

UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of	)	
	)	
AMAZON.COM, INC.	)	
	)	
	)	CPSC DOCKET NO.: 21-2
	)	
Respondent.	)	
	)	

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION TO STAY**

Amazon.com Inc.’s (“Amazon’s”) Motion to Stay<sup>1</sup> the Commission’s July 29 Decision and Order (“July 29 Order” at Dkt. No. 142) and any subsequent order should be denied for three reasons. First, if Amazon seeks relief from the Commission’s thoroughly litigated July 29 Order, it should seek it in the federal court forum in which it intends to challenge that Order. Second, Amazon’s request for a stay from the Commission is undercut by the fact that it is unlikely to prevail in any attempt to obtain a stay in federal court. Third, Amazon’s request fails to specifically identify the portions of the July 29 Order that it seeks to stay, making its motion improper.

**I. FEDERAL DISTRICT COURT IS THE APPROPRIATE FORUM FOR AMAZON’S STAY REQUEST**

This case was brought more than three years ago. In that time, the parties fully litigated their positions before two Administrative Law Judges and the Commission. After considering extensive briefing and oral argument, the Commission issued its well-reasoned July 29 Order, which thoroughly addresses the issues in dispute. In short, Amazon has been fully and fairly heard

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<sup>1</sup> Amazon sent a letter to the Secretary and the Commissioners on August 1, 2024. Dkt. No. 143. On August 6, 2024, the Commission issued an Order Shortening the Time for Any Opposition to Amazon.com, Inc.’s Motion to Stay, deeming Respondent’s letter a motion under 16 C.F.R. § 1025.23 and requiring Complaint Counsel’s opposition by August 9, 2024. Dkt. No. 144.

on the merits and its motion for stay raises no compelling basis for the Commission to further delay providing relief to consumers.<sup>2</sup> To the extent that Amazon now desires to challenge the Commission’s Order, or any subsequent order, and the timing of enforcement, it should do so in federal district court.<sup>3</sup>

## **II. AMAZON’S REQUEST FOR A STAY IS UNLIKELY TO SUCCEED IF BROUGHT IN A FEDERAL DISTRICT COURT**

Weighing heavily against a Commission stay of its Order is the fact that if Amazon proceeds to file an action in a federal district court, it would be unlikely to clear the high legal bar for a stay. *See First-Citizens Bank & Trust Co. v. Camp*, 432 F.2d 481, 483 (4th Cir. 1970) (explaining that courts are required to consider four factors in deciding whether to stay execution of an administrative agency’s decision: (1) likelihood of prevailing on the merits, (2) irreparable harm absent injunctive relief, (3) impact of a stay on other parties interested in the proceeding, and (4) where the public interest lies) (citation omitted); *see also Guaranty Savings and Loan Ass’n v. FHLBB*, 330 F. Supp. 470, 472 (D.D.C. 1971); *Garlock, Inc. v. United Seal, Inc.*, 404 F.2d 256, 257 (6th Cir. 1968); *Carlson Companies, Inc., v. Sperry & Hutchinson Co.*, 374 F. Supp. 1080, 1097 (D. Minn. 1974).

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<sup>2</sup> The agreed-upon stay in the *Zen Magnets* case cited by Amazon is in no way determinative. Dkt. No. 143 at 2. That the Commission (via delegated authority to Complaint Counsel) agreed to a stay after the respondent filed a Complaint and a Motion for Preliminary Injunction in federal court in a case involving different legal and factual issues in no way dictates that a stay should be issued in this matter now or in the future.

<sup>3</sup> Amazon’s suggestion that the Commission should postpone the effective date of its July 29 Order “pending judicial review” under 5 U.S.C. § 705 is inapposite. Despite Amazon’s references to a possible appeal and a potentially forthcoming “final judgment” from a “federal district court,” Dkt. No. 143 at 1, it has not sought judicial review of the Commission’s July 29 Order in any federal district court. There is therefore no pending judicial review under 5 U.S.C. §§ 702 *et seq.* at this time that would necessitate the Commission’s consideration of a unilateral stay. Further, Complaint Counsel has no record of any request for a stay made by Amazon counsel on or about February 6, 2024. *See* Dkt. No. 143 at 1. Had Amazon sought a stay at that time, Complaint Counsel would have opposed it.

Complaint Counsel defers a detailed rebuttal of Amazon’s arguments for a stay to any future Opposition filed in conjunction with the Department of Justice should Amazon seek such relief in federal district court. Briefly, however, Amazon is unlikely to prevail in that venue in consideration of the four factors.

