UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of Amazon.com, Inc., *Respondent*	CPSC Docket No. 21-2

RESPONDENT AMAZON.COM, INC.'S ANSWERING BRIEF

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I. Introduction

Complaint Counsel asserts that the Presiding Officer erred by (1) declining to extend the Initial Decision to an unknown set of "similar" products that were not specified in the Complaint or determined to constitute a substantial product hazard, (2) rejecting Complaint Counsel's proposed coopting of Amazon's personalized "Your Orders" page on Amazon.com, and (3) declining to require duplicative postings to Amazon's social media accounts. But Complaint Counsel fails to meet its burden for each of the three issues raised on appeal, and the Presiding Officer correctly recognized that Complaint Counsel's requests contravene the requirements set forth in the Consumer Product Safety Act ("CPSA").

Complaint Counsel first argues that the Final Decision should be expanded to include not only the products specifically identified in the Complaint, but also those with "cosmetic variations such as in color and size." Dkt. 125 at 9.[1] But Congress set clear boundaries for the Commission, limiting the universe of products for which the agency may order remedial action. The plain text of the CPSA makes clear that the Commission may order remedial action only for specific products that the agency has formally determined to pose a substantial product hazard—not some broader set of potentially similar products. In the lead-up to this adjudication, CPSC testing staff claimed to have purchased samples of a discrete list of products sold by third-party sellers on Amazon.com, tested those products using specialized equipment and technical standards, and generated individualized testing summaries for each of the products. Based on such

[1] As Amazon noted in its Appeal Brief, Amazon cites record material according to docket number, and will file an appendix containing copies of all cited material for the Commission's convenience upon the completion of briefing.

testing, Amazon stipulated that the discrete list of products identified in the Complaint met the requirements for a substantial product hazard determination under the CPSA (and no others). Complaint Counsel nonetheless invites the Commission to rely on Amazon's precautionary (and voluntary) treatment of certain other products as *potentially* hazardous as sufficient to satisfy the Commission's obligation to determine that such products *are* hazardous. That approach erroneously circumvents the Commission's legal obligation to establish that a substantial product hazard exists with something more than *ipse dixit* speculation, or guesswork.

Complaint Counsel next seeks an order that a banner at the top of each customer's "Your Orders" page remain visible for 120 days notwithstanding the Presiding Officer's conclusion that Amazon's existing formulation of the page is sufficient. In doing so, Complaint Counsel seeks to coopt components of Amazon's website, notwithstanding the extensive direct notification Amazon has already provided. In addition to successfully sending email and Amazon account messages to all of the original Subject Product purchasers, Amazon went further in creating other mechanisms on Amazon.com to highlight and collate pertinent recall and product safety information. For example, Amazon created a hyperlinked banner in the customer's personalized "Your Orders" page which alerts the customer to a recall or product safety notification, transports the customer to a recall-specific summary page when the customer clicks on the link, and remains viewable on the "Your Orders" page indefinitely until clicked. Complaint Counsel seeks an order requiring that link to remain viewable for 120 days, but Amazon's existing protocol is better calculated to ensure that the banner is seen by customers. Complaint Counsel offers no evidence establishing why this arbitrary website change is necessary to protect the public.

Complaint Counsel also fails to provide any underlying factual basis or evidence for its request that Amazon make three repeat postings to each of its primary social media accounts for each of the three Subject Product categories. The Presiding Officer correctly deemed that request excessive, and Complaint Counsel has failed to show that repeat posting on customer-facing social media accounts that have nothing to do with recalls (and where a separate recall webpage is readily available) is necessary in these circumstances, especially where the Subject Product purchasers were notified and refunded over two years ago.

For every remedy and form of notice requested, Complaint Counsel must first establish that the Commission has statutory authority to enter such an order pursuant to the CPSA. And even if the Commission has such authority, Complaint Counsel bears the burden of establishing that any remedial action is in the public interest and that any notice is required to adequately protect the public. In doing so, Complaint Counsel must rely on substantial, reliable, and probative evidence, not vague references to agency experience or documents that lack any known factual or evidentiary basis. Complaint Counsel fails to meet its burden in each of these respects for each issue it raised on appeal. Accordingly, Complaint Counsel's appeal should be denied.

II. Legal Standard

Complaint Counsel's articulation of the relevant standard of proof is incomplete. While Complaint Counsel must indeed establish the requisite elements under Section 15 by a preponderance of the evidence, *Zen Magnets, LLC*, CPSC Dkt. No. 12-2, Final Decision and Order, 2017 WL 11672449, at *7 (Oct. 26, 2017), the same precedent cited by Complaint Counsel makes clear that such evidence must be of sufficient quality and quantity. *See Steadman v. SEC*, 450 U.S. 91, 104 (1981), *reh'g denied*, 451 U.S. 933 (1981).

As the Supreme Court held in *Steadman*, Section 556(d) of the Administrative Procedure Act ("APA") requires that the Commission's decision be "supported by and in accordance with the reliable, probative, and substantial evidence." *Id.* at 98 (quoting 5 U.S.C. § 556(d) (emphasis omitted)). This language, according to the Supreme Court, connotes "a *minimum quantity* of evidence." *Id.* Evidence constituting "pure speculation" is "due zero weight on the substantial evidence scale." *Alpo Petfoods, Inc. v. NLRB.*, 126 F.3d 246, 251 (4th Cir. 1997). "[C]onclusory assertions" likewise "cannot satisfy the requirement that the Commission act only upon substantial evidence." *Sea Robin Pipeline Co. v. FERC,* 795 F.2d 182, 188 (D.C. Cir. 1986).

