

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of

Amazon.com, Inc.

CPSC Docket No. 21-2

October 19, 2021

Order Following Prehearing Conference

I held a prehearing conference via video teleconference in this proceeding on October 15, 2021; counsel for the Consumer Product Safety Commission and Respondent Amazon.com, Inc. participated. Before the conference, the parties submitted a joint letter covering the issues listed in 16 C.F.R. § 1025.21(a)(1) through (14), discovery, deadlines, and settlement attempts. The parties also jointly moved to modify the service and filing rules in this proceeding so that service may be accomplished through email to all counsel of record and filing may be accomplished through email to all counsel of record and the Secretary of the Consumer Product Safety Commission. I have confirmed this procedure will not burden the Secretary and will order the requested procedures below.

The following issues were discussed in the parties' joint letter and the prehearing conference. Respondent's counsel confirmed that Respondent's answer responded to the complaint that was served on Respondent, and will confer with complaint counsel regarding the discrepancy between the numbering in the served complaint and the complaint published in the Federal Register at 86 Fed. Reg. 38,450 (July 21, 2021). The parties agreed that discovery should be deferred until the close of the currently anticipated motions. Complaint counsel filed a motion for partial summary decision on October 13, 2021, and the schedule for further filings was agreed by both parties: Respondent will file a combined motion to dismiss and opposition to complaint counsel's motion by November 2, 2021; complaint counsel may reply to Respondent's motion/opposition by November 22, 2021; and Respondent's reply in support of its motion is due December 7, 2021.

Respondent's opposition to complaint counsel's summary decision motion should include a separate document responding to complaint counsel's statement of material facts. This document should address each numbered paragraph in complaint counsel's statement and include citations to evidence establishing the existence of a genuine question of material fact or agreeing that the asserted fact is undisputed. Any material facts Respondent does not specifically dispute will be deemed admitted. Respondent's responsive

statement may contain, in addition, short numbered paragraphs as to which Respondent contends there is no genuine issue. These additional paragraphs must also be supported by specific citations to evidence. Complaint counsel may file a reply statement that addresses Respondent's statement, with specific citations to evidence as appropriate. The same rules that apply to Respondent's opposition will apply to complaint counsel's reply.

Per the parties' joint request, I will hold an argument on the motions on Thursday, December 16, 2021, at 1 p.m. Eastern Time. The location for this argument and whether it will be in-person or by video conference will be determined prior to the argument. I anticipate ruling on both parties' motions together, likely shortly after the oral argument.

Both parties agreed that discovery should not begin until disposition of filed or anticipated motions. Because I intend to rule on all motions at the same time, opening discovery at that time would fulfil both parties' wishes. Both parties confirmed 150 days of fact discovery is likely sufficient. Given the unavoidable delay associated with my appointment as Presiding Officer, and the parties' resource-conserving joint proposal to delay the start of discovery until after I rule on the dismissal and summary decision motions, I find good cause to extend the 150-day deadline for completion of discovery. *See* 16 C.F.R. § 1025.31(g).

The parties should meet and confer and, by November 12, 2021, should submit a letter jointly proposing a schedule for discovery and a hearing, should that be necessary. In the same letter, the parties should state whether they believe oral argument should be in person or by video.

In the event that I do not grant Respondent's forthcoming motion to dismiss, I laid out the following procedure, to which both parties agreed, regarding resolution of disputes:

1. Before asking me to resolve a dispute, the parties should try in good faith to resolve it.
2. If the parties cannot resolve the dispute, they should email my office at alj@sec.gov. The email should attach a one-page document explaining the dispute. The document should not include argument or precedent. In the email, the parties must certify that they have tried in good faith to resolve the dispute. The email should confirm when both parties' counsel are available over the next 3 business days; my office will try to set up a video or phone conference to attempt to resolve the dispute.
3. If the conference doesn't resolve the issue, written motions will follow.

4. If the dispute is about a deposition, email my office and if I am available, we will promptly try to resolve the matter on the phone.

