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FILED: August 26, 2024

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 23-1661
(8:21-cv-02058-TDC)

JAKE'S FIREWORKS INC.

Plaintiff – Appellant

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION; ALEXANDER HOEHN-SARIC, in his official capacity as Chairman of the CPSC

Defendants – Appellees

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

Filed: 06/26/2024

PUBLISHED

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No. 23-1661

JAKE'S FIREWORKS INC.,

Plaintiff – Appellant,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION; ALEXANDER HOEHN-SARIC, in his official capacity as Chairman of the CPSC,

Defendants – Appellees.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Theodore D. Chuang, District Judge. (8:21-cv-02058-TDC)

Argued: May 8, 2024 Decided: June 26, 2024

Before DIAZ, Chief Judge, WILKINSON, Circuit Judge, and MOTZ, Senior Circuit Judge.

Affirmed by published opinion. Judge Motz wrote the opinion, in which Chief Judge Diaz and Judge Wilkinson joined.

ARGUED: Oliver J. Dunford, PACIFIC LEGAL FOUNDATION, Palm Beach Gardens, Florida, for Appellant. Daniel Tenny, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Damien M. Schiff, Sacramento, California, Molly E. Nixon, PACIFIC LEGAL FOUNDATION, Arlington, Virginia; Timothy L. Mullin, Jr., Dwight W. Stone II, MILES & STOCKBRIDGE PC, Baltimore, Maryland, for Appellant. Brian M. Boynton, Principal Deputy Assistant Attorney General, Cynthia A. Barmore, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Erek L. Barron, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellees.

DIANA GRIBBON MOTZ, Senior Circuit Judge:

Jake's Fireworks Inc., a large importer and distributer of consumer fireworks, seeks judicial review of several warning notices it received from the U.S. Consumer Product Safety Commission. The district court dismissed the complaint after determining that the notices do not constitute final agency actions under the Administrative Procedure Act. For the reasons explained below, we affirm.

I.

Congress created the Consumer Product Safety Commission ("the Commission" or "the agency") in 1972 "to protect the public against unreasonable risks of injury associated with consumer products." *See* 15

U.S.C. §§ 2051(b)(1), 2053(a). The Commission is composed of up to five Commissioners, each appointed by the President and confirmed by the Senate. *Id.* § 2053(a). The Commission regulates consumer fireworks under the Federal Hazardous Substances Act and the Consumer Product Safety Act. *See id.* §§ 2079, 1261(q)(1)(B), 1263(a); *id.* § 2068(a)(1), (2)(D); *see also* 16 C.F.R. pt. 1507 (safety regulations for fireworks). The staff of the Commission includes the Office of Compliance and Field Operations ("Compliance Office"), which aids in investigatory and enforcement matters and provides guidance to industry on complying with product safety rules. *See* 16 C.F.R. § 1000.21.

Jake's Fireworks Inc. ("Jake's Fireworks") is a large importer and distributer of consumer fireworks. From 2014 to 2018, the Commission's staff sampled fireworks imported by Jake's Fireworks. About one-third of those samples indicated that the fireworks were dangerously overloaded with explosive material, rendering them "banned hazardous substances" under the agency's regulations. *See* 16 C.F.R § 1500.17(a)(3); *see also* Govt. Br. at 5, 11.

The Commission's Compliance Office accordingly sent Jake's Fireworks several "Notice[s] of Non-Compliance." *E.g.*, J.A. 102.[1] These Notices, though worded slightly differently, all informed Jake's Fireworks of test results indicating that the fireworks were banned hazardous substances. The Notices then stated that "the staff requests that the distribution of the sampled lots not take place and that the existing inventory be destroyed." *E.g.*, J.A. 165. Each Notice

[1] Citations to "J.A. __" refer to the Joint Appendix filed by the parties in this appeal.

also set forth a procedure for documenting the destruction of the fireworks if Jake's Fireworks "chose to destroy the goods" in question, and provided a 90-day deadline by which to do so. *E.g.*, J.A. 103. The Notices concluded by warning of potential statutory penalties, including civil fines and criminal liability, for distributing and selling banned hazardous substances.

Jake's Fireworks, not pleased with this advice, has twice sought to obtain judicial review of it. First, in 2019, Jake's Fireworks sued the Commission in federal court, seeking injunctive and declaratory relief from the agency's enforcement of its fireworks regulations via the Notices. The district court determined that the Notices did not rise to the level of reviewable final agency actions under the Administrative Procedure Act because the Notices did not consummate the Commission's decisionmaking process. *See Jake's Fireworks Inc. v. U.S. Consumer Prod. Safety Comm'n*, 498 F. Supp. 3d 792, 806-07 (D. Md. 2020). In reaching this conclusion, the court relied on two rationales. First, the court noted that Jake's Fireworks could request an informal hearing with the Compliance Office to seek reconsideration of the Notices. *Id.* at 803, 806. Second, the court determined that the Commission, not its Compliance Office, had final decisionmaking authority on whether to pursue legal enforcement. *Id.* at 803. Because the Notices thus represented only the "intermediate ruling[s] of a subordinate official," the court dismissed the lawsuit without prejudice for lack of jurisdiction. *Id.* at 803, 807.

Following the dismissal of its first lawsuit, Jake's Fireworks in November 2020 requested an informal hearing with the Compliance Office to contest the No-

tices. The Compliance Office declined to hold a hearing or to revisit its findings, and advised Jake's Fireworks that the Notices expressed only "an initial determination in the Commission's process." J.A. 318. The Compliance Office also stated that the Commission had made no final determination on whether the products violated the prohibition of dangerously overloaded fireworks at 16 C.F.R. § 1500.17(a)(3).

In response, Jake's Fireworks again filed suit—this action—once more challenging the Commission's supposed enforcement of its fireworks regulations via the Notices, and claiming it had been unable to sell more than $2.6 million dollars' worth of fireworks for fear of penalties. The district court again determined that the Notices did not constitute reviewable final agency actions because they "only request voluntary compliance" and because the Compliance Office could not independently pursue enforcement. *Jake's Fireworks Inc. v. U.S. Consumer Prod. Safety Comm'n*, No. 8:21-cv-02058-TDC, 2023 WL 3058845, at *8 (D. Md. Apr. 24, 2023). The court dismissed the lawsuit without prejudice. *Id.* at *9. Jake's Fireworks's timely appeal of the dismissal of its second lawsuit is now before us.

II.

The only question presented is whether the Notices constitute reviewable final agency actions.

A.

The Administrative Procedure Act ("APA") waives the federal government's sovereign immunity "to permit judicial review of only 'final agency action[s].'" *Nat'l Veterans Legal Servs. Program v. U.S. Dep't of Def.*, 990 F.3d 834, 839 (4th Cir. 2021) (quoting 5

U.S.C. § 704). Because "sovereign immunity is jurisdictional in nature," finality under the APA is a jurisdictional requirement. *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 430 (4th Cir. 2019) (quoting *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)) (cleaned up). We thus review the district court's finality determination de novo. *Id.*

An agency action must satisfy two conditions in order to be deemed "final" under the APA: "First, the action must mark the *consummation* of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)) (emphasis added). An action must meet both prongs of the *Bennett* test to be final. *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432 (4th Cir. 2010).

We "first look" to the statutes and regulations that govern the agency action at issue to determine whether it is final. *See, e.g.*, *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 858 (4th Cir. 2002). When examining the consummation prong of *Bennett*, "[t]he decisionmaking processes set out in an agency's governing statutes and regulations are key to determining whether an action is properly attributable to the agency itself and represents the culmination of that agency's consideration of an issue." *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018). An action that is "informal, or only the ruling of a subordinate official, or tentative" ordinarily does not conclude an agency's decisionmaking process. *Id.*

(quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967)).

The Compliance Office's Notices of Noncompliance are not final—they do not "mark the consummation of the agency's decisionmaking process." *See Hawkes*, 578 U.S. at 597 (cleaned up). It is the Commission itself, not its Compliance Office, that makes final determinations on whether goods are banned hazardous substances under the Federal Hazardous Substances Act and the Consumer Product Safety Act. *See* 15 U.S.C. §§ 1274(a)–(b), 2064(c)–(d). Only the Commission itself may vote to authorize an administrative complaint seeking to compel a firm to take corrective action. 16 C.F.R. § 1025.11(a). Only the Commission itself may refer matters to the Department of Justice for potential civil or criminal enforcement in court. *See* 15 U.S.C. § 2076(b)(7). Furthermore, the Commission takes these actions in consultation with the Office of the General Counsel, *see* 16 C.F.R. § 1000.14, and typically only after providing regulated parties with notice and an opportunity to be heard, 15 U.S.C. §§ 1266, 1274(e), 2064(f); 16 C.F.R. § 1119.5.

The Commission's regulatory scheme provides its Compliance Office with a role that is subordinate, investigatory, and advisory to the Commission. The Compliance Office's responsibilities include "develop[ing] surveillance strategies and programs designed to assure compliance," "conduct[ing] inspections and in-depth investigations," "identifying and addressing safety hazards in consumer products," and "promoting industry compliance with existing safety rules." 16 C.F.R. § 1000.21. Notices of Noncompliance fit squarely within the Compliance Office's advisory

and investigatory functions. As the agency's Handbook guide explains, a Notice of Noncompliance "informs the firm of the specific product and violation that has occurred; requests that the firm take specific corrective actions[;] . . . and informs the firm of legal actions available to the Commission." U.S. Consumer Prod. Safety Comm'n, *The Regulated Products Handbook* 5 (May 6, 2013) ("Handbook"). Notices of Noncompliance therefore represent the conclusions and advice of agency staff, not of the Commission itself.

Thus the Notices from the Compliance Office hardly constitute the culmination of the Commission's decisionmaking process. For a Notice of Noncompliance does not trigger any of the administrative, civil, or criminal proceedings that the Commission could pursue. If a party ignores a Notice of Noncompliance, "the staff *may request* the Commission approve appropriate legal proceedings, including the issuance of an administrative complaint." *Id.* at 19 (emphasis added). But the power to make a final determination as to whether a violation has occurred and whether to pursue enforcement rests with the Commission itself; its Compliance Office lacks authority to issue binding decisions on behalf of the agency. *See* 15 U.S.C. §§ 1274(a)–(b), 2064(c)–(d). Nor does any statute, regulation, or Handbook language require the Commission to follow the recommendation of its Compliance Office. A Notice of Noncompliance thus constitutes "the ruling of a subordinate official" which, at most, functions "more like a tentative recommendation than a final and binding determination." *See Dalton v. Specter*, 511 U.S. 462, 469-70 (1994) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992)).

Jake's Fireworks nonetheless insists that the Commission has delegated authority to its Compliance Office to issue final determinations on behalf of the agency. But though the Commission *could* delegate this authority to its staff, *see* 15 U.S.C. § 2076(b)(10), the Commission has not done so. In arguing to the contrary, Jake's Fireworks solely relies on 16 C.F.R. § 1000.21, the housekeeping regulation that establishes the Compliance Office's general duties. That provision states that the Compliance Office "conducts compliance and administrative enforcement activities under all administered acts" and "conduct[s] administrative litigation." 16 C.F.R. § 1000.21. The provision lacks any delegation authorizing the Compliance Office to issue final orders binding regulated parties, or to make recommendations that bind the Commission. Rather Section 1000.21 is entirely consistent with the Commission's retention of final decisionmaking authority for itself—the very arrangement that Congress established in the statute. *See* 15 U.S.C. §§ 1274(a)–(b), 2064(c)–(d).

