UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

RESPONDENT AMAZON'S REPLY IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY DECISION

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INTRODUCTION

Complaint Counsel fails to rebut any of the three reasons Amazon put forth for why the Presiding Officer should dismiss the Complaint or issue a summary decision in Amazon's favor. *First*, Amazon is a "third-party logistics provider" and not a "distributor" of the Third-Party Products as defined by the Consumer Product Safety Act ("CPSA"). Complaint Counsel's untenable interpretation of these terms ignores the CPSA's plain language, which carves out third-party logistics providers from the definition of "distributor" and references lack of title as a defining feature of a third-party logistics provider. Complaint Counsel's interpretation would render the logistics-provider exception a nullity. Complaint Counsel's attempts to distinguish relevant product-liability decisions—which hold that Amazon is not a distributor or seller of Third-Party Products because, among other things, it does not hold title to them—are similarly flawed.

Second, the CPSC cannot lawfully circumvent Congress, or the notice-and-comment rulemaking process, by unilaterally creating and retroactively imposing a sweeping new policy by means of an adjudication targeted at a single company. Complaint Counsel does not meaningfully address this argument, relying instead on generalities about an agency's discretion to choose between rulemaking and adjudication, and fails to rebut Amazon's argument that proceeding by adjudication *in this specific case* is an abuse of discretion. Complaint Counsel does not even mention the relevant factors governing the legality of retroactive application of the CPSC's new and unprecedented policy.

Third, this proceeding is moot because Amazon already took effective remedial steps before the Complaint was filed. Complaint Counsel has failed to show that additional relief within the Commission's power to order, and not already provided by Amazon, is necessary to protect consumers. Complaint Counsel's contention—that any

remedy or notification is insufficient unless it is reviewed and approved by the CPSC—is entirely unsupported by law. Similarly, Complaint Counsel's conclusory assertion that Amazon's direct and swift consumer safety notifications were "insufficient" is contradicted by the undisputed facts: Amazon clearly warned consumers of the product hazard, instructed them to immediately stop using and dispose of the products, and provided a full refund. Finally, Complaint Counsel's invocation of exceptions to mootness is inapt; neither the "voluntary cessation" exception nor the "capable of repetition, yet evading review" exception applies in this case.

ARGUMENT

I. Complaint Counsel's Interpretations of the Definitions of "Distributor" and "Third-Party Logistics Provider" Are Untenable.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into a harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations and quotation marks omitted). Complaint Counsel's interpretation of the CPSA results in anything but a harmonious whole. Instead, it focuses myopically on the word "solely" in a manner that renders superfluous multiple portions of the statute and is divorced from the statute's structure and context. The CPSA provides the following relevant definitions:

> **(a) In general** . . .
>
> > **(7) Distribute in commerce; distribution in commerce**
> >
> > The terms "to distribute in commerce" and "distribution in commerce" mean to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce.
> >
> > **(8) Distributor**
> >
> > The term "distributor" means a person to whom a consumer product is delivered or sold for purposes of distribution in commerce, except that such term does not include a manufacturer or retailer of such product.
> >
> > . . .
> >
> > **(16) Third-party logistics provider**
> >
> > The term "third-party logistics provider" means a person who solely receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product.
> >
> > . . .
>
> **(b) Common carriers, contract carriers, third-party logistics provider, and freight forwarders**
>
> A common carrier, contract carrier, third-party logistics provider, or freight forwarder shall not, for purposes of this chapter, be deemed to be a manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business as such a carrier or forwarder.

15 U.S.C. § 2052.[1] Complaint Counsel's contentions with respect to Amazon hinge on the word "solely" in the definition of "third-party logistics provider." Complaint Counsel

[1] Complaint Counsel purports to be confused about "which provision of Federal Rule of Civil Procedure 12(b)" applies. Opp'n at 1. Amazon's motion to dismiss under 16 C.F.R. § 1025.23(d) challenges the CPSC's subject-matter jurisdiction (Rule 12(b)(1)) as well as the Complaint's failure to state a claim upon which relief can be granted (Rule 12(b)(6)). To be clear, Amazon does not raise a personal-jurisdiction challenge under Rule 12(b)(2).

argues that an entity cannot conduct *any* activity beyond receiving, holding, or transporting consumer products to fall within the definition, *even if* such activity has nothing to do with distribution.

That interpretation ignores the relevant structure and context of the statute. The third-party logistics provider definition is an *exception* to being considered a distributor. The word "solely" must be interpreted in that definitional context: what it means is that the sole *distribution* activity in which a third-party logistics provider can engage is holding, receiving, or otherwise transporting goods.[2] *See Thraser-Lyon v. CCS Commercial, LLC*, No. 11-cv-4473, 2012 WL 3835089, at *3 (N.D. Ill. Sept. 4, 2012) (interpreting an exception to a prohibition in light of the scope of the prohibition itself: "Because the prohibition applies only to" certain conduct, "the exception is similarly limited"). It does not mean that a third-party logistics provider may not perform any other activities that are unrelated to distribution (such as payment processing and customer service). The plain text makes this clear: the activities referenced in the "third-party logistics providers" definition echo the activities referenced in the "distribution in commerce" definition. To "distribute in commerce" is defined as "to sell in commerce, to ***introduce or deliver*** for introduction into commerce, or to ***hold*** for sale or distribution after introduction into commerce." 15 U.S.C. § 2052(a)(7) (emphases added). The "third-party logistics provider" carve-out mirrors this language, excepting each person who solely "***receives, holds, or otherwise transports***" consumer products

[2] The same logic would apply to manufacturing and retailing activities, which are not at issue here.

