UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of Amazon.com, Inc., Respondent.	CPSC Docket No. 21-2 Hon. Jason S. Patil Presiding Officer

RESPONDENT AMAZON'S SUPPLEMENTAL BRIEF ON REMEDIES

In accordance with the Presiding Officer's May 8, 2023 Order on Summary Decision Motions (the "Order"), Respondent Amazon.com, Inc. ("Amazon") submits this Supplemental Brief on the implementation of the Order and in response to Complaint Counsel's Amended Proposed Initial Order (the "Proposed Order"). Amazon objects to the Presiding Officer's Order to the extent it denied Amazon's Motion for Summary Decision, but at the Presiding Officer's express direction, Amazon now proceeds with supplemental briefing in reliance on the Presiding Officer's holding that any response given "will not be considered a waiver of Amazon's objections to [the] order and the summary decision order of January 19, 2022." Order at 47–48.[1]

Complaint Counsel's Proposed Order is problematic in multiple respects. *First*, in issuing the Order, the Presiding Officer set clear boundaries for the forthcoming remedies, but Complaint Counsel's Proposed Order repeatedly disregards those boundaries. *Second*, multiple components of Complaint Counsel's Proposed Order contain remedies that were not previously requested, briefed, or litigated—those remedies have been forfeited and the Presiding Officer otherwise lacks the authority to order remedies for which Complaint Counsel failed to make the requisite showing under the Consumer Product Safety Act ("CPSA"). *Third*, other aspects of Complaint Counsel's

[1] Amazon reserves and does not waive any of its rights to appeal or otherwise contest any of the Presiding Officer's orders in this adjudication.

Proposed Order are unreasonable, exceed the agency's common practice, or impose disproportionately burdensome requirements. For these reasons, the portions of Complaint Counsel's Proposed Order identified below should be rejected in accordance with the limitations set forth in the Presiding Officer's Order and the CPSA.

I. Complaint Counsel's Proposed Order Impermissibly Exceeds the Requirements for Cessation of Distribution Under the CPSA.

(a) Complaint Counsel Goes Too Far in Seeking to Force Amazon to Retrieve and Destroy Products Possessed by Manufacturers.

Amazon has already ceased distribution of the Subject Products, and as such, compliance with that portion of any forthcoming order will be achieved the moment the order is entered. As part of the forthcoming order to cease distribution, however, Complaint Counsel requests that Amazon be ordered to:

> [N]otify all persons or entities that transport, store, distribute, or otherwise handle any Subject Product, or to which any Subject Product has been transported, sold, distributed, or otherwise handled, to immediately cease distribution of the Subject Products.

Proposed Order at 2. While this language directly quotes Section 15(c)(1)(B) of the CPSA, it bears noting that the Subject Products have not been available for purchase on Amazon.com for years. The only non-Amazon entities who might possibly possess the products are the originating third-party sellers and individual consumers. Given that Complaint Counsel's Proposed Order dedicates a section to the direct notice of individual consumers, the only remaining entity to whom such notice could be given is the upstream third-party sellers/manufacturers whom Amazon already notified about any applicable notices of violation involving the Subject Products. *See* Dkt. No. 87 at ¶ 122, CPSC Resp. to Amazon SUMF (Oct. 21, 2022).

As part of the requested notification, Complaint Counsel seeks to require Amazon to instruct upstream third-party sellers/manufacturers to "destroy or return to Amazon any Subject

Products in their inventory." Proposed Order at 7. In addition to this request, Complaint Counsel has also hidden a related requirement in an exhibit attached to its Proposed Order (Exhibit A). That exhibit, in turn, seeks to impose an additional obligation on Amazon to instruct upstream third-party sellers/manufacturers to "provide [Amazon] with a certificate of destruction" for any and all inventory destroyed by the third-party seller/manufacturer. Proposed Order, Ex. A at 3. As written, these provisions would require Amazon—in its capacity as a purported downstream distributor—to collect and destroy the inventory of an upstream manufacturer and otherwise serve as the verifying agent for any destruction carried out by the manufacturer. This request makes no sense—it is illogical for a manufacturer to "return" a product to Amazon that had never been shipped to Amazon in the first place.