The Section 556(d) standard likewise connotes a minimum "*quality* of evidence." *Steadman*, 450 U.S. at 98. Complaint Counsel cannot meet its burden with evidence of "poor quality," *i.e.*, evidence that is "irrelevant, immaterial, unreliable, and nonprobative." *Id.* at 102. Accordingly, the Commission may not rely on vague notions of agency "experience" in rendering its decision. *See Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 349 (5th Cir. 1981) (agency decision "must be based on something more than trust and faith in [the agency's] experience," and courts "are no longer content with mere administrative ipse dixits based on supposed administrative expertise" (citation omitted)). Nor may "so-called expertise" satisfy the standard of proof under the APA when no underlying basis for that expertise is present in the record. *See Balt. & Ohio R.R. Co. v. Aberdeen & Rockfish R.R. Co.*, 393 U.S. 87, 92 (1968).

III. Argument

A. The Commission's Remedial Authority Extends Only to the Subject Products.

In arguing that the Final Decision should extend not only to the Subject Products, but also to "the same products, however identified, as well as products differing only cosmetically such as by size or color variations," Dkt. 125 at 13, Complaint Counsel seeks a novel expansion of the Commission's authority. This expansion is neither authorized by the CPSA's plain text nor does it comport with the agency's own understanding of product safety hazards. The Presiding Officer recognized these defects in Complaint Counsel's arguments, and rightly rejected Complaint Counsel's invitation to exceed the Commission's statutory authority.

1. Section 15 Remedial Authority Applies to Particular Products, Not Classes of Products.

For the first time in this adjudication, Complaint Counsel contends that the term "product"—as used in Section 15 of the CPSA—is not defined. Dkt. 125 at 13–16. Based on that flawed premise, Complaint Counsel argues that the Commission may craft its own definition of "products" out of whole cloth to serve purported policy goals. But Complaint Counsel's underlying premise is wrong, and its contrived reading of the CPSA is nonsensical. The CPSA does indeed provide a definition for the "products" covered by Section 15, and that definition expressly forecloses Complaint Counsel's effort to expand the Final Decision beyond the Subject Products.

The Commission's jurisdictional scope is captured by the very name of the agency: the *Consumer Product* Safety Commission. Accordingly, the CPSA limits the agency's remedial authority to an express category of "consumer products" that pose a "substantial product hazard" and no other products. 15 U.S.C. § 2051(b). To remove any doubt for

the Commission, Congress has supplied an express definition of "consumer product" as "any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, . . . or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise[.]" 15 U.S.C. § 2052(a)(5). This definition confirms in no uncertain terms that a "consumer product" is thus limited in scope to an "article" or "component part thereof." *Id.*

The CPSA definition of "consumer product" comports with an ordinary and commonsense understanding of the term. As made clear by the Supreme Court, the ordinary meaning of the term "article" is "a particular thing." *Samsung Elecs. Co. v. Apple Inc.*, 580 U.S. 53, 59 (2016) (citation omitted). This accords with well-established definitions of the term "article." *See, e.g.*, *Article*, Black's Law Dictionary (11th ed. 2019) ("Generally, a particular item or thing."). Thus, in defining a "consumer product" as an "article" or subordinate "component part," Congress limited the term "consumer product" to a *particular* product, not an indefinite or otherwise broad class of products.

References in the CPSA to agency action with regard to a "product" could only mean a "consumer product" as defined in the statute—that is the only type of product over which the agency may exercise authority. As limited by the statute, the Commission may only therefore initiate Section 15 adjudicative action regarding *particular* products expressly identified by the agency. In a footnote, Complaint Counsel nonetheless takes the untenable position that the CPSA's definition of "consumer product" does "not appear to have any direct bearing on the meaning of the word 'product' in Section 15." Dkt. 125 at 14 n.12. This is demonstrably false and belies any commonsense reading of the CPSA.

If Complaint Counsel's assertion were true, the Commission could initiate Section 15 adjudications involving *any* type of product, including food or motor vehicles, which are governed exclusively by other agencies under the express terms of the CPSA.[2]

Moreover, Section 15's express terms make clear that only "consumer products" may be the subject of administrative adjudications. By their terms, the notice and remedy provisions in Sections 15(c) and 15(d) may be imposed only on a "manufacturer or any distributor or retailer." *See* 15 U.S.C. §§ 2064(c)–(d). Each of those categories—manufacturer, distributor, and retailer—in turn, are defined by the CPSA. *See* 15 U.S.C. § 2052(a). And each of those respective definitions make clear that the Commission's authority extends to manufacturers, distributors, and retailers *to the extent* those entities manufacture, sell, or deliver "consumer product[s]." *See id.* §§ 2052(a)(8), (11), (13). Thus, the *only* products for which the Commission may order Section 15(c) notice or Section 15(d) remedies are "consumer products," and Complaint Counsel's assertion that the definition of "consumer product" has no connection to Section 15 is unfounded.

In requesting an order extending not only to the Subject Products, but also to distinct products from distinct sellers based on purported cosmetic similarity, Complaint Counsel is essentially requesting that the Commission utilize its adjudicative authority to declare that an entire class of products constitutes a substantial product hazard. But in drafting the CPSA, Congress established a mechanism for declaring an entire "class" of products to be hazardous: "The Commission may specify, *by rule*, for any consumer product or class of consumer products, characteristics whose existence or absence shall be deemed a substantial product hazard[.]" 15 U.S.C. § 2064(j) (emphasis added).

[2] *See* 15 U.S.C. §§ 2052(a)(5)(A)–(I) (listing categories of products excluded from CPSC's jurisdiction, including motor vehicles, pesticides, aircraft components, drugs, and food).

