

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

In the Matter of Amazon.com, Inc., Respondent.

CPSC Docket No. 21-2

Hon. Jason S. Patil
Presiding Officer

**RESPONDENT AMAZON’S OPPOSITION TO
COMPLAINT COUNSEL’S AMENDED PROPOSED INITIAL ORDER**

Respondent Amazon.com, Inc. (“Amazon”) respectfully reiterates its opposition to Complaint Counsel’s attempt to lodge a new proposed order. Many of the remedial actions set forth in the new proposed order were absent from Complaint Counsel’s motion for summary decision. Section 15 of the Consumer Product Safety Act (“CPSA”) places the burden on Complaint Counsel to establish that every single one of its requested notices are required to adequately protect the public and that its requested remedial actions meet the relevant public interest standard. Complaint Counsel’s attempt to preempt the Presiding Officer’s decision on the pending cross-motions for summary decision should not be permitted. Its new proposed order should be given no weight or consideration at this time.

At the end of the March 28, 2023 hearing on the pending the cross-motions for summary decision, the Presiding Officer articulated a clear path toward the resolution of the initial stage of this adjudication. He made clear that he “would . . . decide summary decision *as briefed and argued by the parties*, but if . . . further specificity was needed in order to create a final order, which ended the action, [the Presiding Officer] would proscribe a period of time for the parties to talk. . . [or] provide *opposing briefs* on that point.” Ex. A, March 28, 2023 Tr. at 175:14–22 (emphasis added). Complaint Counsel’s submission of a new proposed order—which introduces new remedial actions not yet briefed or argued by the parties—runs afoul of that process.

Complaint Counsel has been on notice that parties may not inject new requests for relief into a proposed order that have not been “briefed and argued by the parties”; Amazon cited authority in opposition to Complaint Counsel’s motion for summary decision establishing that such efforts are impermissible. *See* Dkt. No. 89, Amazon’s Opp. to Complaint Counsel’s Mot. for Summary Decision (Oct. 21, 2022) at 22. Complaint Counsel’s new proposed order, filed without regard to the Presiding Officer’s process, nonetheless smuggles multiple remedial actions not otherwise briefed in Complaint Counsel’s motion, including the creation of a brand new webpage “for frequently-asked questions (‘FAQs’).” Dkt. No. 105, Complaint Counsel’s Am. Proposed Initial Order (Apr. 10, 2023) at 5. The new proposed order also seeks content changes to the “Your Orders” page on Amazon.com. *Id.* at 3. It further seeks to compel Amazon to include, in proposed notices, additional content not previously discussed in Complaint Counsel’s motion. *Id.* at 2–3.

Every component of a Section 15 Commission order must be necessary to adequately protect the public (for Section 15(c) remedies) or in the public interest (for Section 15(d) remedies). *See* 15 U.S.C. § 2064(c)(1); 15 U.S.C. § 2064(d)(1). Complaint Counsel, in turn, bears the burden of supplying such justification to the Presiding Officer. Summarily raising new remedial components, solely through a new proposed order, does not meet that burden. As Amazon previously explained in its Opposition, it is well-established that arguments raised “only summarily, without explanation or reasoning” are waived. *See* Dkt. No. 89, Amazon’s Opp. to Complaint Counsel’s Mot. for Summary Decision (Oct. 21, 2022) at 22 (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 250–51, n.22 (D.C. Cir. 2003)).

Absent sufficient justification by Complaint Counsel, an order adopting these additional requests for relief would be arbitrary and contrary to law under the Administrative Procedure Act (“APA”). *See* 15 U.S.C. § 2064(f); 5 U.S.C. § 706 (an agency cannot take action that is

“arbitrary”). By definition, any decision by the Presiding Officer which orders a remedial action for which Complaint Counsel failed to provide any particularized public interest or public safety justification is impermissibly arbitrary under the APA. *See Comm. To Save WEAM v. FCC*, 808 F.2d 113, 116 (D.C. Cir. 1986) (an agency “must articulate with reasonable clarity its reasons for decision . . . so that a court may ensure that the public interest finding results from reasoned decision-making”). This requirement is mandatory—Complaint Counsel cannot sidestep agency obligations expressly imposed by Congress.