Complaint Counsel's failure to acknowledge or support this request in its Supplemental Brief is unsurprising given that Section 15(c)(1) only requires a firm to provide ***notice*** to third-parties, not assume collection, destruction, and verification responsibilities (none of which are mentioned in the statute) for those entities. Not only has Complaint Counsel altogether forfeited inclusion of such components in the Presiding Officer's forthcoming order, its attempt to backdoor such requirements into the order should trigger close scrutiny of its entire submission.

(b) The Order Should Not Extend to Products Purportedly Varying by Size, Color, and Style.

The Presiding Officer denied Complaint Counsel's request for an order extending relief to purported "functionally equivalent" hair dryers and carbon monoxide detectors, but left open the possibility of extending the cease-distribution order to children's sleepwear varying in "size, color, and style that present the same hazards" as the Subject Products. Order at 30. It bears noting, however, that the Presiding Officer lacks authority to extend the cease-distribution order in this way for one important reason. The Presiding Officer's May 8, 2023 Order—based, in turn, on the

Parties' prior stipulation—made a formal substantial product hazard determination for a specific list of Subject Products. Order at 13–15. Pursuant to the CPSA, those are the only products for which the Presiding Officer may order Amazon to take action. *See* 15 U.S.C. §§ 2064(c) & (d) (authorizing the Commission to order relief only for those products which the agency has formally "determined" constitute a substantial product hazard). The only way in which the Presiding Officer would have authority to order Amazon to take action with regard to additional sleepwear products would be to identify each additional product and make a formal "determination" that those products pose a substantial product hazard. Amazon made no such stipulation. *See* Dkt. No. 35, Stipulation of the Parties (Apr. 26, 2022).

The Presiding Officer's Order relied on 16 C.F.R. § 1120.3, a regulation which provides a formula to convert children's clothing sizes denoted as "small," "medium," and "large" to a numerical size label (*e.g.*, size range 2T to 16). *See* Order at 29. The regulation's assertion that a garment labeled as size "large" is equivalent, as matter of industry standard, to a garment labeled as size "12," says nothing about whether garments of different sizes, colors, or styles are, in fact, equivalent for purposes of "hazard" under Section 15 of the CPSA. *See* 16 C.F.R. § 1120.3(b)(2). To the contrary, Amazon cited sleepwear-specific evidence in its Motion undermining such a finding, while Complaint Counsel did not offer any evidence—empirical, expert, or otherwise—to support such a finding. *See* Dkt. No. 74 at 43, Amazon's Mot. for Summ. Decision (Sept. 23, 2022). For example, the Commission's own product testing regulations presume that changes in fabric color (*i.e.*, dyes) can affect flammability.[2] Given that flammability is the key safety hazard

[2] *See*, *e.g.*, 16 C.F.R. § 1615.4(b)(2) (noting that different colored garments may be included in a testing sample "provided such colors or print patterns demonstrate char lengths that are not significantly different from each other as determined by previous testing of at least three samples from each color or print pattern"); *see also* Amazon Ex. 101, CPSC_AM0014331.

at issue for the children's sleepwear products, the potential for differing flammability in connection with cosmetic differences precludes automatic extension of a Section 15 remedy to products lacking an individualized hazard determination by the Commission.

Were the Presiding Officer to nonetheless proceed with such an order, Amazon again submits that Complaint Counsel's Proposed Order directly contradicts the May 8, 2023 Order. The Presiding Officer was quite clear that the cessation of distribution order would ***not*** extend to hair dryers and carbon monoxide detectors. Order at 29–31. And yet, Complaint Counsel's Proposed Order (and Brief in support) makes no such distinction, seeking an order that extends to "size," "color," and "style" variations of ***all*** the Subject Products at issue, not just the children's sleepwear garments. Proposed Order at 2.