"in the ordinary course of business ***but who does not take title to the product***." *Id.* § 2052(a)(16) (emphases added).[3]

The parties' competing statutory interpretations are illustrated below. Complaint Counsel's position is that the *only activity* a third-party logistics provider can engage in is in the green box. Amazon's position is that the only *distribution* activity a third-party logistics provider can engage in is in the green box, but engaging in non-distribution activity in the blue box (which is simply outside the scope of the relevant provisions of the CPSA) does not make a third-party logistics provider a distributor, so long as it does not fall into distribution activity in the red circle (such as, for example, selling or taking title):

[3] As Amazon noted in its initial brief, *without* the word "solely," a distributor could engage in activity that indisputably would be covered by the CPSA, yet claim that reporting and recall obligations did not apply because it *also* engages in third-party logistics provider activities. Amazon Mem. at 21. The word "solely" prevents that result. *See Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23, 32 (2d Cir. 2010) (reaching a parallel conclusion in interpreting a statutory exception applicable to lawsuits that "solely involve[]" certain claims).

A. Complaint Counsel's Interpretation Reads Out Of The Statute "Who Does Not Take Title To The Product."

The statute's text, structure, context, and function all weigh decisively in Amazon's favor. The term "solely" cannot be read in a vacuum but instead must be interpreted in its relevant context. The Supreme Court recently rejected a similar "grammatically possible way of viewing" the function of the word "solely," because it was "ultimately inconsistent" with the "text and context of the statute." *Sturgeon v. Frost*, 139 S. Ct. 1066, 1084 (2019).[4] In other cases involving statutory exceptions, courts have found the term "solely" to be susceptible of different interpretations, requiring an evaluation of the relevant context. *See, e.g.*, *Whitaker v. Thompson*, 353 F.3d 947, 949–50 (D.C. Cir. 2004).[5]

Here, relevant context cuts decisively against Complaint Counsel's interpretation. By placing exclusive emphasis on the term "solely," Complaint Counsel's interpretation renders the second half of the "third-party logistics provider" definition superfluous. There would have been no need for Congress to specify that a third-party logistics provider must "not take title to the product" under Complaint Counsel's interpretation. By definition, taking title would extend beyond "solely" "receiv[ing], hold[ing], or otherwise transport[ing] a consumer product"—it would be the separate action of taking title to the product. The statute cannot be interpreted in that manner. *See Bilski v.*

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[4] At issue in *Sturgeon* was a statute that exempted certain non-public lands from being regulated by rules "solely" applicable to public lands. The Court rejected the argument that the exemption also applied to regulations governing *both* public and non-public lands, even though read literally this was "grammatically possible," because such rules did *not* solely apply to public lands. 139 S. Ct. at 1084.

[5] In *Whitaker*, the court addressed a statute providing that a dietary supplement is not considered a drug "solely" because its label contains certain health claims. The court noted that there were at least three potential ways to read that language, and found the statute ambiguous. Ultimately, the court found the agency's interpretation reasonable, based on the "legislative history and statutory context." 353 F.3d at 952.

Kappos, 561 U.S. 593, 607–08 (2010) (applying "the canon against interpreting any statutory provision in a manner that would render another provision superfluous"). The CPSA's express requirement that title not be transferred to qualify for the exception to "distributor" status is fully consistent with the common-law principle that "regardless of what attributes are necessary to place an entity within the chain of distribution, the failure to take title to a product places that entity on the outside." *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393, 398 (S.D.N.Y. 2018).

Complaint Counsel's interpretation of "solely" would as a practical matter render the third-party logistics provider exception a dead letter. Entities that are plainly third-party logistics providers, such as UPS and FedEx, provide an array of services beyond simply receiving, holding, and transporting consumer products. UPS, for example, offers a wide variety of services to third-party sellers, including connection of sellers' stores to UPS systems, orders and inventory management, returns management, business intelligence/analytics, and "branded delivery."[6] FedEx similarly offers services such as order fulfillment, returns management, and integration of sellers' inventory, "marketplaces," and "platforms" onto FedEx's platform.[7]

Under Complaint Counsel's theory, *none* of these entities is a third-party logistics provider. Although Complaint Counsel asserts that other entities might fall within the

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[6] *See, e.g.*, *e-Commerce Fulfillment*, UPS Supply Chain Solutions, https://www.ups.com/us/en/supplychain/logistics/efulfillment.page (last accessed Nov. 30, 2021).

[7] *FedEx® Fulfillment*, FedEx Supply Chain, https://supplychain.fedex.com/fulfillment-for-small-medium-business (last accessed Nov. 30, 2021).

scope of the exception, Complaint Counsel neither identifies any such entities nor explains how its reading of the statute can be reconciled with the practical operations of modern third-party logistics providers. Opp'n at 11 n.6.[8]

B. Complaint Counsel's Reliance On Subsection (B) Would Also Read The Third-Party Logistics Provider Exception Out Of The Statute.

Complaint Counsel's attempt to rely on 15 U.S.C. § 2052(b) to bolster its interpretation would also read the third-party logistics provider exception out of the statute. Under that provision, a "common carrier, contract carrier, third-party logistics provider, or freight forwarder" shall not be "deemed to be a manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business as such a carrier or forwarder." 15 U.S.C. § 2052(b). Complaint Counsel contends that "Amazon does not qualify for the exception set forth in the statute above because the exception is grounded in the identified entities' limited actions in commerce *as carriers or forwarders*." Opp'n at 13 (emphasis added).[9]

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[8] Complaint Counsel downplays the many sources identifying Amazon as a third-party logistics provider with respect to third-party sellers' goods, suggesting that these sources fail to specifically mention FBA by name. Opp'n at 9 n.5. This is simply incorrect. *See, e.g.*, Charley Dehoney, *Amazon Isn't Going Into 3PL Business; It's Already There*, FREIGHTWAVES, Jan. 15, 2021, https://www.freightwaves.com/news/commentary-amazon-isnt-going-into-3pl-business-its-already-there (discussing "FBA's 3PL services").