Moreover, the Commission reports that it has made no such delegation to the Compliance Office, either in 16 C.F.R. § 1000.21 or anywhere else. Govt. Br. at 22, 34. We "pay particular attention" to the Commission's views on the meaning of 16 C.F.R. § 1000.21 in light of the agency's obvious expertise in writing and administering its own regulations. *See Vanda Pharm., Inc. v. Ctrs. for Medicare & Medicaid Servs.*, 98 F.4th 483, 491 (4th Cir. 2024) (quoting *County of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 180 (2020)). Given that Jake's Fireworks's position would turn the agency's decisionmaking hierarchy upside down, we find the agency's interpretation far more persuasive. *See id.*

B.

Examination of the language of the Notices confirms that they convey preliminary findings and advice from agency staff rather than a final determination from the Commission itself.[2] The Notices informed Jake's Fireworks that sampling results indicated violations of the agency's fireworks regulations and stated that "*the staff requests*" that Jake's Fireworks destroy the products. *E.g.*, J.A. 165 (emphasis added). Subsequent Notices stated that "*the staff* reiterates its *requests*." *E.g.*, J.A. 187-88 (emphasis added). The Handbook referenced in the Notices explains the advisory nature of the Notices; the Notices do not command any action. Handbook 5-6. Nor has the Compliance Office even recommended that the Commission take enforcement action. Govt. Br. at 24.

Jake's Fireworks argues that the Notices impose an obligation because some of them state that the fireworks "must be destroyed within 90 days from the date of this letter unless an extension of time is requested and approved by" the Compliance Office. J.A. 103. But the same Notice that Jake's Fireworks quotes indicates that these procedures for documenting the destruction of the fireworks apply only if Jake's Fireworks "*chose* to destroy the goods." *Id.* (emphasis added). Other language in the Notice that

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[2] Though we think the language of the Notices is consistent with our conclusion, we are also guided by the process set forth in the Commission's governing statutes and regulations. *Soundboard Ass'n*, 888 F.3d at 1267. Regardless of the language used, it is clear that the Notices are nonfinal because the agency has yet to take the steps required before it can order Jake's Fireworks to take action.

Jake's Fireworks points to—for example, "it is a prohibited act to introduce or deliver . . . or receive in interstate commerce any banned hazardous substance," J.A. 103-04—merely track the general statutory prohibition on selling such substances. *See* 15 U.S.C. §§ 1263(a), (c). In sum, the Commission's Compliance Office simply lacks authority to issue binding final orders on behalf of the Commission itself, or to independently pursue enforcement action, rendering this 90-day deadline advisory.

Indeed, when the Commission itself does issue orders, it says so, stating that they are "final decisions and orders" to perform clearly binding commands. *See, e.g.*, Final Decision and Order, *In re Zen Magnets, LLC*, CPSC Docket No. 12–2, at 1, 54-56 (C.P.S.C. Oct. 26, 2017) (ordering that Zen Magnets "shall cease" from selling certain products). The agency's final orders come from the Commission itself, not agency staff in the Compliance Office, and issue only after the Commissioners have voted to authorize an administrative complaint and an administrative law judge has held a hearing. *See id.* at 1, 4-6, 56. None of that has happened here.

In an attempt to salvage its case, Jake's Fireworks relies on precedents arising from other regulatory contexts, each of which differs markedly from the one before us today. For example, *Sackett v. EPA* concerned a compliance order issued via EPA's authority to enter binding administrative orders under the Clean Water Act. 566 U.S. 120, 123 (2012) (citing 33 U.S.C. § 1319(a)(3)). But here the Compliance Office lacks authority to issue binding orders independently of the Commission and the process set forth in its governing framework. And in *U.S. Army Corps of Engineers v.*

Hawkes Co., the Army Corps's own regulations deemed the jurisdictional determination at issue a "final agency action." 578 U.S. at 598 (quoting 33 C.F.R. § 320.1(a)(6)). Here, in contrast, the Commission's Handbook clarifies the Notices are only advisory. Handbook 5, 19. The Notices also have little in common with legislative rules or final certifications issued by federal and state agencies after notice-and-comment. *See Abbott Labs.*, 387 U.S. at 138; *Sierra Club v. W. Va. Dep't of Env't Prot.*, 64 F.4th 487, 496-98, 500 (4th Cir. 2023).[3]

The Notices at issue here simply do not represent the Commission's last word on this matter. They merely provide preliminary findings and warnings by agency staff, like countless other letters and guides that federal agencies issue throughout the year. The position that Jake's Fireworks advances "would quickly muzzle any informal communications between agencies and their regulated communities—communications that are vital to the smooth operation of both government and business." *See Golden*, 599 F.3d at 432 (quoting *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (Roberts, J.)). If the APA made informal advice like these Notices subject to judicial review, it seems "likely that many

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[3] The out-of-circuit cases on which Jake's Fireworks relies similarly provide it little support. *See Ipsen Biopharm., Inc. v. Azar*, 943 F.3d 953, 956 (D.C. Cir. 2019) (agency did not dispute Bennett's consummation prong); *S.F. Herring Ass'n v. U.S. Dep't of Interior*, 946 F.3d 564, 567-68, 578 (9th Cir. 2019) (warning letters became reviewable once Park Service officers relied on them to order fishermen to stop fishing); *CSI Aviation Servs., Inc. v. U.S. Dep't of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011) (agency warning letter ripe for review when "taken together" with corresponding final exemption order).

voluntary and helpful comments from agency staff would be withheld altogether." *See Sanitary Bd. of Charleston v. Wheeler*, 918 F.3d 324, 338 (4th Cir. 2019). We decline to adopt that view today.[4]

III.

For the reasons set forth above, the judgment of the district court is

AFFIRMED.

[4] Because the Notices do not consummate the agency's decisionmaking process, we need not determine if they have "direct and appreciable legal consequences" under the regulatory scheme. *See Hawkes*, 578 U.S. at 598 (quoting *Bennett*, 520 U.S. at 178).

Filed 04/24/23

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

JAKE'S FIREWORKS INC., Plaintiff, v. UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION and ALEXANDER HOEHN-SARIC, *in his official capacity*, Defendants.	Civil Action No. TDC-21-2058

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that:

1. Defendants' Motion to Dismiss, ECF No. 16, is GRANTED.
2. The case is DISMISSED WITHOUT PREJUDICE.
3. The Clerk shall close the case.

Date: 4/21/2023

s/ Theodore D. Chuang
THEODORE D. CHUANG
United States
District Judge

Filed 04/24/23

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

JAKE'S FIREWORKS INC., Plaintiff, v. UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION and ALEXANDER HOEHN-SARIC, *in his official capacity*, Defendants.	Civil Action No. TDC-21-2058

MEMORANDUM OPINION

For the second time, Plaintiff Jake's Fireworks Inc. ("Jake's Fireworks") has filed a civil action in this Court alleging that the United States Consumer Product Safety Commission and its Chairman (collectively "the CPSC") have applied certain regulations and testing procedures to its "Excalibur" line of fireworks in an arbitrary and capricious manner, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (2018). Jake's Fireworks seeks declaratory and injunctive relief as well as attorney's fees and costs. The CPSC has filed a Motion to Dismiss for lack of subject matter jurisdiction, which is fully briefed. Having reviewed the submitted materials, the Court finds that

no hearing is necessary. *See* D. Md. Local R. 105.6. For the reasons set forth below, Defendants' Motion to Dismiss will be GRANTED.

BACKGROUND

The factual background and procedural history of this dispute prior to October 2020, as well as the relevant legal framework, are set forth in detail in the opinion of the Court in Jake's Fireworks's first civil action against the CPSC, *Jake's Fireworks v. CPSC* ("*Jake's Fireworks I*"), 498 F. Supp. 3d 792 (D. Md. 2020), in which Judge Paul W. Grimm dismissed a nearly identical case for lack of subject matter jurisdiction because there had been no final agency action. *Id.* at 799-800. Judge Grimm's opinion in *Jake's Fireworks I* is incorporated by reference in its entirety, and this Court will therefore only summarize the pre-2020 background and will focus on the events following the issuance of that opinion.

I. Notices of Non-Compliance

Jake's Fireworks is among the largest importers and distributors of consumer fireworks in the United States, with distribution centers in seven states from which it sells fireworks to consumers in over 20 states. Among the consumer fireworks sold by Jake's Fireworks are those classified as "reloadable aerial shell" fireworks, which are shot from a mortar tube or launch tube. Compl. ¶ 19, ECF No. 1. Reloadable aerial shell fireworks are classified as either "Display fireworks," which must be launched by licensed operators, or as "Consumer fireworks," which may be launched by ordinary consumers. *Id.*

At various points from 2014 to 2019, Compliance Officers from the CPSC Office of Compliance and

Field Operations ("OCFO") issued to Jake's Fireworks multiple Notices of Non-Compliance ("Notices"), sometimes referred to by the CPSC as Letters of Advice, which asserted that certain reloadable aerial shell fireworks violated regulations under the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. § 1261(q)(l)(B) (2018), particularly based on the finding from sample testing that they were "intended to produce audible effects" and "the audible effect is produced by a charge of more than 2 grains of pyrotechnic composition." 16 C.F.R. § 1500.17 (2023); Compl. ¶ 66. Jake's Fireworks has responded to the Notices by requesting that the CPSC rescind the Notices based on its position that its reloadable Aerial Shell Fireworks ("the Aerial Shell Fireworks") are not banned hazardous substances because they are not "fireworks devices intended to produce audible effects," 16 C.F.R. § 1500.17(a)(3), and that the CPSC's testing methodology is improper. Though the OCFO staff at one point agreed to re-test certain of the sampled fireworks products and on that basis rescinded some of the relevant Notices, Compl. ¶ 74, the OCFO staff continued to conduct sample tests on the Aerial Shell Fireworks and to issue Notices to Jake's Fireworks.

Pursuant to procedures outlined in the OCFO Regulated Products Handbook ("the Handbook"), Jake's Fireworks made written submissions in support of its position and also received an in-person meeting with OCFO Director Robert Kaye and OCFO staff on December 14, 2017. At the meeting, however, the staff reiterated that they intended to enforce the existing regulations as they understood them. Since the meeting, OCFO has continued to issue Notices. For example, an April 9, 2019 Notice, signed by an OCFO Compliance Officer, stated that based on certain testing,

"the sampled lot is a banned hazardous substance" under FHSA regulations, and that "the staff requests that the distribution of the sampled lots . . . not take place and that the existing inventory be destroyed." 4/9/19 Notice at 3, Compl. Ex. L, ECF No. 1-12. It further outlined certain steps that must be followed, if Jake's Fireworks chose to destroy the inventory, in order to provide proper documentation. The April 9, 2019 Notice also warned Jake's Fireworks that selling a banned hazardous substance would violate the law and subject it to civil penalties and possibly criminal prosecution. Finally, the Notice informed Jake's Fireworks that if it disagrees with the OCFO staff's position, it can follow the procedure in the Handbook to present its views and supporting evidence, and it requested a response on how Jake's Fireworks would respond to the Notice. As a result of the Notices, Jakes's Fireworks asserts that it has not sold the Aerial Shell Fireworks alleged to be banned hazardous substances, which has caused it significant financial harm.

