UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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

RESPONDENT AMAZON.COM, INC.'S REPLY TO COMPLAINT COUNSEL'S STATEMENT OF DISPUTED ISSUES

As required by the U.S. Consumer Product Safety Commission's ("CPSC" or the "Commission") July 29, 2024, Decision and Order (the "Decision and Order"),[1] Respondent Amazon.com, Inc. ("Amazon") submits this Reply to Complaint Counsel's Statement of Disputed Issues.

Amazon objects to the Commission's Decision and Order on the grounds stated in its prior briefing and Proposed Notification and Action Plan. The Commission lacked authority to issue the Decision and Order because Amazon is not a "distributor" of the Subject Products under the Consumer Product Safety Act ("CPSA" or the "Act"). Even if Amazon were subject to the Commission's authority with respect to the Subject Products, further action is unnecessary and inappropriate because Amazon directly notified every purchaser of the Subject Products of the product hazards, warned them (and through them, any secondary recipients) to stop using and to dispose of the products, and credited the full purchase price to their Amazon accounts. Those steps were adequate to protect

[1] The Decision and Order was served on the parties and published on the adjudication docket the following day.

the public and serve the public interest. Furthermore, the notice and remedy orders to be issued by the Commission in connection with these proceedings are unlawful for the reasons stated in Amazon's briefing, including because they exceed the Commission's statutory authority and because they compel Amazon's speech in violation of the First Amendment. Amazon intends to challenge the Commission's final order once issued, including by seeking a stay of the final order, and does not waive any of its objections to the Commission's past or future rulings by submitting this document or participating in the process ordered by the Commission.

Notwithstanding these objections, Amazon submitted its Proposed Notification and Action Plan under protest in accordance with the Decision and Order. It likewise submits this Reply under protest as directed by the Decision and Order. Amazon reserves all of its rights, including all defenses and objections previously asserted in this proceeding, and with respect to the issues raised in the Decision and Order, Amazon's Proposed Notification and Action Plan, and this Reply.

I. Background on Disputed Issues

On August 14, 2024, and in accordance with the Decision and Order, Amazon submitted its Proposed Notification and Action Plan to Complaint Counsel.[2] On August 28, 2024, Complaint Counsel provided a written mark-up of the Proposed Notification and Action Plan to Amazon. On August 29, 2024, the parties conferred via videoconference to discuss Complaint Counsel's objections to the Proposed Notification

[2] As discussed above, Amazon submitted its Proposed Notification and Action Plan to Complaint Counsel under protest. Amazon maintains the objections and reservations of rights raised in its Proposed Notification and Action Plan, including all defenses and objections previously asserted in this proceeding, and with respect to the issues raised in the Decision and Order and Amazon's Proposed Notification and Action Plan.

and Action Plan. The parties were unable to resolve all of the issues. On September 9, 2024, Amazon filed its Proposed Notification and Action Plan with the Commission. Under this plan, Amazon proposes one round of additional direct customer notices and would offer refunds conditioned upon proof of destruction. Amazon also proposes that a Recall Alert be posted on the CPSC website and that Amazon repost the CPSC's Recall Alert on its public "Recalls and Product Safety Alerts" page. Amazon also proposes one additional round of notifications to the last known contact for the Third-Party Sellers of the Subject Products.[3]

On September 17, 2024, Complaint Counsel filed its Statement of Disputed Issues. Amazon now responds to that Statement and addresses the points of disagreement below.[4]

II. The Commission Should Reject Complaint Counsel's Attempts to Expand the Scope of This Adjudication.

Complaint Counsel's Position: In its Statement of Disputed Issues, Complaint Counsel requests that the Commission depart from the Decision and Order by adopting an imprecise and contradictory definition of the term "Subject Products" and by expanding the universe of Subject Products to include units sold through the Amazon Warehouse program.