[9] Complaint Counsel's brief includes a lengthy digression on irrelevant parts of the legislative history of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). Opp'n at 12. For example, Complaint Counsel cites members of Congress touting the CPSIA's provision of more funding to the CPSC and its strengthening of the CPSC's authority over all-terrain vehicles. *Id*. But the sole relevant part of the CPSIA is the addition of the "third-party logistics provider" exception. Complaint Counsel's argument—that Congress's expansion of the CPSC's authority in unrelated areas expands the CPSC's authority to regulate third-party logistics providers, *id*. at 13—both defies logic and is inconsistent with the CPSC's acknowledgement that the CPSIA did not expand the Commission's "substantive authority to order that a mandatory recall notice be issued." 75 Fed. Reg. 3,355 (Jan. 21, 2010).

But this reading is illogical and renders the third-party logistics exception added in 2008 superfluous. It would mean that third-party logistics providers would qualify for the exception only when they are acting "as such a carrier or forwarder"—*i.e.*, as a common carrier, contract carrier, or freight forwarder. Given that the statutory provision applies to a "common carrier, contract carrier, third-party logistics provider, or freight forwarder," 15 U.S.C. § 2052(b), Complaint Counsel's insistence that a third-party logistics provider must be a common carrier, contract carrier, or freight forwarder would read the term "third-party logistics provider" out of the statute entirely, contrary to the most basic tenet of statutory interpretation. *See Greenwich Fin. Servs.*, 603 F.3d at 32 (rejecting interpretation of an exception containing the phrase "solely involves" that would result in the exception becoming "essentially meaningless").

Amazon's interpretation is the only one that gives each statutory provision meaning and renders none of them superfluous: the sole *distribution* activity that a third-party logistics provider can engage in without falling within the definition of "distributor" is receiving, holding, or otherwise transporting the consumer products at issue, as long as it does not take title. This reading recognizes the identical or synonymous terms in the definitions of "distribution in commerce," "distributor," and "third-party logistics provider" (holding, receiving, transporting). This reading does not alter the plain text of the term "solely" or depart from the dictionary definition; it simply applies it to the intended context of distribution activities, resulting in a "coherent regulatory scheme" that fits "all parts into a harmonious whole." *Brown & Williamson*, 529 U.S. at 133.

Under this interpretation, Amazon falls within the third-party logistics provider exception, and not within the definition of "distribution," because none of its FBA activities (*i.e.*, activities other than receiving, holding, or otherwise transporting

consumer products) amounts to distribution. "[P]ayment processing," "management of the sales venue," "imposing of pricing restrictions," and "processing customer returns" are not "distribution" within the CPSA definition. Opp'n at 7.[10] And the remaining activities cited by Complaint Counsel—having products "delivered to Amazon" (*i.e.*, receiving products) and "holding" products, Opp'n at 7—fall squarely within the third-party logistics provider exception. 15 U.S.C. § 2052(a)(16).

C. Complaint Counsel's Interpretation Is Contrary To The Majority Of Relevant Case Law.

Complaint Counsel's argument that title, ownership, and sale are irrelevant to the CPSA is similarly misplaced. Opp'n at 16-18. For one thing, title *is* a requirement to be considered a distributor, just as *not* holding title is required to be considered a third-party logistics provider. *See* Doc. No. 15 ("Amazon Mem.") at 10–12. That conclusion is confirmed by the multiple cases in the product-liability context that recognize transfer of title as either a requirement of distribution or as an important element, and not holding title as placing an entity outside the category of "distributor." *Eberhart*, 325 F. Supp. 3d at 398; *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 835 F. App'x 213, 216 (9th Cir. 2020); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 141–42 (4th Cir. 2019); *Allstate*

[10] Complaint Counsel wrongly claims that it is "undisputed" that Amazon "controls the prices charged by third-party sellers using the FBA program." Opp'n at 3 (inaccurately citing to SUMF ¶ 21). In fact, third-party sellers set their own pricing, and Amazon has specifically denied Complaint Counsel's inaccurate assertion to the contrary. Answer (Doc. No. 3) ¶ 21. Statement of Undisputed Material Fact ¶ 21 addresses Amazon's Fair Pricing Policy, which allows Amazon to take action against third-party sellers whose pricing practices are manipulative or otherwise might harm customer trust. SUMF ¶ 21.

N.J. Ins. Co. v. Amazon.com, Inc., No. 17-cv-2738, 2018 WL 3546197, *8 (D.N.J. July 24, 2018); *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101, 109–12 (Tex. 2021).[11]

Courts have routinely relied on Amazon's status as a third-party logistics provider to conclude that Amazon is not a distributor or seller in the product-liability context. *See State Farm*, 835 F. App'x at 216 (Amazon's "facilitat[ion of] shipping of the third-party seller's [products] from the warehouse to the consumer . . . did not make Amazon the seller of the product any more than the U.S. Postal Service or United Parcel Service are when they take possession of an item and transport it to a customer"); *accord Erie*, 925 F.3d at 142 ("Although Amazon's services were extensive in facilitating the sale, they are no more meaningful to the analysis than are the services provided by UPS Ground, which delivered the [product].").

