THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (the Chamber) states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

INTEREST OF THE AMICUS CURIAE

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

This case implicates those interests because the administrative proceeding brought by the U.S. Consumer Product Safety Commission (the Commission) against Craig Zucker is premised on the so-called "responsible corporate officer" doctrine, under which individual liability is imposed on a company's officer for the company's responsibilities. Such personal liability is traditionally reserved for extraordinary situations, such as abuse of the corporate form. But in this case, the Commission seeks to hold Mr. Zucker personally liable for recall and reimbursement costs based simply on his having served as an officer of his former company. Responsible corporate officer liability raises serious concerns when used in any situation, and is particularly worrisome in its application here, as the Commission seeks to impose multi-million-dollar liability upon Mr. Zucker personally without proof of wrongful conduct or intent.

ARGUMENT

I. NOVEL APPLICATION OF "RESPONSIBLE CORPORATE OFFICER" LIABILITY IS NEITHER INEVITABLE NOR APPROPRIATE IN THE CONSUMER PRODUCT SAFETY ACT CONTEXT

The administrative proceeding commenced against Mr. Zucker by the Commission seeks to hold Mr. Zucker liable as a "responsible corporate officer." Under that theory of liability, the government can hold an individual criminally and individually liable for the actions of a corporation merely by having a "responsible relation" to the relevant conduct, even absent proof of individual criminal scienter or conduct. Responsible corporate officer liability under the Consumer Product Safety Act would raise serious constitutional and policy concerns.

A. "Responsible Corporate Officer" Liability Has Far Exceeded Its Original Statutory Basis

The doctrine has its roots in *United States v. Dotterweich*, 320 U.S. 277, 278 (1943), where, based on an analysis of the legislative history of the Food, Drug, and Cosmetic Act (FDCA), the Supreme Court held that a corporation's president could be held criminally liable under the FDCA simply because he held a "responsible relation" to the relevant transaction of shipping adulterated and misbranded drugs. *Id.* at 285. The statute at issue, 21 U.S.C. § 333, had originally imposed liability on "any officer, agent, or other person" acting for the corporation, but had been subsequently re-written to impose liability on "any person" acting for the corporation. *Dotterweich*, 320 U.S. at 281-282. The Court concluded that the statute's revisions had not substantively altered the scope of liability, and thus the corporation's officer could be found personally liable for a misdemeanor offense. *Id.* at 282-283.

Thirty years later, the Court again held that responsible corporate officers could be liable under the FDCA in *United States v. Park*, 421 U.S. 658 (1975). Because the FDCA imposes the

"highest standard of foresight and vigilance," the Court held that a corporate officer may be found liable by virtue of his "responsibility and authority of his position." *Id.* at 673, 675. The Court's opinion closely tracked the argument urged by the United States in its briefing, in which the government emphasized the "unique character and special importance of the pure food and drug laws" (*Park* U.S. Reply Br., 1975 WL 370186, at *2 (Mar. 14, 1975)), explained that a corporate officer "has a *personal* affirmative duty" to prevent violations under the FDCA (*id.*), and noted that "none of the opposing briefs contends that the FDA has used its prosecutorial discretion arbitrarily or unwisely" (*id.* at *8). The relevant offense in *Park* was a misdemeanor carrying a $250 fine.

Even responsible corporate officer liability under the FDCA (the statute addressed by the Court in *Dotterweich* and *Park*) presents significant constitutional and policy concerns. A presumption of criminal liability, of course, "conflict[s] with the overriding presumption of innocence" afforded to all defendants by the Constitution. *Morissette v. United States*, 342 U.S. 246, 275 (1952). And a defendant may not be convicted of a "status" crime, but must instead commit an identifiable criminal act. *See Robinson v. California*, 370 U.S. 660, 662-663 (1962). Responsible corporate officer liability runs against both principles and deserves to be considered in light of them. *See generally* Stinneford, *Punishment Without Culpability*, 102 J. Crim. L. & Criminology 653, 702 (2012) (lamenting the Supreme Court's "ambivalen[ce]" towards the constitutional concerns raised by the doctrine).

Although *Dotterweich* and *Park* addressed only the FDCA, lower courts have expanded the responsible corporate officer doctrine into other contexts of the law where the imposition of personal liability is much more attenuated, based on the relevant statute and underlying policy

concerns. *See* Stewart, *Basics of Criminal Liability for Corporations and Their Officials, and Use of Compliance Programs and Internal Investigations*, 22 Pub. Cont. L.J. 81, 84 (1992) (the doctrine "has expanded in recent years and bears close watching … [it] may well grow further."). For example, the government has sought to impose responsible corporate officer liability for violations of the Public Health Service Act, *United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 560-561 (6th Cir. 1985), the Controlled Substances Act, *United States. v. Poulin*, 926 F. Supp. 246, 253 (D. Mass. 1996), and the Clean Water Act, *United States v. Ming Hong*, 242 F.3d 528, 531-532 (4th Cir. 2001). And the government has used the doctrine as the basis for excluding individuals from the Federal health care system. *See Friedman v. Sebelius*, 686 F.3d 813, 824 (D.C. Cir. 2012).