Amazon's Position: The Commission should decline to adopt Complaint Counsel's proposal to define the Subject Product population as "all carbon monoxide detectors, children's sleepwear garments, and hair dryers identified in the Complaint and

[3] It is undisputed that Amazon previously "notified all Third-Party Sellers of Commission notices regarding the Subject Products that Amazon received." Dkt. 87 ¶ 122.

[4] Amazon incorporates by reference all arguments made in its prior briefing.

the Parties' Joint Stipulation, *regardless of ASIN*." Dkt. 150 at 4 (emphasis added). Complaint Counsel's proposal to disregard the Amazon Standard Identification Numbers ("ASINs") associated with the Subject Products is inconsistent with the Decision and Order, which makes clear that the universe of Subject Products is limited to "the products identified in the Complaint and Joint Stipulation." Dkt. 142 at 44.[5] The Complaint identifies the Subject Products by their ASIN. Dkt. 1. The Stipulation of the Parties, in turn, expressly describes the Subject Products as those "identified by Amazon Standard Identification Number in paragraph[s 21, 30, and 39] of the Complaint." Dkt. 35 ¶¶ 1–3. A definition of "Subject Products" that combines the descriptions contained in the Complaint and Stipulation with an express disclaimer of the relevance of ASINs to the definition is internally inconsistent. It is thus Complaint Counsel's proposed definition, not Amazon's, that creates "unnecessary ambiguity." Dkt. 150 at 3.

In a footnote, Complaint Counsel also contends, for the first time, that units sold through the Warehouse Program should be included in the scope of this adjudication. Dkt. 150 at 4–5 n.1. But the administrative record, from beginning to end, makes clear that this adjudication concerns the three types of consumer products listed in the Complaint and sold by third-party sellers through the Fulfilled by Amazon program. Dkt. 1 ¶ 1 (referring to "certain consumer products sold on amazon.com" through the "Fulfilled by Amazon ('FBA') program"); Dkt. 142 at 72 (referring to "Fulfilled by Amazon" products). Complaint Counsel's new argument is that the products sold through the Amazon Warehouse program should be within the scope of the adjudication because they

[5] As noted in the Decision and Order, "Complaint Counsel misidentified the ASIN for the HOYMN products," and "the Commission understands the Subject Products to include those products listed by ASIN B0743BM1NV (not ASIN B074V558SB)." Dkt 142 at 42 n.32.

were originally fulfilled through the FBA program. Dkt. 150 at 4–5 n.1. Had those products remained in the possession of consumers, they would be Subject Products. However, consumers returned the products to Amazon, which took title to them and resold them to new consumers via its Warehouse program. Because consumers returned the products fulfilled through the FBA program, the original transactions are null and irrelevant to this proceeding, which is limited to products provided to consumers through the FBA program. Indeed, as Complaint Counsel previously confirmed, it is undisputed that the units sold through the Amazon Warehouse program are excluded from the universe of Subject Products in this adjudication. Dkt. 87 ¶ 2 nn.6–9. As the Decision and Order concluded, "there is not adequate evidence to expand the scope of products in this matter" at this juncture. Dkt 142 at 43.[6]

III. Amazon Disputes Complaint Counsel's Assertion that Amazon Must Be Ordered to Cease Distribution of the Subject Products.

In setting aside the Initial Decision, the Commission acknowledged the ALJ's failure to "account for the fact that Amazon has already ceased distribution of the Subject Products" and, partly on that basis, limited the Decision and Order's Section 15(c) requirements to Amazon's submission of a "Proposed Notification Plan that includes direct and public recall notices" so that the Commission could "consider all of the relevant facts and circumstances before approving a *notice remedy* in this case." Dkt. 142 at 52–53 (emphasis added).

[6] These attempts by Complaint Counsel to muddle the scope of this adjudication illustrate the importance of retaining the reference in Amazon's Proposed Notification and Action Plan to the Commission's finding that "the products listed by ASINs in Amazon Exhibit 130 that are not also identified in the Complaint and Joint Stipulation" are outside of the scope of this proceeding. Dkt. 148 at i.