Further, in stating that the Commission's rulemaking authority extends to a "consumer product *or* a class of consumer products," Congress made clear that the phrase "consumer product" alone does not inherently extend to a "class" of products unless otherwise specified. *See id.* (emphasis added); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("We refrain from concluding . . . that the differing language in two subsections has the same meaning in each."). Complaint Counsel's invitation to apply an adjudicatory order to an entire class of products would violate the express terms of the CPSA.

Language in Section 15(d) further precludes Complaint Counsel's request. There, Congress likewise made clear that where it intends to apply an expansive meaning of the term "product" to include "like or equivalent" products, it does so expressly. *See id.* § 2064(d)(1)(B) (authorizing the Commission to order a firm to "replace [a hazardous] product with *a like or equivalent product* which complies with the applicable rule." (emphasis added)). In identifying the "products" for which the Commission may order adjudicatory relief in Sections 15(c)(1) and 15(d)(1), Congress declined to use such language, instead limiting the Commission's authority to only those products which it has actually determined to pose a substantial product hazard, not "like or equivalent" products. *See id.* §§ 2064(c)(1), (d)(1).

Nor may Complaint Counsel override express statutory language with vague notions of statutory purpose. Complaint Counsel argues that because one of the purposes of the CPSA is to "protect the public against unreasonable risks of injury associated with consumer products," the Commission may essentially apply any definition of its choosing for what constitutes a "product" in the name of protecting the public. *See* Dkt. 125 at 14. This argument, too, conflicts with well-established precedent governing statutory interpretation—Courts have long held that broad notions of statutory purpose cannot

create agency authority that Congress did not otherwise elect to provide in express terms. *See, e.g.*, *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 230–31 & n.4 (1994) (agencies "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.").

Accordingly, the Commission may only order relief with regard to *particular* products, *i.e.*, the Subject Products specified in the Complaint.

2. Complaint Counsel Invites the Commission to Sidestep the Statutorily-Mandated Process for Determining Substantial Product Hazards.

In addition to the statutory definition of "consumer product," the underlying structure of Sections 15(c) and 15(d) precludes Complaint Counsel's request to extend the Final Decision to purportedly similar products never evaluated or tested by the Commission. Those provisions set an express limit on the universe of products for which the Commission may order action: those which the Commission "determines," based on substantial evidence, to be a "substantial product hazard." *See* 15 U.S.C. §§ 2064(c)–(d).

Under Section 15(c), before the Commission may order a firm to issue direct notifications to consumers, the agency must first "determine[] . . . that a product distributed in commerce presents a substantial product hazard." *Id.* § 2064(c)(1). Only *after* the agency has made that determination can it order the firm to provide notice to the consumers to whom "*such product* was delivered or sold." *Id.* § 2064(c)(1)(F) (emphasis added). Section 15(d) imposes the same structural limitation: only after the agency "determines" that "a product" poses a "substantial product hazard" may it order a firm to repair, replace, or refund "such product." *Id.* § 2064(d)(1).

In accordance with this statutory framework, the record makes clear that in ordinary practice, CPSC Compliance Office personnel do not initiate recall procedures

until agency technical staff have *first* tested a product and determined that it poses a hazard. *See, e.g.*, Dkt. 76, Amazon Ex. 67, [redacted] Such requirements make particular sense for Fulfilled by Amazon ("FBA") products, given that the CPSA obligates product manufacturers and the Commission to conduct specialized testing to identify safety standard noncompliance and other hazards, and Amazon is neither. Indeed, it was only in reliance on the Commission's product-by-product testing results that Amazon stipulated that the Subject Products—and those products alone—meet the requirements for a substantial product hazard. *See* Dkt. 35.

Thus, the Commission may order Section 15 notice and remedies only for specific products it has formally determined to constitute substantial product hazards. Seeking to override statutory limitations and ordinary agency practice, Complaint Counsel nonetheless relies on two incorrect assumptions in requesting that the Final Decision extend to purportedly similar products never tested or analyzed by the Commission.

First, Complaint Counsel assumes—without substantial evidence in support—that products with "mere cosmetic differences" must necessarily present the same product hazards as the Subject Products. Dkt. 125 at 14. And based on that assumption, Complaint Counsel asserts that the Commission may order Section 15 relief not only for the Subject Products, but an unspecified array of *other* products the Commission has never seen before, *i.e.*, products bearing only "cosmetic differences" from the Subject Products. In an attempt to establish that the entire universe of products bearing some purportedly cosmetic similarity to the Subject Products must necessarily pose identical hazards, Complaint Counsel represents that a few purported sample products subsequently purchased by agency staff on Amazon.com (following its initiation of this

adjudication) "present the same substantial product hazards" as the Subject Products. *See* Dkt. 125 at 14. But this mischaracterizes the record; agency testing personnel were not definitive in their findings and the parties did not stipulate to a substantial product hazard for these additional out-of-scope products.

To determine whether other FBA products bearing visual similarities to the Subject Products posed the same hazard as the Subject Products, agency testers [redacted] Dkt. 87, ¶ 200; Dkt. 76, Amazon Ex. 101, CPSC_AM0014331 at 14331. But even after all of that testing, agency personnel did not, in fact, *determine* that the tested products were the same as the Subject Products. To the contrary, they acknowledged that [redacted]. Dkt. 76, Amazon Ex. 101, CPSC_AM0014331 at 14331. Accordingly, [redacted]

In providing the agency's official position for purposes of this adjudication, the Commission's Rule 30(b)(6) representative further testified that [redacted]. *See* Dkt. 127 at 52. [redacted]. Thus, Complaint Counsel's assumption that products with

"mere cosmetic differences" must necessarily carry the same product hazards finds no support in the record, and was contradicted by the CPSC's own witness. More importantly, such testimony and corresponding record material make clear that the differences at issue here—*e.g.*, differences in dye, fabric, etc.—are not merely "cosmetic," but instead are potentially *material* to a substantial product hazard determination.

