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

| | |
|---|---|
| In the Matter of Amazon.com, Inc.,<br><br>Respondent. | CPSC Docket No. 21-2<br><br>Hon. James E. Grimes<br>Presiding Officer |

**RESPONDENT AMAZON'S MOTION TO COMPEL DISCOVERY OF CPSC POLICY AND PRACTICE MATERIAL**

In this proceeding, Complaint Counsel seeks an order from the Consumer Product Safety Commission ("CPSC" or "the Commission") requiring Respondent Amazon.com, Inc. ("Amazon") to undertake a number of recall-related remedial actions beyond the substantial actions Amazon completed over a year ago. The Commission's authority to grant such relief is circumscribed by two statutes: the Consumer Product Safety Act's ("CPSA") requirement that remedial actions be in the "public interest" and the Administrative Procedure Act's ("APA") requirement that agencies provide sufficient justification for treating like cases dissimilarly or diverging from policies or practices. The CPSA's public interest standard is informed at least in part by agency policies and practices, while the APA standard requires comparison of Complaint Counsel's proposed remedies to past actions and policies to avoid entry of an arbitrary and capricious mandatory recall order. Pursuant to both of these standards, Amazon is therefore entitled to discovery of CPSC's policies and practices.

Accordingly, Amazon served various document discovery requests on Complaint Counsel, seeking material that identifies the remedies sought and obtained in other recalls; the criteria CPSC uses in selecting recalling entities; the criteria CPSC uses in

determining appropriate remedies; and the criteria CPSC uses to evaluate recall remedy effectiveness. Contrary to Complaint Counsel's insistence that Amazon must wait until CPSC issues a final order before determining whether the agency's actions diverge from past practice, now is the time to develop the discovery record on these questions. The material assembled in this adjudication pursuant to the liberal discovery provisions of the Federal Rules of Civil Procedure will constitute the "exclusive record for decision" in any subsequent appeal to the Commission or a federal court. *See* 5 U.S.C. § 556(e).

In response to Amazon's document requests, Complaint Counsel informed Amazon that it is withholding an unspecified volume of material responsive to Amazon's requests because it has unilaterally deemed the withheld material to be irrelevant. Complaint Counsel further refuses to provide a list of documents being withheld, how many such documents exist, their authors, or their locations. This is plainly improper. Self-help discovery remedies are generally barred in federal proceedings. Parties cannot serve as their own referee in judging whether ***responsive***, non-privileged discovery material should in fact be produced—only the Court can make that determination.

Complaint Counsel's curated selection of documents does not provide a complete picture of CPSC's policies and practices. And the agency's abbreviated log references only twelve documents withheld on privilege grounds. Amazon therefore requests that the Presiding Officer order Complaint Counsel, in addition to supplementing their privilege log, to produce the following narrowed categories of documents, consistent with Amazon's document requests:

1. Material reflecting remedies sought and finalized in other recalls and Corrective Action Plans involving children's sleepwear, hair dryers and air brushes, and carbon monoxide detectors from 2015 to the present;

2. Material reflecting the criteria CPSC uses to select the entity (manufacturer, distributor, and/or retailer) to perform a recall, and any material reflecting the agency's bases for those criteria or analyses of such criteria;

3. Material reflecting the criteria CPSC uses in selecting particular recall remedies and corrective actions in individual recall actions, and any material reflecting the agency's bases for those criteria or analyses of such criteria, including related material submitted by CPSC to the Government Accountability Office;

4. Internal operating procedures relating to recall remedies for CPSC offices tasked with recall-related responsibilities, such as the Office of Communications;

5. Material reflecting CPSC's evaluation of recall remedy effectiveness from 2009 to the present, including related material submitted by CPSC to the Government Accountability Office; and

6. Material reflecting CPSC's evaluation of post-recall reporting, including monthly progress reports and the Retailer Reporting Program.

Complaint Counsel lacks any colorable basis to withhold this material and should therefore be ordered to produce it without further delay. Depositions are currently ongoing and scheduled through August 19, 2022. Amazon's ability to develop a factual record through documents and deposition testimony is prejudiced by further delay in producing the identified material.

## BACKGROUND

Amazon has sought for months to obtain discovery from Complaint Counsel regarding CPSC's remedy-related practices and policies. Amazon first served written discovery requests on February 14, 2022. Amazon Request for Production ("RFP") Nos. 15, 19–26 seek material regarding CPSC's actions, practices, policies, and guidance involving similar firms, similar products, or similar forms of relief. *See* Ex. A at 8–10.[1]

[1] All exhibits cited herein are appended to the Declaration of Sarah Wilson, dated August 1, 2022.