II. *Jake's Fireworks I*

In 2019, Jake's Fireworks filed *Jakes Fireworks I*, alleging that the CPSC's Notices and determinations that the Aerial Shell Fireworks violated the FHSA constituted arbitrary and capricious agency action in violation of the APA and also violated Jake's Fireworks's right to due process of law under the Fifth Amendment to the United States Constitution. *Jake's Fireworks I*, 498 F. Supp. 3d at 800. The CPSC filed a motion to dismiss for lack of subject matter jurisdiction in which it argued that the Notices did not constitute "final agency action" as is required before a plaintiff may file a civil action under the APA. *See* 5 U.S.C.

§ 704.

To determine whether the CPSC's actions constituted final agency action, Judge Grimm applied the two-pronged approach mandated by *Bennett v. Spear*, 520 U.S. 154 (1997), which requires that (1) the action mark the "consummation of the agency's decisionmaking process"; and (2) the action be "one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (citations omitted); *see Jake's Fireworks I*, 498 F. Supp. 3d at 802. As to the first prong, Judge Grimm concluded that the Notices were not the "consummation of the Commission's decision-making process." *Jake's Fireworks I*, 498 F. Supp. 3d at 806. In particular, Judge Grimm found that the Notice at issue was "an intermediate ruling of a subordinate official" who lacked the "independent authority to initiate enforcement action that could expose Jake's Fireworks to civil or criminal penalties without first obtaining the approval of the Commission's Office of the General Counsel." *Id.* at 803. Rather, as noted in the Handbook, if the subject of a Notice "declines to take corrective action, the staff may request the Commission approve appropriate legal proceedings, including the issuance of an administrative complaint, injunctive action, seizure action, or such other action as may be appropriate." *Id.* Judge Grimm noted that although after discussions with the subject of the Notice, the CPSC staff "may request that the Commission . . . approve appropriate legal proceedings and, generally, will provide a written notification before that happens," "[no] enforcement proceedings have been initiated, and the Notice does not indicate in any way that an enforcement action will be pursued by the staff." *Id.* at 804. Judge Grimm further noted that "[w]hile

the process may be nearing its end, there are still steps that Jake's Fireworks may take, such as request a hearing or reconsideration." *Id.* at 806. Because *Bennett* requires that both prongs be satisfied, Judge Grimm concluded that the failure to satisfy the first prong warranted dismissal for lack of subject matter jurisdiction. *Id.* at 806-07.

I. Post-*Jake's Fireworks I* Events

Since *Jake's Fireworks I*, Jake's Fireworks has taken additional steps. In a November 13, 2020 letter to OCFO Director Kaye, Jake's Fireworks requested that OCFO either inform it of what steps it could take to "perfect the informal hearing process," including requesting another meeting, or confirm that Jake's Fireworks had "exhausted [its] administrative appeals and that your determinations expressed in the Notices stand." 11/13/20 Letter at 2-3, Compl. Ex. N, ECF No. 1-14. In a responsive letter dated December 16, 2020, Director Kaye clarified that while the lots of imported fireworks referenced in the Notice were conditionally released to Jake's Fireworks under an "import and entry bond," OCFO staff had never requested that U.S. Customs and Border Protection ("CBP") take any action such as demanding the return of the fireworks, the conditional release periods had all expired, and as a result neither OCFO staff nor CBP could take further action regarding the bonds such as to require the return of the fireworks. 12/16/20 Letter at 1, Compl. Ex. O, ECF No. 1-15. Director Kaye further stated that Notices "are an initial determination in the Commission's process," and that "issuance of a Notice of Non-Compliance by a Compliance Officer does not constitute a final determination by the Commission subject to enforcement in federal court, nor does it

complete the agency's decision-making process." *Id.* at 1-2. Director Kaye noted that Jake's Fireworks could still submit "information bearing upon the samples' compliance with the requirements of 16 C.F.R. § 1500.17(a)(3)." *Id.* He further clarified that in order to take an enforcement action, OCFO staff would have to refer the matter to the CPSC Office of the General Counsel ("OGC"), and that the five-member Commission ("the Commission") would have to approve any recommendation for a referral for an enforcement action. Director Kaye also informed Jake's Fireworks that if an enforcement action were to be taken by the CPSC, whether to seek civil penalties or an injunction, Jake's Fireworks would be notified in writing prior to the commencement of any such enforcement action. Thus, Director Kaye concluded "there has been no final determination by the Commission with respect to the samples identified in the Notices." *Id.* at 3.

In a letter dated January 11, 2021, Jake's Fireworks reiterated its request that Director Kaye confirm that it had exhausted the informal hearing process or, in the alternative, that the CPSC grant Jake's Fireworks an in-person hearing with CPSC staff or confirm that it is free to sell the Aerial Shell Fireworks "without risk of civil or criminal penalties." 1/11/21 Letter at 6, Compl. Ex. P, ECF No. 1-16. Jake's Fireworks also re-stated its arguments on the non-applicability of 16 C.F.R. § 1500.17(a)(3) to the Aerial Shell Fireworks, including by stating that its reloadable Aerial Shell Fireworks are not "intended to create an audible effect." 1/11/21 Letter at 5. Director Kaye responded by sending a letter on February 8, 2021 in which he stated that the request for a hearing was "premature" because the CPSC had "made no final determination regarding Jake's or the samples that were

the subject of the Notices." 2/8/21 Letter at 1, Compl. Ex. Q, ECF No. 1-17.

II. The Complaint

On August 13, 2021, Jake's Fireworks again filed suit to challenge the Notices based on its position that the agency action is now final. Jake's Fireworks asserts three counts of violations of the APA based on alleged arbitrary and capricious agency actions arising from the Notices, including (1) the CPSC's application of 16 C.F.R. § 1500.17(a)(3) to deem the Aerial Shell Fireworks to be banned hazardous substances under the FHSA; (2) the CPSC's imposition of a labeling requirement pursuant to 16 C.F.R. § 1500.14(b)(7); and (3) the CPSC's use of a particular test to assess fireworks' compliance with the regulations. The Notices at issue, as attached to the Complaint are those dated August 19, 2014; September 18, 2018; December 20, 2018; and April 9, 2019. Compl. Exs. C, E, K, L, ECF Nos. 1-3, 1-5, 1-11, 1-12. Jake's Fireworks seeks declaratory and injunctive relief to prevent CPSC from applying 16 C.F.R. § 1500.17(a)(3) and 16 C.F.R. § 1500.14(b)(7) to its Aerial Shell Fireworks.

In the Complaint, Jake's Fireworks alleges that Director Kaye's letters of December 16, 2020 and February 8, 2021, along with the earlier Notices, demonstrate that the CPSC has taken final agency action on the issues underlying the Complaint. Jake's Fireworks argues that these communications demonstrate that the CPSC's decision-making process has in fact been consummated, and that the failure to acknowledge that it is complete is a "strategy to evade judicial review permanently while prohibiting Jake's [Fireworks] from selling its lawful products." Compl. ¶ 91.

As a result, Jake's Fireworks faces "clear legal jeopardy" and is deprived "of the ability to avail itself of significant business opportunities with respect to the affected products." Compl. ¶ 89.

DISCUSSION

In its Motion to Dismiss, the CPSC alleges that this case should be dismissed for lack of subject matter jurisdiction because (1) Jake's Fireworks lacks standing; (2) any agency action is not final and is therefore unreviewable; and (3) the matter is not ripe.

I. Legal Standard

Federal Rule of Civil Procedure 12(b)(1) allows a defendant to move for dismissal for lack of subject matter jurisdiction. When a defendant asserts that the plaintiff has failed to allege facts sufficient to establish subject matter jurisdiction, the allegations in the complaint are assumed to be true under the same standard as in a Rule 12(b)(6) motion, and "the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). When a defendant asserts that facts outside of the complaint deprive the court of jurisdiction, the Court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Velasco v. Gov't of Indonesia*, 370 F.3d. 392, 398 (4th Cir. 2004); *Kerns*, 585 F.3d at 192. A court should grant a Rule 12(b)(1) motion based on a factual challenge to subject matter jurisdiction "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Evans v. B.F. Perkins Co., Div. of Standex Int'l Corp.*, 166 F.3d 642, 647 (4th Cir. 1991) (quoting *Richmond, Fredericksburg &*

Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991)). It is the plaintiff's burden to show that subject matter jurisdiction exists. *Evans*, 166 F.3d at 647.

II. The Regulatory Scheme

Before considering the specific arguments in the Motion, the Court first identifies the statutory and regulatory framework at issue. "The decisionmaking processes set out in an agency's governing statutes and regulations are key to determining whether an action is properly attributable to the agency and represents the culmination of that agency's consideration of an issue." *Soundboard Ass'n v. Fed. Trade Comm'n*, 888 F.3d 1261, 1267 (D.C. Cir. 2018).

The CPSC and CBP, a component agency of the United States Department of Homeland Security, jointly operate a monitoring program for imported goods under which they have authority to examine samples of an imported product, determine if it is a banned hazardous substance under the FHSA, and then order any such product destroyed or exported back out of the United States. 15 U.S.C. § 2066(h); §§ 1273(a), (b). Under this system, imported goods subject to examination may be conditionally released to the importer on a bond pending a decision on whether the product at issue constitutes a banned hazardous substance. 15 U.S.C. § 1273(b). Pursuant to the bond, the importer agrees that conditionally released imported product must be returned to CBP if a determination is made that the product fails to comply with laws such as the FHSA and CBP makes a demand for redelivery of the product within 30 or 60 days after the initial release of the product. 19 C.F.R. § 113.62(d). At that point, CBP may order that the

product be destroyed, that it be modified if that would bring the product into compliance with the FHSA, or, upon application of the product owner or importer, that it may be exported back out of the United States. 15 U.S.C. §§ 2066(c), (e). Before such action is taken, the owner is notified in writing that the product is subject to refusal of admission, and there may be an informal hearing on the product's admissibility or on whether modification could bring the product into compliance with the FHSA. 16 C.F.R. § 1500.268. If, at the conclusion of this process, the owner does not destroy the product, the owner is liable for the costs of destruction by the United States government. 15 U.S.C. § 2066(f).

Because conditional release bonds expire within 30 to 60 days, 19 C.F.R. § 113.62(d), CBP must make a determination on the admissibility of the product within that time period. After the expiration of the conditional release bond, the product may be subject to "liquidation" by CBP in that any duties are finally computed and the product enters interstate commerce. 19 C.F.R. § 159.1. After liquidation, CBP may not demand the return of product, even if the product was previously subject to a conditional release bond. 19 C.F.R. § 141.113(h) (establishing the time limitation on demands for return to CBP custody); *id.* § 141.113(d) (authorizing CBP to demand the return of unliquidated products to CBP custody). With limited exceptions not relevant here, all imported products are deemed liquidated by operation of law one year after the date of entry to the United States. 19 C.F.R. § 159.11. At that point, CBP's border authority to order imported products destroyed or exported out of the United States on the basis that they violate the FHSA ends. *Id.* § 141.113(h).