Additionally, to the extent the Presiding Officer elects to proceed with such a remedy, Amazon respectfully requests that the Order extend only to items that vary by "size" or "color" and omit reference to items that vary by "style." At no point in this litigation has Complaint Counsel offered a justiciable standard or rubric for what constitutes a change in "style." In its responses to Complaint Counsel's Interrogatories on this topic, Amazon described how it looked to "size," "color," or "print pattern" for identification of potentially-similar products.[3] *See* Amazon Ex. 130 at 3–4, Amazon's Suppl. Obj. and Resp. to First Set of ROGS (June 15, 2022).[4]

Under the quintessential test for objectivity, two reasonable people might draw the line in two different locations in terms of where a "style" difference ends and a new product begins.

[3] As part of its continual effort to promote customer safety, Amazon takes proactive measures to identify and remediate safety issues. The question here is a separate one: whether the Commission has the necessary authority—or is appropriately situated—to insert itself into the efforts that Amazon elects to take as part of its business processes.

[4] All exhibits herein (Amazon Exs. 130–32) are attached to the Declaration of Nicholas Griepsma dated May 30, 2023.

Given that the Presiding Officer's Order will carry the force of law, fundamental tenets of fairness and due process require that the standard enforced on Amazon be clear and objective. *See United States v. Chrysler*, 158 F.3d 1350, 1354 (D.C. Cir. 1998) (agencies must provide "fair notice" of imposed standards); *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852, 857 (D.C. Cir. 1978) (citing cases "invalidating administrative action because the agency had no articulated standards"). Any reference to "style" should be omitted from the forthcoming order.

II. Complaint Counsel's Requested Notice Exceeds the Requirements of the CPSA.

Complaint Counsel calls for Amazon to issue two additional rounds of "email notifications to original purchasers" and for the Commission to issue a press release on the agency's website. *See* Proposed Order at 2–3. Both requests go too far. *First*, two rounds of email notifications are unnecessary under the circumstances. *Second*, Complaint Counsel's proposed language for the email notice and press release includes content that exceeds the limitations put in place by the CPSA and associated mandatory recall regulations.

As both the Presiding Officer and Complaint Counsel have acknowledged, Amazon already sent emails to all original purchasers of the Subject Products.[5] Those emails were sent close in time to the Commission's safety determination, *i.e.*, when customers were still likely to possess the product. Indeed, even Complaint Counsel's proposed email notifications acknowledge that the intended recipients "may have previously received a communication from Amazon regarding th[e Subject Products.]" *See* Proposed Order, Ex. C. One round of email notifications issued now, years later, as a result of an order in this adjudication, would effectively serve as a second notice to the original purchasers of the Subject Products.

[5] *See* Order at 36 ("Amazon already emailed the original purchasers[.]"); Dkt. No. 87 at ¶ 110.

Further, despite Complaint Counsel's claim that its proposed notices "reflect the content required by Section 15(i) of the CPSA, and its regulations at 16 C.F.R. §§ 1115.23–.29," Compl. Counsel Suppl. Br. at 3, its proposed email notifications and press releases include extraneous content that are neither prescribed by the statutory and regulatory guidance nor consistent with the Commission's past practice.

Recall notices are meant to help consumers "identify[] the specific product" being recalled, "understand[] the hazard that has been identified with such product," and "understand[] what remedy, if any, is available to a consumer who has purchased the product." 15 U.S.C. § 2064(i)(1). Yet Complaint Counsel's proposed notices contain language that does not serve any of those purposes.

For instance, the headlines of Complaint Counsel's proposed press releases include the phrase "Court-Ordered Mandatory Recall." Proposed Order, Ex. B. References to this adjudication (which is before an administrative agency, not a "Court") would not aid consumers in identifying the Subject Products, understanding the substantial product hazards identified with respect to the Subject Products, or understanding the remedies available to them. Indeed, neither the CPSA nor the mandatory recall regulations authorize the Commission to order that the adjudication itself be referenced in a direct notice or press release. *See generally* 15 U.S.C. § 2064(i)(2); 16 C.F.R. § 1115.27. Moreover, the Commission did not include such language in the press release for its most recent mandatory recall and, instead, simply referenced the name of the recalled product and the identified hazard.[6] Any references to the adjudication should therefore be omitted from any mandatory notices ordered by the Presiding Officer.