Nor do the two cases cited by Complaint Counsel support such an assumption here. *See* Dkt. 125 at 13 (citing *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 916 (7th Cir. 2007); *Beaty v. Ford Motor Co.*, 854 F. App'x 845, 848–49 (9th Cir. 2021)). Neither of those cases dealt with statutory authority of an administrative agency. The *JCW Investments* case concerned product similarity for purposes of copyright infringement, not whether two products necessarily pose the same hazards based on purported cosmetic similarities. *See* 482 F.3d at 916. And contrary to Complaint Counsel's characterization of the unpublished *Beaty* decision, the panel there did *not* reason that product defects necessarily carry over to different models bearing "cosmetic" similarities in the context of state consumer protection law. Instead, the panel held that the question of whether two products were sufficiently similar was a triable issue of fact, meaning that the Plaintiff would need to further convince a jury as to the nature of the similarities. *See Beaty*, 854 F. App'x at 848–49.

Second, Complaint Counsel improperly assumes that Amazon "determines" that other non-Subject Products pose substantial product hazards. Dkt. 125 at 16. Based on this assumption, according to Complaint Counsel, the Commission can simply adopt—unilaterally and without conducting any testing—that determination as its own for purposes of Section 15 notice and remedy. But this assumption, too, is directly contradicted by the record.

Amazon does not need to make a substantial hazard determination to remove products from its store. As a private entity, Amazon can remove products based on the mere *potential* for hazard as part of its own prioritization of customer safety. Accordingly, Amazon simply endeavored to identify products that *potentially* posed the same hazard as the Subject Products based on a purely-visual inspection. *See* Dkt. 127 at 52; *see also* Dkt. 113, Amazon Ex. 130 at 3 ("Amazon sought to suppress, message, and refund consumers for identified [products] that *appeared* to vary from the Subject Products only by size, color, or print pattern[.]" (emphasis added)). Nor could Amazon reasonably do more—the Presiding Officer rightly found that Amazon "is not equipped, except at tremendous cost" to "inspect and test those products." Dkt. 109 at 31.

The Commission, on the other hand, is required by statute to make a formal substantial product hazard determination prior to seeking a recall. Complaint Counsel's attempt to shift its burden to Amazon is not appropriate under the express terms of the CPSA. Congress did not provide authority to the Commission to intrude into private commerce based on the mere possibility or speculation of hazard. Instead, the Commission must "determine" that a product poses a hazard and may only order relief for "such product." 15 U.S.C. §§ 2064(c), (d). The only products meeting that criteria in this adjudication are the Subject Products identified in the Complaint and the Parties' Stipulation on product hazard, which only covered the products specifically identified in the Complaint. Complaint Counsel's request to rely on Amazon's purely-visual inspection of non-Subject Products as a sufficient basis to expand the Final Decision beyond the Subject Products thus contradicts the plain text of the CPSA and the clear record evidence.

3. No Commission Precedent Supports Complaint Counsel's Reading of the CPSA.

Complaint Counsel cites to a 1976 Commission order as purportedly supporting its request to extend the Commission's forthcoming order to "similar" products. *See* Dkt. 125 at 15 (citing Order at 1, *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4 (C.P.S.C. Oct. 27, 1976)). Complaint Counsel further represents to the Commission in its Appeal Brief that the Presiding Officer did not "expressly address[]" the *Relco* decision in his ruling on the Parties' Motions for Summary Decision. *Id.* That is wrong: the Presiding Officer expressly addressed—and rejected—Complaint Counsel's reliance on *Relco* in support of its "excessive" and "sweeping" request. Dkt. 109 at 30–31. Nor has Complaint Counsel offered any argument as to why the Presiding Officer's reading of the *Relco* decision was erroneous. Nor could it.

As correctly summarized by the Presiding Officer, *Relco* was a Section 15 administrative proceeding that ordered a welder manufacturer "to refrain from manufacturing and distributing . . . the Wel-Dex Electric Arc Welder, or any other electric welder of similar design or construction, containing any of the defects alleged to create a substantial product hazard[.]" Dkt. 109 at 30 (quoting *Relco*, Order at 1). According to Complaint Counsel, this directive—issued to a product *manufacturer*—opens the door for the Commission to order any entity to take action for any products of purportedly "similar design or construction." Dkt. 125 at 15. But the *Relco* decision did not provide any rationale for that portion of its order. And, as the Presiding Officer correctly recognized, Complaint Counsel's overly-expansive reading of *Relco* is flawed.

The Presiding Officer aptly concluded that the *Relco* order "was directed at the specific manufacturer of a particular welder with a documented design defect and at other

similar products of that company." Dkt. 109 at 31. Accordingly, "the manufacturer would be well equipped to know if it designed its other welders with the same hazardous defect." *Id.* The *Relco* decision was therefore premised on the notion that Relco had intimate knowledge of its own products and would be able to determine with certainty whether other products contained the same particular deficiency at issue. *See id.*

The underlying factual premise of the *Relco* decision is not present here: "Amazon has not designed and manufactured the hundreds of thousands of products" at issue. *Id.* Nor has Complaint Counsel identified any portion of the *Relco* order suggesting that the Commission intended for such a remedy scheme to apply where that underlying factual premise is not present. Dkt. 125 at 15. As noted by the Presiding Officer, "*Relco*'s reach does not extend so far." Dkt. 109 at 31.

The Presiding Officer's resistance to Complaint Counsel's misreading of *Relco* is well-founded. Complaint Counsel's proposal to rely on *Amazon's* discretionary basis for removing products from Amazon.com as *its own* basis to formally determine that an entire universe of products pose a substantial product hazard would pervert—not improve—incentives to promote consumer safety. If a firm's decision to treat a product as *potentially* hazardous will automatically trigger a formal Commission determination that the product is hazardous under the CPSA, firms would be perversely incentivized to cease their voluntary efforts to err on the side of caution. In addition to lacking record or precedential support, Complaint Counsel's request defies common sense and sound policy.