After the product is deemed to have cleared the border and entered interstate commerce, a different regime applies based on the CPSC's authority to enforce the FHSA as to products in domestic commerce. If after importation the product is still believed to be a banned hazardous substance, the CPSC may order that the seller give notice to consumers that the product is hazardous; that the seller make modifications to bring the product into compliance; or that the seller replace or refund the banned hazardous product. 15 U.S.C. § 1274(a), (b). Those remedies must be ordered by the Commission and only after notice and the opportunity for a formal hearing on the record. 15 U.S.C. § 1274(e); 16 C.F.R. § 1025.1 (providing that remedies under 15 U.S.C. § 1274 "are required by statute to be determined on the record after opportunity for public hearing").

Alternatively, the CPSC may seek seizure of the product, civil penalties, or injunctive relief through an enforcement action in federal court. 15 U.S.C. §§ 1264(c), 1265, 1267. To pursue such an action, OCFO must make a recommendation as to what specific enforcement action should be sought; OCFO itself does not carry out mandatory enforcement actions or proceedings in federal court. 16 C.F.R. § 1000.21. Any enforcement action for civil penalties in federal court is subject to a review by OGC and Commission approval before the commencement of the action. 15 U.S.C. § 2076(b)(7)(A); 16 C.F.R. § 1000.14. Before the CPSC seeks a civil penalty, the product owner must be notified in writing and is entitled to submit evidence and arguments against the imposition of a civil penalty and the particular penalty amount. 16 C.F.R. § 1119.5. Finally, the Commission, advised by OGC,

may refer the matter to the U.S. Department of Justice ("DOJ") for criminal investigation or prosecution. 15 U.S.C. § 1264(a), 1266, 2076(b)(7)(B); 16 C.F.R. § 1000.14. By statute, the CPSC must provide "appropriate" notice and an opportunity to present oral or written information before it reports the violation to DOJ for prosecution. 15 U.S.C. § 1266.

Here, the Aerial Shell Fireworks were subject to a 60-day bond. Notice of Conditional Release at 1, Compl. Ex. A, ECF No. 1-1; 19 C.F.R. § 113.62(d). As noted by Director Kaye in his December 16, 2020 letter, CBP has not directed that Jake's Fireworks destroy or export the Aerial Shell Fireworks out of the country, and the bonds relating to the fireworks at issue in the Notices have expired, as has period of time to CBP to direct such action. 12/16/20 Letter at 1. Accordingly, the CPSC's issuance of the Notices are properly construed as pursuant to the CPSC's domestic authority as outlined above.

III. Standing

As an initial matter, the CPSC argues that Jake's Fireworks lacks standing to seek injunctive relief because it is not under threat of an injury in fact based on the Notices. Because Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies," plaintiffs in federal civil actions must demonstrate standing to assert their claims. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum" requirements of standing consist of three elements: (1) the plaintiff must have suffered an "injury in fact"; (2) the injury must be fairly traceable to the actions of the defendant; and (3) it must be "likely" that the injury will be

"redressed by a favorable decision." *Id.* at 560-61 (citations omitted). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). In the present case, only the first two prongs are at issue.

Jake's Fireworks has successfully alleged an injury in fact traceable to the Notices. The Notices identify the Aerial Shell Fireworks as banned hazardous substances, and based on the warnings provided in the Notices themselves, Jake's Fireworks faces potential civil and criminal penalties if it sells those fireworks. Jake's Fireworks has asserted that based on the Notices, it has refrained from selling the Aerial Shell Fireworks that are subject to the Notices, which have a value of over $2.6 million, and has lost the ability to "avail itself of significant business opportunities" relating to such fireworks. Compl. ¶ 89. Where Jake's Fireworks has withheld its products from commerce as a direct consequence of its receipt of the Notices, this economic loss is fairly traceable to the CPSC. Where the voluntary compliance regime evidenced by the Notices is intended to produce this exact effect of causing companies to refrain from selling potentially offending products, the CPSC cannot credibly claim that Jake's Fireworks has not suffered an injury traceable to the Notices. *See Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 997 F.3d 1247, 1253 n.3 (D.C. Cir. 2021) (finding that a regime for voluntary compliance with approved airline schedules for Newark International Airport was not truly voluntary where the Federal Aviation Administration warned

that deviation from the schedule could result in a return to strict controls because a "request for help backed by a threat hardly seems a call for voluntary action").

Even if the economic loss resulting from the failure to sell the fireworks were deemed to be the result of a purely voluntary choice, Jake's Fireworks still faces an imminent injury because if it were to sell the fireworks in defiance of the Notices, as it has stated that it would do in the absence of the Notices, it would likely face civil penalties. Opp'n at 11-12, ECF No. 17; *see, e.g.*, 4/9/19 Notice at 4. As Jake's Fireworks points out, certain courts have found that the facts that fireworks failed a CPSC test and Notices were issued can constitute evidence that a violation was "knowing" for purposes of civil penalty actions in federal court. *See, e.g.*, *United States v. Shelton Wholesale, Inc.*, No. 96-6131-CV-SJ, 1998 WL 251273, at *3, *11 (W.D. Mo. 1998). Thus, the injury here, whether actual or imminent, is not conjectural or hypothetical, nor is it based on a "speculative chain of possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2012). Where the injury is also traceable to the issuance of the Notices, Jake's Fireworks has established standing to seek injunctive relief.

IV. Final Agency Action

Jake's Fireworks contends that in light of the two most recent letters by Director Kaye in which he denied its request for a finality determination, the Notices are effectively final agency actions as defined in the APA, which includes an agency "order," "sanction," or denial of "relief." 5 U.S.C. § 551(13). CPSC contends that the Notices are not agency actions at all, and that if they are agency actions, they are not "final

agency action[s]" suitable for judicial review. Mot. Dismiss at 14, ECF No. 16-1. This Court will assume without deciding that the Notices were agency actions and will instead focus on the issue of whether they were final agency actions. *Jake's Fireworks I*, 498 F. Supp. 3d at 805.

Standing is a constitutional inquiry; the APA's final agency action requirement is statutory. 5 U.S.C. § 704. Nevertheless, a final agency action is a jurisdictional requirement in an APA action. *City of New York v. U.S. Dep't of Defense*, 913 F.3d 423, 430 (4th Cir. 2019); *Am. Acad. of Pediatrics v. Food & Drug Admin.*, 379 F. Supp. 3d 461, 474 (D. Md. 2019). The United States Supreme Court has established a two-pronged test to determine whether an agency's action is final. "First, the action must mark the consummation of the agency's decisionmaking process" and "must not be of a merely tentative or interlocutory nature." *Bennett*, 520 U.S. at 177-78. Second, "the action must be one by which rights or obligations have been determined or from which legal consequences will flow." *Id.* Both prongs must be satisfied before a court may review purported agency action. *Golden & Zimmerman, LLC v. Domenech*, 599 F.3d 426, 432 (4th Cir. 2010).

In its Motion, the CPSC argues that no final agency action has been taken or consummated in the form of an enforcement action, and that any future enforcement action requires independent decision-making by entities other than OCFO staff, including the Commission itself. In *Jake's Fireworks I*, Judge Grimm already determined that the Notices were not "consummation of the Commission's decision-making process." *Jake's Fireworks I*, 498 F. Supp. 3d at 806. Rather, the Notices constitute "intermediate ruling[s]

of a subordinate official" who lacked the "independent authority to initiate enforcement action that could expose Jake's Fireworks to civil or criminal penalties without first obtaining the approval of the Commission's Office of the General Counsel." *Id.* at 803. That ruling remains sound and will not be revisited. In this new case, Jake's Fireworks argues that the first prong is now satisfied because (1) Judge Grimm stated in *Jake's Fireworks I* that "[w]hile the process may be nearing its end, there are still steps that Jake's Fireworks may take, such as request a hearing, or reconsideration," *id.* at 806; and (2) since that ruling, Jake's Fireworks has, in fact, made a request for a hearing that was denied by Director Kaye, such that there are no further steps that Jake's Fireworks can take to appeal or otherwise challenge the determinations made in the Notices.

This argument misreads *Jake's Fireworks I* and the statutory scheme underlying the CPSC's enforcement of the FHSA. Judge Grimm's observation that Jake's Fireworks still needed to request a hearing in relation to one of the Notices identified a necessary, but not sufficient, condition to consummate the agency's decision. Those steps arguably would exhaust available procedures within OCFO; they do not demonstrate that CPSC has taken a final agency action. *Darby v. Cisneros*, 509 U.S. 137, 144 (1993) (stating that "the judicial doctrine of exhaustion of administrative remedies is conceptually distinct from the doctrine of finality").

While the Notices state that the OCFO staff's position is that the Aerial Shell Fireworks are banned hazardous substances under the FHSA, they do not actually order Jake's Fireworks to take any action.

Rather, each Notice takes the same approach: it requests destruction of the fireworks and mandates the procedures for destruction should Jake's Fireworks choose to take that action, and it warns of the possibility of legal action if Jake's Fireworks sells banned hazardous substances to the public. For example, in the September 18, 2018 Notice, an OCFO Compliance Officer stated that OCFO "requests that the distribution of the [fireworks] not take place and that the existing inventory be destroyed," then informed Jake's Fireworks that if it "chose to destroy the goods," it must take certain steps to confirm compliance with local requirements for safe destruction. 9/18/18 Notice at 2, Compl. Ex. C, ECF No. 1-3. Likewise, in the December 20, 2018 Notice, the OCFO Compliance Officer "request[ed] that the distribution of the sampled lots . . . not take place and that the existing inventory be destroyed." 12/20/18 Notice at 2, Compl. Ex. K, ECF No. 1-11. Though the Notices and the Handbook procedures allow the product owner to submit additional information and to request an informal hearing with the OCFO staff, *see, e.g.*, 9/18/18 Notice at 3; Handbook at 18, Compl. Ex. B, ECF No. 1-2, the completion of any such processes does not end the agency's activities. At this point, all that has occurred is that the OCFO staff has requested voluntary compliance. *See Holistic Candlers Consumers Ass'n v. Food & Drug Admin.*, 664 F.3d 940, 942, 944 (D.C. Cir. 2012) (holding that Food and Drug Administration "Warning Letters" sent to manufacturers and distributors of ear candles which stated that the agency considered the candles to be "adulterated and misbranded medical devices" did not constitute final agency action because they provided an opportunity for voluntary corrective action before any enforcement action was taken and

stated only that the failure to correct deviations "may" result in enforcement action and that the parties "should" take action to correct deviations). As discussed above, if the subject of the Notice "continues to disagree with CPSC staff and declines to take corrective action, the staff may request the Commission approve appropriate legal proceedings, including the issuance of an administrative complaint, injunctive action, seizure action, or such other action as may be appropriate." Handbook at 18-19; *Jake's Fireworks I*, 498 F. Supp. 3d at 803.

To pursue an administrative enforcement action, the OCFO staff would have to secure approval from the Commission itself, which could commence and impose an administrative enforcement action only after notice and an opportunity to be heard. 15 U.S.C. § 1274(e). To pursue either civil penalties or criminal prosecution in federal court, the OCFO staff would have to make a recommendation to the Commission, which would consult with OGC to make a determination of whether to refer the matter to DOJ, and any such referral would occur only with notice and an opportunity to be heard provided to the product owner. *Jake's Fireworks I*, 498 F. Supp. 3d at 803; 15 U.S.C. §§ 1264(a), 1266, 2076; 16 C.F.R. § 1000.14. Thus, OCFO, even if it has completed its assessment of whether the Aerial Shell Fireworks constitute banned hazardous substances, does not have the final word within the CPSC on that issue.