Complaint Counsel does not dispute that the majority of courts to consider the issue, including the Fourth Circuit in which the CPSC is headquartered, have held that Amazon is not a "distributor" or "seller" of third-party products for which orders were fulfilled by Amazon under state product-liability statutes and common law. Amazon Mem. at 12–13 (collecting cases). In so concluding, these courts have cited the same characteristics dispositive of the CPSA "distributor" and "third-party logistics provider" issue here. For example, Amazon clearly and repeatedly identified the third-party seller

[11] Complaint Counsel argues that the product-liability cases setting forth the consensus view (*i.e.*, that Amazon is not a "distributor" or "seller" of third-party sellers' products merely because it fulfills orders for them) are "of no value." Opp'n at 15. That argument assumes its own premise: that the cases are inapposite because they rely "on products liability laws where taking title to the product was generally required" and "the CPSA has no requirement that a distributor sell a product or take legal title to it." *Id*. at 16–18.

to the consumer; facilitated the sale rather than controlled or inspected the product; and neither held title to the product nor influenced the product's design or manufacture. *Id.* (citing cases).[12]

D. Complaint Counsel's Public Policy Concerns Are At Odds With The Plain Statutory Text, And Are Baseless In Any Case.

Complaint Counsel's reliance on public-policy considerations underscores the lack of a statutory basis for its position and the significant change in policy it impermissibly hopes to achieve through an adjudication. *See infra* part II. Complaint Counsel contends that "public policy compels" the conclusion that Amazon is a "distributor" of the Third-Party Products, Opp'n at 21–22, but cites no legal authority except the "purposes" section of the CPSA, which merely states that one of the Act's four purposes is "to protect the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. § 2051(b)(1). The "purposes" section says nothing about how responsibility should be allocated among importers, manufacturers, distributors, retailers, and third-party logistics providers. Nor does it modify the express provisions of the CPSA that follow, such as the definitions of "distributor" and "third-party logistics provider." *See Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) (noting that statutory preambles and prefatory

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[12] Complaint Counsel clings to three outlier decisions (two from California state courts and one from a federal district court in Wisconsin) coming to a contrary conclusion. Opp'n at 20–21. Complaint Counsel asserts that these cases offer an "extensive review of Amazon's actions in the FBA Program," *id.* at 21, yet fails to acknowledge that the greater number of decisions holding that Amazon is not a seller or distributor involved an equally extensive review of the comparative roles of Amazon and the third-party sellers. *See* Amazon Mem. at 12–13. Complaint Counsel also touts another outlier case because "the Wisconsin products liability statute at play" in that case "was intended to be read in a broadly remedial fashion, like the CPSA." Opp'n at 21 (citing *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964 (W.D. Wis. 2019)). But that elastic mode of statutory interpretation has been repeatedly rejected by the Supreme Court. *See* Amazon Mem. at 14 (citing *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014) and *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1195 (11th Cir. 2019)).

language are of limited usefulness); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 245 (1989) (similar). In any case, courts do "not presume . . . that any result consistent with their account of the statute's overarching goal must be the law but will presume more modestly instead 'that [the] legislature says . . . what it means and means . . . what it says.'" *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (quoting *Dodd v. United States*, 545 U.S. 353, 357 (2005)). Here, under the CPSA's plain language, Amazon was a third-party logistics provider for the Third-Party Products, not a distributor of them, and therefore had no recall obligations. Amazon Mem. at 8–15.

Complaint Counsel also rests its public-policy argument on Amazon's "capability to message consumers about unsafe FBA products, to provide refunds, and to take other remedial actions," Opp'n at 22; on Amazon's requirement that "merchants using its FBA program . . . submit approval documentation for certain categories of products," *id.*; and on Amazon's requirement that third-party sellers of music, jewelry, and certain other product types (none of which is relevant here) obtain approval before listing such products for sale, *id.* at 20 n.8. None of these considerations has any bearing on whether Amazon is a distributor, because the CPSA does not define "distributor" or "third-party logistics provider" in terms of "capability."

Finally, and tellingly, Complaint Counsel ignores the countervailing public policy considerations underpinning Congress's choice in the CPSA to allocate responsibility for reports and remediation to manufacturers, retailers, and distributors, and not to third-party logistics providers. Manufacturers establish a product's specifications and designs, engineer the product, and select the product's material composition, Amazon Mem. at 31, while distributors and retailers take title to products, market, and sell consumer products. Given these roles, the CPSA sensibly allocates the responsibility for identifying and

reporting safety hazards and conducting recalls to manufacturers, retailers and distributors, rather than to third-party logistics providers. *Id*. (quoting study recognizing that "a third-party seller may have product-specific knowledge that Amazon lacks, making it less costly for that seller to market the product and answer consumers' inquires").

II. Complaint Counsel's Attempted Retroactive Policymaking-By-Adjudication Is Impermissible.

Complaint Counsel does not dispute that the CPSC has never:

- initiated a rulemaking or encouraged a voluntary standard-setting process to address e-commerce companies that fulfill orders for third-party sellers' products;
- published informal guidance announcing the agency's views on this topic;
- addressed the scope of the terms "distributor" and "third-party logistics provider" as applied to e-commerce websites; or
- previously launched an adjudicative proceeding against an e-commerce website operator regarding sales by third-party merchants to a consumer.

Complaint Counsel's Response to Amazon's Statement of Undisputed Material Facts (Doc. No. 23) ("CPSC Resp. to Amazon's SUMF"), ¶¶ 24-29. Instead, Complaint Counsel raises a series of misplaced arguments in an attempt to defend its rulemaking-by-adjudication approach, which would impose a sweeping new set of nationwide requirements on online logistics providers.

Complaint Counsel argues that because it is engaging in an adjudication, it is not engaged in a rulemaking. Opp'n at 23. But this *ipse dixit* assertion demonstrates the very point: the CPSC has erred by attempting to adopt a sweeping new policy for the first time in an adjudication. The implication of Complaint Counsel's argument is that there can never be a legal challenge to rulemaking by adjudication.

Complaint Counsel also argues at length that agencies have discretion to choose between rulemaking and adjudication to engage in interpretation of a statute. Opp'n at 23–25. But the relevant question is not whether agencies may engage in adjudication to interpret statutes, but whether in *this particular* case, the CPSC's "reliance on adjudication . . . amount[s] to an abuse of discretion." *Nat'l Labor Relations Bd. v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).[13] Complaint Counsel fails to address that question.