Finally, with respect to the requests for relief contained in the new proposed order that were actually addressed in Complaint Counsel’s motion for summary decision and supporting briefs, those requests remain deficient for the reasons discussed in Amazon’s briefs. The Commission either lacks sufficient statutory authority to order such relief or Complaint Counsel has failed to meet its APA burden to justify its requests.

For these reasons, the Presiding Officer should not give consideration to Complaint Counsel’s new proposed order at this time and should proceed with the process for motion resolution as articulated at the March 28, 2023 hearing.

Dated: April 19, 2023

Respectfully submitted,



Sarah L. Wilson
Stephen P. Anthony
Rukesh A. Korde
Thomas F. Brugato
Nicholas J. Griepsma
Jamie Dominique U. Magcale

COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
202-662-5397
swilson@cov.com
santhony@cov.com
rkorde@cov.com
tbrugato@cov.com
ngriepsma@cov.com
jmagcale@cov.com

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2023, a true and correct copy of the foregoing document was, pursuant to the Order Following Prehearing Conference entered by the Presiding Officer on October 19, 2021:

- filed by email to the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills, at amills@cpsc.gov, with a copy to the Presiding Officer at alj@sec.gov and to all counsel of record; and
- served to Complaint Counsel by email at jeustice@cpsc.gov, lwolf@cpsc.gov, and sanand@cpsc.gov.

Nicholas Griepsma

Nicholas J. Griepsma

Exhibit A

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

- - - - - x

IN THE MATTER OF : CPSC Docket No. 21-2

AMAZON.COM, INC. :

- - - - - x

U.S. Securities and Exchange Commission
100 F Street, NE
Hearing Room 2
Washington, D.C.

Tuesday, March 28, 2023

The above-entitled matter came on for hearing
at 10:08 a.m., pursuant to notice.

BEFORE: Jason S. Patil, Administrative Law Judge

APPEARANCES:

On behalf of the Complaint:

John Eustice, [jeustice@cpsc.gov]

Serena Anand [sanand@cpsc.gov]

Thomas Mendel [tmendel@cpsc.gov]

Liana G.T. Wolf [lwolf@cpsc.gov]

Howard Tarnoff [htarnoff@cpsc.gov]

U.S. Consumer Product and Safety Commission

Office of Compliance and Enforcement

4330 East West Highway

Bethesda, Maryland 20814

APPEARANCES (continued):

On behalf of the Respondent:

Sarah Wilson [swilson@cov.com]

Covington and Burling, LLP

One City Center

850 Tenth Street, N.W.

Washington, D.C. 20001

Kevin F. King [kking@cov.com]

Covington and Burling, LLP

Stephen Anthony

Thomas Brugato,

Brendan Parets

Jamie Magcale

Covington & Burling, LLP

850 Tenth Street, N.W.

Washington, D.C. 20001

1 burden. And to the extent that complaint counsel feels
2 like Amazon has said something that they don't agree
3 with, or they want to provide supplementary
4 information, I'll give you a few days, a week,
5 something reasonable -- don't hold me to exactly that
6 -- but in order to reply. Okay.

7 Now, I want to talk about something that's
8 more -- it's more notional at this phase, but I want to
9 actually have a discussion about it. And that is if --
10 based on that further submission, the arguments here,
11 the briefing, the evidence, that I were to -- well, I
12 mean, obviously one thing that could happen is if
13 Amazon were to prevail on all the legal arguments that
14 would manifest itself in decision that would be
15 essentially a final, initial decision by me and then
16 subject to whatever further process and review takes
17 place by the commission. So, that's one thing and that
18 sort of is not one thing we need to discuss about
19 because it's relatively straightforward.