[6] *See* CPSC Recall No. 21-179, "Zen Magnets and Neoballs Magnets Recalled Due to Ingestion Hazard" (Aug. 17, 2021), *available at* https://www.cpsc.gov/Recalls/2021/Zen-Magnets-and-

The references to death included in Complaint Counsel's proposed notices are also inconsistent with Commission practice. For example, Complaint Counsel calls for the following hazard language to be included in notices regarding the children's sleepwear Subject Products:

> "The bathrobes and pajamas fail to meet the flammability standards for children's sleepwear, posing a risk of burn injuries and ***even death*** to children."[7]

Yet the Commission has published recall notices regarding similar products and hazards that omitted such references to a risk of death:

> "The children's pajamas fail to meet the flammability standards for children's sleepwear, posing a risk of burn injuries to children."[8]

Indeed, it appears that *none* of the Commission-approved recall notices involving children's sleepwear in 2023 have used such extreme language. *See* Amazon Ex. 132 (compilation of recall notices). Complaint Counsel appears to have reflexively opted for the most severe possible language in its proposed notices, but has not provided a reasoned explanation for its departure from past practice. *See FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 513 (2009) (agencies must have "good reasons" for departing from established policy).

III. Complaint Counsel Disregards the Confines of the Order With Regard to Internet Notice.

Multiple aspects of Complaint Counsel's Proposed Order exceed the boundaries set by the Presiding Officer's Order. Excessive changes to Amazon's website, sweeping social media posts,

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Neoballs-Magnets-Recalled-Due-to-Ingestion-Hazard#:~:text=Zen%20Magnets%20LLC%20is%20aware,powered%20magnets%20and%20requiring%20surgery.

[7] Proposed Order, Exs. B–C (emphasis added).

[8] CPSC Recall No. 22-177, "Children's Sleepwear Recalled Due to Violation of Federal Flammability Standards and Burn Hazard; Imported by Kids Tales; Sold Exclusively at Amazon.com" (June 30, 2022), *available at* https://www.cpsc.gov/Recalls/2022/Childrens-Sleepwear-Recalled-Due-to-Violation-of-Federal-Flammability-Standards-and-Burn-Hazard-Imported-by-Kids-Tales-Sold-Exclusively-at-Amazon-com (emphasis added).

and notice to third-parties who do not possess the Subject Products should be omitted from the Initial Decision.

(a) Postings to Amazon.com

The Order calls for "the pertinent recall notices (or direct links to each notice)" to be posted "on the Amazon.com 'Product Safety and Recalls' and 'Your Recalls and Product Safety Alerts' pages and the CPSC website." Order at 38 (citation omitted). Complaint Counsel's Proposed Order, however, attempts to exceed this directive in a disproportionately burdensome manner.

Complaint Counsel calls for Amazon to significantly alter the Amazon.com homepage by adding a "conspicuous link" to Amazon's "Product Safety and Recalls" page. Proposed Order at 3. Such a redesign of Amazon's website goes far beyond the issuance of a notice tailored to the Subject Products in this particular action. It also has no basis in the Presiding Officer's Order, which recognized that "[g]iven the scope of Amazon.com's web traffic, totaling billions of visits a month, and well over a quarter-billion products sold on its site," reference to the recalls on Amazon's homepage is "not 'required in order to adequately protect the public'—particularly given the availability of other more narrowly calculated remedial measures." Order at 38. Accordingly, the Presiding Officer determined that inclusion of links to CPSC press releases elsewhere on Amazon's website would sufficiently enable a "person querying the product on [Amazon's] site" to receive adequate notice. Order at 38.[9] Any requests by Complaint Counsel

