UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO STAY THE CONSUMER PRODUCT SAFETY COMMISSION'S FINAL ORDER

Amazon.com Inc.'s ("Amazon's") Motion to Stay[1] the Commission's January 16, 2025, Decision and Order Approving Notification and Action Plan ("Final Order" or "January 16 Order" at Dkt. No. 154) should be denied.[2]

First, Amazon fails to satisfy its legal burden for showing that a stay is warranted in light of pending litigation because Amazon has not filed a challenge to the Commission's Order in federal court. Second, Amazon cannot demonstrate that justice requires a stay based on the applicable four-factor test. Any further delay of the required notice and remedies for the Subject Products would harm consumers who have been left without such remedies while continuing to be exposed to substantial product hazards for the pendency of this action.

[1] This is Amazon's second time petitioning the Commission for a stay. Amazon sent a letter to the Secretary and the Commissioners on August 1, 2024. Dkt. No. 143. Amazon's motion contains the same general arguments and suffers from many of the same deficiencies discussed in Complaint Counsel's opposition to Amazon's letter filed on August 9, 2024. Dkt. No. 145.

[2] To the extent that Amazon's motion to stay attempts to extend to any portion of the July 29, 2024 Decision and Order, Dkt. No. 142, that was incorporated by reference in the Final Order, Complaint Counsel opposes Amazon's requested relief for all the reasons cited herein.

I. LEGAL STANDARD

While Amazon correctly notes that the Commission possesses the authority to stay its Final Order, Dkt. No. 155 at 4, citing 5 U.S.C. § 705; 16 C.F.R. § 1025.57(a), the Commission should not exercise that authority here.

Federal courts have made clear that any stay granted under Section 705 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 705, must "plainly be tied to the underlying pending litigation" and that agencies must "ground the stay on the existence or consequences of the pending litigation." *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 33 (D.D.C. 2012); *see also Bauer v. DeVos,* 325 F. Supp. 3d 74, 108 (D.D.C. 2018) ("§ 705 requires an agency to explain why*, in light of the pending litigation*, a stay is necessary to ensure that the parties ultimately obtain adequate and just relief.") (emphasis added).

In considering whether justice requires a stay, agencies are not compelled to apply the specific four-factor test used by federal courts to evaluate requests for preliminary injunctive relief, *see Bauer,* 325 F. Supp. 3d at 105, 107 (D.D.C. 2018). However, they must "weigh the same kinds of equitable considerations that courts have long applied," *id.* at 107, meaning that the Commission must consider whether Amazon has demonstrated that justice requires issuance of a stay based on (1) Amazon's likelihood of success on the merits, (2) whether Amazon would suffer irreparable harm absent a stay, (3) the impact on interested parties, and (4) the public interest. *See also Sierra Club*, 833 F. Supp. 2d at 30 (agency's grant of a stay was arbitrary and capricious for three separate reasons, one of which being that the agency had not justified its decision pursuant to the four-factor framework for preliminary injunctive relief); Dkt. No. 145 at 2 (listing the four factors). In the context of government action, those final two factors may also be combined as "pay[ing] particular regard for the public consequences." *Bauer,* 325 F. Supp. 3d at 106 (citations omitted).

Amazon has not shown, simply by invoking that it intends to appeal the Commission's Order, that a stay should be issued pending judicial review. *See Sierra Club*, 833 F. Supp. 2d at 33. Furthermore, when considering the interests of justice, Amazon has failed to provide compelling reasoning for the agency to delay implementation of final agency action. *See Hill Dermaceuticals, Inc. v. U.S. Food & Drug Admin.,* 524 F. Supp. 2d 5,9 (D.D.C. 2007).

II. AMAZON FAILS TO DEMONSTRATE THAT A STAY IS REQUIRED PENDING JUDICIAL REVIEW

This case was filed more than three and a half years ago. In that time, the parties fully litigated their positions before two Administrative Law Judges and the Commission. After extensive briefing, additional negotiation between the parties, and competing plans for notification and action, the Commission issued its well-supported January 16 Order, which provides needed relief for consumers who possess the hazardous Subject Products.

To the extent that Amazon now desires to challenge the Commission's Final Order and the timing of its enforcement, it should do so in federal district court. Instead, Amazon is testing the waters: it claims that it "will file a complaint in federal district court" challenging the Commission's Final Order within 14 days after the Commission resolves its Motion to Stay, but then frames this filing as a mere possibility, stating "***[i]f*** Amazon files a complaint" it would stipulate to an expedited briefing schedule. Dkt. No. 155 at 1 n. 1 (emphasis added).

