

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

In the Matter of Amazon.com, Inc.,

Respondent.

CPSC Docket No. 21-2

Hon. James E. Grimes
Presiding Officer

JOINT INITIAL PREHEARING CONFERENCE LETTER

Pursuant to the Presiding Officer's Order of September 24, 2021 (Doc. No. 5) and 16 C.F.R. § 1025.21, Complaint Counsel and Respondent Amazon.com, Inc. ("Amazon") submit this Joint Initial Prehearing Conference Letter in advance of the October 15, 2021 Initial Prehearing Conference.

The parties have met and conferred to discuss the issues identified in the Order and the CPSC Rules of Practice for Adjudicative Hearings (the "Rules"). The parties provide their joint statements on each point below. Where the parties could not reach agreement, each party provides a separate response.

16 C.F.R. § 1025.21(a)(1): "Petitions for leave to intervene."

Joint Statement: To date, no petitions for leave to intervene have been filed in this action. Neither party is aware of plans by any person to submit a petition.

16 C.F.R. § 1025.21(a)(2): "Motions, including motions for consolidation of proceedings and for certification of class actions."

Joint Statement: Complaint Counsel intends to file a motion for partial summary decision pursuant to 16 C.F.R. § 1025.25. Amazon intends to move to dismiss the Complaint pursuant to 16 C.F.R. § 1025.23, or, in the alternative, for summary decision pursuant to 16 C.F.R. § 1025.25. The general grounds for each motion are described in point (3), *infra*. The proposed schedule incorporates the computation-of-time rules set forth in 16 C.F.R. § 1025.15(a), such that if the last day of the period computed is "a Saturday, a Sunday, or a legal holiday," the period will run "until the end of the next day which is not a Saturday, a Sunday, or a legal holiday."

To promote timely and orderly briefing, and to avoid duplicative submissions on related issues, the parties propose the following briefing schedule. The proposed schedule contemplates four papers being filed (as set forth below):

Event	Deadline
Complaint Counsel files motion for partial summary decision	10/13/2021
Amazon files combined motion to dismiss (or, in the alternative, for summary decision) and opposition to Complaint Counsel's motion for partial summary decision	11/2/2021
Complaint Counsel files combined opposition to Amazon's motion to dismiss (or, in the alternative, for summary decision) and reply in support of Complaint Counsel's motion for partial summary decision	11/22/2021
Amazon files reply in support of its motion to dismiss (or, in the alternative, for summary decision)	12/7/2021

The parties ask the Court to schedule an oral argument on the motions on an available date soon after both motions are fully briefed. Complaint Counsel and Amazon's counsel are available as soon as the week of December 13.

16 C.F.R. § 1025.21(a)(3): “Identification, simplification and clarification of the issues.”

Joint Statement: The issues currently identified in this case are principally set forth in the Complaint (Doc. No. 1), Answer (Doc. No. 4), and forthcoming motions.

Complaint Counsel's Statement: Complaint Counsel seeks an enforceable order directing Amazon, as a “distributor” under the Consumer Product Safety Act (“CPSA”), to provide notice pursuant to 15 U.S.C. § 2064(c) and undertake remedial actions pursuant to 15 U.S.C. § 2064(d) to protect the public from the substantial product hazards presented by the Subject Products, which are sold on Amazon.com and distributed by Amazon through its Fulfillment by Amazon (“FBA”) program. The issue of Amazon's status as a distributor under the CPSA is addressed in Complaint Counsel's pending motion for partial summary decision, to be filed on October 13, 2021.

Amazon's Statement: Amazon's motion to dismiss (or, in the alternative, for summary decision) will demonstrate that the Complaint fails as a matter of law for multiple independent reasons.

Upon being notified by CPSC staff about potential hazards relating to the third-party sellers' products listed in the Complaint (the “Third-Party Products”), Amazon voluntarily removed the Third-Party Products from Amazon.com; directly notified all consumers who purchased the Third-Party Products about the hazard; instructed those consumers to immediately stop using, and dispose of, the Third-Party Products; and refunded the purchase price. Amazon's voluntary and effective safety-protective steps go beyond the agency's statutory recall authorities. The additional relief that the Complaint seeks to compel exceeds the Commission's authority under the CPSA. 15 U.S.C. § 2064(c)–(d), (f). This action is thus moot.

Additionally, contrary to Complaint Counsel's position, the Commission lacks jurisdiction over Amazon with respect to the Third-Party Products that Amazon did not manufacture, distribute, or sell. Rather, Amazon provided FBA logistics services to the

sellers of such Third-Party Products. The provision of such services by Amazon and other third-party logistics providers (such as FedEx) does not constitute “distribution” within the CPSA’s meaning, 15 U.S.C. § 2052(a)(7)–(8), (b).