[9] Complaint Counsel's request that Amazon maintain recall notices on Amazon.com for ten years is likewise unprecedented and excessive. In the agency's most recent mandatory recall, the Commission ordered that the notices remain posted to the firm's website "for an extended period of time, to the extent possible." *Zen Magnets, LLC*, Dkt. No. 12-2, 2017 WL 11672449, at *43 (CPSC Oct. 26, 2017). Given the potential volume of recall-related posts to Amazon's recall page, Complaint Counsel's arbitrary proposal of ten years is likely infeasible and unjustifiably departs from the standard imposed in *Zen Magnets*.

to change the Amazon.com homepage therefore exceed the scope of the Presiding Officer's Order and are unnecessary.[10]

In addition to altering the Amazon.com homepage, Complaint Counsel's brief goes further in calling for Amazon to "post a banner on the 'Your Orders' page, providing notice of the recall and linking to the" customer's recall page, for 120 days." Compl. Counsel Suppl. Br. at 7. The Presiding Officer's Order, however, does not invite or contemplate a rebuild of the "Your Orders" page, and rightly so. Congress has already engaged in the calculus of what level of notice is required to adequately protect the public, and it chose to exclude any express provisions in the CPSA that would open the door to such changes of this magnitude to one of the most heavily-trafficked websites in the history of the Internet. Regardless, Amazon's April 6, 2023 letter to the Presiding Officer explained how Amazon has—of its own volition—incorporated a banner to its "Your Orders" page that, when clicked, redirects users to their personalized "Your Recalls and Product Safety Alerts" page. *See* Dkt. No. 103 at 3, Amazon's Resp. to the Mar. 30, 2023 Order Following Oral Arg. (Apr. 6, 2023). Upon confirmation the user has seen the banner (*i.e.*, the user successfully clicks on the banner), it no longer appears. The fact that Amazon takes actions of its own accord does not—in and of itself—convey regulatory authority on the Commission. And to the extent the Presiding Officer nonetheless elects to order action with regard to Amazon's "Your Orders" page, it should not require further reformulation of the page.

Complaint Counsel's proposed redesign of Amazon's website is yet another request to unconstitutionally compel Amazon's speech. As the Presiding Officer recognized, such a

[10] Nor has Complaint Counsel provided any justification for its vague and unworkable request for Amazon to report the number of "website hits Amazon received on its dedicated website for the recall of the Subject Products." Proposed Order at 8. Such a request is unnecessary given Complaint Counsel's simultaneous request for reports of the number of products returned or destroyed by customers. *See id.*

compulsion is appropriate only if it "directly advances [a] substantial government interest . . . [and] is not more extensive than is necessary to serve that interest." Order at 33 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980)). Amazon's First Amendment argument in its Motion for Summary Decision was focused on the direct notices and press releases (the relief Complaint Counsel was seeking at that time), but Complaint Counsel's requests involving Amazon's website constitute new—and even less tenable—First Amendment intrusions. Even assuming the changes to Amazon's website advance a substantial governmental interest, Complaint Counsel has failed to show that the substantial changes are truly necessary, especially given its parallel request to create a permanent online record of the recalls via press release.

The "Your Orders" page at issue already contains the same link to the "Your Recalls and Product Safety Alerts" page as contained on the Amazon.com homepage. *See* Dkt. No. 103 at 3, Amazon's Resp. to the Mar. 30, 2023 Order Following Oral Arg. (Apr. 6, 2023) (stating that a link to the page is "available on all pages on Amazon.com"). And the "Your Recalls and Safety Alerts" page, in turn, provides a complete and personalized listing of all Amazon products for which a recall has been initiated. As the Presiding Officer's Order indicates, that is sufficient.

