

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of

Amazon.com, Inc.

CPSC Docket No. 21-2

February 7, 2022

Protective Order

On February 3, 2022, the parties filed a joint motion for a protective order. Under 16 C.F.R. § 1025.31(d), I grant the motion. I adopt the parties' proposed order with formatting and capitalization changes and modifications to: paragraph 7 specifying that the presiding officer will decide the procedure for resolving disputes over a producing party's assertion of privilege; and paragraph 9 requiring a party who wishes to submit material under seal to prepare a version for the public record with the confidential information redacted. Therefore, I order the following:

1. *Confidential Information.* As used in this order, "Confidential Information" means information that is private, confidential, or proprietary and is designated "CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER" by the producing party. Confidential Information includes, but is not limited to: (a) information prohibited from disclosure or subject to confidentiality by any statute or regulation; (b) business confidential or proprietary information, including trade secrets, of a party or any of its affiliates, parents, subsidiaries, and third-parties with whom a party has or had a business relationship; (c) research, technical, financial, or commercial information; (d) personally identifiable information (including home addresses, personal telephone and cell numbers, personal email addresses, current employers for any former employees of a party, social security numbers, and any other information protected by applicable law); (e) medical, financial, or other confidential information concerning any individual; and (f) tax returns and other non-public financial information.
2. *Scope.* The materials designated as confidential in accordance with paragraph 3 below ("documents") including, but not limited to, materials produced in the course of discovery, shall be subject to this order. Documents include electronic images, duplicates, extracts, summaries, notes, transcripts (including of deposition testimony), or descriptions—regardless of format and regardless of whether in written, paper, electronic, audio, or video form—that are derived from Confidential

Information or contain Confidential Information or disclose the substance of Confidential Information.

3. *Designation of Documents as Confidential.* A party may designate a document as Confidential Information under this order by placing the words “CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER” on the document produced or disclosed and all copies in a manner that will not interfere with the legibility of the document. A producing party making such a designation shall do so (i) in good faith and (ii) subject to paragraph 6, prior to or at the time the document is produced or disclosed.
4. *Depositions.* This order protects deposition testimony only if designated as “CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER” on the record at the time the testimony is taken or within 30 days of review of the deposition transcript. Deposition testimony so designated shall be treated as Confidential Information. After delivery of the transcript by the court reporter, any party may dispute the continued classification of the transcript or specific portions of the transcript as Confidential Information pursuant to the procedures identified in paragraph 8 of this order.
5. *Protection of Confidential Information.*
 - (a) *General Protections.* A receiving party, a receiving party’s counsel, or any other persons identified in subparagraph (b) shall not use or disclose Confidential Information other than in this proceeding, any Commission appeal or judicial review relating to this proceeding, and any settlement conferences relating to this proceeding.
 - (b) *Limited Disclosures.* A receiving party and a receiving party’s counsel shall not disclose or permit the disclosure of any Confidential Information to any third person or entity except to the following:
 - (1) *Counsel.* Counsel for the parties and their employees or contractors who are reasonably involved in assisting counsel in representing the parties to this proceeding.
 - (2) *Parties.* Parties; the parents, subsidiaries, and affiliates of parties; and employees of a party, but only to the extent counsel determines in good faith that the employee’s assistance is reasonably necessary to the conduct of the litigation.
 - (3) *Presiding Officer and Presiding Officer’s Staff.* The presiding officer assigned to this proceeding, the presiding officer’s attorney-advisors, and any staff members responsible for assisting the presiding officer in connection with this proceeding.

- (4) *Commission Secretary.* The Secretary of the U.S. Consumer Product Safety Commission (“Secretary”), but solely for the purposes of receiving Confidential Information filed under seal or submitted for in camera review under the provisions of 16 C.F.R. § 1025.45, and in no event for docketing or public release, unless consented to by the parties or ordered by the presiding officer.
- (5) *Commissioners.* Any member of the U.S. Consumer Product Safety Commission (“Commission”) and his or her staff members, but solely to the limited extent necessary to perform their functions under the Rules, 16 C.F.R. part 1025, or the Consumer Product Safety Act (“CPSA”), 15 U.S.C. § 2051, et seq., as amended, as it relates to this matter, and consistent with the ex parte rules of 16 C.F.R. § 1025.68.
- (6) *Court reporters.* Any court reporter engaged for depositions, conferences, or hearings.
- (7) *Contractors.* Any person engaged by a party or a party’s counsel for the limited purpose of making copies of documents, organizing or processing documents, or for providing discovery support.
- (8) *Consultants and experts.* Any consultant, investigator, testifying expert, and consulting expert employed or retained by a party or a party’s counsel to assist in the preparation and hearing of this proceeding, but only after such person executes the acknowledgement contained in Attachment A.
- (9) *Mediators or arbitrators.* Any mediator or arbitrator engaged by the parties to this action, but only after such persons have executed the acknowledgement contained in Attachment A.
- (10) *Witnesses at depositions.* During their depositions, witnesses in this proceeding to whom disclosure of Confidential Information is reasonably necessary, but only after such persons have executed the acknowledgement contained in Attachment A. Witnesses shall not retain any documents or copies of documents containing Confidential Information, except that witnesses may receive a copy of all pages of deposition testimony and exhibits marked at their depositions as containing Confidential Information in connection with review of the transcripts, subject to the terms of this order.

