

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

In the Matter of Amazon.com, Inc.,

Respondent.

CPSC Docket No. 21-2

Hon. Jason S. Patil
Presiding Officer

**JOINT STATEMENT REGARDING
LIVE TESTIMONY AND ORAL ARGUMENT**

Pursuant to the Presiding Officer’s Order of February 8, 2023 (Dkt. No. 97), Complaint Counsel and Respondent Amazon.com, Inc. (“Amazon”) submit this Joint Statement.

- (1) **Whether the parties elect to forgo presentation of live testimony on the issues raised by the pending summary decision motions. In the event that either party requests to present live testimony of a specific witness, it shall provide a concise summary, supported by citation to authority, of the requesting party’s justification for such a request and any response thereto.**

Joint Statement: The parties do not plan to seek live testimony for the resolution of the pending cross motions for summary decision. *See* 16 C.F.R. § 1025.25(c) (“A Summary Decision and Order shall be granted if the pleadings and any depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a Summary Decision and Order as a matter of law.”).

Amazon Statement: In the event that the Presiding Officer concludes that genuine issues of material fact remain for any of the issues raised by the pending summary decision motions, Amazon requests that live expert testimony be permitted. *See id.* § 1025.44(b) (“Upon a showing of good cause, the party sponsoring the expert witness may be permitted to amplify the written direct testimony during the hearing.”).

Should such a future hearing occur, there is good cause to permit the parties to offer live testimony from their experts regarding any issues that remain pending. Amazon’s expert, Joseph Mohorovic, is a former CPSC Commissioner with “peculiar knowledge” regarding the recall-related notice and remedy practices and procedures central to the remaining issues in this case. 16 C.F.R. § 1025.44(a); *see also* Fed. R. Evid. 702.

Commissioner Mohorovic’s live testimony at a hearing would provide the Presiding Officer with an opportunity to ask clarifying questions regarding any remaining issues in this case, including the Commission’s views regarding the effectiveness of direct,

electronic—rather than indirect—hazard notices, the unworkability of the concept of functionally equivalent products, the history of Commission practices regarding recall-related corrective actions, and the product hazard-specific contexts in which the Commission has required product disposal or returns. Accordingly, good cause exists to allow expert testimony that amplifies the written testimony already submitted in the event of a hearing. *See* 16 C.F.R. § 1025.44(b). *See also* Dkt. No. 76, Declaration of Joshua González In Support of Amazon’s Motion for Summary Decision, Ex. 62 (Mohorovic Expert Report).

The Commission has recognized the value of live expert testimony, relying on it in prior mandatory recall proceedings. *See, e.g., Zen Magnets, LLC* (CPSC Oct. 26, 2017) at 33; *Dye and Dye* (CPSC Jul. 17, 1991), 1989 WL 435534 at *6-7.

CPSC Statement: It is premature to determine whether there is “good cause” to allow in-court expert testimony at any hearing on the merits of this matter. The parties would need to know the issues remaining to be decided, if any, following this Court’s disposition of their respective Motions for Summary Decision before proposing the form or content of any evidence pertinent to those issues and any objections thereto.

Moreover, to the extent that Amazon is implying that Mr. Mohorovic’s testimony is needed to identify and order the appropriate remedies in this case should it proceed to trial, Amazon is mistaken. As Complaint Counsel makes clear in its Response to Amazon’s Statement of Undisputed Material Facts, as well as in its Opposition to Amazon’s Motion to Exclude the Rebuttal Expert Report and Testimony of Ms. Sharon R. White, Mr. Mohorovic’s opinions are irrelevant and, in some cases, unsupported. As such, should the matter proceed beyond dispositive motions, Complaint Counsel would dispute that there is “good cause” for his in-court testimony at a hearing.

Therefore, Complaint Counsel opposes Amazon’s premature offering of “good cause” for the in-court expert testimony of Joseph Mohorovic and reserves the right to address the form and content of any evidence to be provided at a hearing of this matter, if necessary, following the Court’s decision on the parties’ Motions for Summary Decision.

(2) Whether the parties elect to forgo oral argument on the pending summary decision motions or the parties request to present oral argument. This election should be made jointly.

Joint Statement: The parties agree that oral argument on the pending Motions for Summary Decision may aid the Court in rendering a decision.

(3) If applicable, jointly proposed dates and preference for in-person or remote testimony or argument.

Joint Statement: The parties prefer an in-person argument.

Amazon Statement: The pending cross-motions for summary decision present complex issues, including the scope of CPSC authority over functionally equivalent

products, the scope of the CPSC’s public interest mandate, and the appropriateness of additional remedial action with respect to three different sets of Subject Products. The parties have submitted a combined 281 pages of briefs, supported by 175 total exhibits. In recognition of the need for thorough consideration of the issues in this proceeding, discovery deadlines were extended, *see* Dkt. No. 65, and additional briefing was ordered on two separate occasions, *see* Dkt. Nos. 59, 83. Amazon also agreed to a CPSC request to extend the agency’s rebuttal expert report deadline by four weeks to accommodate witness availability. Dkt. No. 40.

Amazon proposes that the Presiding Officer use his “broad discretion to . . . alter time limitations . . . as required by the complexity of the particular matter,” 16 C.F.R. § 1025.1, and set an oral argument date that provides sufficient time for the parties to fully prepare. *See also* 16 C.F.R. 1025.15(c) (“For good cause shown, the Presiding Officer may extend any time limit prescribed or allowed by these rules or by order of the Commission or the Presiding Officer.”). The dates Amazon proposes are consistent with past CPSC mandatory recall adjudications. *See, e.g., Zen Magnets, LLC* (CPSC Mar. 30, 2017), Order Scheduling Oral Argument (oral argument set 11 months after completion of briefing, and two months after the date of scheduling order).

To provide adequate time to prepare and avoid scheduling conflicts in other matters, including but not limited to the March dates proposed by the CPSC, Amazon proposes the following dates for oral argument on the cross-motions for summary decision: last week of April or May 9, 10, or 11.

CPSC Statement: Complaint Counsel opposes Amazon’s dates on the grounds that they run contrary to the CPSC’s Rules of Adjudicative Practice, which instruct the Presiding Officer to move adjudication forward “in a timely manner.” 16 C.F.R. § 1025.1. The parties fully completed briefing the cross-Motions for Summary Decision in November 2022, three months ago. Delaying oral argument on the Summary Decision Motions by nearly another three months as proposed by Amazon would run contrary to the rule as set forth at 16 C.F.R. § 1025.1.

Accordingly, Complaint Counsel proposes the following dates for oral argument on the Motions for Summary Decision: March 8, 9, 10, 14, 15, or 16. Complaint Counsel is willing to work with Amazon counsel and the Court in identifying additional available dates in March for oral argument.

In the event that the motions for summary decision do not result in an Initial Decision, the parties jointly request a prehearing conference to discuss preparation and scheduling for a hearing. *See* 16 C.F.R. § 1025.21.

Dated: February 22, 2023

Respectfully submitted,

s/John C. Eustice _____

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CERTIFICATE OF SERVICE

I certify that, on February 22, 2023, a true and correct copy of the foregoing document was, pursuant to the Order Following Prehearing Conference entered by the Presiding Officer on October 19, 2021:

- filed by email to the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills, at amills@cpsc.gov, with a copy to the Presiding Officer at alj@sec.gov and to all counsel of record; and
- served to Complaint Counsel by email at jeustice@cpsc.gov, lwolf@cpsc.gov, and sanand@cpsc.gov.

s/ Sarah L. Wilson
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