Complaint Counsel's Position: Complaint Counsel's proposed order seeks a mandatory cease-distribution order, a term that the Commission has expressly excluded from the scope of the remedial notification and action plan.

Amazon's Position: An order requiring Amazon to cease distribution of the Subject Products is not necessary to protect the public or in the public interest. *See* 15 U.S.C. § 2064(c)(1). Years ago, and within days of receiving the relevant notices from the Commission, Amazon took down the Subject Products from Amazon.com so that the Third-Party Sellers could no longer sell or ship them to purchasers. Dkt. 89 at 21. Indeed, the Subject Products have not been available for purchase on Amazon.com for years. Dkt. 112 at 2. And the Subject Products cannot be sold due to a technological block that prohibits them from being listed on Amazon.com. Dkt. 87 ¶¶ 7, 28, 42, 61, 79, 96, 109, 116. Moreover, Amazon quarantined all Subject Product inventory in Amazon's fulfillment centers and swiftly began destroying the Subject Product units. *See* Dkt. 87 ¶¶ 117, 120. All inventory units have since been destroyed. The Commission concluded that the ALJ "failed to consider [these] facts" and cited this as a basis for setting aside the ALJ's order. Dkt. 142 at 52.

Complaint Counsel offers no real response, instead asserting in conclusory fashion that "Amazon's cessation has been wholly voluntary, and Amazon must be ordered to cease distribution of the Subject Products under a Section 15 Order to ensure that distribution will not begin again." Dkt. 150 at 5. Notwithstanding that Complaint Counsel offers no justification or explanation for its position, *see id.*, its characterization of Amazon's actions is incomplete and misleading. Amazon has not merely voluntarily ceased distribution; it has quarantined and destroyed all of the Subject Products in its

inventory. *See supra*. Complaint Counsel offers no evidence that Amazon would resume distribution even if it were able to do so.

Complaint Counsel's argument also mischaracterizes Amazon's position regarding Complaint Counsel's repeated request for a cease distribution order. Dkt. 150 at 5. Amazon has not taken the position that there is never any "need for a cease distribution order once the Commission rules that" a consumer product "present[s] a substantial product hazard." Dkt. 150 at 5. Although a cease distribution order might be justified in a different proceeding involving different facts, Amazon's position is that there is no need for a cease distribution order in this proceeding because Amazon has *already* taken the necessary steps to prevent the Subject Products from being sold on Amazon.com. There is simply no "distribution" left for Amazon to "cease" in this case. *See also* Dkt. 94 at 36.

The legal authority cited by Complaint Counsel is inapposite. Although the CPSA does provide for orders to cease distribution, *see* 15 U.S.C. § 2064(c)(1)(A), (d)(2), the Commission's authority is bounded by the need to "adequately protect the public from . . . substantial product hazard[s]," *id.* § 2064(c)(1). The Subject Products have already been destroyed, and Complaint Counsel identifies no threat to the public that a cease-distribution order would alleviate. Dkt. 150 at 5–6. For similar reasons, Complaint Counsel errs by invoking prior Commission orders because, unlike Amazon, the regulated party in each of those cases had not already ceased distribution and destroyed all remaining inventory of the relevant products. *See, e.g.*, *In re Zen Magnets, LLC*, CPSC Dkt. No. 12-2, 2017 WL 11672449, at *41–42 (Oct. 26, 2017) ("[T]he Subject Products present a substantial product hazard to children that cannot be mitigated by *warnings*." (emphasis added)); *In re Dye and Dye*, CPSC Dkt. No. 88-1, 1989 WL 435534, at *19–20 (July 17, 1991) (assessing the respondents' settlement offer, which included

modifications, warnings, labels, and instructions but not cessation of distribution, either prior or subsequent).