Both parties agreed that they will identify matters of which I may take official notice under 16 C.F.R. § 1025.43(d)(1). The parties were not, however, able to agree on the applicability of Federal Rules of Civil Procedure 26, 30, 31, and 33, and the work-product privilege, to this proceeding. Counsel confirmed they will further confer to try to reach agreement. If the parties cannot reach an agreement, they should submit letters, limited to five pages, setting out their positions by December 13, 2021.

I have attached, as Exhibit A to this order, the letter I received from the Acting Chairman of the Consumer Product Safety Commission appointing me as Presiding Officer in this proceeding.

Hearing Guidelines

I will follow the general guidelines described below during this proceeding. The parties should review what follows *and promptly raise any objections they may have to the application of these guidelines in this matter.*

1. *Subpoenas.* Because third-party subpoenas must be issued by the Commission, applications for third-party subpoenas should be submitted as far in advance as possible.¹ See 16 C.F.R. § 1025.38. A motion to quash a subpoena is due within five days after the person receives the subpoena, and answers to such motions are due within five days after service of the motion. The Commission will rule on motions to quash or limit subpoenas.
2. *Exhibits.* The parties should confer and attempt to stipulate to the admissibility of exhibits. To avoid duplication of exhibits, the parties should identify joint exhibits. Exhibits are not filed with the Secretary of the Commission until the close of the hearing at my instruction.
3. *Exhibit lists.* A comprehensive exhibit list prevents other parties from being surprised in the middle of the hearing. Given this fact, exhibit lists shall be exchanged among the parties and should include all documents that a party expects to use in the hearing for any purpose. This includes documents that are relevant only for impeachment purposes or which are presumptively inadmissible. The parties should serve their opponents with any amendments to their individual exhibit list. Because I rely on the parties' exhibit lists, the parties should submit electronic copies of their

¹ Because filings will be submitted electronically, the parties need not submit subpoena requests "in triplicate." 16 C.F.R. § 1025.38(c).

final exhibit lists to my office and provide me with a paper copy of their final exhibit lists at the beginning of an in-person hearing. There is no need in the interim to submit amendments to my office. Following the hearing, I will issue a separate order directing the parties to file a list of all exhibits, admitted and offered but not admitted, together with citations to the record indicating when each exhibit was admitted.

4. *Hearing schedule.* The first day of the proceeding will begin at 9:30 a.m. Unless circumstances require a different schedule, we will begin each subsequent day at 9:00 a.m. Each day of the proceeding should last until at least 5:15 p.m. I generally take one break in the morning, lasting about fifteen minutes, and at least one break in the afternoon. I generally break for lunch between noon and 12:30 p.m., for about one hour.
5. *Hearing issues—Examination.*
 - a. In general, complaint counsel presents its case first because it has the burden of proof. Respondent then presents its case. If necessary, the parties may agree to proceed in some other order and may take witnesses out of order.
 - b. If complaint counsel calls a non-party witness that Respondent also wishes to call as a witness, Respondent should cross-examine the witness as if Respondent were calling the witness in its own case. This means that Respondent's cross-examination of the witness in this circumstance may exceed the scope of what was covered by complaint counsel's direct examination of that same witness. This will avoid the need to recall a witness just so the witness can testify for Respondent's case.
 - c. In general, cross-examination may be conducted by leading questions, even as to complaint counsel's witnesses that Respondent wishes to call in its own case. Counsel may not lead his or her client, however. As a result, if employees of Respondent are called as witnesses in complaint counsel's case, Respondent's counsel may not ask leading questions on cross-examination. Similarly, if a Commission employee is called as a witness for Respondent, complaint counsel may not ask leading questions on cross-examination.
 - d. Avoid leading questions on direct examination. Leading questions during direct examination of a non-hostile witness are objectionable. Repeatedly having to rephrase leading questions slows down the hearing.