* * *

In sum, the plain text of the CPSA does not authorize the Commission to extend the Final Decision to any products other than the Subject Products actually tested and

determined to be a substantial product hazard. Nor may the Commission adopt Amazon's voluntary process to identify other products that *potentially* pose hazards to circumvent its own legal obligation to definitively determine substantial product hazards.

B. The Commission Should Reject Complaint Counsel's Request that Amazon Be Ordered to Maintain Notifications on the "Your Orders" Page for 120 Days.

Complaint Counsel's request that Amazon should be required to redesign its "Your Orders" page to maintain a notification banner for 120 days—rather than until such a notification is clicked on—should be rejected.

Amazon's "Your Orders" page is a private and personalized page configured to each individual customer's order history, allowing customers to view information regarding all products that they have purchased on Amazon.com. *See* Dkt. 103 at 3. If a product purchased by a customer "has either been recalled or otherwise been the subject of a product safety alert issued by Amazon's Product Safety team, a hyperlinked banner will appear on the customer's 'Your Orders' page stating that a product that they have purchased has been the subject of a recall or product safety alert." *Id.* The hyperlinked banner, when clicked, leads customers to their "Your Recalls and Products Safety Alerts" page, another dedicated and personalized page that allows customers to access information regarding products in their order history that have been the subject of a recall or product safety alert. *Id.* Amazon also "sends direct notices regarding recalls and product safety alerts to customers via e-mail and, separately, via the Message Center of customers' Amazon accounts." *Id.* at 2. The Presiding Officer recognized Amazon's "already extant process" for notifying customers of product recalls and safety alerts through the "Your Orders" and "Your Recalls and Product Safety Alerts" pages, and concluded that it was sufficient. Dkt. 119 at 7.

Complaint Counsel nonetheless requests that Amazon be ordered to redesign its website to maintain notifications on customers' private "Your Orders" page on Amazon.com for a 120-day period. However, there is no statutory authority for this type of significant alteration to a private, personalized website. Nor has Complaint Counsel provided any substantial evidence for this request as mandated by the APA. And for the same reasons, Complaint Counsel's request violates the First Amendment's bar on compelled speech. Complaint Counsel has failed to show that its requested changes to Amazon's website at least "directly advance" a "substantial interest" and cannot "be served as well by a more limited restriction." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980).[3] As shown below, Complaint Counsel offers no substantial basis for its request. To the contrary, Complaint Counsel's requested change is inappropriate given that Amazon's existing framework is better calculated to alert customers.

First, Complaint Counsel claims that the Commission has authority to order this change to Amazon's website, but that is incorrect, because this portion of the website is not "public." Complaint Counsel's reliance on the Commission's "authority to order public notification and to specify the form and content of any such notice" under Section 15(c)(1)(D), Dkt. 125 at 17, is misplaced because the webpage and notification at issue here—a banner notification on the "Your Orders" page—are non-public. The "Your Orders" page is private by design and accessible only to Amazon account holders, *i.e.*, the

[3] As discussed in Amazon's Appeal Brief, attempts to compel non-commercial speech are subject to strict scrutiny under the First Amendment. *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014). The Commission need not reach the question of whether the speech at issue here is commercial in nature, however, because Complaint Counsel's request to compel speech cannot meet the intermediate scrutiny requirements articulated in *Central Hudson*. *See Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015).

original purchasers of the Subject Products. *See* Dkt. 103 at 2. As acknowledged by Complaint Counsel, Section 15(c)(1)(D) applies only to "public" notices. Dkt. 125 at 17. It does not apply to notifications that—like the banner on the "Your Orders" page—are individualized for specific customers. *See* 15 U.S.C. § 2064(c)(1)(D) (the Commission may order "*public* notice of the defect or failure to comply, including posting clear and conspicuous notice on its Internet website" (emphasis added)). Accordingly, Complaint Counsel's request falls outside the Commission's statutory authority over *public* notifications. *See City of Arlington, Tex. v. FCC*, 569 U.S. 290, 297 (2013) (an agency's "power to act and how they are to act is authoritatively prescribed by Congress" and, thus, ". . . when they act beyond their jurisdiction, what they do is ultra vires").

Nor does the Commission's authority to order certain direct notifications permit compelled revisions to the Amazon "Your Orders" page. Section 15(c) of the CPSA authorizes the Commission to issue direct notices to consumers via "mail." *See* 15 U.S.C. §§ 2064(c)(1)(E), (F) ("the Commission may order. . ." a recalling entity "[t]o mail notice to every person to whom . . . such product was delivered or sold."). Even assuming *arguendo* that this provision extends to email messages as a form of digital "mail," banners on private website account pages are not sufficiently comparable to an email message under Sections 15(c)(1)(E) and (F). Nor does any other part of Section 15 confer authority to mandate changes to a private, individually-customized webpage like the "Your Orders" page.

Second, Complaint Counsel "must support its predicted public-interest scenario with 'substantial evidence when considered on the record as a whole,'" and "where an essential premise of a public-interest finding is only supported by bare assumptions, as in the present case, [a court] will find substantial evidence lacking." *NRDC v. EPA*, 857

F.3d 1030, 1041–42 (9th Cir. 2017) (citation omitted). Complaint Counsel must make a similar showing under the First Amendment that its request will "directly advance" a "substantial interest." *Central Hudson*, 447 U.S. at 564. Here, without reference to any underlying factual basis or evidence, Complaint Counsel provides only a cursory assertion that maintaining the banner on the "Your Orders" page for 120 days "makes it more likely affected consumers will be made aware of the hazards posed by the Subject Products," and that a "minimum posting requirement would prevent Amazon's premature removal of such notice, which could thwart consumer awareness." Dkt. 125 at 17. These unsupported pronouncements, without more, do not pass muster, especially given record evidence showing that Amazon was able to provide direct notification to the original Subject Product purchasers. Nor does Complaint Counsel provide any justification for a large public notice campaign in such an instance, contrary to other contexts where it is likely necessary, such as brick-and-mortar retail where the specific identity of purchasers is largely unknown.