IV. The Commission Should Decline to Adopt Complaint Counsel's Notice Demands.

A. Amazon Disputes Complaint Counsel's Assertion that a Recall Alert on the CPSC Website Is Insufficient to Notify the Public of the Product Hazard.

The Commission ordered Amazon to issue public notice regarding the hazards presented by the Subject Products. Dkt. 142 at 72. Amazon's Proposed Notification and Action Plan implements this aspect of the Order by providing a Recall Alert to be posted on the Commission's website and on Amazon's Recalls and Product Safety Alerts page.

Complaint Counsel's Position: Complaint Counsel's proposed order would require a Press Release, rather than a Recall Alert, to be posted on the CPSC Recalls website.

Amazon's Position: A recall alert, rather than a press release, would be the appropriate form of public notice if ordered by the Commission.

Under the CPSA, the fundamental question is whether notice is "required in order to adequately protect the public." 15 U.S.C. § 2064(c)(1). For the reasons stated in Amazon's prior briefing, public notice is not necessary given the actions that Amazon took years ago to notify 100 percent of the purchasers of the Subject Products of the potential hazards posed by the Subject Products.

Even if public notice were necessary, Complaint Counsel has failed to demonstrate why a press release, rather than a recall alert, is required to protect the public. Amazon's prior notices to the Subject Product purchasers contained the key information necessary to provide the notice contemplated by the CPSA and contained language that is similar to

other notices previously approved by the Commission. Amazon's ability to send targeted emails to every purchaser obviated the need for mass public notices utilized for products sold in other venues, such as "brick-and-mortar" retail stores, where records capable of accurately identifying the purchasers typically are not available. Dkt. 127 at 3.

The issuance of a recall alert, rather than a press release, is supported by the Commission's own policies. The Commission's Section 15 Manual provides that a "recall alert"—a form of public notice that "is not distributed to national wire services, but . . . is posted on the CPSC's external website"—is "used when a company can identify all or almost all the population of purchasers of a product being recalled and notify them of the recall directly." Dkt. 76 Amazon Ex. 64, CPSC_AM0013521 at 13526 (Section 15 Manual); *see, e.g.,* Dkt. 150, Ex. C (CPSC recall alert for hair dryer), Ex. D (CPSC recall alert for hairbrush). That is the case here: Amazon can and has identified 100 percent of the purchasers of the Subject Products. Dkt. 89 at 15. Moreover, if the Commission seeks to ensure that purchasers are able to search online for additional information about the Subject Products, a recall alert will provide that information in the same way as a press release.

B. Amazon Disputes the Commission's Authority to Order Changes to the Private "Your Orders" Page.

Complaint Counsel's Position: Complaint Counsel's proposed order would require Amazon to maintain a personalized banner on consumers' "Your Orders" pages to inform them of the recall. Dkt. 150 at 7.

Amazon's Position: The "Your Orders" page is private by design and accessible only to Amazon account holders, *i.e.*, the original purchasers of the Subject Products. Dkt.

128 at 17.[7] The Commission lacks statutory authority to order Amazon to make changes to such private, customized sections of its website as the "Your Orders" page. The Commission may only order specific forms of notice enumerated in Section 15(c). These include "*public* notice of the defect or failure to comply, including posting clear and conspicuous notice on its Internet website," and "mail notice" to purchasers. 15 U.S.C. § 2064(c)(1)(D), (F) (emphasis added).

As acknowledged by Complaint Counsel, Section 15(c)(1)(D) applies only to "public" notices. Dkt. 125 at 17. It does not apply to notifications that—like the banner on the "Your Orders" page—are individualized for specific customers. *See* 15 U.S.C. § 2064(c)(1)(D) (allowing the Commission to order a manufacturer, retailer, or distributor to "give public notice of the defect or failure to comply, including posting clear and conspicuous notice on its Internet website").