This case is like others in which courts have found that an agency proceeded unlawfully through an adjudication. For example, in *Ford Motor Co. v. Federal Trade Commission*, the court addressed an FTC order that interpreted the FTC Act as prohibiting automobile dealers from crediting the owners of repossessed cars wholesale (rather than retail) value. 673 F.2d 1008, 1008–09 (9th Cir. 1981). The court held that the FTC had to pursue rulemaking rather than adjudication because the FTC's interpretation at issue "changes existing law, and has widespread application." *Id.* at 1010.

Here, too, a ruling in the CPSC's favor would change the CPSA's meaning and would have widespread application beyond Amazon. As in *Ford*, this case is "the first agency action against a [defendant] for violating [the statute] for doing what [the defendant] does." *Id.* Also, as in *Ford*, a decision on the distributor issue will have

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[13] As explained in Amazon's initial brief, an agency abuses its discretion when, for example, it attempts to propose legislative policy by an adjudicative order or attempts to use adjudication to circumvent APA's rulemaking (notice and comment) procedures. Amazon Mem. at 26 (citing *First Bancorporation v. Bd. of Governors of Fed. Reserve Sys.*, 728 F.2d 434, 438 (10th Cir. 1984) and *City of Anaheim v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984)).

"general application"; will implicate "practices similar" to those of Amazon's FBA logistics service, which are "widespread in the . . . industry"; and will create a new "national interpretation" of the relevant statutory provision. *Id*. Indeed, CPSC Commissioner Feldman has acknowledged as much: in a recent statement plainly referencing this matter, he proclaimed that this is "an era where CPSC is asserting jurisdiction to keep pace with 21st Century commerce."[14] The only distinction from *Ford* that Complaint Counsel draws is that, in *Ford*, the agency had proposed a rule on the issue. But the *Ford* decision did not hinge on that fact, and indeed the *dissent* speculated that perhaps the decision could be limited in that way. *Ford*, 673 F.2d at 1012 n.2.

First Bancorporation also dealt with an impermissible attempt to create rules through an adjudication. There, the Federal Reserve issued an order finding that an entity's activity (providing a certain type of account) subjected it to certain banking regulations. *First Bancorporation*, 728 F.2d at 438. The Court found this to be an impermissible "broad policy announcement" that could not be issued in an adjudication. *Id*. Although Complaint Counsel correctly points out that in *First Bancorporation* the agency had not engaged in determining "adjudicative facts," Complaint Counsel's sweeping interpretation of the CPSA likewise requires no particular examination of any specific adjudicative facts. Complaint Counsel is advancing an interpretation of the statute under which *any* entity that does *anything* beyond solely receiving, holding, or storing consumer products necessarily is a distributor under the CPSA. As in *First*

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[14] *Statement of Commissioner Peter A. Feldman: New Penalty Caps May Provide Insufficient Deterrence Against the Largest E-Commerce Platforms*, Nov. 23, 2021, https://cpsc-d8-media-prod.s3.amazonaws.com/s3fs-public/Civil%20Penalties%20Adjustment%20Nov%2023%202021.pdf.

Bancorporation, such an interpretation would plainly result in a widespread change in industry regulation, and an order against Amazon would amount to "a vehicle by which policy would be changed." *Id.* at 437. The CPSC's true impetus is policy change. The agency does not need to seek a mandatory order to obtain the relief to consumers already provided by Amazon long before the CPSC filed its complaint. *See infra* section III.

Finally, even if the CPSC could adopt this new policy in an adjudication, it cannot do so retroactively. Complaint Counsel does not address the multi-factor tests adopted by courts to evaluate whether a new interpretation adopted in an adjudication can have retroactive force. Nor does it acknowledge the rule of *SEC v. Chenery Corp.*: that any "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." 332 U.S. 194, 203 (1947). Here, for the unrebutted reasons set forth in Amazon's initial brief, Amazon Mem. 28–29, applying any order in this proceeding retroactively would be unwarranted. The CPSC is for the first time asserting jurisdiction over an entire class of entities, based on a brand-new interpretation of critical statutory terms and exceptions, in a case where Amazon has already provided all of the relief required by the CPSA.

III. The Complaint Is Moot.

The Complaint does not adequately plead, and the Opposition does not attempt to show, *any* facts demonstrating that additional relief within the Commission's power to order, and not already provided by Amazon, is necessary to protect consumers. Amazon Mem. at 31. Accordingly, this proceeding is moot and Amazon "is entitled to a dismissal as a matter of right." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Prior to the filing of the Complaint, Amazon had already removed the Third-Party Products from Amazon.com; directly notified all purchasers of the specific hazard posed by the products;

instructed all purchasers to immediately stop using the products; and provided all purchasers a full refund. Contrary to Complaint Counsel's claim, the CPSA does not require that all corrective actions or consumer notifications be pre-approved by the CPSC. And the exceptions to the mootness doctrine invoked by Complaint Counsel are inapposite.