(11) *Others by Consent or Order.* Any other person by consent of the producing party or by order of the presiding officer.

(c) *Non-Waiver and Required Disclosures.* Nothing in this order increases, diminishes, impairs, alters, modifies, or waives any party's rights, duties, or obligations under the CPSA or other applicable laws, including but not limited to laws and regulations pertaining to information disclosure.

6. *Inadvertent Failure to Designate.* An inadvertent failure to designate a document as Confidential Information or a failure to serve a timely notice of designation does not waive a party's claim of confidentiality or a party's right to so designate the document. If a party designates a document as Confidential Information after it was initially produced, or serves a notice of designation after the time set forth in this order, the receiving party, on notification of the designation, must make a reasonable effort to assure that the document is thereafter treated in accordance with the provisions of this order.
7. *Productions Under This Order Shall Not Waive Privilege or Protection.* If information subject to a claim of attorney-client privilege or work product protection or any other privilege or protection is inadvertently or otherwise produced, such production shall in no way prejudice or otherwise constitute a waiver of, or estoppel as to, any claim of privilege or protection for such information or its subject matter as provided under applicable law, including but not limited to CPSC Rules and local bar rules, Federal Rule of Evidence 502, and any order issued by the presiding officer. If a producing party has inadvertently or otherwise produced information subject to a claim of protection or privilege, and if the producing party makes a written request for the return of such information, the information for which a claim of inadvertent production is made (including any analyses, memoranda, or notes which were internally generated based upon such information), as well as all copies, shall be either destroyed or returned immediately to the producing party, even if the receiving party disputes the claim of privilege. If the receiving party disputes the producing party's assertion of privilege, the parties shall jointly notify the presiding officer of the dispute. The presiding officer will decide the procedure for resolving the dispute, which may include submission of a detailed privilege log and the material for in camera review.
8. *Challenges to Confidential Information Designation.*
 - (a) *General Provisions.* A party may request that the party designating material as Confidential Information promptly confirm in writing

whether all or part of any material previously designated as Confidential Information should remain so designated. Within seven (7) calendar days of receipt of such a request, the party designating material as Confidential Information shall indicate in writing which portions of such material previously designated as Confidential Information should remain so designated. If, following such a request, a party wishes to challenge the continued designation of material as Confidential Information, that party must notify the party designating the material as Confidential Information of the objection. Additionally, the parties shall make a good-faith effort to meet and confer within ten calendar days of such notification. If the parties do not resolve an objection, the presiding officer shall resolve the dispute under the terms of this order and other applicable law. In any dispute over whether material constitutes Confidential Information, the party designating the material as Confidential Information shall have the burden of demonstrating that the material meets the definition of such information set forth in paragraph 1.

(b) *Failure to Initially Object.* A receiving party's failure initially to object to a designation, or a producing party's disclosure of Confidential Information, shall not preclude a party from later raising objections for good cause. The parties shall promptly meet and confer in such instances and, if unable to reach agreement, shall file a paper or papers asking the presiding officer to resolve the dispute. Until the presiding officer rules on the challenge, all parties shall continue to treat the material as Confidential Information.

9. *Filing and Submission of Confidential Information.* If any Confidential Information or document containing Confidential Information is contained in, or attached to, any pleading, motion, exhibit, or other paper in this matter, irrespective of whether filed prior to, during, or after any hearing ("submitted material"), 16 C.F.R. § 1025.45 shall apply except to the extent inconsistent with this order. Any Confidential Information contained in submitted material shall be considered "in camera material" as defined by 16 C.F.R. § 1025.45(a). If a party submits material that contains Confidential Information, such party shall inform the Secretary and the presiding officer (by either email or motion) and file such material under seal. In accordance with 16 C.F.R. § 1025.45(d), "[i]n camera materials shall be segregated from the public record and protected from public view." A party filing material under seal must prepare a version for the public record that redacts or omits any Confidential Information. This version should be designated "CONFIDENTIAL INFORMATION REDACTED." If

redacting the Confidential Information is impracticable, the party may seek leave from the presiding officer to be excused from this requirement.