First, Amazon cannot demonstrate a likelihood of prevailing on the merits. Complaint Counsel provided, and the Administrative Law Judges and the Commission considered, substantial evidence demonstrating that Amazon is a “distributor” of “Fulfilled by Amazon” (“FBA”) products under the Consumer Product Safety Act, 15 U.S.C. §§ 2051–2084. The remedial requirements prescribed by the Commission for the Subject Products are likewise fully supported by the record. Ultimately, the Commission’s well-reasoned July 29 Order is firmly grounded in the text of the Consumer Product Safety Act and its attendant regulations, as well as Commission and federal court precedent, and it represents the culmination of three years of administrative litigation in which Amazon had every opportunity to bring its factual and legal arguments. As such, Amazon has a low likelihood of prevailing on the merits.

Second, Amazon would not suffer irreparable harm absent a stay. Amazon’s sole argument here relates to the costs it would incur having been found a distributor of FBA products, along with the fact that the government is protected by sovereign immunity. *See* Dkt. No. 143 at 3. But, Amazon will need to establish “that the economic harm is so severe as to ‘cause extreme hardship to the business,’” with reference to “specific details” rather than “conclusory assertions of potential loss.” *California Ass’n of Priv. Postsecondary Sch. v. DeVos*, 344 F. Supp. 3d 158, at 170-71 (D.D.C. 2018) (internal citations omitted). In resting its argument primarily on a vague reference to the need to “spend considerable time, effort, and money to comply with the CPSA’s various distributor obligations,” Dkt. No. 143 at 3, Amazon fails to meet this burden, and it is unlikely

to be able to do so in any federal court action, given the minimal burden of compliance relative to its \$575 billion annual revenue in 2023. *See* July 29 Order at 7 n. 2.

Third, the impact of the stay on consumers, the true interested party in this case, would be more harmful than the impact on Amazon to meet its statutory obligations. Consumers who purchased or obtained the more than 400,000 units of Subject Products have already suffered substantial delay in receiving appropriate notice and remedy to address the ongoing hazard presented by the products they possess. Amazon’s incorrect reliance on its own initial and insufficient actions in response to the hazards posed by the Subject Products does not tilt this factor in its favor. *See, e.g., Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 596 (3d Cir. 2002) (in assessing the impact of a preliminary injunction on the parties, “the injury a [party] might suffer if an injunction were imposed may be discounted by the fact that the [party] brought that injury upon itself”).

Finally, it is in the public interest to take immediate action to ensure the removal of the hazardous Subject Products from the stream of commerce. *See* July 29 Order at 2, 44, 55, 58, 72-73 (finding that notification of the hazardous products is required to adequately protect the public under Section 15(c) of the CPSA, and that it is in the public interest to order remedial action under Section 15(d) of the Act to incentivize removal of the products from consumers’ homes). Amazon’s letter fails to provide a justifiable or compelling reason to delay this important safety remedy or the Commission’s legal finding that Amazon is a distributor of its FBA products under Section 3(a)(8) of the CPSA (15 U.S.C. § 2052(a)(8)). Dkt. No. 142 at 72 (“Order” at ¶ 1).

In short, any efforts by Amazon to petition for a stay of enforcement in federal court are unlikely to succeed, and there is therefore no cause for the Commission to preemptively delay enforcement of its July 29 Order.

**III. AMAZON’S MOTION TO STAY FAILS TO STATE WITH PARTICULARITY THE PORTIONS OF THE COMMISSION’S JULY 29 ORDER THAT IT SEEKS TO STAY**

Although the Commission has deemed Amazon’s letter a “motion” under its regulations, the filing fails to specify what portions of the July 29 Order that Amazon seeks to stay and, for that reason alone, should be denied. A motion must “state with particularity the order, ruling or action desired and the reasons why the action should be granted,” 16 C.F.R. § 1025.23(b), and must be filed with a proposed order. *Id.* (“All motions shall contain a proposed order setting forth the relief sought.”). Amazon’s letter makes only vague reference to “any and all portions of the July 29 Order that are deemed final” as the subject of its stay request. Dkt. No. 143 at 1. In addition, Amazon failed to include a proposed order.

For these reasons, Amazon’s motion to stay should be denied.

Respectfully submitted,



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August 9, 2024

**CERTIFICATE OF SERVICE**

I hereby certify that on August 9, 2024, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

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