6. *Briefs.* Prehearing and post-hearing briefs are limited to 10,000 words. Although parties may seek leave to exceed this limit through a motion filed seven days in advance of the relevant briefing deadline, such motions will not be viewed favorably. To enhance the readability of pleadings, I urge counsel to limit the use of acronyms to those that are widely known.² For the same reason, I ask that counsel use the same font size in footnotes as that used in the body of a pleading.

Order

I adopt the preceding hearing guidelines and schedule. I also grant the parties' joint request for electronic service and filing and ORDER that service of any document in this proceeding (except service of a document to a nonparty) may be accomplished by email to all counsel of record and that the filing of any document in this proceeding may be accomplished by email to all counsel of record, to my office at alj@sec.gov, and to the Secretary of the Commission.

/s/ James E. Grimes
Administrative Law Judge

² See Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 120–22 (2008); see also *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1320–21 (D.C. Cir. 2014) (Silberman, J., concurring).

Exhibit A



U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA MD 20814

Acting Chairman Robert S. Adler

August 23, 2021

VIA CERTIFIED MAIL

and EMAIL: [REDACTED]

The Honorable Judge James E. Grimes
Acting Chief Administrative Law Judge
U.S. Securities and Exchange Commission (SEC)
100 F Street, NE, Suite 2585
Washington, DC 20549

Re: Case Assignment Letter for OPM Loan Number 2022-20, *In the Matter of Amazon.com, Inc.*,
CPSC Docket No. 21-2.

Dear Judge Grimes:

This letter confirms that the Office of the Personnel Management has approved the U.S. Consumer Product Safety Commission's ("Commission") request for the loan of an Administrative Law Judge ("ALJ") from the U.S. Securities and Exchange Commission ("SEC"). The Commission requested the ALJ for administrative case, *In the Matter of Amazon.com, Inc.*, *CPSC Docket No. 21-2*.

I hereby approve the loan of your services to the Commission under terms and conditions prescribed in 5 U.S.C. § 3344 and 5 C.F.R. § 930.208, and I approve your appointment as my own action under the Constitution per my authority under Section 4(f)(1) of the Consumer Product Safety Act, 15 U.S.C. § 2053 (f)(1).

The complaint initiating this proceeding was issued July 14, 2021 and was published in the *Federal Register* on July 21, 2021. The complaint seeks public notification and remedial action pursuant to 15 U.S.C. § 2064(c) and (d) of the Consumer Product Safety Act. The Commission's Complaint in the matter and the Commission's Rules of Practice for Adjudicative Proceedings can be found at the following links¹:

https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/001-In-re-Amazon-com-Inc_0.pdf?dauedagmK_edg7bMv0UdbIUzb0J4Sijh

<https://www.ecfr.gov/cgi-bin/text-idx?SID=20ea130cfd2b9f2087e263e127f49a3c&mc=true&node=pt16.2.1025&rgn=div5>

¹ Pleadings filed thus far can be found on the Commission's website at [Recall Lawsuits: Adjudicative Proceedings | CPSC.gov](https://www.cpsc.gov/Recall/Lawsuits/Adjudicative-Proceedings)

Note that part of 1025 requires that “[e]xcept when the presiding officer determines that unusual circumstances would render it impractical or valueless a prehearing conference shall be held in person or by conference telephone call within fifty (50) days after publication of the complaint in the *Federal Register* and upon ten (10) days’ notice to all parties and participants.” 16 C.F.R. § 1025.21(a).

The Commission will enter into an inter-agency agreement with SEC’s ALJ Office for your services in this matter. Nina DiPadova, Attorney Advisor in the Office of the General Counsel, Division of the Secretariat, will be the contracting officer for this matter. Please contact Ms. DiPadova at [REDACTED] and Secretary of the Commission Alberta Mills at [REDACTED] concerning any other procedural matter.

The Commission appreciates the assistance of your office and the cooperation of the SEC in making your services available to our agency.

Sincerely,



Robert S. Adler
Acting Chairman

cc:

Diane Hobbs: [REDACTED]
Program Manager
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