20 The other option as I see it or other path
21 this might take is if I were to determine at least one
22 remedy was to be ordered, but the specifics of that

1 remedy may need to be further elucidated, indeed, even
2 the staff's complaint counsel's proposed order, sort of
3 avers to that, that with respect to certain items at
4 least one or more of them or even if there's just one
5 that requires some further specification, that the
6 parties would need to address the specificity because
7 that level of specificity was not the subject
8 previously of the considerable briefings.

9 And so, if that happened, meaning if that,
10 say, one or more remedies was to be ordered and some
11 more specificity was needed, and again, we're talking
12 notionally, but I do want to have the discussion is
13 that I wouldn't issue a final order when I decide
14 summary decision that resolves the entire case. I
15 would instead decide summary decision as briefed and
16 argued by the parties, but if I felt that further
17 specificity was needed in order to create a final
18 order, which ended the action, I would proscribe a
19 period of time for the parties to talk, maybe come up
20 with something they could agree to, but wouldn't be
21 surprised if they didn't agree, and therefore, to
22 provide opposing briefs on that point.

1 So, here's the question and I'll let -- so we
2 know the universe of remedies being sought. And this
3 is again notional. It relies upon one or more of them
4 being ordered and then requiring some level of
5 specificity. But I want you to give me some idea, a
6 ballpark, say, that I decided this case in a month.
7 Not the case. Well, maybe the case. But if not the
8 case, at least the motions. And that order I provided
9 directions to the parties with regard to what
10 additional specificity would need to be briefed.

11 How long would it take for the government to
12 respond to something like that?

13 MR. EUSTICE: Not long at all, Your Honor. It
14 would be -- the proposed order that we attached to our
15 motion for summary decision says that on issues where,
16 for instance, the language of a clear and conspicuous
17 notice on Amazon's website had to be done, we said 30
18 days. And I think that we could do that, perhaps even
19 fast.

20 JUDGE PATIL: Okay. But 30 days.

21 MR. EUSTICE: That was what we listed in
22 our --

1 (crosstalk)

2 JUDGE PATIL: It's in your papers. You could
3 do it faster?

4 MR. EUSTICE: Yes.

5 JUDGE PATIL: So, if I said 24 -- how much
6 faster could you do it?

7 MR. EUSTICE: I don't think we need -- two --
8 sorry? One week.

9 JUDGE PATIL: The only reason why I suggested
10 is the following. It's notional, but if you're ready
11 to go in a couple weeks, you know, if needed. That's
12 good information to have. I just wanted to collect the
13 information at this point. I'm not deciding anything.

14 MR. EUSTICE: Mm-hmm.

15 JUDGE PATIL: Okay. Got it. I heard someone
16 say one week, but what I really wondered was --

17 MR. EUSTICE: One week.

18 JUDGE PATIL: Okay. No more than 30 days.
19 Okay. Now, yes?

20 MS. WILSON: Yeah. Well, I was going to
21 suggest six weeks, but if -- if your 30 days would --
22 we could certainly meet.

1 I do want to allow my colleague, Mr. King,
2 however, to put a First Amendment framing on this
3 first, and then -- but we would be amenable to filing
4 something within a week, if ordered by Your Honor.

5 JUDGE PATIL: Oh, I'm not --

6 MS. WILSON: Excuse me, not a week, a month.

7 JUDGE PATIL: I'm sorry. The week is going to
8 be for a letter just following up a few --

9 MS. WILSON: Right.

10 JUDGE PATIL: -- small items. It won't be
11 extensive. Everything pretty much will have been
12 addressed by me today, raises an issue, but I might
13 just put a couple more issues in there. That's just --
14 but it's more like here is this --

15 MS. WILSON: Understood.

16 JUDGE PATIL: -- Judge, and the other one, I
17 was more -- just, you know, those costs and resources
18 for all the parties here and I do not want to prolong
19 the proceeding. I mean, when this was assigned to me,
20 as you may have known, I was on military duty and I was
21 away. And my -- so -- but now that I'm fully engaged
22 on this case and so, I want to work with the parties,

1 you know, to get a prompt resolution, you know, but I'm
2 not trying to rush it in the sense that, you know, I'm
3 highly unlikely to say in one week you do this, but I
4 just -- it's good to know that we can wrap this up
5 potentially if we -- if it goes that way. That's all.
6 I'm not going to hold you to it, and I'm certainly not
7 trying to hold you to, you know, one week. I'm glad to
8 have the information from both sides.

