets 12-1, 12-2, and 13-2 (consolidated) (March 26, 2014), *available at* http://www.cpsc.gov//Global/Recalls/Recall-Lawsuits/Ordera.pdf.

In the absence of final agency action, Plaintiff's claims satisfy neither the fitness nor the hardship prongs of the ripeness test. The CPSC has not finally determined any legal rights or obligations, or otherwise consummated its adjudicative proceeding, and Plaintiff will suffer no cognizable hardship from deferring review until the conclusion of the ongoing administrative proceeding. Accordingly, Plaintiff's challenge is not ripe for review and must be dismissed. *Fourth Quarter Props. IV, Inc. v. City of Concord, N.C.*, 127 Fed. App'x 648 (4th Cir. 2005) (upholding district court's dismissal of claim for lack of ripeness under Rule 12(b)(1)).

III. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED BECAUSE IT IS AN ATTEMPT TO PRECLUDE AN ENFORCEMENT ACTION

Plaintiff's claims do not escape the proscription of *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950), notwithstanding Plaintiff's allegations that CPSC has acted beyond its statutory authority and in derogation of Plaintiff's constitutional rights. Courts have found *Ewing* to bar federal courts from exercising jurisdiction over actions to enjoin administrative adjudicative proceedings, even in the face of constitutional and jurisdictional challenges. *See, e.g., N.C. Bd. Dental Exam'rs v. FTC,* 768 F. Supp. 2d 818, 823 (E.D.N.C. 2011) (dismissing plaintiff's claim for declaratory and injunctive relief arising from ongoing administrative proceeding initiated by the FTC, despite allegations that the FTC's proceedings exceeded the agency's jurisdiction); *Direct Mktg. Concepts, Inc. v. FTC*, 581 F. Supp. 2d 115, 117 (D. Mass. 2008) ("Any challenges to the propriety of the agency action [including a First Amendment claim] should be addressed in the enforcement action itself"). *Cf. POM Wonderful LLC v. FTC*, 894 F. Supp. 2d 40, 44 (D.D.C. 2012) ("[The FTC] is 'perfectly capable' of determining whether [administrative action] exceeds the bounds of the FTC Act [or] violates the First and Fifth Amendments."). *Accord Imperial Carpet Mills Inc.*,

v. CPSC, 634 F.2d 871, 873 (5th Cir. 1981) (refusing to consider whether CPSC had authority or jurisdiction to initiate cease and desist proceedings because "[q]uestions of an agency's authority and jurisdiction have long been held [] to be particularly appropriate for initial agency determination.")[13]

[13] Contrary to Plaintiff's claim, Opp. at 18, Defendants have not waived their argument for dismissal of Plaintiff's constitutional claims. CPSC's Motion to Dismiss, and supporting arguments, encompassed Plaintiff's entire complaint, including his constitutional claims. *See* Motion (Dkt. 20) at 1 ("Defendants hereby move to dismiss the complaint . . . ."). Unable to show how the administrative proceeding directly impacts him or his company, Plaintiff asserts that his First Amendment rights to exercise free speech and to petition the government have been stifled by the alleged retaliatory action taken by CPSC in naming Plaintiff as a Respondent in the administrative proceeding. However, Plaintiff cannot escape the requirements of finality and ripeness – nor the proscription of *Ewing* – merely by asserting a retaliation claim where his allegations on their face fail to demonstrate a causal connection between his speech and the alleged retaliatory action. *See Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685-86 (4th Cir. 2000) (listing three elements of constitutional retaliation claim). As stated in Plaintiff's Complaint, the CPSC moved to name Plaintiff as a Respondent in its administrative proceeding in February 2013, long after Plaintiff had already exercised his right to criticize CPSC's decisions, and after Plaintiff purported to dissolve his company. S*ee* Compl. ¶¶ 56, 59, and 65. Moreover, Plaintiff continues to avail himself of his First Amendment rights to free speech, *see, e.g.*, Sohrab Ahmari, The Weekend Interview with Craig Zucker: What Happens When a Man Takes on the Feds, Wall Street Journal (August 30, 2013) (*available at* http://online.wsj.com/news/articles/SB10001424127887324108204579023143974408428) (last accessed April 25, 2014); http://unitedweball.org/ (last accessed April 25, 2014); Twitter feed of Craig Zucker, *available at* https://twitter.com/cjzucker (last accessed April 25, 2014). Thus Plaintiff cannot demonstrate that CPSC's alleged retaliatory action had any adverse effect on him at all. *Suarez*, 202 F.3d at 685 (retaliation claim requires a showing that the alleged actions, "even if retaliatory . . . had some adverse impact on the exercise of the plaintiff's constitutional rights.").

CONCLUSION

For the foregoing reasons, Plaintiff's complaint should be dismissed.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

MAAME EWUSI-MENSAH FRIMPONG
Deputy Assistant Attorney General

MICHAEL S. BLUME
Director

_/s/_____
PERHAM GORJI
Trial Attorney
Consumer Protection Branch
United States Department of Justice
P.O. Box 386
Washington, DC 20044
Telephone: 202-353-3881
Fax: 202-514-8742