As summarized here, those requests seek material regarding CPSC's policies and practices with regard to:

> **No. 15** – the "circumstances" and appropriate "factors" under which a recall notification is "required in order to adequately protect the public" pursuant to the CPSA;
>
> **No. 19** – recall remedies applicable to distributors;
>
> **No. 20** – recall remedies applicable to international manufacturers, importers, and retailers;
>
> **No. 21** – recall remedies applicable to domestic manufacturers, importers, and retailers;
>
> **No. 22** –CPSC's evaluation of the effectiveness of various recall remedies;
>
> **No. 23** – internal CPSC studies or analyses regarding recall notifications and their effectiveness;
>
> **No. 24** –CPSC's evaluation or approval of proposed recall remedies or corrective actions;
>
> **No. 25** – when a "recall" (joint press release) should be issued as opposed to a "recall alert" (direct consumer notification); and
>
> **No. 26** – the "circumstances" and appropriate "factors" under which a recall remedy is "in the public interest" pursuant to the CPSA.
>
> *See id.* at 8–10.

Complaint Counsel served written objections to Amazon's RFPs on March 21, 2022. *See* Ex. B. In doing so, Complaint Counsel initially declined to produce documents for any one of the above-listed requests. *Id.* at 14–21. Complaint Counsel attempted to justify the withholding of responsive documents on the grounds that "this litigation only relates to the specific remedies sought with respect to the three categories of Subject Products listed in the Complaint." Ex. C. Complaint Counsel further stated that it would produce only the material it deems "relevant" to the litigation. *See id.*

Amazon responded by explaining why the requested material is relevant, noting that such documents bear on whether Complaint Counsel's requested remedies are (1) in the public interest or (2) arbitrary or capricious under the APA. Ex. D. Even so, to reduce potential burdens on Complaint Counsel, Amazon offered to negotiate and potentially narrow the types of documents that would fulfill its requests if Complaint Counsel could explain how CPSC did (or did not) compile, track, or assemble material relating to its past actions and policies. *Id.*

Complaint Counsel responded by doubling down on its relevance objections and declining to provide any meaningful description or elaboration regarding CPSC's recordkeeping of policies and practices. *See* Ex. E. Complaint Counsel stated that for one particular sub-category of requested material (records of corrective action plans), CPSC did not possess "aggregations or compilations." *Id.* Complaint Counsel further declined to provide any commitment that it would produce all responsive internal material related to agency practices or policies. *See id.*

Amazon met and conferred with Complaint Counsel multiple times regarding this material. *See* Ex. F through V. Complaint Counsel eventually produced some material, which, according to Complaint Counsel, provides a sufficient picture of CPSC's policies and practices. As Amazon noted to Complaint Counsel, however, nearly all of those documents consist of already-public material such as printouts from CPSC's own website and high-level reports to Congress. None of those documents, for example, include internal CPSC memoranda or communications regarding the effectiveness of recall remedies.

The core of Complaint Counsel's production purportedly reflecting policies and practices consists of approximately 15 documents. Those documents are a public Recall

Handbook, a single agency policy directive, three PowerPoint Presentations given by CPSC personnel at a public Recall Effectiveness conference in 2017, two redacted chapters from a staff manual titled Section 15 Defect Investigation Procedures Manual ("Section 15 Manual"), and six template forms containing a list of conceivable remedies known to the agency but lacking instructive guidance as to how and why the staff member should choose any one remedy over another. It is a near-certainty, however, that CPSC possesses additional internal documents reflecting the agency's practices and policies regarding recall remedies.[2]

For example, a 2019 CPSC Inspector General audit states that CPSC maintains a database of at least 165 directives containing "descriptions of agency programs, policies, and procedures."[3] Given that product recalls are a core function of the agency, Complaint Counsel's unverifiable claim that just one of those 165 directives relate to recall remedies is highly suspect. Complaint Counsel produced that document only after Amazon identified a citation to that particular directive in the redacted version of the Section 15

---

[2] For example, in response to a Request for Admission that CPSC has adopted no standard, rule, policy, procedure, or guidance outlining the circumstances when a Commission order directing a company to provide consumer notification or additional remedies is "in the public interest" within the meaning of the CPSA, Ex. Y, Complaint Counsel denied the request, citing the CPSA, its implementing regulations, a public handbook, and the two produced chapters of the Section 15 Manual. *See* Ex. Y. Complaint Counsel also stated that its policies "include[ed], but [are] not limited" to those documents." *Id.* Amazon is thus entitled to these additional relevant policy documents that Complaint Counsel itself claims to exist.

[3] *See Audit of the CPSC's Directives System* at 4, Office of the Inspector General, U.S. Consumer Product Safety Commission (March 21, 2019), *available at* http://www.oversight.gov/sites/default/files/oig-reports/Audit%20of%20the% 20CPSC%27s%20Directives%20System%20Final.pdf.

Manual, which, in turn, Complaint Counsel also failed to produce until Amazon requested it by name. Nor can Amazon evaluate Complaint Counsel's claim regarding the purported irrelevance of all of the agency's other policy directives. First, Complaint Counsel failed to log any such documents. Second, the Inspector General found that the agency continues to withhold the majority of those directives from public inspection in direct violation of at least one federal regulation.[4]

Moreover, the overall absence of documents is not explained by any privilege claim. Complaint Counsel's privilege log identifies just twelve documents withheld on privilege grounds. *See* Ex. X at 12–15 (CPSC Privilege Log entry Nos. 81–92).

