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BEIJING BOSTON BRUSSELS DUBAI FRANKFURT
JOHANNESBURG LONDON LOS ANGELES NEW YORK
PALO ALTO SAN FRANCISCO SEOUL SHANGHAI WASHINGTON

Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 6000

Via Electronic Mail

August 1, 2024

Office of the Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Re: In the Matter of Amazon.com, Inc., CPSC Docket No. 21-2 — Amazon’s Request to Stay Enforcement of the Commission’s Orders

Dear Chair Hoehn-Saric and Commissioners Feldman, Trumka, Boyle, and Dziak:

Respondent Amazon.com, Inc. (“Amazon”) respectfully requests that the Commission stay enforcement of its July 30, 2024 Decision and Order (the “July 30 Order”) in the above-captioned proceeding, and agree to stay any forthcoming order on the Proposed Notification Plan and Proposed Action Plan (the “Final Order” and, together with the July 30 Order, the “Orders”), pending judicial review. Specifically, Amazon requests that any and all portions of the July 30 Order that are deemed final be stayed immediately while Amazon attempts to negotiate a Proposed Notification Plan and Proposed Action Plan with Complaint Counsel as directed by the Commission. Furthermore, because a Final Order requiring Amazon to issue additional notice and refunds raises significant statutory and constitutional concerns, Amazon requests that the Commission stay the Final Order once issued. Amazon requests that both stays remain in effect until a federal district court has issued a final judgment with respect to the Orders and all appeals of that judgment have been exhausted. Alternatively, Amazon requests a stay pending issuance or denial of a preliminary injunction with respect to the Orders. Counsel for Amazon initially made this request to Complaint Counsel on February 6, 2024. The Commission has authority to issue such a stay pursuant to 5 U.S.C. § 705 and 16 C.F.R. § 1025.57(a), and it has agreed to stay enforcement in other mandatory recall adjudications.

A stay is warranted here for four main reasons. *First*, Amazon has raised significant questions about the statutory validity of the Commission’s determination that Amazon is a “distributor” and the statutory and constitutional validity of the notice and remedial requirements that will be imposed by the Final Order. *Second*, Amazon will face irreparable harm absent a stay. Classifying Amazon as a distributor would conceivably require it to spend significant resources to comply with the CPSA’s distributor requirements and, in the event of non-compliance, face the threat of civil penalties. Furthermore, the Final Order may infringe Amazon’s First Amendment rights—a harm the Supreme Court has said “unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). In addition, Amazon will have to issue millions of dollars of double refunds that it will not be able to recover from the Commission in litigation because the government’s sovereign immunity has not been waived for such claims. *Third*, a stay would serve the public interest because it would preserve the status quo—a status quo in which the Subject

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Products are no longer sold, and every purchaser has been notified and fully refunded—until courts can rule on the significant legal issues raised by the Orders. *Fourth*, granting Amazon’s request would promote efficiency by saving Amazon and the Commission resources that would otherwise be expended litigating a temporary restraining order and/or preliminary injunction.

I. The Commission Has the Power to Stay Enforcement of the Orders.

The Commission has authority to stay enforcement of the Orders and has previously exercised this authority. As an initial matter, the Commission’s regulations provide that “[a]n order of the Commission in proceedings arising under the Consumer Product Safety Act becomes effective upon receipt, *unless otherwise ordered by the Commission.*” 16 C.F.R. § 1025.57(a) (emphasis added). Moreover, the Administrative Procedure Act (“APA”) provides that “[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.” 5 U.S.C. § 705.

The Commission has previously stayed its enforcement of a final decision and order pending review of the decision in federal court. In *Zen Magnets*, the Commission initially stipulated that it would stay enforcement of its stop sale order for 60 days or until a motion for preliminary injunction was resolved. *Zen Magnets, LLC v. CPSC*, No. 17-CV-02645-RBJ, 2018 WL 2938326, at *2 (D. Colo. June 12, 2018). The Commission later extended this stay by 120 days to allow for the resolution of motions for summary judgment, and then extended the stay again for an additional 120 days. *See* Stipulated Briefing & Hr’g Schedule, *Zen Magnets, LLC v. CPSC*, No. 17-CV-02645-RBJ (D. Colo. Nov. 16, 2017), ECF No. 17; Stipulated Briefing Schedule & Continued Stay, *Zen Magnets* (D. Colo. Jan. 12, 2018), ECF No. 26; Stipulated Continued Stay, *Zen Magnets* (D. Colo. May 23, 2018), ECF No. 49.

II. A Stay Is Warranted Here.

The APA provides that an agency may enter a stay of its own action when “justice so requires.” 5 U.S.C. § 705. That provision grants agencies “equitable authority to maintain the status quo,” “prevent irreparable injury,” and “afford parties an adequate judicial remedy.” *Bauer v. DeVos*, 325 F. Supp.3d 74, 105–06 (D.D.C. 2018) (citations and internal quotation marks omitted). In conducting that analysis, the Commission need not “apply the same four-factor test that courts apply,” but must “balanc[e] the [parties’] competing claims” and “consider[] the effect on each party of granting the stay.” *Id.* (internal quotation marks and punctuation omitted); *see also Casa de Maryland, Inc. v. Wolf*, 486 F. Supp. 3d 928, 971 (D. Md. 2020) (“Section 705 operates broadly to allow the agency to postpone enactment of a rule for a host of reasons, or for a Court to suspend enforcement or enjoin its application.”). Those considerations support granting a stay pending judicial review here.