The facts that the Notices only request voluntary compliance, and that under the applicable statutory and regulatory regime, the Commission itself or OGC must act before any enforcement action may proceed, demonstrate that no final agency action has occurred.

In *Reliable Automatic Sprinkler Co. v. Consumer Product Safety Commission*, 324 F.3d 726 (D.C. Cir. 2003), a manufacturer of automatic sprinkler heads challenged the CPSC's preliminary determination, expressed in a letter to the manufacturer requesting voluntary corrective action, that the sprinkler heads presented a "substantial product hazard" in violation of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064(a). *Reliable Automatic Sprinkler*, 324 F.3d at 730. After the company filed suit seeking a declaratory judgment that its product did not violate the CPSA, the court upheld the dismissal of the case based on the lack of a final agency action because "[t]he agency ha[d] not yet made any determination or issued any order imposing any obligation" on the company, and "the agency ha[d] not yet taken the steps required under the statutory and regulatory scheme for its actions to have any legal consequences." *Id.* at 732. In particular, CPSC had not initiated any administrative enforcement proceedings against the company, and if it filed such a complaint, the company would then have the right to a hearing before the Commission before any sanction would be imposed. *Id.* at 733.

Similarly, in *Soundboard Association v. Federal Trade Commission*, 888 F.3d 1261 (D.C. Cir. 2018), the court held that a letter issued by the staff of the Federal Trade Commission ("FTC") that followed "extensive investigative efforts" and included "some definitive language" was not a final agency action for purposes of subject matter jurisdiction. *Id.* at 1267. The court rejected the argument that the letter constituted "the consummation of agency decisionmaking for 'all intents and purposes'" in part because under

the particular statutory and regulatory scheme at issue, if the FTC staff sought to bring an enforcement action, the Commission itself would have to decide whether the staff's interpretation was correct and vote on whether to issue a complaint. *Id.* at 1269 (noting that "the manner in which the agency's governing statutes and regulations structure its decisionmaking processes is a touchstone of the finality analysis").

Here, the CPSC, through OCFO, has to date only requested voluntary corrective action. In order to make a determination imposing any obligation on Jake's Fireworks, such as civil penalties, the OCFO staff would have to refer the matter to the Commission itself or OGC for additional action. As noted in Director Kaye's December 15, 2020 letter, OCFO staff has taken no action to date to do so. Where there is "only the possibility" that a party will "hav[e] to defend itself at an enforcement hearing" if it "does not undertake certain voluntary action," there is no final agency action. *Reliable Sprinkler*, 324 F.3d at 735; *see Holistic Candlers*, 664 F.3d at 945 (finding no final agency action in part because the Food and Drug Administration could "only ban devices after going through a formal process that it has not undertaken here").

Jake's Fireworks' arguments to the contrary do not alter this conclusion. Although Jake's Fireworks asserts, based on *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590 (2016), that a decision to initiate an enforcement action is not required to establish final agency action, the discussion of this issue in *Hawkes* focused on the second *Bennett* prong of "direct and appreciable legal consequences." *Hawkes*, 578 U.S. at 598 (citing *Bennett*, 520 U.S. at 178). It

was undisputed that the action at issue, the issuance of a 'jurisdictional determination" by the U.S. Army Corps of Engineers was, pursuant to a regulation, the consummation of the agency's decision. *Hawkes*, 578 U.S. at 597. Similarly, *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012), relied upon by Jake's Fireworks, is distinguishable because the order deemed to be a final agency action actually ordered, rather than requested, compliance, and the court found that the findings and conclusions in the compliance order were not subject to any further review within the Environmental Protection Agency. *Id*. at 127. In contrast, here, as in *Reliable Sprinkler* and *Soundboard Association*, the CPSC operates under an independent commission structure where the statutory and regulatory regime contemplates review and a determination by either the Commission itself or OGC before any binding order can be entered. In cases in which notices seek voluntary compliance and the steps required to impose a mandatory order upon the subject have not yet occurred, no final agency action has occurred. *See Reliable Sprinkler*, 324 F.3d at 733; *Soundboard Ass'n*, 888 F.3d. at 1267.

Jake's Fireworks also argues that because it "faces the choice of either complying with CPSC's dictates by not selling the products deemed banned or risking severe sanctions for knowing violations of the FHSA if it does not[*] sell its products," the agency action has been consummated. Opp'n at 22. This precise argument was rejected in *Reliable Sprinkler*, in which the court found no final agency action even though the

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[*] [Counsel for Jake's Fireworks here notes a typographical error in the district court's opinion: This "not" does not appear in the Opposition Brief at 22.]

CPSC's letter seeking voluntary compliance imposed the "dilemma" and "practical consequence[]" of the product owner having to choose "between voluntary compliance with the agency's request for corrective action and the prospect of having to defend itself in an administrative hearing should the agency actually decide to pursue enforcement." *Reliable Sprinkler*, 324 F.3d at 732. Notably, the fact that only some of Jake's Fireworks's Aerial Shell Fireworks have been marked as banned hazardous substances, but 66 percent of those sampled have not, makes future CPSC enforcement action far from certain. Furthermore, Jake's Fireworks's reliance on *Doe v. Tenenbaum*, 127 F. Supp. 3d 426 (D. Md. 2012), is misplaced because the final agency action at issue was the publication of a report pursuing to the Consumer Product Safety Improvement Act, an entirely different scenario from that presented here. *Id.* at 465.

Finally, Jake's Fireworks argues that the Notices effectively impose legal consequences upon it because in other cases, including *United States v. Shelton Wholesale, Inc.*, No. 96-6131-CV-SJ, 1998 WL 251273 (W.D. Mo. Apr. 28, 1998), such Notices have been used as evidence of a "knowing" violation of the FHSA, as needed to establish civil penalties should the CPSC choose to pursue them. *See* 15 U.S.C. §§ 1264(a), (c)(1). In *Shelton Wholesale*, however, the court found only that a factfinder could consider the knowledge that fireworks had failed CPSC compliance testing as evidence of a knowing violation of the FHSA, not that it definitively established such state of mind. *Shelton Wholesale*, 1998 WL 251273, at *11. Even if the potential for the notice to impact the determination of whether a civil penalty may be imposed could be

deemed to constitute a legal consequence, that conclusion would relate to the second prong of *Bennett*, the requirement that the action be one from which "legal consequences will flow." *Bennett*, 520 U.S. at 178. It would not demonstrate that the first prong, the consummation of the agency's decisionmaking, had been established.

Because both *Bennett* prongs must be satisfied to establish a final agency action, and the Court finds that the first prong has not been satisfied, the Court concludes that there has been no final agency action. The Motion to Dismiss will therefore be granted.

CONCLUSION

For the foregoing reasons, the CPSC's Motion to Dismiss will be GRANTED, and the Complaint will be DISMISSED WITHOUT PREJUDICE. A separate Order shall issue.

Date: April 21, 2023

s/ Theodore D. Chuang
THEODORE D. CHUANG
United States
District Judge

Filed 10/30/20

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

JAKE'S FIREWORKS INC., Plaintiff, v. UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION, *et al.*, Defendants.	Case No. PWG 19-cv-1161

MEMORANDUM AND ORDER

Jake's Fireworks Inc. ("Jake's Fireworks") seeks injunctive and declaratory relief against the United States Consumer Product Safety Commission (the "Commission" or "CPSC") and Ann Marie Beurkle, in her official capacity as Acting Chairman of the Commission.[1] Am. Compl. ¶ 1, ECF No. 16. The Commission is a regulatory agency charged with enforcing the Consumer Product Safety Act ("CPSA"), 15 U.S.C. §§ 2051 *et seq.*, and the Federal Hazardous Substances

[1] Defendants report that on October 1, 2019, Ann Marie Buerkle was replaced by Robert S. Adler as Acting Chairman of the United States Consumer Product Safety Commission. Reply n.1, ECF No. 23; *see also* https://cpsc.gov/About-CPSC (last visited Oct. 20, 2020).

Act ("FHSA"), 15 U.S.C. §§ 1261 *et seq*. *Id.* at ¶ 6. Jake's Fireworks, a nation-wide retailer of consumer fireworks, alleges that it received enforcement letters from the Commission requiring the impound of some of its merchandise for failure to satisfy certain regulations. *Id.* at ¶ 4. In its four-count complaint, Jake's Fireworks seeks this Court's declaration that the statutory and regulatory provisions enforced by the Commission that are at issue do not apply to their particular consumer fireworks or, alternately, that the Commission's enforcement of the statutes and regulations is arbitrary and capricious. *Id.*

Defendants filed the pending motion to dismiss all claims brought against them in the Amended Complaint for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Mot. ECF No. 17. In the alternative, Defendants seek to dismiss the fourth cause of action—a Fifth Amendment void-for-vagueness challenge—for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and argue that Jake's Fireworks' requests for injunctive relief are moot. *Id.*; Mot. Mem. 3, ECF No. 17-1. Because I conclude that this Court does not have subject-matter jurisdiction, Defendants' Motion to Dismiss, ECF No. 17, is GRANTED,[2] and the Amended Complaint is DISMISSED WITHOUT PREJUDICE.

[2] Because I find that this court lacks subject-matter jurisdiction, I need not reach the other grounds raised by the Defendants in their motion to dismiss.

BACKGROUND

I. Regulatory Overview

The Consumer Product Safety Act ("CPSA") was enacted, in part, "to protect the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. § 2051(b). The CPSA created the Consumer Product Safety Commission and authorized it, among other things, to conduct research on and test consumer products, to promulgate consumer product safety standards, and to ban hazardous products. 15 U.S.C. §§ 2053, 2054, 2056, 2057. The Commission also inherited from the Food and Drug Administration responsibility for enforcing the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. §§ 1261 *et seq*. *See* 15 U.S.C. § 2079. The FHSA prohibits "the introduction or delivery for introduction into interstate commerce" of "hazardous substance(s)," 15 U.S.C. § 1263, and provides for penalties, 15 U.S.C. § 1264, and seizures of misbranded or banned products, 15 U.S.C. § 1265.[3]

The Commission works with importers and the United States Custom and Border Protection ("CBP") to sample imported fireworks devices and examine them for possible violations of the FHSA. 15 U.S.C. § 1273(a). The Commission's multi-step process for

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[3] Consumer fireworks are regulated under the FHSA, and Jake's Fireworks challenges the applicability to its reloadable aerial shells of two fireworks regulations, specifically, 16 C.F.R. § 1500.17(a)(3), and 16 C.F.R. § 1500.14(b)(7). *See* Am. Compl. ¶¶ 16-41. Jake's Fireworks also asserts that the "poof/bang" test that the Commission uses to test fireworks has not been promulgated through notice and comment rulemaking, or otherwise been publicized; thus the test is unreasonable, arbitrary, and capricious. *Id*. at ¶¶ 42-56.

sampling, notifying the importer, and enforcing its statutes and implementing regulations is described in detail in The Regulated Products Handbook (the "Handbook"), which was developed to help importers understand their responsibilities and procedural options when informed of a violation. Mot. Ex. 4, ECF No. 17-6.[4] The Handbook provides this summary in the Preface:

> When CPSC staff determines that a product violates a specific statute or regulation, CPSC Office of Compliance and Field Operations generally notifies the responsible firm (the product manufacturer, importer, distributor, or retailer) of the violation and requests a specific remediation of the problem.
>
> Notification to the responsible firm is usually in the form of an official letter, referred to in this Handbook as the Letter of Advice or a Notice of Noncompliance from the Office of Compliance and Field Operations (collectively referred to in this Handbook as LOA). Firms should review this Handbook in conjunction with the LOA sent by CPSC staff that identifies the applicable statutes and regulations violated. The LOA informs the firm of the specific product and violation that has occurred; requests that the firm take specific corrective actions (including stopping the sale and distribution of the product; recalling the product from distributors, retailers, and/or consumers; quar-

[4] The Handbook, specifically Chapter 3, is referenced in the Amended Complaint, Exhibit B, Exhibit D, and Exhibit H.