The Section 15 Manual provides a representative example of Amazon's difficulty in obtaining discovery. In 2020, the Government Accountability Office ("GAO") conducted a major performance audit of CPSC's policies and practices, culminating in a November 2020 report to Congress.[5] The GAO report references the Section 15 Manual, one of many likely-internal CPSC documents responsive to Amazon's requests. The Section 15 Manual was not included, however, in any of Complaint Counsel's initial productions. Only after Amazon inquired about the document by name did Complaint Counsel acknowledge its existence and produce just a portion of the document, Ex. I, withholding the remainder of the Manual on purported relevance grounds. *See* Ex. J. When Amazon requested that

---

[4] *Id.*

[5] *Consumer Product Safety Commission: Actions Needed to Improve Processes for Addressing Product Defect Cases*, U.S. Government Accountability Office (Nov. 2020), *accessible at* https://www.gao.gov/assets/gao-21-56.pdf. It is worth noting that ***none*** of the GAO's recommendations have been completed by CPSC to date. *Consumer Product Safety Commission: Actions Needed to Improve Processes for Addressing Product Defect Cases*, *available at* https://www.gao.gov/products/gao-21-56.

Complaint Counsel at least produce the Manual's table of contents to enable evaluation of Complaint Counsel's relevance assertions, Complaint Counsel refused. *See* Ex. V.

Similarly, during the Parties' correspondence and meetings, Amazon repeatedly requested a list of responsive policy and practice material being withheld by Complaint Counsel on purported relevance grounds. Complaint Counsel eventually provided a single-sentence description of material being withheld, but only with regard to the sub-category of documents submitted by CPSC to GAO. *See* Ex. O at 2. For that particular sub-category of material, Complaint Counsel stated that it was withholding, *inter alia*, "documents regarding rulemaking and mandatory standards, … internal operating procedures of the Office of Communications' information campaigns, … and a list of Notices of Violation issued from October 2012 to December 2019." *Id.* at 2. According to Complaint Counsel, "none" of those documents are relevant to the proceeding. *Id.*

On July 8, after follow-up emails and a meet-and-confer in which Amazon explained how such material is indeed responsive and relevant to the adjudication, Complaint Counsel produced five previously-withheld documents, including the list of Notices of Violation submitted to GAO. Amazon's review confirmed the relevance of this document to CPSC's past practices—it lists dates, product categories, and remedies deemed appropriate by the agency when issuing Notices of Violation to other marketplace actors. *See* Ex. W (single-page excerpt of list). But Amazon has been unable to evaluate Complaint Counsel's withholding of "internal operating procedures of the Office of Communications" because Complaint Counsel has yet to produce them. Upon information and belief, this Office—unlike many other agency Communications Offices—plays a role in the approval and publishing of joint press releases with subject firms.

Amazon has sought for months to obtain discovery from Complaint Counsel regarding CPSC's remedy-related practices and policies. Nor does Amazon know the extent of material being withheld by Complaint Counsel on purported relevance grounds—only Complaint Counsel knows the material being withheld.

**LEGAL STANDARD**

The Presiding Officer ruled on January 19, 2022 that Federal Rule of Civil Procedure 26(b) governs the scope of discovery in this adjudication. *See* Doc. No. 27. Under Rule 26(b), "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Even after the 2015 Amendment to Rule 26, "relevance is still to be construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any party's claim or defense." *United States ex rel. Shamesh v. CA, Inc.*, 314 F.R.D. 1, 8 (D.D.C. 2016) (quotation marks and citation omitted). The record developed pursuant to such discovery will provide the record of review on appeal to either the Commission or federal court. *See, e.g., FERC v. Powhatan Energy Fund*, LLC, 286 F. Supp. 3d 751, 765–66 (E.D. Va. 2017) (citing 5 U.S.C. § 556(e)).

When a party "fails to respond to discovery, in whole or in part," the requesting party may move for an order "compelling discovery." 16 C.F.R. § 1025.36. Federal Rule of Civil Procedure 37 similarly provides that a party may seek to compel production of documents when a responding party fails to provide the requested material. Fed. R. Civ. P. 37(a)(3)(B)(iv).

## ARGUMENT

Complaint Counsel's conduct warrants an order compelling production of withheld document discovery. Amazon's motion should be granted for two reasons.

***First***, material reflecting the agency's policies and practices is not only relevant, Amazon is entitled to present such material to the Presiding Officer and the Commission in challenging the permissibility, appropriateness, and lawfulness of Complaint Counsel's requested remedies. Complaint Counsel's attempts to preclude discovery of such material is wholly unsupported in law.

***Second***, Complaint Counsel's tactic of withholding of discovery based on its unilateral, restrictive relevancy determinations is barred by the Federal Rules.