The Complaint also violates the Administrative Procedure Act and the Constitution’s Due Process Clause because it improperly seeks to extend the reach of the CPSA through an adjudication without congressional authorization or notice-and-comment rulemaking, and amounts to an unlawful attempt to impose retroactive liability.

16 C.F.R. § 1025.21(a)(4): “Necessity or desirability of amending the pleadings.”

Joint Statement: Complaint Counsel does not, at this time, intend to amend its Complaint. Amazon does not, at this time, intend to amend its Answer.

Sept. 24, 2021 Order at 1: “[A] plan for discovery and whether there are issues as to preservation, retrieval, review, disclosure, or production of discoverable information, including issues as to the disclosure or discovery of electronically stored information.”

16 C.F.R. § 1025.21(a)(5): “Stipulations and admissions of fact and of the content and authenticity of documents.”

16 C.F.R. § 1025.21(a)(6): “Oppositions to notices of depositions.”

16 C.F.R. § 1025.21(a)(7): “Motions for protective orders to limit or modify discovery.”

16 C.F.R. § 1025.21(a)(8): “Issuance of subpoenas to compel the appearance of witnesses and the production of documents.”

16 C.F.R. § 1025.21(a)(9): “Limitation of the number of witnesses, particularly to avoid duplicate expert witnesses.”

Joint Statement: The parties agree that discovery should not commence immediately. The Presiding Officer has broad discretion to defer discovery under the Rules. *See, e.g.*, 16 C.F.R. §§ 1025.42(a)(4), (6); 1025.31(i). However, the parties disagree on when discovery should begin.

Complaint Counsel’s Statement: Complaint Counsel proposes that the 150-day discovery period set by 16 C.F.R. § 1025.31(g) should toll until the Presiding Officer issues a decision resolving Complaint Counsel’s motion for partial summary decision, assuming a prompt resolution of the motion. Here, good cause exists to defer discovery pending a ruling on Complaint Counsel’s motion for partial summary decision, as that ruling is likely to narrow the scope of discovery in the action.

When discovery commences, Complaint Counsel will work with Amazon counsel to submit (i) a proposed joint protective order to govern the treatment of information and documents produced by the parties during discovery in this action, and (ii) a proposed discovery order to govern the schedule, stipulations to the authenticity of certain documents and information, and depositions. At that time, Complaint Counsel is

amenable to producing, for depositions, staff involved in the determination that the Subject Products pose a substantial product hazard. This excludes Commissioners, Commissioner staff, and others not involved in the substantial product hazard allegations set forth in the Complaint.

Complaint Counsel also moves for Federal Rules of Civil Procedure 30, 31, and 33 to govern the limitation on the number of oral and written depositions and written interrogatories.

Amazon Statement: As stated above, both parties propose that discovery be deferred. Amazon's position is that discovery should not commence until after the Presiding Officer resolves both (i) Amazon's motion to dismiss, or, in the alternative, for summary decision and (ii) Complaint Counsel's motion for partial summary decision.

Complaint Counsel's proposed schedule envisions commencing discovery immediately after the resolution of Complaint Counsel's motion for partial summary decision, even if Amazon's motion to dismiss, or, in the alternative, summary decision, is still pending. That is illogical. Deferring discovery pending the resolution of both motions (i) would preserve the resources of the parties and the Presiding Officer and avoid incurring potentially unnecessary expenses and burdens; (ii) would not prejudice either party or cause harm to the public interest; and (iii) would not occasion any undue delay, since the motions will be fully briefed by December 2021. Amazon's motion to dismiss or, in the alternative, for summary decision, will be based on dispositive legal issues. If Amazon prevails on its motion, then this proceeding would be dismissed and discovery would be unnecessary.

Amazon also takes the position that deciding the scope of discovery is premature at this time, except to note that any depositions of agency staff should not be limited to staff involved in substantial product hazard determinations. Amazon is willing to meet and confer, if necessary, following resolution of the dispositive motions. If discovery becomes necessary, Amazon's counsel will work with Complaint Counsel to submit (i) a proposed joint protective order to govern the treatment of information and documents produced by the parties during discovery in this action, and (ii) a proposed discovery order to govern the schedule, stipulations to the authenticity of certain documents and information, and depositions.

16 C.F.R. § 1025.21(a)(10): "Matters of which official notice should be taken and matters which may be resolved by reliance upon the laws administered by the Commission or upon the Commission's substantive standards, regulations, and consumer product safety rules."