A. Undisputed Facts Show That the Action Is Moot.

Undisputed facts establish that this proceeding is moot.[15] Complaint Counsel "does not dispute that Amazon has taken" action to protect consumers, Opp'n at 31, and specifically concedes that:

- Amazon removed all the Third-Party Products from Amazon.com *before* the CPSC filed the Complaint (and in some instances, more than a year prior to this litigation). CPSC Resp. to Amazon's SUMF, ¶¶ 11–14.
- None of the Third-Party Products is currently available for purchase on Amazon.com. *Id.* ¶ 15.
- Amazon has quarantined the Third-Party Products in Amazon fulfillment centers, and either destroyed them or set them aside for destruction. *Id.* ¶ 16.
- After the CPSC approached Amazon about the Third-Party Products, Amazon informed the Third-Party Sellers of the CPSC outreach. *Id.* ¶ 17.
- After the CPSC approached Amazon about the Third-Party Products, Amazon provided a full refund to purchasers, *id.* ¶ 18, and informed purchasers that the refund had been applied. *Id.* ¶ 23.
- Prior to the filing of the Complaint, Amazon emailed consumer safety notifications directly to *all* affected purchasers. *Id.* ¶¶ 19–20.
- Each direct consumer safety notification identified the specific *product*. *Id.* ¶ 22.

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[15] Complaint Counsel does not contest that mootness doctrines apply to agency adjudications. Amazon Mem. at 29–30. And Complaint Counsel fails entirely to address Amazon's prudential mootness argument, rooted in *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1209–15 (10th Cir. 2010). Amazon Mem. at 30.

- Each direct consumer safety notification identified the specific *hazard*. *Id*. ¶ 23.

- Each direct consumer safety notification gave clear, specific *instructions* to recipients on what to do, saying (for example): "If you still have this product, we urge you to stop using it immediately and dispose of it. If you purchased this product for someone else, please notify the recipient immediately and let them know they should dispose of it." *Id*. ¶ 21.

Moreover, Complaint Counsel does not allege that Amazon's notifications failed to reach consumers. Amazon Mem. at 33. Nor does Complaint Counsel contest the extensive body of research, and CPSC statements, establishing that direct, targeted purchaser notifications are the most effective form of recall notice. *Id*. at 34–35.[16] And Complaint Counsel does not contest that Amazon's direct targeted, consumer outreach, in addition to Amazon's automatic refunds of the full purchase price to all purchasers, greatly surpassed the reach and effectiveness of "traditional" CPSC recalls. *Id*. at 34.

B. Complaint Counsel's Contention That Corrective Actions Must Be Approved By the CPSC Fails As a Matter of Law.

The thrust of Complaint Counsel's argument is that all corrective actions must be approved by the CPSC; that direct consumer safety notifications not pre-approved by the CPSC are *per se* inadequate, even if they clearly identify the hazard in terms substantially identical to those CPSC press releases; and that the mootness doctrine therefore cannot apply here. Opp'n at 29. Complaint Counsel similarly suggests that the direct consumer safety notifications that Amazon sent to all affected purchasers are insufficient because they "lack[] the force and effect of a strong statement from the CPSC, the nation's

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[16] *See* 83 Fed. Reg. 29,102, 29,102 (June 22, 2018) ("Direct notice recalls have proven to be the most effective recalls."); *Recall Effectiveness Research: A Review and Summary of the Literature on Consumer Motivation & Behavior*, ZL Assocs. & Heiden Assoc. (prepared for CPSC) (July 2003), at 8 ("Direct notification of consumers was found to have a powerful positive relationship to recall success.").

consumer product safety agency" and fail to "inform consumers that a responsible party is recalling the product at its behest." *Id*. at 31–32 n.14. These contentions inflate the role of the CPSC beyond its statutory bounds, are at odds with the public interest in product safety, and fail as a matter of law.

The Commission has the power to issue mandatory remedial orders only under certain conditions. *See* Amazon Mem. at 4. For example, the Commission may order a manufacturer, distributor, or retailer to provide notice to the public or others *only* if the product "presents a substantial product hazard and . . . notification is required in order to adequately protect the public." 15 U.S.C. § 2064(c). Similarly, the Commission may order a manufacturer, distributor, or retailer to provide a remedy *only* if the product "presents a substantial product hazard" and ordering a specific remedy would be "in the public interest." *Id*. § 2064(c). Complaint Counsel seeks to turn these CPSA provisions on their head, asserting that a proceeding cannot be moot if a company's actions are "voluntary" or "unilateral" (*i.e.*, undertaken without a "mandatory enforceable order"). Opp'n at 29. In other words, Complaint Counsel contends that a notification cannot be sufficient unless it is "*from the CPSC*." *Id*. at 31–32 n.14 (emphasis added).

Complaint Counsel's argument is circular: Complaint Counsel maintains that a proceeding to obtain a mandatory enforceable order can never be moot, because until one is granted, no mandatory enforceable order exists. The argument is also unmoored from the CPSA's text. The CPSA does *not* require companies to receive Commission approval before notifying consumers of a safety issue or furnishing a remedy. 15 U.S.C. § 2064(c) and (d) are limited to narrow circumstances in which a mandatory enforceable order is needed "to adequately protect the public" and is "require[d]" by "the public interest."

Many safety issues are resolved without a CPSC joint recall, and the vast majority are resolved without a mandatory enforceable order.

If Congress wanted to require a company to wait (often for protracted periods of time) for CPSC approval whenever the company wanted to alert consumers to a potential hazard or provide a remedy, Congress could readily have enacted a statute saying so. In fact, Congress did require regulatory approval in the context of motor vehicle safety. In the National Traffic and Motor Vehicle Safety Act, Congress prescribed specific rules for what direct "[n]otification by a manufacturer required under [that act] of a defect or noncompliance shall contain." 49 U.S.C. § 30119(a). NHTSA, acting pursuant to Congress's mandate, prescribed specific additional requirements for manufacturers' direct notifications to consumers, down to precise wording in letters and on envelopes. 49 C.F.R. §§ 577.5, 577.7. In sharp contrast, for non-automotive consumer products, Congress chose a less prescriptive course. By insisting that a "voluntary" or "unilateral" remedy can *never* moot a proceeding for a mandatory order, Complaint Counsel disregards congressional intent and the CPSA's plain language, and impermissibly seeks to substitute its judgment for that of Congress.