### I. Agency Policy and Practice Material is Not Only Discoverable—it is Necessary for Amazon's Defenses.

#### A. Policy and Practice Material is Highly Relevant.

Discovery of CPSC policies and practices is highly relevant to the proceeding. First, such discovery will assist the Presiding Officer in evaluating whether Complaint Counsel's proposed remedies are in the "public interest" pursuant to the CPSA. Second, such discovery is necessary to determine whether Complaint Counsel's proposed remedies would result in an arbitrary or capricious order.

##### 1. CPSA "Public Interest" Requirement

The Presiding Officer must evaluate whether Complaint Counsel's proposed remedies are in the "public interest" as required by Consumer Product Safety Act. *See* 15 U.S.C. § 2064(c), (d), (f) (the Commission may order specified remedial actions only if they are "in the public interest," and only after a full contested hearing in accordance with APA procedure). If Complaint Counsel fails to demonstrate that the proposed remedies

are in the public interest, the Commission may not enter a mandatory recall order against the respondent. *See id.*

At the July 27 conference before the Presiding Officer, Complaint Counsel suggested that what is in the "public interest" would be determined, at least in part, by reference to what CPSC generally does to address substantial product hazards, which makes clear that evidence of CPSC's policies and practices regarding remedies are directly relevant to the public interest determination. That is logical: presumably, prior recalls demonstrate the types of remedial action that were sufficient to address any "unreasonable risk" posed to consumers. 15 U.S.C. § 2051(b). If Complaint Counsel is demanding more of Amazon than it required of others, that would weigh against a finding that those additional actions are in fact in the "public interest," given that they were not required of other entities. And while past practices or policies, either consistent or inconsistent with the relief sought by Complaint Counsel in this proceeding, may not exclusively dictate how the public interest is served in a specific case, Complaint Counsel's refusal to provide key evidence of CPSC's own policies and practices goes too far in depriving Amazon—and, by extension, the Presiding Officer—of an important category of relevant discovery.

**2. Administrative Procedure Act**

Complaint Counsel has not disputed that CPSC is under a continuing obligation to avoid arbitrary or capricious conduct. Nor could it—agency conduct that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law" is "unlawful" under the APA. 5 U.S.C. § 706.

Case law makes clear that regulatory agencies must "treat like cases alike." *Westar Energy, Inc. v. Fed. Energy Regul. Comm'n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007);

*N.L.R.B. v. Wash. Star Co.*, 732 F.2d 974, 977 (D.C. Cir. 1984) (holding that "inconsistent" treatment of parties in adjudication was arbitrary and capricious). Where an agency seeks to treat similar respondents or situations dissimilarly, the agency must provide sufficient justification for the dissimilar treatment. *See N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776 (D.C. Cir. 2005) ("An agency must provide an adequate explanation to justify treating similarly situated parties differently."). Nor may an agency fail "to consider an important aspect of the problem." *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121–22 (D.C. Cir. 2010).

Additionally, agencies must acknowledge whether their decisions constitute a change in established practice or policy, and if so, supply justification for the change. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action ... ordinarily demand[s] that it display awareness that it is changing position .... [T]he agency must show that there are good reasons for the new [position].").

Contrary to Complaint Counsel's assertions, these requirements apply here and now. Agencies must justify decisions constituting a change in policy or practice at the time they make the decision—not later or after the fact. *See Circus Circus Casinos, Inc. v. Nat'l Lab. Rels. Bd.*, 961 F.3d 469, 476 (D.C. Cir. 2020) ("When the Board seeks to change applicable standards through an adjudication, the Board must 'display awareness that it is changing position,' demonstrate the rule is 'permissible under the statute,' and show 'there are good reasons for the new policy.'" (quoting *Fox*, 556 U.S. at 515)).

Here, Complaint Counsel seeks multiple remedial actions that would treat Amazon differently from other cases or otherwise constitute a change in agency policy or practice. For example, Complaint Counsel proposes that Amazon be ordered to take additional

action with regard to unspecified "functionally equivalent products," a term that it acknowledges is defined nowhere in the Consumer Product Safety Act or its corresponding regulations. *See* Compl. ¶¶ XI(3)(a), (4)(d), (6). Amazon is not aware of ***any*** prior CPSC attempt to seek relief with regard to "functionally equivalent products" as defined by Complaint Counsel in this adjudication. Complaint Counsel similarly invites the Presiding Officer and the Commission to order Amazon to "[p]rovide monthly reports" to CPSC—for an indefinite period—summarizing the incident data submitted to CPSC through the Retailer Reporting Program in a format consistent with recall monthly progress reports. *See id.* ¶¶ XI(3)–(7). This is a first-of-its-kind request, as the Retailer Reporting Program has always been voluntary, has never been codified in regulation, and has never been tied to the recall monitoring process.[6]

Amazon is entitled to put forward evidence which will enable the Presiding Officer and the Commission to evaluate whether any of Complaint Counsel's proposed remedies, individually and together, (1) treat Amazon and the Subject Products dissimilarly from other companies and similar products or (2) constitute a change in policy or practice. If so, the Presiding Officer and Commission must determine whether Complaint Counsel has supplied sufficient justification for doing so. Additionally, the Presiding Officer and the Commission must consider whether Complaint Counsel's proposed relief fails to consider important aspects of the case.