The government has also used the doctrine to impose increasingly onerous penalties. At issue in *Dotterweich* and *Park* were a $1,500 fine[1] and a $250 fine[2] respectively, while in *Hodges X-Ray*, *Poulin*, *Ming Hong*, and *Friedman*, the individuals were subject to a $20,500 fine,[3] a $50,000 fine,[4] a $1,300,000 fine with three years' imprisonment,[5] and a $34,500,000 disgorgement order with a 12-year ban from participating in Federal health care programs.[6] In fact, "the more recent applications of the *Park* Doctrine [have seen] company officials receiving prison terms of up to nine months and fines ranging from hundreds of thousands to millions of dollars." Tulli, *A Prescription For Responsibility: The FDA Looks to Expand the Scope of*

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1 *Dotterweich* U.S. Br., 1943 WL 54821, at *2 (Aug. 1943).

2 *Park*, 421 U.S. at 666.

3 *Hodges X-Ray*, 759 F.2d at 558.

4 *Poulin*, 926 F. Supp. at 255.

5 *Ming Hong*, 242 F.3d at 534.

6 *Friedman*, 686 F.3d at 816-817. The D.C. Circuit remanded the 12-year exclusionary period to the agency for re-consideration, but hinted that that term of years may "be justifiable." *Id.* at 828.

Potential Liability for Drug Company Officials (2014 ed.), *available at* 2013 WL 5760778 at *2. This expanding universe of punitive sanctions for responsible corporate officers was precisely the concern annunciated by the dissent in *Park*, which lamented that the "standardless conviction approved today can serve in another case tomorrow to support a felony conviction and a substantial prison sentence." *Park*, 421 U.S. at 682-683 (Stewart, J., dissenting).

B. Responsible Corporate Officer Liability For Mr. Zucker Would Raise Serious Constitutional And Policy Concerns

The Commission's second amended complaint in the administrative proceeding alleges that Mr. Zucker is "appropriately named as a respondent" due to his capacity as a "responsible corporate officer." Compl. (Dkt. 1) Ex. 3, at 6. The Commission therefore seeks to hold Mr. Zucker personally responsible for a recall of BuckyBalls and BuckyCubes, at an estimated personal cost of $57 million. Compl. ¶ 60. Responsible corporate officer liability in these circumstances would both raise serious constitutional concerns and stretch the doctrine far beyond its typical reach.

The Commission seeks to enforce a recall and reimbursement for all "subject products" sold by Mr. Zucker's former company, Manfield & Oberton Holdings, LLC (M&O), without any proof of individual scienter or conduct other than his having acted as a corporate officer. Yet due process requires that this enormous potential sanction be commensurate with the Mr. Zucker's individual conduct. *See BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996) (reprehensibility of defendant's conduct is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award"). The Commission's complaint does not address this concern.

Instead, the Commission supports its exercise of jurisdiction by relying upon an unpublished decision from the Western District of Missouri issued 15 years ago. *United States v. Shelton Wholesale, Inc.*, 96-6131-CV-SJ-6, 1999 WL 825483 (W.D. Mo. Sept. 21, 1999) (unpublished); *see* Compl. Ex. 3, at 9-11. *Shelton Wholesale*, however, is wholly inapposite. There, the Commission sought to hold a company's sole shareholder personally liable under four different theories of accountability, including the responsible corporate officer doctrine and a theory of "alter ego." *Shelton Wholesale*, 1999 WL 825483, at *1. Because the court agreed with the Commission that Shelton was personally liable as a participant in the underlying conduct and because he personally imported the products to the United States, *id.* at *2, the Court's discussion of the responsible corporate officer doctrine was nothing more than dictum unnecessary to the ultimate holding.

In an effort to hold Mr. Zucker liable as a responsible corporate officer, the Commission relies on his communications with the Commission (*See* Compl. Ex. 3, at 3-4), with the press (*id.* at 5 & n.5), and with elected federal officials in both personal emails and in an open letter to the President (*id.* at 4). Although these communications are ostensibly cited to prove the undisputed fact that Mr. Zucker was the founder and CFO of M&O, most relate either to (1) Mr. Zucker's efforts to work with the Commission concerning any safety issues with BuckyBalls and BuckyCubes and (2) Mr. Zucker's efforts to fight the Commission's administrative action. It would indeed be troubling if the only basis for holding a corporate officer liable was the fact that the officer had worked with the agency prior to action and contested the basis for the action in a public forum after it was already initiated.

II. JUDICIAL REVIEW IS WARRANTED AT THIS TIME

Without better-founded support for the Commission's exercise of authority, and in light of the expanding use and punishment associated with responsible corporate officer liability, judicial review is warranted to combat and curtail potential agency overreach. The Commission's invocation of the responsible corporate office doctrine is a "strictly legal issue" on which the Commission is "unlikely … [to] change its position" and can be considered by the Court at this time before further administrative proceedings continue. *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1487-1489 (D.C. Cir. 1983). Moreover, the administrative case against M&O and Mr. Zucker began over 20 months ago and likely has exposed Mr. Zucker to litigation expenses and discovery orders which hinge upon his potential liability as a responsible corporate officer. It would make little sense to continue to subject Mr. Zucker to an administrative process that will not help inform the court's understanding of his federal complaint or the Commission's defenses in response. Because the beneficial purposes behind the final agency action rule do not obtain here, and because the practical benefits from resolving the Commission's jurisdictional authority at the earliest possible stage are clearly present, the Court should deny the Commission's motion to dismiss.

April 8, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 8, 2014, I caused a copy of the foregoing document to be served on all parties by this Court's electronic filing system.

/s/
HEATHER MOWELL