Nor would a banner be analogous to the type of direct notice that the CPSC has authority to order as "mail notice." Dkt. 128 at 18. Section 15(c) of the CPSA authorizes the Commission to issue direct notices to consumers via "mail." See 15 U.S.C. § 2064(c)(1)(F) ("[T]he Commission may order . . ." a recalling entity "[t]o mail notice to every person to whom . . . such product was delivered or sold."). Nor does any other part

[7] For this reason, Complaint Counsel errs in suggesting that changes to the "Your Orders" page are equivalent to public "posting[s] on a company's Internet website." Dkt. 150 at 8. *Zen Magnets* is distinguishable on that basis and does not support Complaint Counsel's position. Whereas in *Zen Magnets* the respondent was ordered to post a draft recall notice "on the home page of all [its] websites," *In re Zen Magnets, LLC*, CPSC Dkt. No. 12-2, 2017 WL 11672451, at *5 (Dec. 8, 2017), here, Complaint Counsel seeks to require Amazon to post notice of the recall (1) on its public website *and* (2) in personalized banners on consumers' *private* "Your Orders" pages, *see* Dkt. 150 at 7–8. *Zen Magnets* did not involve the latter form of private notification and thus provides no support for Complaint Counsel's position.

of Section 15 confer authority to mandate changes to a private, individually customized webpage like the "Your Orders" page.

Complaint Counsel's request therefore falls outside the Commission's statutory authority over public notifications. *See City of Arlington v. FCC*, 569 U.S. 290, 297 (2013) (stating that agencies' "power to act and how they are to act is authoritatively prescribed by Congress" and, thus, ". . . when they act beyond their jurisdiction, what they do is ultra vires"); *FEC v. Cruz*, 596 U.S. 289, 301 (2022) ("An agency, after all, 'literally has no power to act' —including under its regulations—unless and until Congress authorizes it to do so by statute." (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986))); Dkt. 128 at 18.[8]

Complaint Counsel's request would also violate the First Amendment's bar on compelled speech. When the government seeks to compel commercial speech, it must (1) establish that the restriction "directly advance[s] the state interest involved" and (2) demonstrate that the interest could not be served "by a more limited restriction on commercial speech," *i.e.*, that the restriction "is not more extensive than is necessary." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564–66 (1980).[9]

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[8] Complaint Counsel misses the point in asserting that its request aligns "with Amazon's current practice" and "capabilities." Dkt. 150 at 7. Complaint Counsel mischaracterizes Amazon's practices, and in any event, the Commission may *order* only those steps authorized by statute, and modifications to a private webpage do not fall in that category.

[9] Attempts to compel non-commercial speech are subject to strict scrutiny under the First Amendment. *See, e.g., Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014). However, the Commission need not reach the question of whether the speech at issue is commercial in nature because Complaint Counsel cannot meet even the intermediate scrutiny requirements articulated in *Central Hudson*.

Complaint Counsel has failed to show it can meet either of *Central Hudson*'s requirements. For example, as Amazon's Proposed Notification and Action Plan contemplates, the CPSC could post a Recall Alert on its own website to inform consumers of the recall, and Amazon could repost that Recall Alert on its own website.

C. The Commission Should Not Order Amazon to Post a Link to the CPSC's Recall Alert on the Amazon.com Home Page.

Complaint Counsel's Position: Complaint Counsel asks that "Amazon's link to the CPSC press release on its 'Recalls and Product Safety Alerts' page be located under 'Let Us Help You' on the Amazon.com homepage." Dkt. 150 at 7.[10]

Amazon's Position: The Commission should reject Complaint Counsel's request. As a threshold matter, this request has no basis in the Decision and Order. More importantly, and as Judge Patil correctly acknowledged, the "extraordinary measure" of requiring notice on Amazon's home page is not required to protect the public, "particularly given the availability of other more narrowly calculated remedial measures." Dkt. 109 at 38. Posting the CPSC's Recall Alert on the "Recalls and Product Safety Alerts" page on Amazon.com, as Amazon's Proposed Notification and Action Plan contemplates, is sufficient. Complaint Counsel's proposal would render the link *less* conspicuous because the "Let Us Help You" section of the Amazon.com home page is located at the bottom of the page and contains links to other pages on Amazon.com. On the other hand,