---

[6] *See, e.g.*, *CPSC Welcomes Sears Holdings to Retailer Reporting Program*, *available at* https://www.cpsc.gov/Newsroom/News-Releases/2006/CPSC-Welcomes-Sears-Holdings-to-Retailer-Reporting-Program-System-Provides-Early-Warning-Hazard-Information (describing the program as "voluntary").

Thus, a prerequisite to an informed decision by the Presiding Officer—supported by "supported by reliable, probative, and substantial evidence," 16 C.F.R. § 1025.51(b)(1)—is a discovery record reflecting CPSC's treatment of like cases and its relevant policies and practices. Gathering and producing such evidence is necessary pursuant to the CPSC Rules of Practice, the Federal Civil Rules applicable to this proceeding, and the APA, which imposes a continuing obligation on the CPSC to ensure that its decisions and orders are not arbitrary or capricious.

### B. Complaint Counsel's Bases for Withholding Policy and Practice Discovery Are Unfounded.

As established above, the "policy and practice" documents sought by Amazon are relevant and discoverable. Complaint Counsel's objections are unfounded.

**1. Agency Discretion.** Complaint Counsel argues that the CPSC has enforcement discretion to determine remedies on a case-by-case basis, and contends that the agency thus has no obligation to treat like cases alike or justify changes in practice or policy. *See* Ex. U. A near identical argument was recently rejected by a federal court. *See Univ. of Tex. M.D. Anderson Cancer Ctr. v. U.S. Dep't of Health & Hum. Servs.*, 985 F.3d 472, 479–80 (5th Cir. 2021).

In *M.D. Anderson Cancer Center*, the agency argued that because "it evaluates each case on individual facts," it was not subject to the above-cited case law requiring the agency to treat like cases alike. *Id.* The Fifth Circuit rejected this argument, holding that "an administrative agency cannot hide behind the fact-intensive nature of penalty adjudications to ignore irrational distinctions between like cases." *Id.* "Were it otherwise," the Court held, "an agency could give free passes to its friends and hammer

its enemies—while also maintaining that its decisions are judicially unreviewable because each case is unique." *Id.*

The same is true in mandatory recall proceedings. Moreover, Complaint Counsel's argument for seemingly unbridled administrative discretion is in tension with the plain language of the CPSA, which requires a more rigorous standard to be met before the Commission may order a mandatory recall. *See* 15 U.S.C. § 2064(f) (mandatory recall orders, whether issued under section (c) or (d) "may be issued only after an opportunity for a hearing before a neutral presiding officer in accordance with" APA requirements).

**2. Final Agency Action**. Complaint Counsel asserts that cases such as *M.D. Anderson Cancer Center* are inapposite because the Commission has not yet issued a final order, and it is therefore premature to consider CPSC's past policies and practices. *See* Ex. U at 2. This is precisely backwards. An agency, in the course of making its decisions, must demonstrate ***contemporaneous*** awareness as to whether it is treating like cases alike or is changing established policy or practice. *See, e.g.*, *Circus Casinos*, 961 F.3d at 476 ("When the Board seeks to change applicable standards through an adjudication, the Board must 'display awareness that it is changing position,' demonstrate the rule is 'permissible under the statute,' and show 'there are good reasons for the new policy.'" (quoting *Fox*, 556 U.S. at 515)); *see also Nat'l Labor Rels. Bd. v. CNN Am., Inc.*, 865 F.3d 740, 751 (D.C. Cir. 2017) (in appeal of agency adjudications, "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based" (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

Here, both the Presiding Officer and the Commission must consider the pertinent standards of review before issuing a decision in order to avoid acting in an arbitrary fashion. More fundamentally, Complaint Counsel's argument would mean that a

defendant in an adjudication could not obtain access to policy and practice evidence, even though such evidence would—even under Complaint Counsel's theory—be relevant on appeal. That is because, under Complaint Counsel's theory, (1) such evidence is not relevant prior to issuance of a final order, and thus not discoverable in the administrative proceedings, and (2) once there *is* a final order and the case is on appeal, and this argument can be raised, there is no further opportunity for discovery, because the appeal would be decided on the adjudicative record. *See, e.g., FERC v. Powhatan Energy Fund*, LLC, 286 F. Supp. 3d 751, 765–66 (E.D. Va. 2017) ("The 'record' which the court reviews consists of '[t]he transcript of testimony and exhibits [taken during the hearing], together with all papers and requests filed in the proceeding.' (quoting 5 U.S.C. § 556(e)). That absurd result cannot be the law.

Nor can Complaint Counsel credibly assert otherwise. The Supreme Court used the present tense in describing the agency's obligation to demonstrate contemporaneous awareness of a change in policy—agencies cannot fulfill it retroactively. *See Fox*, 556 U.S. at 515. Complaint Counsel nonetheless declines to produce evidence necessary to evaluate whether there has been such a change in policy. But the Presiding Officer will need a discovery record reflecting agency practices and policies to determine whether Complaint Counsel is inviting the Commission to execute a change in policy or practice or to treat like cases dissimilarly.