9 MS. WILSON: Yes.

10 JUDGE PATIL: Sorry.

11 MS. WILSON: So, yes on both, basically. One
12 week for the responses to the factual questions, and
13 then a month would be terrific. We have authority that
14 we need to get and, you know, want to be responsible to
15 your notional idea of specificity.

16 JUDGE PATIL: No, I certainly understand.

17 Undoubtedly many of these issues are, you know, some of
18 the issues in the past are important as well, and you
19 maybe seeking further review, and I understand that,
20 which is part of my desire to make sure you have a full
21 and fair decision and you do so in a prompt manner
22 instead of waiting, you know, interminably as I'm sure

1 you have for certain courts' officers to decide cases.

2 So, I do thank you.

3 MS. WILSON: And thank you for your
4 responsiveness.

5 MR. KING: Very quickly, just to put some
6 flesh on the bones about why we think something like 30
7 days on that fleshing out process would be helpful.
8 You alluded earlier to sort of considering the speech
9 as a whole and the statement as a whole, and we think
10 that matters from a First Amendment perspective. And
11 so --

12 JUDGE PATIL: I do, I already agree with you.
13 I'm not saying I'm going the direction of a notice
14 because there are other issues to be worked through.

15 MR. KING: Right.

16 JUDGE PATIL: But I mean, a notice is well
17 within the ambit of what happens in cases like this if
18 those other requirements are met, but as you say, it
19 may need to be limited or appropriately tailored. And
20 yes, before ordering anyone to provide any sort of
21 information or notice, I would like to see it in its
22 complete form, absolutely. I understand that.

1 MR. KING: Okay. And so that's what we'd be
2 using the time for is to think about it from that
3 perspective and the perspective of the statute. Thank
4 you, Your Honor.

5 JUDGE PATIL: Okay. With that, this -- whoa.

6 MR. EUSTICE: I apologize, Your Honor.

7 JUDGE PATIL: You really wanted to have the
8 last word.

9 MR. EUSTICE: No, I really didn't, but I just
10 wanted to make one note and that's that this case has
11 been pending for nearly two years, and we simply -- if
12 you agree with the parties that these issues are ripe
13 for summary decision, we don't want the hold up to be
14 language and a conspicuous notice on their website
15 because that kind of stuff has been -- is routine as a
16 matter of both voluntary and even mandatory recalls.
17 So, we think that issue can be -- that issue can be
18 resolved very quickly. That's why we proposed a week.
19 We understand that you may not proscribe a week, but we
20 want to get this done as quickly as possible. Thank
21 you, Your Honor.

22 JUDGE PATIL: No, I understand, and again, I'm

1 not a hundred percent committed to the idea of if we do
2 get there that I wouldn't have the government go first
3 since it bears the burden and then give respondent the
4 opportunity to look at what you -- because you haven't
5 set forth that specificity, certainly not as I would
6 order it in whatever instance. They may need some time
7 then to think it over and decide. I appreciate that.
8 And I especially appreciate you're willing to
9 potentially be ready very quickly in the event we reach
10 that point because that would give me some comfort in
11 saying hey, in a week or in two weeks do this and then
12 give, you know. But at the same time, just -- if I do
13 stagger the briefing in some sense, I trust that the
14 respondent will look at the order and begin its
15 preparations and then we find them in the context of
16 what's recommended or sought by the complaint counsel.

17 All right. Thank you so much for your time,
18 everybody. Have a good day.

19 MR. EUSTICE: Thank you, Your Honor.

20 (Whereupon, the hearing was adjourned at 2:03
21 p.m.)

22 * * * * *