Finally, the CPSC—without citing any authority—argues that "[w]ithout a mandatory, enforceable order," the agency "will be without recourse to make and keep consumers safe," and that a mandatory order is thus "required to empower the CPSC" to obtain information from Amazon. Opp'n at 29. This argument, too, is circular, suggesting

that the criteria for issuing an order are *always* met whenever the Commission believes an order is necessary "to adequately protect the public." 15 U.S.C. § 2064(c)(1).[17]

In any case, Complaint Counsel's argument is contradicted by the CPSA, which gives the CPSC the power to seek information, take enforcement action, regulate consumer products, and promote consumer safety consistent with its statutory powers, which are not limited to the provisions in 15 U.S.C. § 2064(c) and (d). Thus, Complaint Counsel's contention—that the CPSC will be left "without recourse" unless the Presiding Officer adopts Complaint Counsel's sweeping interpretation—is wrong.

C. Complaint Counsel Fails To Adequately Allege That Amazon's Direct Consumer Safety Notifications Were Insufficient.

The Complaint fails to plead any facts showing that Amazon's direct safety notifications to all purchasers were inadequate in any way, or that further notification is necessary to "adequately protect the public from . . . substantial products hazards created by" the Third-Party Products. Compl. at 18. In a footnote, Complaint Counsel claims without any support that "Amazon's notices are inadequate," asserting that, for carbon monoxide ("CO") detectors, the "reference to the hazard" is "tepid," is "not forceful or persuasive," and "does nothing to incentivize the consumer to remove the product from the marketplace." Opp'n at 31–32 n.14. Complaint Counsel's footnote fails to counter the facts establishing mootness, and creates no genuine issue of material fact as to the adequacy of the notifications. *See American Council of the Blind v. Paulson*, 525 F.3d 1256, 1273 (D.C. Cir. 2008) ("Assertions are not evidence and thus cannot create a

[17] Complaint Counsel also simply ignores that even where the CPSC is involved in voluntary recalls, the corrective action plan and associated actions are not legally binding. 78 Fed. Reg. 69,793, 69,795 (Nov. 21, 2013); 16 C.F.R. § 1115.20(a).

material issue of fact in dispute"). Complaint Counsel does not devote even a footnote on the adequacy of Amazon's notifications for the other Third-Party Products.

It is uncontested that Amazon's direct notifications were sent to all affected purchasers of the Third-Party Products. *See* CPSC Resp. to Amazon's SUMF ¶¶ 19–20. The wording of the notifications is also uncontested. Each notification consisted of clear, direct, simple language. Purchasers of the CO detectors were warned that the units "may fail to alarm on time, posing a risk of exposure to potentially dangerous levels of Carbon Monoxide." *Id.* ¶ 22(a). Purchasers of the hair dryers were warned that the units "may fail to have mandatory immersion protection, posing a risk of electric shock if the hair dryer comes into contact with water." *Id.* ¶ 22(b). And purchasers of the sleepwear were warned that the items "failed to meet the federal safety standard for the flammability of children's sleepwear, posing a risk of burn injuries to children." *Id.* ¶ 22(c). All purchasers of the Third-Party Products—including the CPSC's own affiant—were clearly instructed: "If you still have this product, we urge you to stop using it immediately and dispose of it. If you purchased this product for someone else, please notify the recipient immediately and let them know they should dispose of it." *Id.* ¶ 21.

Despite Complaint Counsel's mischaracterization of the CO detector notifications as "tepid," Opp'n at 31 n.14, the language used in Amazon's direct consumer safety notifications tracks the language in *CPSC-approved* recall press releases regarding similar products and hazards.[18] This clear, concise language did not downplay the alleged

[18] *E.g.*, No. 09–235, *Hair Dryers Recalled by Vintage International Due to Electrocution Hazard*, CPSC, June 3, 2009, https://www.cpsc.gov/Recalls/2009/hair-dryers-recalled-

hazard or noncompliance. Complaint Counsel's new, baseless characterization of the notifications for the first time in the Opposition (and for only one of the three categories of Third-Party Products) cannot overcome the undisputed plain language of the messages sent by Amazon directly to all purchasers. This is especially true here, where Complaint Counsel's argument is undercut by the CPSC's past actions. Amazon's direct consumer safety notifications to consumers contain essentially the same elements as prior CPSC-approved recall press releases, except in a superior format and through a more effective method of transmission (*i.e.*, direct emails with a subject line "Attention: Important safety notice about your past Amazon order," rather than mass-blast press releases). *See* Amazon Mem., App'x B (side-by-side comparison).

D. Exceptions to the Mootness Doctrine Do Not Apply.

Complaint Counsel also contends that the Complaint is not moot "due to the voluntary cessation doctrine." Opp'n at 29–31. In a footnote, Complaint Counsel also suggests that the "capable of repetition yet evading review" exception "may also apply," Opp'n at 30 n.12. Neither exception applies here.

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by-vintage-international-due-to-electrocution-hazard (language similar to Amazon's direct consumer safety notification on hair dryers); No. 21–769, *Children's Sleepwear Recalled Due to Violation of Federal Flammability Standard and Burn Hazard; Sold Exclusively by Zoetop Business Co. Ltd. at www.SHEIN.com (Recall Alert)*, CPSC, July 29, 2021, https://www.cpsc.gov/Recalls/2021/Childrens-Sleepwear-Recalled-Due-to-Violation-of-Federal-Flammability-Standard-and-Burn-Hazard-Sold-Exclusively-by-Zoetop-Business-Co-Ltd-at-www-SHEIN-com-Recall-Alert (language similar to Amazon's direct consumer safety notification on sleepwear); No. 12–701, *ADT Recalls Carbon Monoxide Detectors Due to Failure to Properly Indicate End of Useful Life*, CPSC, Oct. 20, 2011, https://www.cpsc.gov/Recalls/2011/adt-recalls-carbon-monoxide-detectors-due-to-failure-to-properly-indicate-end-of-useful (language similar to Amazon's direct consumer safety notification on CO detectors).