Joint Statement: The parties' motions will identify matters that might be resolved by reliance upon the laws administered by the Commission. Both parties anticipate requesting that the Presiding Officer take official notice of certain documents or matters "[g]enerally known within the jurisdiction of the Commission" or "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." 16 C.F.R. § 1025.43(d)(1).

16 C.F.R. § 1025.21(a)(11): “Disclosure of the names of witnesses and of documents or other physical exhibits which are intended to be introduced into evidence.”

Joint Statement: Complaint Counsel and Amazon agree that disclosures of witnesses, documents, and exhibits intended to be introduced into evidence should be deferred until the time set forth in the discovery schedule(s) referenced in their respective Statements in response to 16 C.F.R. § 1025.21(a)(5)-(9), *supra*.

16 C.F.R. § 1025.21(a)(12): “Consideration of offers of settlement.”

Joint Statement: Complaint Counsel and Amazon’s counsel met after the filing of the Complaint to discuss settlement. A settlement could not be reached at that time.

Amazon’s Statement: Before the CPSC filed its complaint, Amazon and the staff of the CPSC’s Office of Compliance and Field Operations (now Complaint Counsel) had reached a preliminary agreement on a new framework whereby Amazon would voluntarily facilitate CPSC recalls of third-party products, including those for which Amazon did not provide FBA logistics services. The CPSC publicly posted Amazon’s letter offering to work together with the CPSC to establish this [new framework governing products](#) sold by third parties on Amazon.com, and to issue a Recall Pledge that other companies could join.¹ Rather than initiating a process to create such a framework, the Commission voted, 3–1, to bring this lawsuit.

Recognizing that the CPSA was drafted almost a half-century before the development of modern online logistics providers, Acting Chairman Adler announced that he voted to authorize the Complaint with “great reluctance.” The Acting Chairman further noted that establishing “a framework for dealing with . . . products” handled by third-party logistics providers is far more constructive than suing a single logistics provider over individual products, which is “ineffective, inefficient, and frustratingly insufficient to protect consumers.”² Amazon agrees with Acting Chairman Adler’s sentiment, and dissenting Commissioner Baiocco’s objection to the lawsuit, and remains ready to work with the CPSC to create a framework for consumer product safety through a uniform standard applicable to all third-party logistics providers, including by a reasonable settlement of this administrative litigation.

Complaint Counsel’s Statement: Complaint Counsel asserts that Amazon’s reference to pre-Complaint discussions between the parties is both irrelevant and

¹ *Letter from Amazon to Commissioners re: Proposed Recalls Pledge*, <https://www.cpsc.gov/s3fs-public/CPSC%20Letter%20to%20Commissioners%20Signed.pdf>

² *Statement of Acting Chairman Robert S. Adler on the Vote to Approve Filing of an Administrative Complaint Against Amazon.com* (July 14, 2021), <https://www.cpsc.gov/s3fs-public/Statement%20on%20Amazon%20RSA%207.14.pdf>.

inappropriate. Moreover, Amazon counsel insisted that those internal discussions be held confidential by both parties. At no time did Amazon agree as part of those discussions to recognize its role as a distributor of FBA products.

16 C.F.R. § 1025.21(a)(13): “Establishment of a schedule for the exchange of final witness lists, prepared testimony and documents, and for the date, time and place of the hearing, with due regard to the convenience of the parties.”

Joint Statement: Complaint Counsel and Amazon agree that it is premature to set a schedule for the exchange of final witness lists, prepared testimony, and documents, or to set a date, time, and place of the hearing. The parties jointly propose that consideration of these matters be deferred. *See supra* Statements in response to 16 C.F.R. § 1025.21(a)(5)-(9).

16 C.F.R. § 1025.21(a)(14): “Such other matters as may aid in the efficient presentation or disposition of the proceedings.”

Joint Statement: To aid the Presiding Officer in the orderly disposition of the motion for partial summary decision and motion to dismiss, the parties propose that oral argument be scheduled on the issues raised in the motions as soon as practicable following the completion of briefing. *See supra* Joint Statement in response to 16 C.F.R. § 1025.21(a)(2). The parties also propose that the Presiding Officer enter an Order, in the form of the attached Proposed Order, allowing for email service and email filing of papers in this action.

Dated: October 12, 2021

s/John C. Eustice

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 12, 2021, a true and correct copy of the foregoing document was served in the following manner:

Original and three copies by U.S. Mail, first-class and postage prepaid, and one copy by electronic mail, to the Secretary of the U.S. Consumer Product Safety Commission:

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One copy by U.S. Mail, first-class and postage prepaid, and one copy by electronic mail, to the Presiding Officer:

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U.S. Securities and Exchange Commission
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One copy by U.S. Mail, first-class and postage prepaid, and one copy by electronic mail to Complaint Counsel:

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