**3. No Change to Policy or Practice.** In the alternative, Complaint Counsel argues that its proposed remedies do not, in fact, constitute a change in CPSC policy or practice. *See, e.g.*, Ex. G at 1. According to Complaint Counsel, "this is a routine action seeking remedies from a responsible party relating to the harms presented by three categories of Subject Products." *Id.* But Complaint Counsel's bare factual assertion that

this action is "routine" must be confirmed or refuted by a developed discovery record. Courts "need not accept [an agency's] conclusory statement of what its practice has been." *Canadian Com. Corp. v. Dep't of Air Force*, 514 F.3d 37, 41 (D.C. Cir. 2008). Complaint Counsel therefore cannot block discovery into agency policies and practices with conclusory factual assertions that the action is "routine" or that the remedies sought are consistent with the agency's policies and practices.

**4. Undue Burden.** In communicating with Amazon, Complaint Counsel failed to describe with any particularity why full compliance with the disputed requests would be unduly burdensome, especially in light of CPSC's significant resources (no fewer than six agency lawyers are staffed on this adjudication, and only three adjudications have been brought since 2018) and CPSC's own touting of the importance of this action.[7] Complaint Counsel's assertions of burden thus "merely state in a conclusory fashion that the requests are burdensome." *Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd.*, 242 F.R.D. 1, 10 (D.D.C. 2007) (quotation marks and citation omitted).

Even so, Amazon has worked extensively with Complaint Counsel to mitigate potential burdens. For example, Amazon has made clear to Complaint Counsel that it is not requesting every CPSC file from every past recall. Instead, it is highly likely that (1) CPSC tracks such information in a format sufficient to identify corrective actions taken in past recalls, or (2) single documents from recall files identify the finalized remedies for that particular recall. *See* Ex. D at 2. Nor is Amazon seeking publicly-available material

[7] *See CPSC Sues Amazon to Force Recall of Hazardous Products sold on Amazon.com*, *available at* https://www.cpsc.gov/Newsroom/News-Releases/2021/CPSC-Sues-Amazon-to-Force-Recall-of-Hazardous-Products-Sold-on-Amazon-com (CPSC press release asserting that its suit against Amazon is a "huge step").

of which the Presiding Officer may take notice. *See* Ex. I at 2. And in its Proposed Order, Amazon has further endeavored to seek only the narrowest possible categories of material (from relatively recent timeframes) capable of providing the baseline policy and practice discovery necessary for its defenses.

### C. Complaint Counsel's Curated Productions are Insufficient.

Complaint Counsel touts the material it has produced, but that production was selectively curated by Complaint Counsel pursuant to its own theory of the case. At the Parties' recent conference with the Presiding Officer, Complaint Counsel cited to certain categories of material that, in its opinion, should be sufficient for Amazon's defense.

For example, Complaint Counsel cited to a Corrective Action Plan ("CAP") Template and a public Recall Handbook as providing sufficient explanation of the agency's policies. That is incorrect. These documents merely identify a menu of options that CPSC claims are available to agency staff in negotiating remedies with subject firms. *See, e.g.*, Ex. Z. Plainly stated, the Recall Handbook and the CAP Template reflect the CPSC's universe of potential remedies. Additionally, Complaint Counsel would have Amazon believe that such template documents essentially appeared out of thin air within the agency—it has neither identified (either through actual documents or their privilege log) nor produced any internal agency analysis or any associated documents describing how the agency generated the list of potential remedy options in their boilerplate staff templates, or any subsequent documents discussing those materials. And none of the approximately one dozen core policy and practice documents produced by the agency reveal or identify the agency's guidance as to what actionable criteria staff should employ in selecting from the menu of potential remedies, *i.e.* the circumstances warranting use

of each remedy. Such information is critically necessary, however, to evaluate the calculus the agency uses to decide on remedies and whether it is departing from that calculus here.

Complaint Counsel likewise made reference to its production of public press releases from CPSC's own website. According to Complaint Counsel, those press releases are sufficient to illustrate the remedies negotiated by the agency in the past. Again, that is incorrect. Press Releases do not identify or describe the full set of remedies included in a Corrective Action Plan—they serve a distinct purpose of communicating a hazard and corresponding instruction to consumers. But the issuance of a press release is not the only remedy that Complaint Counsel is seeking here. From a press release alone, Amazon has no way of inferring the full list of remedies ultimately agreed to in a past recall.