Accordingly, Amazon provides no certainty as to whether it will, in fact, file a complaint in federal court, and likewise gives no assurances that it would move for a stay of the Commission's January 16 Order in that forum. Amazon therefore fails to demonstrate that its request for stay is "grounded . . . on the existence or consequences of pending litigation." *See Sierra Club*, 833 F. Supp. 2d at 33. This is more than a mere technicality, as federal courts have previously found agency stays under Section 705 of the APA to be arbitrary and capricious where no pending litigation was actively proceeding or where "the case [was] indefinitely on hold." *Nat. Res. Def.*

Council v. U.S. Dep't of Energy, 362 F. Supp. 3d 126, 150–51 (S.D.N.Y. 2019) ("[N]othing has happened in the Seventh Circuit litigation since DOE entered the stay: there have been zero docket entries, and briefing has remained suspended for more than a year."); *see also Sierra Club,* 833 F. Supp. 2d at 33–34 ("The agency cannot use Section 705 of the APA to stay the effectiveness of its rules . . . simply because litigation in the court of appeals *happens to be pending*.") (emphasis in original).

Given the speculative nature of Amazon's purported federal district court complaint, the unknown nature of the time needed to resolve that as-yet-unfiled action, and the compelling need to provide consumers with the remedies set forth in the Commission's Final Order, the Commission should deny Amazon's request for a stay.[3]

III. AMAZON HAS NOT SHOWN THAT JUSTICE REQUIRES THE COMMISSION TO ISSUE A STAY

Amazon also fails to demonstrate that justice requires a stay of the Commission's Final Order under the four-factor preliminary injunction framework. The Commission's well-reasoned July 29, 2024 Order is firmly grounded in the text of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. §§ 2051–2084, and its attendant regulations, as well as Commission and federal court precedent. The remedial actions prescribed by the Commission for the Subject Products in its January 16 Order are likewise fully supported by the CPSA, its regulations, and the record. As

[3] As discussed in Complaint Counsel's Opposition to Amazon's prior petition for a stay, Dkt. 145 at 2 n.2, Amazon's reliance on the *Zen Magnets* case as precedent for its stay request is unavailing given significant distinctions between this administrative litigation and *Zen Magnets*. Specifically, as a procedural matter, the stay in *Zen Magnets* was jointly agreed upon by the parties only after the respondent had filed a Complaint and a Motion for Preliminary Injunction in federal court, and the stay was therefore well grounded in a pending judicial review. Furthermore, this case is also factually distinct from *Zen Magnets* in several important ways bearing on the elements of the four-factor preliminary injunction framework, including that Amazon has stipulated to the fact that each of the more than 400,000 units of Subject Products presents a substantial product hazard. As there is no dispute as to the danger posed by these products, including the risk of serious injury or death, it is imperative that Amazon be required to take swift action to remove these hazardous products from consumers' homes and inform consumers of the hazards they pose.

such, Amazon has a low likelihood of prevailing on the merits and cannot demonstrate irreparable harm, and a stay under these circumstances would be harmful to interested parties and not in the public interest.

A. Amazon Is Unlikely to Prevail on the Merits of Its Claims

First, Amazon has a low likelihood of prevailing on the merits of its claims. Amazon purports to have raised "significant statutory and constitutional questions, including issues of first impression" which "weigh in favor of granting a stay." Dkt. No. 155 at 4. This appears to be Amazon's vehicle for arguing that it is likely to succeed on the merits of its claims in federal district court.

Amazon reasserts that it is not a distributor of the Subject Products under the CPSA, but instead is a third-party logistics provider. *Id.* at 5. However, the Administrative Law Judges and the Commission considered substantial evidence presented by Complaint Counsel that demonstrated Amazon is a "distributor" of "Fulfilled by Amazon" ("FBA") products, such as the Subject Products, under the CPSA. This is a straightforward application of the language of the statute to the undisputed facts in this matter. The Subject Products are consumer products that were delivered to Amazon through its FBA program. *See* Dkt. No. 142, at 7–8. Among other actions, Amazon held and stored the Subject Products in its warehouses, charging monthly and long-term storage fees to FBA participants, before distributing the Subject Products to consumers, *id.* at 8, which means Amazon held the products for distribution as plainly stated in the statutory language of the CPSA. *See* 15 U.S.C. § 2052(a)(8) (defining "distribution in commerce" to include, among other things, "holding" for distribution). The Commission concluded that, "[f]rom pricing and payment processing to packaging, delivery, and tracking on the front end to post-sale customer service, returns, refunds, and recalls on the back end, Amazon exerts extensive control

over products sold through its" FBA program. Dkt. No. 142 at 11. Ultimately, these undisputed actions place Amazon squarely within the definition of "distributor."

Similarly, Amazon cannot demonstrate a likelihood of prevailing on the merits of its constitutional challenges under First Amendment, separation of powers, and due process theories. Each of Amazon's constitutional arguments rely on novel legal theories that are contrary to existing federal court precedent, and which have already been considered and rejected by the Commission after a full hearing conducted pursuant to the requirements in Section 15(f) of the CPSA. *See* 15 U.S.C. § 2064(f); *see also* 5 U.S.C. § 554. Amazon's motion raises no compelling new basis to delay enforcement of the ordered remedies.