(b) Social Media Postings

The Order indicates that "action on 'social media platforms'" controlled by Amazon may be appropriate, and calls for briefing as to "which Amazon-controlled sites the notices" should be "posted on, and for how long." Order at 38–39. Complaint Counsel has proposed that notices be posted three times over the course of three weeks on each of the following accounts:

- Facebook: "Amazon"
- Facebook: "AmazonHelp"
- Twitter: @Amazon
- Twitter: @AmazonHelp
- Instagram: @Amazon

Proposed Order at 4. Complaint Counsel's demand to use Amazon's primary social media accounts for this purpose is as "misplaced" as its demand to use Amazon's homepage in a similar manner. Order at 38. Whereas a smaller business entity may only experience a few recalls in its existence, the number of third-parties selling products on Amazon entails a correspondingly larger number of potential recall actions, sometimes on a daily basis, and use of Amazon's main social media pages for recall information would likely subsume those pages. It therefore makes sense that larger entities such as Amazon are often forced by necessity to create multiple accounts dedicated to discrete topics and information categories. In this instance, Amazon has already created social media pages dedicated to customer service issues, namely its "AmazonHelp" Facebook page and its @AmazonHelp Twitter account. These pages are more appropriately categorized and suited for information dissemination of this type, and to the extent Amazon is ordered to publish notices via social media, the forthcoming order should limit such notice to the AmazonHelp Facebook page and the @AmazonHelp Twitter account.

Additionally, given the potential volume of recall-related posts made to these accounts in proportion to Amazon's size as one of the largest online stores, Complaint Counsel's request for multiple duplicative posts to these social media pages is disproportionately burdensome. Complaint Counsel declined to provide any elaboration in its Supplemental brief justifying three duplicative postings to the same social media account in a matter of weeks. Repetitive posting of recall information to multiple social media accounts is far afield from the "tailored online notice contemplated" by the Presiding Officer's Order, and will assuredly contribute to recall fatigue. Order at 24. To the extent Complaint Counsel is looking to create a permanent record of the recall on a particular social media account, that objective is achieved by a single posting, and Complaint Counsel has offered no justification for multiple postings.

(c) Third-Party Retailer Notifications

Finally, the Order calls for Amazon to "provide 'notice to any third party Internet website on which Amazon placed the [Subject Products] for sale.'" Order at 38 (citation and alterations omitted). But there is no such website. And while Complaint Counsel well knows that Amazon did not place the Subject Products for sale on any other website, it nonetheless demands that Amazon be ordered to "[s]end notice" to "Facebook Marketplace, Alibaba, Etsy, eBay, Offerup, Alibaba [sic] and Craigslist." Proposed Order at 4. Nor has Complaint Counsel provided any factual basis identifying any such website where "Amazon placed" the Subject Products for sale. This portion of the Proposed Order wholly disregards the boundaries set by the Presiding Officer's Order and lacks any factual basis, and should therefore be rejected.

IV. New Remedies Not Previously Requested or Argued Cannot be Injected into the Adjudication.

Complaint Counsel's Proposed Order calls for a number of remedies not provided for or authorized by the Presiding Officer's Order. Indeed, these requests were not addressed by the Presiding Officer because Complaint Counsel failed to present them to the Presiding Officer—or Amazon—in its Summary Decision briefing. These demands include the establishment of a "recall response system" consisting of "a toll-free telephone" hotline, a "website URL for frequently-asked questions," and "an email address . . . for consumers to respond to the recall announcement." Proposed Order at 4–5.

During discovery, Amazon served an Interrogatory on Complaint Counsel seeking notice of the remedies that the agency would seek from the Presiding Officer. Complaint Counsel's response to that Interrogatory contained a list of remedies: There is no mention of a "recall response system," telephone hotline, or entirely new webpages on Amazon.com dedicated to frequently asked questions. *See* Amazon Ex. 131 at 25, Obj. and Resp. to Amazon's Interrogatory

No. 14 (Mar. 21, 2022). Complaint Counsel remained subject to a continuing "duty to supplement [its] response" for accuracy throughout the discovery period, 16 C.F.R. § 1025.31(f), but no such supplementation identifying these remedies was ever provided to Amazon. Moreover, Complaint Counsel is obligated under the CPSA to make a factual showing that each requested remedy is in the public interest, and Complaint Counsel's failure to make any reference to these remedies in its Summary Decision briefing precludes its ability to include those remedies in its Proposed Order. *See City of Waukesha v. EPA*, 320 F.3d 228, 250–51, n.22 (D.C. Cir. 2003).