Complaint Counsel's assertion that 120 days is "consistent with the standard period for which CPSC requires firms to maintain a prominent link to recall information on recalling entities' main landing pages" is likewise deficient. Dkt. 125 at 16. "[A]n agency's statement of what it 'normally' does or has done before . . . is not, by itself" adequate basis. *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1377 (Fed. Cir. 2016) (citation omitted). Indeed, "something more than trust and faith in [the agency's] experience" is required, and "mere administrative ipse dixits based on supposed administrative expertise" do not suffice. *Am. Petroleum Inst.*, 661 F.2d at 349 (citation omitted).

In lieu of any underlying evidence supporting its assertions, Complaint Counsel invokes the 2021 version of the "Product Safety Planning, Reporting, and Recall Handbook" (the "Recall Handbook"), published after this adjudication was initiated. This, too, is unavailing. As a threshold matter, and as discussed in Amazon's Appeal Brief, the Recall Handbook is a non-binding, informal document reflecting the mere preferences of agency staff without underlying factual or evidentiary basis. *See* Dkt. 127 at 42–45. As relevant here, the Recall Handbook provides no underlying support whatsoever for its assertion that "[a]fter 120 days, or when the case is closed, companies may remove the dedicated recall webpage link from the top of the company's homepage." Dkt. 76, Ex. 89 at 23.

Even assuming that the Recall Handbook could supply the requisite authority otherwise lacking in the CPSA to order Complaint Counsel's requested change to Amazon's website (it does not), the particular Recall Handbook provision cited by Complaint Counsel does not apply here. That provision specifically refers to a "company's homepage." *Id.*[4] And the record makes clear that the "Your Orders" page is *not* "the company's homepage." For this reason, the Presiding Officer found that the provision was "not directly applicable because [he] did not order a dedicated link [on the Amazon homepage]." Dkt. 119 at 6. On appeal, Complaint Counsel now attempts to characterize the "Your Orders" page as similar to a homepage because they are both "web-based notices," *see* Dkt. 125 at 16, but this assertion obfuscates a crucial distinction: the "Your

[4] The Recall Handbook makes this clear several times over: it asks companies to "[c]learly link recall announcements to the *company website's first-entry point*, such as *the consumer home page*," then advises that "[t]he dedicated recall webpage link should appear within the top 1/3 of *the company's consumer home page*. . . After 120 days, or when the case is closed, companies may remove the dedicated recall webpage link from the top of *the company's homepage*." Dkt. 76, Ex. 89 at 23 (emphasis added).

Orders" page, unlike a typical homepage on a company's website, is not public-facing. The "website notices" contemplated by the Recall Handbook, on the other hand, are those which are publicly accessible. *See* Dkt. 76, Amazon Ex. 89 at 23 (comparing the "[w]ebsite notifications" for which the Recall Handbook provides recommendations to a "news release").

Third, Complaint Counsel's requested alteration is actually inferior to the website's existing framework. As currently formulated, the hyperlinked banner on the "Your Orders" page remains visible *indefinitely*, until the customer clicks it and is redirected to the "Your Recalls and Product Safety Alerts" page. Dkt. 112 at 10. In cases where the customer does not visit the "Your Orders" page within 120 days of a recall or product safety notification, the hyperlinked banner will remain on that customer's "Your Orders" page beyond that period, and until the user interacts with the banner. This means that, unlike Complaint Counsel's proposal, Amazon's existing framework ensures that the banner will remain in place until the consumer has not only seen the banner, but successfully clicked on the banner. Once the banner has been seen and clicked by the customer, however, there is no reasonable basis to require the banner to remain in place for an additional arbitrary period of time, and Complaint Counsel presents no evidence to the contrary.

In sum, Complaint Counsel has failed to meet its burden to prove that a 120-day period for maintaining a banner on the "Your Orders" page is necessary, or that the Presiding Officer erred in rejecting that request.

C. Social Media Postings Are Not Necessary to Protect the Public in This Particular Context.

1. Complaint Counsel Cannot Justify Repetitive Postings to Amazon's Primary Social Media Accounts.

As established in Amazon's Appeal Brief, inundating consumers with multiple posts on social media would not further any safety interest, and would ultimately be counterproductive. Here, it is undisputed that Amazon was able to send emails and account messages to every original Subject Product purchaser. *See* Dkt. 87, ¶ 110. As technological capabilities have increased, so too has Amazon's ability to provide rapid direct notification to its customers. And the Commission has long acknowledged that direct notice is "the most effective form of a recall notice"[5] and that its availability obviates the need for other forms of notice.[6] Yet Complaint Counsel seeks to reflexively apply notice mechanisms utilized in other contexts where direct notice is less feasible, such as brick-and-mortar retail, where customer identity is largely unknown. But Complaint Counsel has not shown that *any* postings to Amazon's primary social media accounts, let alone multiple, repetitive posts, are "required in order to adequately protect the public." *See* Dkt. 127 at 61–63.