As the Commission correctly detailed in its January 16 Order, the prescribed notices "withstand First Amendment scrutiny under both [the] *Zauderer* and *Central Hudson*" tests of speech regulations. Dkt. No. 154 at 32–43. In disputing this ruling, Amazon simply reiterates its previously rejected arguments that the notice is invalid under *Central Hudson* and the CPSA. Dkt. No. 155 at 5–6. While Amazon argues for the first time that the Commission's decision to remove a statement regarding third-party sellers triggers "heightened First Amendment scrutiny," it misleadingly relies on cases addressing speech prohibitions rather than disclosure requirements. *See Thompson v. Western States Medical Center*, 535 U.S. 357, 377 (2002) (addressing a challenge to a law "[f]orbidding the advertisement of particular compounded drugs"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502–04 (1996) (addressing statutes imposing a "categorical prohibition" on vendors and news media advertising the retail price of alcoholic beverages); *see also* Dkt. 154 at 33 ("[W]ithin the class of regulations affecting commercial speech, there are 'material differences between disclosure requirements and outright prohibitions on speech.'") (*quoting Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985)).

As to its separation of powers and due process challenges, Amazon offers no new support for its prior arguments that the Commission has already considered and rejected. The Commission's finding in its July 29, 2024 Decision and Order that "the holding of *Humphrey's Executor* continues to apply to statutory removal restrictions for multi-member agencies, including the CPSC," is well grounded in federal court precedent and specifically relies on multiple supporting cases across several circuits. Dkt. No. 142 at 64–65. Indeed, in the months since the Commission's Order, the Supreme Court has denied two separate petitions for certiorari attempting to challenge the CPSC's status under *Humphrey's Executor*. *Consumers' Rsch. v. CPSC*, 91 F.4th 342, 346 (5th Cir. 2024), *reh'g en banc, reh'g denied*, 98 F.4th 646 (5th Cir. 2024), *petition for cert. denied*, No. 23-1323 (U.S. June 14, 2024); *Leachco, Inc. v. CPSC*, 103 F.4th 748, 765 (10th Cir. 2024), *petition for cert. denied*, No. 22-7060 (U.S. Aug. 9, 2024). Likewise, the Commission correctly rejected Amazon's due process arguments, concluding that the Commission's combined investigatory, prosecutorial, and judicial roles were presumptively valid absent any particular facts indicating bias. Dkt. No. 142 at 70–72. Amazon's motion makes no specific allegations as to bias and cannot point to any case law holding that an agency proceeding violated due process on this basis. In light of the clear and broad legal precedent refuting Amazon's separation of powers and due process challenges to this administrative litigation, Amazon's challenges are unlikely to succeed on the merits.

Amazon's final argument relating to the merits involves the purported "duplicative refunds" ordered by the Commission. Dkt. No. 155 at 7. The Commission made clear that no CPSA Section 15 refund has been issued by Amazon for the Subject Products, and that Amazon's unilateral measures were deficient by failing to track disposal of the hazardous products and by failing to include any action to remove those products from the marketplace. Dkt. No. 142 at 55. Removal of hazardous products from commerce and from the possession of consumers serves the

CPSA's purpose of protecting the public against unreasonable risks of injury. *Id.*; *see also* 15 U.S.C. § 2051(a) and (b). Because the ordered refunds are the first CPSA remedy for the Subject Products, they are not duplicative and do not implicate the Fifth Amendment's Takings Clause.

B. Amazon Will Not Suffer Irreparable Harm Absent a Stay of the Commission's Final Order

Second, Amazon argues it will face irreparable harm based on (1) the resources needed to meet its obligations under the CPSA as a distributor and speculation on future civil penalties Amazon may face for non-compliance; (2) Amazon's inability to recoup those resources as well as the refunds it has been ordered to issue to facilitate removal of the Subject Products from consumers' homes; and (3) the First Amendment violations Amazon alleges it faces due to the Section 15 notices ordered by the Commission.

Amazon's first argument on irreparable harm fails, as courts have held that the invocation of vague and speculative costs do not suffice to establish irreparable economic harm. *See* Dkt. No. 145 at 3, *citing California Ass'n of Priv. Postsecondary Sch. v. DeVos*, 344 F. Supp. 3d 158, at 170-71.