> antining and disposing of inventory of the product; and changing future production of the product); and informs the firm of the legal actions available to the Commission (including civil and criminal penalties and injunctive relief). In addition, the LOA informs the firm that if it disagrees with CPSC staff's determination that a violation has occurred or believes the product is not subject to the Commission's jurisdiction, it may question staff's findings and present evidence to support its position. *See* Chapter 3 of this *Handbook*.

Handbook 5-6. Chapter 3 contains the procedures to be followed:

> RESPONDING TO THE CPSC LETTER OF ADVICE (LOA)
>
> When the CPSC staff notifies you in a LOA that a product that you manufacture, import, distribute, sell, or offer for sale fails to comply with a CPSC statute, rule, regulation, standard, or ban, you may present evidence supporting your view if you disagree with staff's determination.
>
> The LOA will state that the firm may present evidence that a violation does not exist or that a product is not covered by the applicable statute or regulation. The letter will indicate to whom the response should be addressed and will give you a timeframe for the expected response. You may submit, to the indicated recipient, all evidence and arguments that support why you believe the product is not violative; not subject to a specific statute, rule, regulation,

standard, or ban; or, should not be refused admission in the United States (if the violation involves an import detained at the port) or seized by CBP.

A firm may respond to a notice of noncompliance orally or in writing, and the firm may request an informal hearing to meet personally with Office of Compliance or Import Surveillance Division staff to present orally views and evidence. Such evidence may consist of:

- results from testing that supports certificates of compliance;
- results of tests indicating the product complies with the applicable regulation;
- marketing data indicating the product is not intended for the population group protected by the regulation or standard; or
- any other relevant data to support the claim of compliance.

CPSC RESPONSE TO FIRM RESPONSE

Any additional evidence or arguments that a firm presents are reviewed by the appropriate CPSC Office of Compliance or Import Surveillance Division staff, including appropriate technical and legal staff. If the information you present, in the staff's opinion, does not refute staff's claim that the product is violative or covered by a specific statute, rule, regulation, standard, or ban, Commission staff, as a general rule, will notify you in writing before staff pursues any enforcement action against the products or your firm.

> If a firm continues to disagree with CPSC staff and declines to take corrective action, the staff may request the Commission approve appropriate legal proceedings, including the issuance of an administrative complaint, injunctive action, seizure action, or such other action as may be appropriate.

Id. at 18-19.

To enforce its statutes and regulations, the Commission prefers to work cooperatively with industry "but initiat[es] litigation when necessary." *Id.* at 7. It may impose sanctions for violations, including both civil and criminal penalties. *Id.* at 8. "In addition, firms and individuals may be enjoined from continuing to violate CPSC statutes and regulations, and pursuant to court order, violative products may be seized to prevent distribution in commerce." *Id.*; *see also id.* at 14 (quoting 15 U.S.C. § 1267 to state that United States district courts have jurisdiction to restrain violations of the FHSA). As referenced above, Chapter 3 provides detailed procedures to follow if a firm disagrees with the Commission's staff's determination that a product is in violation of a statute or regulation, including how a firm may respond to a Letter of Advice ("LOA") or notice of noncompliance and the steps that follow such a response. *Id.* at 18. Ultimately, "[i]f a firm continues to disagree with CPSC staff and declines to take corrective action, the staff may request the Commission approve appropriate legal proceedings, including the issuance of an administrative complaint, injunctive action, seizure action, or such other

action as may be appropriate." *Id.* at 19.[5] Chapter 4 provides the details for handling of regulated products at ports of entry. *Id.*

II. Factual and Procedural Background

Jake's Fireworks is one of the nation's largest importers and distributors of consumer fireworks with distribution centers from coast to coast. Am. Compl. ¶¶ 5, 57. One of its best sellers is the Excalibur product line of small reloadable aerial shells,[6] which it purchases and imports from a Chinese manufacturer. *Id.* at ¶ 57. When Jake's Fireworks imports these shells, it must certify that the fireworks comply "with all rules, bans, standards, or regulations applicable." *Id.* at ¶ 59 (quoting CPSA, 15 U.S.C. § 2063(a)(1)(A)). Since about 2010, Jake's Fireworks has used American Fireworks Standards Laboratory, an independent non-profit third-party testing laboratory, to test its fireworks for compliance with the Commission's regulations. *Id.* at ¶ 60. The Commission inspects and samples products, including the fireworks at issue, at United States ports of entry to ensure compliance with

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[5] Before a civil or criminal penalty is sought, the regulated entity must be notified and provided an opportunity to present views or submit evidence and arguments. 15 U.S.C. § 1266; 16 C.F.R. § 1119.5. Additionally, the Commission must approve any settlement by the Office of General Counsel ("OGC") of a civil penalty or OGC recommendation to refer to the United States Department of Justice an action seeking to assess a civil penalty. 15 U.S.C. § 2069(b), (c).

[6] Also referred to as reloadable tube aerial devices. Am. Compl. ¶ 57, n.1. According to Jake's website, these explosive devices are "known for great color" and "thunderous breaks." Mot. Mem. 2 (quoting Jake's Fireworks, https://www.jakesfireworks.com/fireworks/artillery-shells (last visited September 24, 2019)).

the safety statutes and regulations, and products are not allowed to be distributed in commerce until the Commission has determined the product's admissibility. *Id.* at ¶ 62.

When the Commission's testing reveals a violation of an applicable requirement—such as improper audible effects or improper labeling—it follows the process described in the Handbook for advising the importer. *Id.* at ¶ 63. Ultimately, the Commission either authorizes release of the product or requests that the shipment be destroyed, subject to civil and criminal penalties if the products are sold without having been released. *Id.* Jake's Fireworks alleges that the Commission increased its sampling of Jake's Fireworks' imports of its reloadable aerial shells beginning in the spring of 2014, and between March 19, 2014 through July 20, 2018, the Commission detained, at least temporarily, an approximate market value of over $3.7 million worth of its reloadable aerial shells. *Id.* at ¶ 64.[7] Jake's Fireworks alleges that the Commission continues to sample and detain these products at an increasing rate. *Id.* at ¶ 64.

Jake's Fireworks received Notices of Non-Compliance (which the Commission also refers to as "Letters of Advice," Handbook at 5) from the Commission requesting that it stop the sale of certain products and destroy them, advising that violations were subject to civil and criminal penalties. *Id.* at ¶¶ 65-68 (attaching

[7] The Commission states that all products at issue were released from import holds, and Jake's Fireworks agrees that the products have been released from import holds. *See* Pl.'s Resp. 2, 21 n.13.

Exhibits B-D as examples).[8] Jake's Fireworks responded to the notices and requested that the Commission rescind them and release the fireworks without condition. *Id.* at ¶ 70-71 (attaching Exhibit E as an example response).[9] On October 3, 2014, the Commission reiterated its position that the reloadable aerial shell fireworks violated applicable statutory and regulatory requirements and requested that they be destroyed. *Id.* at ¶ 72 (attaching the letter as Exhibit F).[10] Jake's Fireworks responded by letter, again asking that the Commission rescind the notices. *Id.* at ¶¶ 72-73 (attaching the letter as Exhibit G).[11] At some point, Jake's Fireworks inquired whether the Commission's October 3, 2014 letter constituted final

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[8] Exhibit B is Notice of Non-Compliance dated September 18, 2018, sent by email to Jake's Fireworks from a Commission Compliance Officer, and included a laboratory report. ECF No. 16-2. Exhibit C is an example of a laboratory report, which was also part of Exhibit B. ECF No. 16-3. Exhibit D is a Notice of Non-Compliance dated August 19, 2014, sent by certified mail to Jake's Fireworks from a Commission Compliance Office, and included a laboratory report. ECF No. 16-4.

[9] Exhibit E is a letter dated May 26, 2016, sent by email from counsel, Miles & Stockbridge, retained by Jake's Fireworks for the purpose of responding to three specific notices. ECF No. 16-5.

[10] Exhibit F is a letter dated October 3, 2014, sent by email and certified mail to Jake's Fireworks and its counsel, Miles & Stockbridge, from a Commission Compliance Officer. ECF No. 16-6. It notes that Jake's Fireworks provided no evidence to dispute the violations, but instead questioned the validity of the regulations, so the Commission staff stands by its determination of the violations. *Id.*

[11] Exhibit G is a letter dated October 14, 2014, sent by email to a Commission Compliance Officer from Jake's Fireworks' counsel, Miles & Stockbridge. ECF No. 16-7.

agency action. *Id.* at ¶ 73.[12] On December 8, 2014, the Commission's staff orally indicated that it would re-test samples, and Jake's Fireworks believes that the re-testing occurred before February 13, 2015. *Id.* at ¶ 73. On May 20, 2015, the Commission issued another Notice of Non-Compliance, including the reports of its re-tests with a determination that two shipments, upon re-testing, complied with regulations, but that other shipments violated regulations. *Id.* at ¶¶ 74-75 (attaching the notice as Exhibit H).[13] The Commission reiterated its request that sales stop and the violative products be destroyed. *Id.* The Commission continues to sample Jake's Fireworks' imports for compliance with regulations, some of which comply while others do not. *Id.* at ¶ 64; Mot. Mem. 11 (attaching examples). The Commission states that it has not initiated any enforcement action against Jake's Fireworks or its products for violations of the FHSA (and,

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[12] In Plaintiff's response to Defendant's motion, it included a letter, Exhibit 4, which indicates that counsel from Mayer Brown spoke with a Commission Compliance Officer on November 25, 2014. ECF No. 22-4. The letter reveals that counsel was informed that the staff letter of October 3, 2014 was not the final agency action. *Id.* The letter notes the costs of delay and contains a request for a final decision. *Id.*

[13] Exhibit H is a Notice of Non-Compliance dated May 20, 2015, sent by email and certified mail to counsel for Jake's Fireworks, Mayer Brown, from the Commission's Lead Compliance Officer, and included a laboratory report. ECF No. 16-8. It responds to correspondence of December 22, 2014 sent from Mayer Brown to the Commission staff, and it states that at Jake's Fireworks' request, staff agreed to conduct re-testing of certain products, which were found to be in compliance. *Id.* It indicates that CBP was asked to release those items from bond. *Id.* Other samples continue to exhibit non-compliance. *Id.* Jake's Fireworks asserts that this notice is a final agency action. Am. Compl. ¶¶ 10, 90, 94, 101; Pl.'s Resp. 2, ECF No. 22.

indeed, that it could not do so without further approval from the Commission's Office of General Counsel, which, in turn, must refer the matter to the Department of Justice for approval of enforcement action). Mot. Mem. 11; Reply 8 n.4.