Complaint Counsel's reliance on 15 U.S.C. § 2064(i)(2)(H)(iii) and 16 C.F.R. § 1115.27(n)(3) is also misplaced. Those provisions merely require that a notice specify its existing customer communication channel—they do not purport to mandate the firm to establish the full list of example channels.[11] A plain reading of these provisions makes clear that so long as Amazon provides a channel for customers to "contact" Amazon to obtain the remedy, and Amazon identifies that channel in the notice, Amazon's obligation has been fulfilled.

V. Double Refunds are Inappropriate but, if Ordered, Should Take the Form of an Amazon Credit or Gift Card.

For the reasons set forth in Amazon's Motion for Summary Decision, Amazon respectfully reiterates its position that a double refund is not permitted by the CPSA in this instance. The CPSA expressly requires that any "refund" not exceed "the purchase price" of the Subject Product. 15 U.S.C. § 2064(d)(1)(C). The holding that payment for the purchase price of a product is not, in fact, a "refund" unless a mandatory tender was required is not supported by the plain language of

[11] *See* 15 U.S.C. § 2064(i)(2)(H)(iii) (notice should include "any information a consumer needs to obtain a remedy or information about a remedy, ***such as*** mailing addresses, telephone numbers, fax numbers, and email addresses" (emphasis added)); 16 C.F.R. § 1115.27(n)(3) (referencing "distributor contact information (***such as*** name, address, telephone and facsimile numbers, e-mail address, and Web site address)" (emphasis added)).

the CPSA or the meaning of the word "refund." Indeed, rapid notification and refund (with instructions for the consumer to destroy the product) remains the fastest possible means by which to achieve hazardous product destruction notwithstanding the Complaint Counsel's unsubstantiated desire to force consumers to provide proof of their own actions to the agency.

Complaint Counsel's reliance on *Mattel* (cited for this first time in its reply brief) is misplaced. That decision simply notes—in the context of discussing whether a voluntary recall preempts common-law claims by consumers—that a voluntary recall does not bar the Commission "from seeking greater remedies at a later date." *In re Mattel, Inc.*, 588 F. Supp. 2d 1111, 1115 (C.D. Cal. 2008). It does not hold that a voluntary remedial action is entirely irrelevant or can be ignored in determining whether the Commission is entitled to any further relief. Indeed, the *Mattel* court ignored language indicating the exact opposite, by omitting half of the relevant sentence: "The Commission reserves the right to seek broader corrective action *if it becomes aware of new facts or if the corrective action plan does not sufficiently protect the public*." 16 C.F.R. § 1115.20(a) (emphasis added). The reference to "new facts" or the corrective actions not sufficiently protecting the public makes clear that prior corrective actions *must* be considered in evaluating whether broader corrective action should be sought.

Acknowledging, however, that the Presiding Officer's Order ruled that either a product refund or product replacement will be mandated in the forthcoming Initial Decision, *see* Order at 44, the Parties are in agreement that the refund should take the form of an Amazon credit to the customers' accounts (as opposed to a cash refund), *see* Proposed Order at 5 ("Amazon shall refund customers the purchase price of the products to consumers in the form of Amazon credit to their account."). The Presiding Officer's Order likewise already concluded that a refund in the form of a "credit" comports with agency practice. Order at 41. Accordingly, to the extent the forthcoming

Initial Decision requires Amazon to issue a refund, it should specify that Amazon may issue said refund in the form of an Amazon credit.

VI. Product Replacement by Amazon Should Be Optional, Not Required.

The Presiding Officer's Order considers the possibility of product replacement as an alternative remedy to product refunds. Order at 43–45. Complaint Counsel likewise concedes that product replacement should be optional—its Brief proposes that "Amazon ***may*** alternatively offer a replacement remedy rather than a full refund of the purchase price for Subject Product carbon monoxide detectors." Compl. Counsel Suppl. Br. at 10 (emphasis added); *see* Proposed Order at 6 ("***Alternatively***, Amazon shall issue a Subject Product carbon monoxide detector replacement[.]") (emphasis added). Amazon agrees that replacement should not be mandated for any of the Subject Products at issue. Accordingly, the Parties are in agreement that to the extent Amazon will be ordered to provide a refund or a replacement, the decision to issue a replacement in lieu of a refund should fall to Amazon.