1. The "voluntary cessation" exception does not apply.

The voluntary cessation exception can only apply when "a defendant chooses to terminate the challenged conduct *after* a lawsuit is filed." *Chavis v. Garrett*, 419 F. Supp. 3d 24, 32 (D.D.C. 2019). Additionally, the exception "does not apply" if the change in conduct is "unrelated to the litigation" or "scheduled before the initiation of the litigation." *Am. Civil Liberties Union of Mass. v. U.S. Conf. of Catholic Bishops*, 705 F.3d 44, 55–56 (1st Cir. 2013) (citations omitted). Here, Amazon did not change its conduct during the litigation with the intent to moot the suit. Rather, the proceeding is moot due to Amazon's actions *before* the Complaint was filed (*i.e.*, removing the Third-Party Products from Amazon.com, providing refunds, alerting consumers to hazards, and instructing consumers to discontinue use of the products). These steps were clearly not attempts "to evade judicial review, or to defeat a judgment." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001).

Moreover, the voluntary cessation exception applies only when litigant is "temporarily altering questionable behavior." *Id.* The exception "can be triggered only when there is a reasonable expectation that the challenged conduct will be repeated following dismissal of the case," a likelihood that is "highly sensitive to the facts of a given case." *ACLU of Mass.*, 705 F.3d at 56. Here, the Third-Party Products have been removed from Amazon.com, and Amazon will not allow the Third-Party Sellers to reinstate them. The direct consumer product safety notifications and refunds were issued to all purchasers long ago, and are irreversible. Under these facts, the voluntary-cessation exception cannot apply. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 101–02 (2013) (voluntary-cessation standard is not met in "absence of any indication that" manufacturer would produce infringing product).

Complaint Counsel contends that the exception applies because Amazon "continues to challenge the [CPSC's] assertion that it is a distributor of FBA products and responsible to conduct recalls." Opp'n at 30. But speculation that some *future* third-party product will be defective or noncompliant is insufficient to invoke the exception. In any case, such abstract claims are not cognizable in adjudicative proceedings seeking a mandatory recall order, which are inherently product-specific. *See Unified Sch. Dist. No. 259 v. Disability Rights Ctr. of Kan.*, 491 F.3d 1143, 1150 (10th Cir. 2007) ("[T]he 'allegedly wrongful behavior' in this case is highly fact-and context-specific, rather than conduct that is likely to 'recur' on similar facts and in the same context. In such a case, the 'voluntary cessation' doctrine is inapplicable, because our review of future instances of 'wrongful behavior' may be quite different than the complained-of example that already has ceased."). Moreover, Amazon's ongoing disagreement with the CPSC's assertion that Amazon is a "distributor" of third-party sellers' products is irrelevant. Mootness does not require Amazon to concede to the CPSC's position, either in this proceeding or hypothetical future cases. *See ACLU of Mass.*, 705 F.3d at 55 n. 9; *Speech First, Inc. v. Killeen*, 968 F.3d 628, 647 (7th Cir. 2020); *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 97, 982 (6th Cir. 2012); *Amalgamated Transit Union v. Chattanooga Area Reg'l Transp. Auth.*, 431 F. Supp. 3d 961, 974–75 (E.D. Tenn. 2020).

2. The "capable of repetition, yet evading review" exception does not apply.

In a footnote, Complaint Counsel suggests that the "capable of repetition, yet

evading review" exception "may also apply." Opp'n at 30 n.12.[19] But a "theoretical possibility" is insufficient to qualify as "capable of repetition." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). There must instead be a "reasonable expectation" or "demonstrated probability" that "the same complaining party would be subjected to the same action again." *Id.* Moreover, the exception applies only in cases in which a plaintiff's claims "are inherently transitory." *Dudley-Barton*, 1653 F.3d at 1153. Complaint Counsel makes no attempt to argue that the issue here is inherently transitory.

Complaint Counsel's remaining argument—that regardless of how the specific Third-Party Products here are ultimately handled, the legal issue "would still need to be resolved because the CPSC and Amazon are likely to end up back in court the next time an FBA product needs to be recalled and Amazon resists on jurisdictional grounds," Opp'n at 30 n.12—also is insufficient to support invocation of the exception. Mandatory recall orders are expressly product-specific. And the exception does not allow abstract legal questions to be adjudicated in the absence of any live controversy, simply because the issue is likely to arise again. Rather, the party seeking to avoid a mootness finding must show that (a) a future case regarding "the same action" is likely to arise *and* (b) that future case is likely to "evade review." Complaint Counsel has done neither here.

CONCLUSION

The Presiding Officer should deny Complaint Counsel's motion for partial summary decision and grant Amazon's motion to dismiss the Complaint or, in the alternative, issue a summary decision in Amazon's favor.

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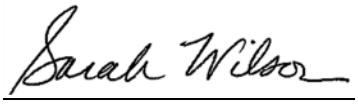
[19] Complaint Counsel characterizes this exception as "frequently invoked," Opp'n at 30 n.12, but it is in fact "rare." *Dudley-Barton v. Srv. Corp. Int'l*, 1653 F.3d 1151, 1153 (10th Cir. 2011); *Ramos v. N.Y.C. Dep't of Educ.*, 447 F. Supp. 3d 153, 159 (S.D.N.Y. 2020).

Dated: December 7, 2021

Respectfully submitted,



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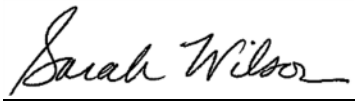
CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2021, 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.



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