Jake's Fireworks alleges that the Commission is applying inapplicable regulations to their reloadable aerial shells in an arbitrary, capricious manner that constitutes an abuse of discretion. Am. Compl. at ¶¶ 76-80. Specifically, Jake's Fireworks alleges four causes of action in its Amended Complaint:

- First Cause of Action – Violation of the Administrative Procedure Act for Abuse of Discretion and Unlawful, Arbitrary and Capricious Agency Action (Application of 16 C.F.R. § 1500.17(a)(3));
- Second Cause of Action – Violation of the Administrative Procedure Act for Abuse of Discretion and Unlawful, Arbitrary and Capricious Agency Action (Application of Non-existent Reports Labeling Requirement);
- Third Cause of Action – Violation of the Administrative Procedure Act for Abuse of Discretion and Unlawful, Arbitrary and Capricious Agency Action (Use of "Poof/Bang" Test);
- Fourth Cause of Action – Unlawful Agency Action under the Administrative Procedure Act Based on the Commission's Violation of the Fifth Amendment to the United States Constitution.

Defendants assert that because the notices and letters transmitted to Jake's Fireworks do not constitute final agency action, the Court lacks subject matter jurisdiction to review them. Mot. Mem. 1-3. Defendants

also argue that the fourth cause of action should be dismissed for failure to state a claim, and that the requests for injunctive relief are moot. *Id.*

STANDARD OF REVIEW

"[W]hether an agency's action 'constituted final agency action under the APA so as to be reviewable in court' is 'a question of subject matter jurisdiction.'" *Am. Acad. of Pediatrics v. Food & Drug Admin.*, 379 F. Supp. 3d 461, 474 (D. Md. 2019) (quoting *Invention Submission Corp. v. Rogan*, 357 F.3d 452, 458 (4th Cir. 2004)).[14] When subject matter jurisdiction is challenged under Federal Rule of Civil Procedure 12(b)(1), the plaintiff has the burden of proving that subject matter jurisdiction exists. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (citing *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir.1991)).

When a defendant moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, asserting a facial challenge that "a complaint simply fails to allege facts upon which subject matter jurisdiction can be based," as Defendants do here, "the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a 12(b)(6) consideration." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

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[14] "There is a split among Courts of Appeals concerning the standard of review for challenges to 'final agency action.'" *See New Mexico v. McAleenan*, 450 F. Supp. 3d 1130, 1190 (D.N.M. 2020) (citing cases). However, in this circuit, whether an agency action is final is a jurisdiction issue. *See City of New York v. U.S. Dep't of Defense*, 913 F.3d 423, 430 (4th Cir. 2019).

Pursuant to Rule 12(b)(6), a plaintiff's claims are subject to dismissal if they "fail[ ] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), and must state "a plausible claim for relief," *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Rule 12(b)(6)'s purpose "is to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Velencia v. Drezhlo*, No. RDB-12-237, 2012 WL 6562764, at *4 (D. Md. Dec. 13, 2012) (quoting *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006)).

Whether considering a Rule 12(b)(1) challenge or a Rule 12(b)(6) motion, the Court may take judicial notice of "fact[s] that [are] not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Additionally, the Court may "consider documents that are explicitly incorporated into the complaint by reference." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016); *see also Sposato v. First Mariner Bank*, No. CCB-12-1569, 2013 WL 1308582, at *2 (D. Md. Mar. 28, 2013) ("The court may consider documents attached to the complaint, as well as documents attached to the motion to dismiss, if they are integral to the complaint and their authenticity is not disputed."); *CACI Int'l v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 150, 154 (4th Cir. 2009); Fed. R. Civ. P. 10(c)

("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."). Moreover, where the allegations in the complaint conflict with an attached written instrument, "the exhibit prevails." *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991); *see Azimirad v. HSBC Mortg. Corp.*, No. DKC-10-2853, 2011 WL 1375970, at *2-3 (D. Md. Apr. 12, 2011).

Here, the Plaintiff attached letters and notices to its Amended Complaint, and Defendants' Motion also included attachments of letters and notices as well as the referenced Handbook. There are no challenges to the authenticity of these documents, and I may consider them when deciding the dismissal motion.

DISCUSSION

"Judicial review under the APA . . . is limited to 'final agency actions.'" *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 430 (4th Cir. 2019) (quoting 5 U.S.C. § 704). Generally, "two conditions must be satisfied for agency action to be 'final.'" *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 194-95 (4th Cir. 2013) (quoting *Bennett v. Spear,* 520 U.S. 154 (1997)). The first requirement is that "the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* (quoting *Bennett*, 520 U.S. at 177-78 (citation and quotation marks omitted)). The second is that "the action must be one by which rights or obligations have been determined *or* from which legal consequences will flow." *Id.* (quoting *Bennett*, 520 U.S. at 178 (citation and quotation

marks omitted) (emphasis added)).[15] Stated differently, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts,* 505 U.S. 788, 797 (1992). "[T]he measure of finality is also 'pragmatic'; an agency action is 'immediately reviewable' when it gives notice of how a certain statute will be applied even if no action has yet been brought." *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 285 (4th Cir.), *as amended* (Feb. 28, 2018) (Gregory, C.J., concurring) (quoting *U.S. Army Corps of Eng'rs v. Hawkes Co.*, —— U.S. ——, 136 S. Ct. 1807, 1815 (2016)), *cert. granted, judgment vacated on other grounds*, —— U.S. ——, 138 S. Ct. 2710 (2018).

Jake's Fireworks alleges that the May 20, 2015 Notice of Non-Compliance[16] ("the Notice") constitutes final agency action. Am. Compl. ¶¶ 10, 90, 94, 101; Pl.'s

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[15] Whether an agency action creates legal consequences does not necessarily address finality concerns, and some courts have instead considered this factor as affecting the definition of "agency action" under 5 U.S.C. § 551(13) rather than the meaning of "final" agency action under § 704. *See City of New York*, 913 F.3d at 431; *Vill. of Bald Head Island*, 714 F.3d at 193.

[16] Am. Compl. Ex. H, ECF No. 16-8; *see also* ECF No. 17-3. In its response to the Commission's motion, Jake's Fireworks adds that the March 7, 2016 Notice of Non-Compliance, which was attached to the Commission's Motion as Exhibit 9, ECF No. 17-11, is also a final agency action. Pl.'s Resp. 2 n.1. Defendants argue that "the complaint may not be amended by the briefs in opposition to a motion to dismiss." Reply 2 (quoting *McDonald v. LG Electronics USA, Inc.*, 219 F. Supp. 3d 533, 541 (D. Md. 2016)). However, Jake's Fireworks' contentions were only that the 2016 notice appears to be similar to the 2015 Notice, both of which differ from the prior notices and demonstrate finality. *See* Pl.'s Resp. 2 n.1, 3 n.2, 5, 8, 9-10, 11, 15, 20-21. I accept it for this

Resp. 2. "'The term "action" as used in the APA is a term of art that does not include all conduct' on the part of the government." *City of New York*, 913 F.3d at 430-31 (quoting *Vill. of Bald Head Island*, 714 F.3d at 193). The alleged "action" at issue here is an "order" or "sanction." Pl.'s Resp. 6; *see* 5 U.S.C. § 551 (6), (10), (13) (defining agency action, order, and sanction). I shall review the Notice to determine if it satisfies both prongs of the *Bennett* test such that the action can be considered final. *See Golden and Zimmerman, LLC v. Domenech,* 599 F.3d 426, 432 (4th Cir. 2010) (indicating that both *Bennett* requirements must be satisfied); *COMSAT Corp. v. National Sci. Found.*, 190 F.3d 269, 274 (4th Cir. 1999) ("[A]n agency action may be considered 'final' only when the action signals the consummation of an agency's decisionmaking process *and* gives rise to legal rights or consequences.") (italics in original).

I. Consummation of Process

Under the first *Bennett* prong, I must evaluate whether the Notice represents the culmination of the Commission's decision-making process rather than a "tentative" or intermediate step. *See Franklin*, 505 U.S. at 797. It also cannot be the ruling of a subordinate official that needs approval from the agency's head before it becomes final. *Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967); *see also Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) ("The decisionmaking processes set out in an agency's governing statutes and regulations are key to determining whether an action is properly attributable to the

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limited purpose, rather than as an attempt to amend the complaint and reference to the Notice herein includes acknowledgment that the 2016 notice is similar.

agency itself and represents the culmination of that agency's consideration of an issue."). And there must be no indication that the decision will be revised in the future, that there is an appeal or further review pending, or that there is any entitlement to further action. *See Sackett v. EPA*, 566 U.S. 120, 127 (2012) ("The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.").

Here, the decision-making process is outlined in the Handbook. The Handbook describes a back-and-forth communication process, which both parties agree occurred here. After multiple communications, the Notice was sent from the "Lead Compliance Officer" of the Regulatory Enforcement Division responding to earlier correspondence and details retesting results of multiple devices. The retesting and review resulted in multiple findings, including that some devices were found to be in compliance and released from bond, some devices were found to be in violation of a different requirement, which allowed for them to be reconditioned or relabeled, and some were found to continue to exhibit non-compliance requiring corrective action. The Handbook, which was attached to the Notice, states that "[a] firm may respond to a notice of noncompliance orally or in writing, and the firm may request an informal hearing to meet personally with Office of Compliance of Import Surveillance Division staff to present orally views and evidence." Handbook at 18. However, Jake's Fireworks did not request a hearing and opportunity to present evidence. The Handbook also states that "[i]f a firm continues to disagree with CPSC staff and declines to

take corrective action, the staff may request the Commission approve appropriate legal proceedings, including the issuance of an administrative complaint, injunctive action, seizure action, or such other action as may be appropriate." *Id.* at 19. Thus, the Lead Compliance Officer lacks the independent authority to initiate enforcement action that could expose Jake's Fireworks to civil or criminal penalties, without first obtaining the approval of the Commission's Office of General Counsel, which, in turn, must refer the matter to the Department of Justice, which then must decide whether to bring an enforcement action. Reply 4-5, 8 n.4. On this basis, the Notice appears to be an intermediate ruling of a subordinate official, and it does not, as contended, clearly reflect the culmination of a series of communications.

Jake's Fireworks contends that the determination of non-compliance was definitive, and the Notice, unlike examples provided of earlier notices, did not invite further discussion, did not include instructions for disputing the determination, and did not refer to the Handbook chapter about how to dispute a determination. Pl.'s Resp. 8-10. But Jake's Fireworks puts too sharp a point on this argument, as it disregards the fact that the Notice did include the Handbook as an attachment (which clearly explains how Jake's Fireworks could dispute a determination, including the opportunity to request an informal hearing, which Jake's Fireworks chose not to pursue, *see* Pl.'s Resp. 4, 9-10), used language such as "reiterates its requests," and ended with "Please submit your response . . . within 10 days from the date you receive this letter outlining the specific corrective action that Jake's Fireworks plans to take to address the future sale of these products and any other products subject to the

mandatory requirements." This type of language can be distinguished from the definitive language used in the cases that Jake's Fireworks cited. *See, e.g.*, *Doe v. Tenenbaum*, 127 F. Supp. 3d 426 (D. Md. 2012) (contesting the Commission's planned publication of an agency report); *Scenic America, Inc. v. United States Dep't of Transp.*, 836 F.3d 42 (D.C. Cir. 2016) (challenging a guidance memorandum issued by the Federal Highway Administration); *City of Dania Beach, Fla. v. FAA*, 485 F.3d 1181 (D.C. Cir. 2007) (petitioning for review of a FAA letter changing runway use procedures at airport); *American Bar Ass'n v. United States Dep't of Educ.*, 370 F. Supp. 3d 1 (D.D.C. 2019) (challenging loan forgiveness denial letters).