VII. Amazon Should Retain Flexibility in Facilitating Product Returns vs. Proof of Destruction.

The Presiding Officer's Order held that "Section 15 refunds, *conditioned upon return or suitable proof of disposition*, represent an appropriate remedy to remove those products that remain in the marketplace." Order at 42–43 (emphasis added). According to the Order, the principle underpinning the Presiding Officer's holding is that "an appropriate remedy should include *sufficient confirmation* that each product has been permanently removed from the market." *Id.* at 41 n.35 (emphasis added). The Presiding Officer's Order nonetheless left open the question of which "confirmation" mechanism should apply here.

Complaint Counsel's Proposed Order would require Amazon to offer ***both*** return shipping ***and*** proof of destruction as simultaneous options for the children's sleepwear garments and hair

dryers. *See* Proposed Order at 6. This goes too far. The Presiding Officer's Order merely holds that refund conditions must be sufficient to provide "confirmation" that the product will be removed from the market and identifies return shipping and proof of destruction as possibilities to achieve that outcome. Accordingly, so long as Amazon employs an approved mechanism to reasonably achieve that "confirmation," it would fulfill the requirements of the Order.

The question of which confirmation mechanism to employ—return shipping vs. photographic proof of destruction—entails materially-different logistical considerations from Amazon's perspective. These considerations are complex and could significantly impact the speed and effectiveness with which Amazon could effectuate product destruction. For example, to Complaint Counsel—who does not specialize in large-scale logistics—mandating a process of photographic submission and verification may seem simple on paper, but significant efforts would need to be undertaken by Amazon to review, analyze, and process those submissions. And such complexities could vary significantly between product types, as conceded in Complaint Counsel's Brief. Compl. Counsel Suppl. Br. at 11. So long as Amazon fulfills the ultimate requirement imposed by the Order of ensuring destruction confirmation, it should fall to Amazon—with knowledge of its own processes and logistical capabilities—to select the appropriate confirmation mechanism so long as destruction is ultimately achieved. Accordingly, to the extent the Presiding Officer requires confirmation of product destruction as a condition of refund, it should fall to Amazon to select either return shipping or photographic proof of destruction (or both) in accordance with its logistical capabilities on a product-by-product basis.

VIII. There is No Justification for Supervised Product Destruction.

Complaint Counsel's Proposed Order demands that, "[p]rior to the disposal or destruction of the Subject Products in the distribution chain and in inventory . . . Amazon shall notify . . . Complaint Counsel so that CPSC may have the opportunity to witness such disposal[.]"

Proposed Order at 7. This demand has no basis in the Presiding Officer's Order or the CPSA, and is unsupported by the record. As the Presiding Officer recognized, "Amazon has destroyed all but 6 units of the Subject Products (all of them hair dryers) at its fulfillment centers." Order at 10. This fact is undisputed. Dkt. No. 87 at ¶ 120. Nor has there been any suggestion that Amazon has previously misled the Commission with regard to inventory destruction, or that affidavits of destruction—the primary means by which Amazon has validated product destruction to the Commission in common practice—are insufficient. Requiring Amazon to hold inventory pending agency staff observation will only serve to unnecessarily delay the destruction of the products.

CONCLUSION

Without waiver of Amazon's defenses and arguments in its Motion for Summary Decision, to the extent the Presiding Officer intends to order remedial action, he should do so in accordance with the foregoing caveats and limitations.

Dated: May 30, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2023, a true and correct copy of the foregoing document was, pursuant to the Order Following Prehearing Conference entered by the Presiding Officer on October 19, 2021:

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

Nicholas Griepsma

Nicholas J. Griepsma