Next, Amazon misstates the law by claiming that because Amazon cannot recoup its funds from the government, in the event Amazon were to win in federal court, Amazon would automatically suffer irreparable harm. Dkt. No. 155 at 8. But just because the economic loss is nonrecoverable, it does not automatically qualify as irreparable harm – if that were the case any agency action requiring the expenditure of funds to comply would constitute irreparable harm. *See Otsuka Pharm. Co. v. Burwell*, 2015 WL 1962240, at *11 (D. Md. Apr. 29, 2015) ("'[P]rospective injunctive relief would often cease to be an "extraordinary remedy" in cases involving government defendants' if it were available whenever the plaintiff cannot recover damages from the defendant due to the defendant's sovereign immunity.") (*citing N. Air Cargo v. USPS*, 756 F. Supp. 2d 116, 125 n. 6 (D.D.C.2010)). Instead, a party seeking injunctive relief must prove that the economic

loss is not only irretrievable, "it must also be serious in terms of its effect on the plaintiff." *Gulf Oil Corp. v. Dep't of Energy*, 514 F. Supp. 1019, 1026 (D.D.C.1981). The "up to $21 million" in Section 15 refunds which Amazon alleges it would suffer, Dkt. No. 155 at 2, would not threaten the existence of Amazon's business, and neither would the vague assertions of costs of compliance with the CPSA or future speculative civil penalties. *See* Dkt. 154, at 48 (noting Amazon's $575 billion in total annual revenue in 2023).

Amazon's invocation of irreparable harm due to an alleged violation of Amazon's First Amendment rights similarly overstates the law. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020), cited by Amazon, concerned restrictions on attendance of religious services that were found to not be narrowly tailored, and therefore unlikely to survive strict scrutiny review. Courts have held that where the "likely success on the merits" prong of the four-factor test is met in a First Amendment challenge, irreparable harm will follow. *Kimberly-Clark Corp. v. D.C.*, 286 F. Supp. 3d 128, 146–47 (D.D.C. 2017). Here, as explained above, the ordered notice provisions are supported by the law and the record, and do not violate Amazon's First Amendment freedoms.

C. A Stay Would Be Harmful to Consumers and Contrary to the Public Interest

The *third* and *fourth* factors, which both jointly require consideration of the public consequences, support denial of Amazon's motion because a stay would be detrimental to consumers. *See, e.g.*, *Grant v. Nat'l Transp. Safety Bd.*, 959 F.2d 1483, 1487 (9th Cir. 1992) (declining to impose a stay where it would impair the FAA's "ability to protect the public safety"). As the Commission determined in its July 2024 and January 2025 Orders, Amazon "did not provide sufficient notification to the public to protect consumers against unreasonable risk of injury associated" with the Subject Products, Dkt. No. 154 at 1–2; "did not seek to remove the Subject Products from commerce and from consumers' possession," *id.* at 2; and "made no direct attempt to reach consumers who obtained the hazardous products as gifts, hand-me-downs, donations, or on

the secondary market," Dkt. No. 142 at 47. Thus, despite Amazon's desire to advance the benefits it would enjoy by maintaining the status quo, the status quo provides inadequate protection for consumers.

The Commission acknowledged this fact in its decision. "If the Subject Products remain in consumers' possession, children will continue to wear sleepwear garments that could ignite and result in injury or death; consumers will unwittingly rely on defective CO detectors that will never alert them to the presence of deadly carbon monoxide in their homes; and consumers will use the hair dryers they purchased, which lack immersion protection, in the bathroom near water, leaving them vulnerable to electrocution." Dkt. No. 142 at 56. Staying the Commission's Final Order "would be contrary to the CPSA's purpose of protecting the public against unreasonable risks of injury from consumer products." *Id.* at 58; *see Hamlin Testing Labs., Inc. v. U.S. Atomic Energy Comm'n*, 337 F.2d 221, 222-23 (6th Cir. 1964) (denying a motion to stay enforcement of an Atomic Energy Commission order and giving "interim respect to the expert judgment of the Commission as a coordinate agency of government specially created to further public purposes in this area").

Finally, nothing about postponing these necessary remedies to consumers would promote efficiency. Given that Amazon is unlikely to succeed in any motion to stay the Commission's orders in federal district court, there is no need to delay enforcement of the January 16 Order.

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

Respectfully submitted,

John C. Eustice, Senior Trial Attorney
Liana G.T. Wolf, Senior Trial Attorney
Serena Anand, Trial Attorney
Thomas J. Mendel, Trial Attorney

Division of Enforcement and Litigation
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (240) 743-8436

Complaint Counsel for
U.S. Consumer Product Safety Commission

January 31, 2025

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2025, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

By email to the Secretary:

Alberta E. Mills
Secretary
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
Email: AMills@cpsc.gov

By email to Counsel for Respondent:

Sarah L. Wilson
Stephen P. Anthony
Thomas R. Brugato
Kevin F. King
Jamie Dominique U. Magcale
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001-4956
swilson@cov.com
santhony@cov.com
tbrugato@cov.com
kking@cov.com
jmagcale@cov.com

John C. Eustice

Complaint Counsel for
U.S. Consumer Product Safety Commission