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[5] 16 C.F.R. § 1115.26(a)(4); *see also* 83 Fed. Reg. 29,102, 29,102 (June 22, 2018) ("Direct notice recalls have proven to be the most effective recalls."); Dkt. 76, Amazon Ex. 89, CPSC_AM0011464 at 1481 [redacted]); Dkt. 76, Amazon Ex. 90 CPSC_AM0011459 at 1463 [redacted]); Dkt. 76, Amazon Ex. 91, CPSC_AM0009669 at 9680 ([redacted]).

[6] *See*, *e.g.*, Dkt. 76, Amazon Ex. 68 at CPSC_00009653 ([redacted]); *see also* Dkt. 76, Amazon Ex. 62 at 10–11 (former CPSC Commissioner explaining that [redacted]).

As with the other requested forms of notice, Complaint Counsel must establish—with substantial evidence—that the requested social media postings are required to adequately protect the public. 15 U.S.C. § 2064(c); 5 U.S.C. § 556(d). It has made no such showing here. For that reason, the Presiding Officer rightly held that Complaint Counsel has not "adequately articulated how repeating the postings would be beneficial in these circumstances." Dkt. 119 at 7–8. Complaint Counsel's purported basis for repetitive social media postings is cursory, not evidentiary—it relies primarily on amorphous references to "agency practice and policy" and non-binding staff documents. None of those can fulfill Complaint Counsel's burden of proof.

As with its other notice-related requests, Complaint Counsel relies on a staff-generated document known as the CAP Template. Agency staff use the CAP Template [redacted]. Dkt. 125 at 19. As established in Amazon's Appeal Brief, however, the CAP Template [redacted]. *See* Dkt. 127 at 59–60. Nor was it reviewed, approved, or ratified by the Commission, let alone subjected to notice-and-comment procedures. *See id.* Such documents, in and of themselves, cannot fulfill Complaint Counsel's burden—they do "not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015) (quotation marks and citation omitted).

Alternative material cited by Complaint Counsel makes no reference to social media at all and further undercuts Complaint Counsel's assertions. For instance, Complaint Counsel mischaracterizes a CPSC-commissioned literature review as supporting repetitive social media postings, Dkt. 125 at 19, but that research merely

concluded that consumers who received a "recall notice in the mail" and also "heard about the recall through media notices and advertising" were more likely to "check[] to see if [their product] was included in the recall." Dkt. 76, Amazon Ex. 94, CPSC_AM0010101 at 108. This is not an instance where most consumers are unlikely to know whether their product was included in the recall—all original purchasers of the Subject Products were directly notified that the specific product they purchased was subject to recall. Nor did Complaint Counsel make any effort to provide substantial evidence quantifying—or even estimating—the number of persons likely in possession of a Subject Product who did not receive direct notice, or establishing any incremental benefit of providing social media posts, let alone multiple social media posts.

Moreover, the Recall Handbook—on which Complaint Counsel repeatedly relies to support its other requests—cuts against its request for repetitive social media posts. As noted by the Presiding Officer, the "Recall Handbook does not recommend repeating social media posts weekly, and Complaint Counsel has not adequately articulated how repeating the postings would be beneficial in these circumstances." Dkt. 119 at 7–8.

Compounding these evidentiary shortcomings, the risk of recall fatigue undermines any appreciable benefit of repeated social media postings at this stage in the proceeding, and will ultimately harm the public by unnecessarily congesting communication channels with redundant postings, to the detriment of other safety warnings. The Presiding Officer's hesitance notwithstanding, Dkt. 109 at 23–24, the CPSC's own Director of Communications, as well as former CPSC Commissioners, have acknowledged the risks posed by recall fatigue and the agency's awareness of the

phenomenon.[7] Duplicative social media postings—particularly in light of all the other notifications about the Subject Products provided through other channels of communication—may cause consumers to "simply ignore urgent calls" regarding "defective goods"[8] when navigating channels over-saturated with "white noise." Dkt. 76, Amazon Ex. 62 at 26. *See also* Dkt. 95, Amazon Ex. 129, Wogalter and Leonard 1999 (noting that "people have limited pools of mental resources that are used for attending and for working (conscious) memory" and "we cannot simultaneously attend to everything around us, as it would exceed the available attention capacity").

Requiring Amazon to issue repetitive posts on its primary social media pages would operate to the *detriment* of Amazon customers, who rely on those pages for updates regarding the company's core services. Indeed, because of the diversity and size of Amazon's various business streams, Amazon has carefully developed its social media practices with customers' specific needs in mind, utilizing dedicated and separate accounts to cover various topics in order to facilitate customers' receipt of information that is most relevant to their specific needs and interests. Redundant use of Amazon's primary social media pages for the recall of individual products would undermine the utility of those pages, especially given the volume of products available for purchase on Amazon.com. Nor has Complaint Counsel provided any evidence indicating that persons who possess a Subject Product but did not receive direct notice are likely to see postings

[7] *See, e.g.,* Dkt. 76, Amazon Ex. 16, [redacted]; Dkt. 76, Amazon Ex. 62 at 26 ([redacted]).

[8] Dkt. 76, Amazon Ex. 95, Lyndsey Layton, *Officials Worry About Consumers Lost Among the Recalls*, The Washington Post (July 2, 2010). *See also* Dkt. 75 at 27–28.

to Amazon's social media accounts, especially given that they likely do not know that the items were purchased on Amazon.com in the first place. Regardless, given that the number of such individuals is likely *de minimis*—a number that Complaint Counsel has not identified—duplicative social media posts are unlikely to serve any safety interest, and will detrimentally impact Amazon's social media accounts in the process.