10. *Using Confidential Information at the Hearing.* Nothing in this order shall prevent a party from using any documents at any hearing or similar proceeding in this matter. A party that intends to present, or that anticipates that another party may present, Confidential Information at a hearing or similar proceeding in this matter shall bring that issue to the attention of the presiding officer and the parties without first disclosing the Confidential Information. The presiding officer may thereafter issue such orders as are necessary to protect the confidentiality of such documents at a hearing or similar proceeding in this matter.
11. *Confidential Information Subpoenaed or Ordered Produced in Other Litigation.* If a party other than the designating party is served with a subpoena or order issued in other litigation that would compel disclosure of any document designated in this proceeding as Confidential Information, the party must notify the designating party, in writing, immediately and in no event more than five business days after receiving the subpoena or order, in order to permit the designating party to contest such subpoena or order. Such notification must include a copy of the subpoena or order.
12. *Third-Party Subpoenas.* Any party seeking the production of material via subpoenas to third parties shall provide the non-requesting party with a copy of the material produced and provide the non-requesting party with a thirty-day period within which to designate any produced material as Confidential Information in accordance with this order. The party requesting such material shall treat all of the material produced as Confidential Information until the non-requesting party has made its designations or the designation period expires, whichever is earlier.
13. *Inadvertent Disclosure.* Any party that becomes aware of any unauthorized disclosure of Confidential Information shall promptly give notice to the party that produced the document of such circumstances. Upon receipt of such notice, the party that produced the document may seek such relief as is appropriate. In any event, the party that made the unauthorized disclosure shall immediately use its best efforts to retrieve such information and prevent further disclosure.
14. *Conclusion of Litigation.*
 - (a) *Effect of Order; Obligations of Parties and Counsel at Conclusion of Litigation.* Unless otherwise agreed or ordered, this order shall terminate after dismissal of the matter or at the conclusion of the

litigation. After the dismissal or conclusion of this litigation (including any appeals to the Commission or to any federal court), a receiving party shall delete or destroy all Confidential Information and documents marked “CONFIDENTIAL—SUBJECT TO PROTECTIVE ORDER” that it has received from any other party, in accordance with federal law and federal record retention requirements (any party asserting federal law or record retention requirements as a basis for not deleting or destroying Confidential Information shall specifically identify, in writing, the relevant law or requirements and the relevant documents), unless the document has been offered into evidence or filed without restriction as to disclosure.

- (b) *Obligations of Persons at Conclusion of Litigation.* At the time that any person identified in paragraph 5 concludes his or her participation in this proceeding, such person shall return to counsel or destroy all documents containing Confidential Information that are in the possession of such person, and shall certify such destruction in writing. Within sixty days after dismissal or at the conclusion of the litigation each party shall (upon request of any other party) certify in writing to all other parties that it has notified all such persons employed or contracted or by that party, or witnesses put forth by that party, of the requirements of this subparagraph.
- (c) *Retention of Work Product and One Set of Filed Documents.* Notwithstanding the above requirements to destroy documents, counsel may retain (1) attorney work product, including an index that refers or relates to designated Confidential Information, and (2) a complete set of documents submitted to the presiding officer via filing with the Secretary. Any retained Confidential Information shall continue to be protected under this order. An attorney may use his or her work product in subsequent litigation, provided that such use does not disclose or use Confidential Information.

15. *Persons Bound.* This order shall take effect when entered and shall be binding upon all counsel of record, the parties, and persons made subject to this order by its terms. The parties, their counsel, and any other persons subject to the terms of this order shall be subject to the jurisdiction of the presiding officer and the Commission for enforcement of the terms of this order.

16. *New Parties to the Proceeding.* In the event that an additional person or entity become a party to this proceeding (whether under 16 C.F.R. § 1025.17 or otherwise), such party shall not have access to Confidential Information produced by or obtained from any disclosing party until the

new party or its counsel executes a copy of the acknowledgement contained in Attachment A and files it on the docket.

17. *Use and Disclosure of Independently Obtained Information.* Nothing herein shall impose any restriction on the use or disclosure by a party or its agent of its own information, or of publicly available information, or of information lawfully available to that party, or of information that lawfully came into the possession of the party independent of any disclosure of documents made in this proceeding.
18. *Advice to Client.* Nothing in this order bars or otherwise restricts counsel from rendering advice to his or her client with respect to this matter, or from generally referring to or relying upon Confidential Information in rendering such advice, so long as counsel does not specifically disclose the substance of the Confidential Information.
19. *Use and Disclosure of Own Information.* Nothing in this order shall be construed to limit any party's use or disclosure of its own documents, including documents designated as containing Confidential Information.

/s/ James E. Grimes
Administrative Law Judge

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ATTACHMENT A

ACKNOWLEDGMENT OF PROTECTIVE ORDER OF CONFIDENTIALITY

The undersigned hereby acknowledges that he/she has read the protective order of confidentiality (“order”) entered in the above-captioned proceeding and attached hereto, understands the terms thereof, and agrees to be bound by its terms. The undersigned submits to the jurisdiction of the U.S. Consumer Product Safety Commission and the presiding officer in matters relating to the order and understands that the terms of the order obligate him or her to use materials designated as Confidential Information in accordance with the order solely for the purposes of the above-captioned proceeding, and not to disclose any such Confidential Information to any other person, firm or entity except as provided by law. The undersigned acknowledges that any violation of the order may result in sanctions imposed by the presiding officer or penalties as provided by statute or regulation.

Date: _____

Signature: _____

Name: _____

Job Title: _____

Employer: _____

Business Address: _____