In a similar vein, Complaint Counsel has cited their production of a Notice of Violation ("NOV") spreadsheet. *See* Ex. X. By way of background, the agency issues letters to firms relative to certain categories of products. For products involving alleged non-compliance with an express statutory or regulatory standard, CPSC issues a NOV, but for products involving safety defects not tied to an express statutory or regulatory standard, CPSC issues a safety defect determination letter. To date, however, Complaint Counsel has failed to produce such a spreadsheet for safety defect letters. Even so, such spreadsheets are insufficient to reliably establish past action or policy—they are not necessarily reflective of the remedies ultimately imposed on a subject firm. NOV and safety defect letters are essentially opening positions by the agency—they begin the process of negotiating a CAP and therefore may not be representative of the ultimate remedies employed in each particular recall. Complaint Counsel has failed to produce any other material showing what remedies were ultimately negotiated in finalized CAPs following such letters. It defies all reasonable expectation, however, that CPSC does not

track—for example, the particular remedies agreed to in each CAP—in any other documents aside from this single NOV spreadsheet.

The existence of other responsive material being withheld by Complaint Counsel is further illustrated by their own production. For example, Complaint Counsel touted production of several PowerPoint Presentations utilized at a public conference in 2017 as evidence of past policies, but it declined to produce any agency documents providing the underlying data or bases for those presentations. One such presentation describes how the agency undertook a study of all finalized CAPS from 2013 to 2016—approximately 865 CAPs in total. The agency apparently used data at its disposal to analyze how various factors such as "Distribution Levels," "Price," "Product Category," "Correction type," and "Recall type" affected what it terms "recall effectiveness." *See* Ex. AA at 4. This presentation reflects what a reasonable observer would expect: CPSC conducts its own analyses of remedy effectiveness. And yet, Complaint Counsel has declined to disclose whether it possesses such material, let alone produce it. Nor is it reasonable to conclude that this is the only example of such analysis in CPSC's history.

Finally, Complaint Counsel's insinuation that the Office of Communications lacks remedy-related material is similarly belied by their own production—this time also in the form of a 2017 Recall Effectiveness Workshop presentation by the Director of CPSC's Office of Communications. *See* Ex. BB. In that presentation, the Director described how CPSC "works with companies to write, post and distribute more than 300 recall press releases every year" and a provided a high-level bulleted summary of certain "guidelines" set by the Office in evaluating press release language. *Id.* at 4–7. Complaint Counsel has nonetheless elected to withhold internal operating procedures from the Office of

Communications. It defies reason to assume, however, that this presentation is the only memorialization of the Office's policies and practices regarding consumer notifications.

Accordingly, Complaint Counsel's bare assertion that they have not withheld material relevant to this action is belied by their own production. Indeed, that production reveals that whatever rubric Complaint Counsel has employed to curate its production is not only improper, but is depriving Amazon of key material necessary for its defense.

## II. Complaint Counsel's Unilateral Withholding of Discovery on Relevance Grounds Violates the Federal Rules of Civil Procedure.

It is well-established that a party cannot withhold responsive discovery simply because that party unilaterally deems the material to be irrelevant. And yet, that is what Complaint Counsel has done here.

Federal Rule of Civil Procedure 26(b) "does not give any party 'the unilateral ability to dictate the scope of discovery based on their own view of the parties' respective theories of the case' because 'litigation in general and discovery in particular … are not one sided.'" *Smith v. JEENS, Inc.*, No. 1:21-cv-00002, 2022 WL 1584702, at *3 (S.D. Iowa Mar. 10, 2022) (quoting *Sentis Grp., Inc. v. Shell Oil Co.*, 763 F.3d 919, 925 (8th Cir. 2014)). Accordingly, a party "cannot unilaterally limit the scope of [the opposing party's] discovery requests." *Weisman v. Barnes Jewish Hosp.*, No. 4:19-cv-00075, 2022 WL 850772, at *1 (E.D. Mo. Mar. 22, 2022).

As the Eighth Circuit explained, "it matters not for the purpose of discovery which side's theory of the case might ultimately be proven correct." *Sentis Grp.*, 763 at 926. "What matters is that each side is entitled to pursue intelligible theories of the case and [neither party can] … by their sole insistence, declare evidence undiscoverable merely because it does not fit into their own theory of the case." *Id.*

This requirement applies in full-force to document requests. *See Coleman v. United States*, No. SA-16-CA-00817-DAE, 2017 WL 1294555, at *1 (W.D. Tex. Mar. 28, 2017) ("[A] party cannot decide what documents he/she believes are relevant and produce only that material[.]"); *Beverly Hills Teddy Bear Co. v. Best Brands Consumer Prod., Inc.*, No. 1:19-cv-3766-GHW, 2020 WL 7342724, at *12 (S.D.N.Y. Dec. 11, 2020) ("Parties to litigation have the right to challenge the relevance of documents through discovery motion practice, rather than unilateral determinations by individuals in whose interest it is to seek to withhold the production of documents that may lead to the discovery of admissible evidence.").

Here, Complaint Counsel has made clear that it is unilaterally withholding documents responsive to Amazon's practice and policy document requests on purported relevance grounds. *See, e.g.*, Ex. J ("[W]e intend to produce materials that are responsive to Amazon's discovery requests and ***relevant*** to matters in dispute." (emphasis added)); Ex. M ("[W]e do not intend to withhold from production any ***relevant***, non-privileged documents responsive to your Request[s]." (emphasis added)). Such conduct is impermissible under the Federal Rules. For its part, Amazon has confirmed to Complaint Counsel that it is not withholding any responsive discovery on relevance grounds.