2. Complaint Counsel's Request for Repetitive Social Media Posts Violates the First Amendment.

As established in Amazon's Appeal Brief, Complaint Counsel's social media requests—like its other compulsory notice demands—run afoul of the First Amendment, and must therefore be denied. "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion). As with its request to alter Amazon's Your Orders page, Complaint Counsel must show that mandated social media postings would at least "directly advance" a "substantial interest." *Cent. Hudson*, 447 U.S. at 564.[9] Further, "if the governmental interest could be served as well by a more limited restriction," the "excessive restrictions cannot survive." *Id.*

Complaint Counsel has not shown how repetitive social media posts would "directly advance" any appreciable safety interest. *Id.*; *see also* Dkt. 119 at 7–8. Complaint Counsel's proffered support for its requests—staff-generated documents and alternative source materials, discussed above—does not provide the requisite evidentiary basis and, at best, provide only "ineffective or remote support for the government's

[9] As noted previously, the Commission need not reach the question of whether the speech at issue here is commercial in nature and thus subject to a strict scrutiny standard because Complaint Counsel's request cannot meet the intermediate requirements articulated in *Central Hudson*. *See supra* note 3.

purpose." *Id.* Under *Central Hudson*, that is not enough. Complaint Counsel's vague appeals to "agency practice and policy" are likewise inadequate as mere "speculation or conjecture." *Nat'l Ass'n of Mfrs.*, 800 F.3d at 527. Indeed, Complaint Counsel's request for duplicative social media postings is excessive in this context, where Amazon has already provided sufficient notice to consumers regarding the hazards posed by the Subject Products.

3. There Is No Basis to Order That Social Media Posts Be Given "Featured" or "Pinned" Status.

For the first time in this adjudication, Complaint Counsel now requests that Amazon be ordered to designate social media posts regarding the Subject Products as "featured" or "pinned" posts on Amazon's primary social media accounts. Dkt. 125 at 19. Complaint Counsel failed to make this request to the Presiding Officer, or to Amazon, at any prior stage of this adjudication.[10] Complaint Counsel cannot add material components to its request for relief at this juncture.[11]

Even if Complaint Counsel had properly preserved this request, it has nonetheless failed to meet its burden under Section 15(c) to show that the public will not be adequately

[10] Indeed, during discovery, Complaint Counsel's response to Amazon's Interrogatory regarding the remedies sought in this adjudication made no mention of "featured" posts on Amazon's social media pages. *See* Dkt. 113, Amazon Ex. 131 at 25. Despite its obligation to do so, Complaint Counsel did not "supplement its response" to identify this new request. *See* 16 C.F.R. § 1025.31(f). Nor did Complaint Counsel make any reference to such a request in its Complaint, Summary Decision briefing, or at oral argument before the Presiding Officer. *See generally* Dkts. 78–79, 86, 93; Mar. 28, 2023 Oral Arg. Tr.

[11] While respondents are not "require[d]. . . to include every possible legal argument or defense in its answer," Dkt. 109 at 32 (explaining 16 C.F.R. § 1025.12), all administrative complaints filed by Complaint Counsel must include "*the* relief which the staff believes is in the public interest," 16 C.F.R. § 1025.11(b)(4) (emphasis added).

protected unless forthcoming social media posts are given "featured" status by "pinning"[12] those posts to the top of Amazon's social media pages. *See* 15 U.S.C. § 2064(c). Complaint Counsel relies on just two sources, neither of which supply any underlying evidence, to establish that the public will not be protected unless Amazon designates the posts as "featured." The first source is a single PowerPoint slide displayed at a Commission-led event known as the Recall Effectiveness Workshop. *See* Dkt. 125 at 18 (quoting Amazon Ex. 68). And while that slide recommends designating posts as "featured," it provides no further elaboration, *e.g.*, what factual basis Commission staff considered or relied upon for that proposition, or what criteria should govern the determination. *See* Dkt. 76, Amazon Ex. 68, CPSC_AM0009649 at 9651. The same is true for Complaint Counsel's citation to the Recall Handbook, which does not provide any factual basis for its recommendation to "[m]ake the recall a featured post, *if possible*." Dkt. 76, Amazon Ex. 89 at 24 (emphasis added).

Even more problematic, when considered in the context of Complaint Counsel's own proposed order—which contemplates multiple simultaneous social media posts for each Subject Product category—it is not *possible* to implement Complaint Counsel's request on all of Amazon's social media accounts. For instance, X (formerly known as Twitter) only allows users to "pin" one post at a time.[13]

Amazon is not only a large retailer, but also services numerous other business lines, and its social media pages serve as pivotal tools for communicating information relevant

[12] Featuring or "pinning" a post allows the post to remain at the top of a social media page's feed. *See, e.g.,* Facebook Help Center, "Pin items to the top of your Facebook page," https://www.facebook.com/help/235598533193464.

[13] *See* X Business, "Twitter 101: Maximizing your Profile," https://business.twitter.com/en/blog/twitter-101-maximizing-your-profile.html.

to its entire worldwide customer-base. To require Amazon to "feature" or "pin" these particular recall postings—when Amazon has already directly notified each customer and Complaint Counsel has offered no evidentiary estimate whatsoever as to how many consumers would likely benefit from this request, *i.e.*, the number of consumers who possess the Subject Products but have not received any notice, direct or otherwise, about these products to-date—would result in the agency assuming control of Amazon's social media accounts in a major and impactful way based on pure speculation alone. Complaint Counsel's belated and unsupported assertions cannot justify such drastic action with no supporting evidence, especially when weighed against the sufficient notice Amazon has already provided to consumers.

IV. Conclusion

For these reasons, Complaint Counsel's appeal should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2023, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

- by email to the Secretary of the U.S. Consumer Product Safety Commission, Alberta Mills, at amills@cpsc.gov; and
- by email to Complaint Counsel at jeustice@cpsc.gov, lwolf@cpsc.gov, sanand@cpsc.gov, fmillett@cpsc.gov, and tmendel@cpsc.gov.

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