First, Amazon has raised significant statutory and constitutional questions regarding the Orders, and the issues raised in Amazon’s briefing weigh in favor of granting a stay. For example, the record in this proceeding provides strong grounds for concluding that Amazon is not a distributor of the Subject Products under the CPSA because it does not “sell” or “introduce” products into commerce, nor does it hold such products “for sale or distribution,” 15 U.S.C. §§ 2052(a)(7)–(8), but instead serves as a third-party logistics provider, 15 U.S.C. §§ 2052(a)(16), (b). Similarly, Amazon has shown that requiring Amazon to issue another round of notices and a

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second refund to purchasers of the Subject Products is at odds with the CPSA, the First Amendment, and the Fifth Amendment's Takings Clause. Even if the Commission is not persuaded by these arguments, Amazon has at a minimum raised the type of "serious legal question[s]" that justify a stay. *Cigar Ass'n of Am. v. FDA*, 317 F. Supp.3d 555, 560 (D.D.C. 2018) (citation omitted); see also *Philipp v. Fed. Republic of Germany*, 436 F.Supp.3d 61, 66 (D.D.C. 2020); *M.M.V. v. Barr*, 459 F.Supp.3d 1, 6 (D.D.C. 2020).

Second, Amazon would be irreparably harmed absent a stay. For example, the July 30 Order classifies Amazon as a distributor, which would require it to spend considerable time, effort, and money to comply with the CPSA's various distributor obligations. If Amazon fails to comply, it could face the risk of significant civil penalties. See, e.g., 15 U.S.C. § 2069(a)(1) (authorizing civil penalties for failure to file a Section 15(b) report); Civil Penalties; Notice of Adjusted Maximum Amounts, 86 Fed. Reg. 68,244 (Dec. 1, 2021) (setting inflation adjusted penalties of up to \$120,000 per violation and up to \$17,150,000 for any related series of violations). This harm is irreparable. "Because the government is protected by sovereign immunity and no monetary damages are available, these severe economic losses can qualify as irreparable harm." *Ass'n of Cmty. Cancer Ctrs. v. Azar*, 509 F. Supp. 3d 482,500 (D. Md. 2020); see also *Nat'l Lifeline Ass'n v. FCC*, No. 18-1026, 2018 WL 4154794, at *1 (D.C. Cir. Aug. 10, 2018) (per curiam) (reasoning that "allegations of *unrecoverable* monetary losses" are subject to "a less stringent standard" when considering a stay); 5 U.S.C. § 702 (waiving sovereign immunity for actions "seeking relief other than money damages").

Further, any notice requirement ordered by the Commission will cause irreparable harm to Amazon's First Amendment rights, and "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) (quoting *Elrod*, 427 U.S. at 373). Furthermore, an order requiring Amazon to pay duplicative refunds to purchasers of the Subject Products to whom Amazon has already issued full refunds would require Amazon to pay up to an additional \$20 million. Amazon will not be able to recover those funds from consumers or the Commission even if a court holds that the Commission lacked authority to order the refunds.

Third, the balance of equities and public interest weigh in favor of a stay of enforcement. See *Nken v. Holder*, 556 U.S. 418, 435 (2009) ("[A]ssessing the harm to the opposing party and weighing the public interest . . . merge when the Government is the opposing party."). In assessing whether to issue a stay, agencies "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief," *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987), as well as the public interest. The immediate and irreparable harm that Amazon faces significantly outweighs any hardship the Commission might face, and a stay would serve the public interest. There is no risk of harm to the public by postponing the effective date of the Orders because the Subject Products are no longer sold through Amazon's FBA program, purchasers of the Subject Products have already been directed to destroy the products, and full purchase price refunds have already issued. To the contrary, the public interest is best served when "its governmental institutions follow the law." *Roe v. Dep't of Def.*, 947 F.3d 207, 230–31 (4th Cir. 2020). Preserving the status quo until courts have had a chance to review the Orders will therefore best serve the public interest and the balance of equities in this case.

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Fourth, and finally, issuing a stay would promote efficiency. If the Commission does not issue a stay, Amazon will seek one in court. Staying the Orders immediately would avoid the need for the Commission and Amazon to expend their resources on judicial stay proceedings and would also speed up disposition of litigation regarding the merits of the Orders (by allowing the parties to proceed directly to cross-motions for summary judgment).

For the foregoing reasons, Amazon respectfully requests that the Commission stay enforcement of the Orders pending judicial review.

Respectfully submitted,



Sarah L. Wilson
Stephen P. Anthony
Kevin F. King
Thomas R. Brugato
Matthew J. Glover
Jamie Dominique U. Magcale
Pierre Anquetil

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

Counsel for Respondent

cc: Robert Kaye
Mary B. Murphy
Howard N. Tarnoff
John C. Eustice
Serena Anand
Liana G.T. Wolf
Frederick C. Millett
Thomas J. Mendel