Jake's Fireworks also argues that the process culminating in the Notice is similar to the informal adjudication that took place in *Tenenbaum*, which was found to qualify as a final agency action. Pl.'s Resp. 10. There, Judge Williams of this court rejected the Commission's arguments about the intermediate nature of its decision to publish a report, concluding instead that the decision was the consummation of a lengthy informal adjudication, and even if subsequent action remained a possibility, it was final for purposes of judicial review. *Tenenbaum*, 127 F. Supp. 3d at 464-65. He found that the notice and procedural requirements obligated the Commission to make a legal determination and included an adversarial process with the provision of evidence "with a view to meeting the 'burden of proof.'" *Id.* at 462-63 (quoting 16 C.F.R. § 1102.26(b)). But here, the process, as outlined in the Handbook, does not require the issuance of a final "notice" at the end of the back-and-forth communications, but rather, it states that at the end of the process, the

staff may request that the Commission (and thereafter, the DOJ) approve appropriate legal proceedings and, generally, will provide a written notification before that happens. No enforcement proceedings have been initiated, and the Notice does not indicate in any way that an enforcement action will be pursued by the staff.

Jake's Fireworks responds to the lack of an enforcement action by arguing that the threat of enforcement hangs over its head like a Damoclean sword, and the Commission does not actually need to bring an enforcement action to be "final." Pl.'s Resp. 15 (citing *Hawkes*, 136 S. Ct. at 1815 and *Sackett*, 566 U.S. at 129). And by its filing of supplemental authority, Jake's Fireworks notes that a series of letters may constitute final action because "receipt of the letters significantly increased its risk of a statutory civil penalty being levied. . . ." *Ipsen Biopharmaceuticals, Inc. v. Azar*, 943 F.3d 953, 954 (D.C. Cir. 2019). However, the "increased risk" argument made in *Ipsen* supported a finding of finality under *Bennett*'s second prong. *Id.* at 955. The parties had agreed that the action was the consummation of the agency's decision-making process and only the second prong was in dispute. *Id.* at 955-56. Likewise, the *Hawkes* and *Sackett* courts considered enforcement risk after deciding that there had been a consummation of the decision-making process and were evaluating whether there was any other adequate remedy under the Clean Water Act. *See Hawkes*, 136 S. Ct. at 1813-15; *Sackett*, 566 U.S. at 127-29. Notably, the *Sackett* court concluded that the compliance order marked the consummation of the decision-making process because the Sacketts had asked for—and been denied—a hearing. 566 U.S. at 127.

Jake's Fireworks argues that the Notice comes to a "definitive conclusion" like the finding in *Scenic America*. Pl.'s Resp. 8-9. In *Scenic America*, the Federal Highway Administration issued guidance criteria for the regulation of billboard lighting, withdrawing discretion from the states' divisional offices. 836 F.3d at 46. The guidance included a statement that it "may provide further guidance in the future as a result of additional information." *Id.* at 56. The *Scenic America* court interpreted the language as a "boilerplate" indication that the agency might issue further interpretations "at some point in the indeterminate future." *Id.* The court primarily relied on *Bennett*'s second prong, because the revised criteria for the agency's offices to use in approving or rejecting state regulations created legal consequences for regulated parties. *Id.* There is no comparable language in the Notice or the Handbook, and the action at issue here is a sanction, not a rule-making action. Rather than presenting a definitive conclusion, the Notice presents multiple conclusions with multiple options for response, and it invites a response.

In *Dania Beach*, the court rejected the FAA's assertion that the letter it sent was not an order that changed existing procedures without a proper review, but merely information about existing procedures. 485 F.3d at 1187-88. The court reasoned that the letter provided a new interpretation of the airport runway restrictions related to the noise compatibility program, and nothing about it was open to further consideration. *Id.* Jake's Fireworks argues that the Notice is like the FAA letter, and, unlike previous letters, did not invite further discussion and did not offer information about possible avenues of further appeal or reconsideration. Pl.'s Resp. 9. But the Notice is subject

to the procedures outlined in the Handbook, which was attached to the Notice, and unlike providing a new interpretation of a program, it was consistent with the prior example letters provided, each of which stated that products in violation of the standard may not be sold and must be destroyed. *Compare* Exs. B, D, F, *with* H. Each letter also referred to an attached Affidavit of Destruction of Fireworks. *See id.* Also, the language in each letter consistently uses the word "request" and provides a time for a response. *See id.* Unlike the FAA letter, the Notice does not contain "new marching orders." *Dania Beach*, 485 F.3d at 1188.

Jake's Fireworks argues that "courts also look to the way in which the agency subsequently treats the challenged action." Pl.'s Resp. 11 (quoting *American Bar Ass'n*, 370 F. Supp. 3d at 21). In *American Bar Ass'n*, law school graduates challenged the Department of Education's letters reversing determinations of loan forgiveness, alleging that the Department had changed its interpretation of its regulations, but the Department argued that the denial letters sent to the plaintiffs were not final agency actions. 370 F. Supp. 3d at 10, 19. Under the first *Bennett* prong, the court determined that the definitive language in the letters demonstrated the Department's final determination that plaintiffs did not qualify for the loan forgiveness program. *Id.* at 20. The letter sent to one of the plaintiffs was "less-than-definitive," but none of the plaintiffs received any additional communications from the Department that suggested that the letters were not final determinations, and even after the lawsuit, the determinations remained unchanged. *Id.* The *American Bar Ass'n* court also considered "whether the *impact* of the [agency action] is sufficiently 'final' to war-

rant review," and found that the letters had an immediate and significant impact on the plaintiffs. 370 F. Supp. 3d at 22. Jake's Fireworks has not alleged any significant impact from the Notice that differed from any of the other letters received that would indicate the Notice was any more final than the earlier letters. All of the letters sent to Jake's Fireworks state the potential sanctions using the same language. I also note that Jake's Fireworks is aware of how to inquire whether a letter is a final decision, it previously inquired whether a particular letter was a final agency action, and it received a response to the inquiry. *See infra* n.12. Jake's Fireworks has not alleged that it made that same inquiry of the Notice.

In *Holistic Candlers*, a case cited by the Commission, the court found that the FDA's warning letters "plainly" did not demonstrate the consummation of the agency's decision-making process because the agency's procedures manual describes the warning letters "as giving 'firms an opportunity to take voluntary and prompt corrective action before it initiates an enforcement action.'" 664 F.3d at 944. Similarly, the Handbook describes the Commission's warning letters as notifications that inform the recipient of violations, request corrective action, informs what legal actions may be taken (including "the maximum sanctions to which the firm and/or individual may be subject"), and informs the steps to take to question the findings. Handbook at 5-6, 11, 18-19. Importantly, the Handbook describes what steps to take upon being informed of a violation, which includes the ability to present evidence, requesting an informal hearing, conditional release, and a possible opportunity to bring the violative product into compliance. *Id.* at 18-22. It specifically states that "the firm may request an informal

hearing to meeting personally with Office of Compliance or Import Surveillance Division staff to present orally views and evidence." *Id.* at 18. "If the information you present, in the staff's opinion, does not refute staff's claim that the product is violative . . . Commission staff, as a general rule, will notify you in writing before staff pursues any enforcement action against the products or your firm." *Id.* Jake's Fireworks has not alleged that it requested a hearing that was denied nor that it requested reconsideration and was denied.

In sum, based on my review of Jake's Fireworks' allegations as well as the letters and Handbook, I conclude that the Notice was not the consummation of the Commission's decision-making process. While the process may be nearing its end, there are still steps that Jake's Fireworks may take, such as request a hearing or reconsideration. Therefore, Jake's Fireworks has failed to satisfy the first prong of the *Bennett* test.

II. *Bennett*'s Second Prong

For the Notice to be reviewable as a final agency action, it must satisfy both prongs of the *Bennett* test. *See Domenech*, 599 F.3d at 432; *COMSAT*, 190 F.3d at 274. Because I have concluded that Jake's Fireworks has not met the burden of showing that the Notice satisfied the first prong of the *Bennett* test, I need not and do not conduct a full analysis of the second prong.

CONCLUSION

Having concluded that Jake's Fireworks has not satisfied its burden to show that the Notice was a final agency action, this Court does not have subject-matter jurisdiction to proceed. Accordingly, the Commission's

motion shall be GRANTED, and the Amended Complaint is DISMISSED WITHOUT PREJUDICE.

ORDER

For the foregoing reasons, it is, this 30th day of October, 2020, hereby ORDERED that:

1. Defendants' Motion to Dismiss, ECF No. 17, is GRANTED.

2. Plaintiff's Amended Complaint, ECF No. 16, is DISMISSED WITHOUT PREJUDICE.

3. The Clerk of Court is directed to CLOSE this case.

/s/
Paul W. Grimm
United States District Judge

Excerpts of Transcript of
Oral Argument held on May 8, 2024
(Pages 1, 2, 3 (Lines 1-7), 18 (Lines 1-11),
23 (Lines 9-18), and 47)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 23-1661

JAKE'S FIREWORKS INC.,

Plaintiff – Appellant

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION; ALEXANDER HOEHN-SARIC, in his official capacity as Chairman of the CPSC,

Defendants – Appellees.

ORAL ARGUMENT
HELD ON
WEDNESDAY, MAY 8, 2024

BEFORE
HONORABLE ALBERT DIAZ, CHIEF JUDGE

HONORABLE J. HARVIE WILKINSON, III,
CIRCUIT JUDGE

HONORABLE DIANA MOTZ,
SENIOR CIRCUIT JUDGE

LEWIS F. POWELL, JR. COURTHOUSE
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ORAL ARGUMENT

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SENIOR CIRCUIT JUDGE

* * *

MR. TENNY: Thank you, Your Honor. May it please the Court, Daniel Tenney representing the Commission. The key point in this case is that the Commission has not made a determination on the legal and factual issues.

CHIEF JUDGE DIAZ: Will it ever?

MR. TENNY: It may, or it may not.

CHIEF JUDGE DIAZ: Well, that's kind of—that's not a very satisfactory answer. I don't think, for someone who's trying to comply with the law.

* * *

CHIEF JUDGE DIAZ: So can I ask a question about the content of the notices which are sometimes, you know, written in a—in a sort of guidance-forward looking way? But with respect to the orders of destruction, "You are hereby ordered to destroy these fireworks within 90 days." I mean, that's pretty definitive. And so Jake's has one option, or two options, either do it or not, in which case they violated an order of the—of the Agency. So how are they supposed to deal with that?

* * *

CERTIFICATE

I, Carolyn Daigle, do hereby certify that the proceeding named herein was professionally transcribed on the date set forth in the certificate herein; that I transcribed all testimony adduced and other oral proceedings had in the foregoing matter; and that the foregoing transcript pages constitute a full, true, and

correct record of such testimony adduced and oral proceeding had and of the whole thereof.

IN WITNESS HEREOF, I have hereunto set my hand this 11th day of October, 2024.

s/Carolyn Daigle
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NAEGELIUSA.COM

5 U.S.C. § 704

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.