And even if Complaint Counsel could apply its own relevance criteria in curating its own productions (it cannot), those productions to date show that its "relevance" rubric is fundamentally flawed and therefore unreliable. As summarized above, Complaint Counsel initially withheld a spreadsheet that is indisputably responsive to Amazon's requests and relevant to the agency's past practices. *See* Ex. W. Only after Amazon pressed for production of the document—after having been made aware of its existence—did Complaint Counsel eventually produce it. Had Amazon remained unaware of not only

this document, but also the Section 15 Manual and other material, it would not have been produced pursuant to Complaint Counsel's flawed relevance test.

Finally, although the law is clear that parties may not withhold responsive discovery pursuant to their own relevance tests, the prejudice caused by Complaint Counsel's conduct is compounded by its failure to provide any log of responsive but nonetheless purportedly irrelevant material. Complaint Counsel's discovery conduct has therefore effectively kept Amazon in the dark: Amazon does not know what material Complaint Counsel is withholding, only that material is being withheld. Amazon therefore cannot identify each withheld document by name, especially when the agency self-servingly withholds, for example, the table of contents from its Section 15 Manual, essentially precluding Amazon from identifying any other potentially-relevant portions of the Manual.[8] And in a similar vein, Complaint Counsel recently stated that it would not produce any additional material unless Amazon could identify such material by name to Complaint Counsel. *See* Ex. U at 1. It is self-evident, however, that Amazon can only identify withheld material that it knows exists. Complaint Counsel's tactic of withholding discovery, failing to include that material in its privilege log, and then challenging Amazon to identify the withheld material by name cuts against the embodying principles of the Federal Rules and should not be permitted.

[8] As indicated at the July 26 conference, Complaint Counsel's withholding of this Manual violates the agency's preexisting obligation to make the entirety of the Manual public. The Freedom of Information Act ("FOIA") requires agencies to affirmatively "make available for public inspection," without having first received a FOIA request, any "administrative staff manuals and instructions to staff that affect a member of the public[.]" 5 U.S.C. § 552(a)(2). There can be no burden or prejudice in producing a Manual that CPSC should have already made public under FOIA.

## CONCLUSION

For the foregoing reasons, the Presiding Officer should order Complaint Counsel to cease the withholding of material responsive to Amazon Request for Production Nos. 15, 19–26 and produce the material listed in Amazon's Proposed Order within ten days of the Court's issuance of an order.

Dated: August, 1, 2022

Respectfully submitted,

Sarah L. Wilson
Stephen P. Anthony
Thomas Brugato
Nicholas J. Griepsma

COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
202-662-5397
swilson@cov.com
santhony@cov.com
tbrugato@cov.com
ngriepsma@cov.com

*Counsel for Respondent*

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

| | |
|---|---|
| In the Matter of Amazon.com, Inc.,<br><br>Respondent. | CPSC Docket No. 21-2<br><br>Hon. James E. Grimes<br>Presiding Officer |

## [PROPOSED] ORDER

This matter, having come before the Presiding Officer on Respondent Amazon.com, Inc.'s Motion to Compel CPSC Policy and Practice Material dated August 1, 2022, it is hereby ORDERED that the Motion is GRANTED.

It shall be further ORDERED:

Within ten (10) days of this Order, Complaint Counsel shall produce a full and complete production of the following categories of material responsive to Respondent's Requests for Production 15, 19–26:

1. Material reflecting remedies sought and finalized in other recalls and Corrective Action Plans involving children's sleepwear, hair dryers and air brushes, and carbon monoxide detectors from 2015 to the present;
2. Material reflecting the criteria CPSC uses to select the entity (manufacturer, distributor, and/or retailer) to perform a recall, and any material reflecting the agency's bases for those criteria or analyses of such criteria;
3. Material reflecting the criteria CPSC uses in selecting particular recall remedies and corrective actions in individual recall actions, and any material reflecting the agency's bases for those criteria or analyses of such

criteria, including related material submitted by CPSC to the Government Accountability Office;

4. Internal operating procedures relating to recall remedies for CPSC offices tasked with recall-related responsibilities, such as the Office of Communications;

5. Material reflecting CPSC's evaluation of recall remedy effectiveness from 2009 to the present, including related material submitted by CPSC to the Government Accountability Office; and

6. Material reflecting CPSC's evaluation of post-recall reporting, including monthly progress reports and the Retailer Reporting Program.

To the extent Complaint Counsel contends that any material responsive to the above categories is subject to privilege, Complaint Counsel shall, within ten (10) days of this Order, produce a log of such material in accordance with Federal Rule of Civil Procedure 26(b).

Dated: August _____, 2022

_____
James E. Grimes
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on August 1, 2022, a true and correct copy of the foregoing document was, pursuant to the Order Following Prehearing Conference entered by the Presiding Officer on October 19, 2021:

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

Nicholas Griepsma

Nicholas Griepsma