[10] This request in Complaint Counsel's Statement of Disputed Issues is inconsistent with Complaint Counsel's Proposed Notification and Action Plan, which requests only that the "Recalls and Product Safety Alerts" page "be accessible from Amazon's home page via a clear and conspicuous link located in the list of links under 'Let Us Help You' on Amazon.com." Dkt. 150 at 18. To the extent that Complaint Counsel only intended to request that the Recalls and Product Safety Alerts page be accessible via the Let Us Help You section, this request is unnecessary because Amazon already provides a link to the Recalls and Product Safety Alerts page in the Let Us Help You section.

the "Recalls and Products Safety Alerts" page is dedicated to recall announcements and other safety alerts. Complaint Counsel's request is therefore not "required in order to adequately protect the public." 15 U.S.C. § 2064(c)(1).

D. Amazon Disputes the Commission's Authority to Order Amazon to Post to Its Social Media Platforms and Further Disputes the Usefulness of Such Posts.

The Commission reversed Judge Patil's Decision ordering social media notice, noting that Judge Patil failed to "assess[] the usefulness of using [Amazon's primary social media accounts] to promote the recall." Dkt. 142 at 52. Accordingly, Amazon's Proposed Notification and Action Plan does not provide for social media notice.

Complaint Counsel's Position: Complaint Counsel argues that Amazon should be required to issue twelve social media posts on its primary and Amazon Help social media accounts. Dkt. 150 at 19. Specifically, Complaint Counsel argues that, for each of Amazon's primary and Help accounts, Amazon must be required to publish "[one] permanent timeline post (including a link to the CPSC recall announcement) every seven (7) calendar days for three (3) weeks" on Facebook; "[two] permanent posts on main profile the day the Press Release is issued, and one (1) post on main profile every seven (7) calendar days for 3 weeks thereafter" on X (formerly known as Twitter); and "[one] permanent post on the main profile (or 'grid') and one (1) Story post (including a link to the CPSC recall announcement) every seven (7) calendar days for 3 weeks," with "the first story post . . . added to the 'story highlights' for permanent visibility," on Instagram. *Id.*

Amazon's Position: Social media posts are not "required in order to adequately protect the public." 15 U.S.C. § 2064(c)(1). The Commission rightfully set aside the ALJ's order requiring Amazon to post notices to its primary social media accounts, Dkt. 142 at 52, and it should reject Complaint Counsel's elaborate requests for the same reasons.

Amazon already contacted 100 percent of all purchasers three years ago and made information about the Subject Products available on every purchaser's Amazon.com account. *See* Dkt. 89 at 16; Dkt. 127 at 54. Amazon has proposed sending yet another round of direct notices to all purchasers of the Subject Products, and it would make information about the Subject Products available on purchasers' Amazon.com accounts. Moreover, under Amazon's Proposed Notification and Action Plan, public notice would be posted on both the Commission's and Amazon's websites. *Id.* Given that multi-pronged and highly targeted notice campaign, Complaint Counsel has not shown that further notice on Amazon's social media pages is necessary. *See also* Dkt. 134 at 32. Complaint Counsel asserts that social media postings "may reach consumers who purchased the products second-hand," Dkt. 150 at 9, but the same is true of the releases that would be posted to the CPSC's and Amazon's websites under Amazon's Proposed Notification and Action Plan, as those postings would be available to any visitor to Amazon.com or CPSC.gov.

Complaint Counsel also relies on a rationale that has no limiting principle. According to Complaint Counsel, the Commission should order social media postings in order to "reach[] as many consumers as possible." Dkt. 150 at 9. On that view, *every* additional form of notification would automatically be warranted because each might help reach additional consumers. But "no legislation pursues its purposes at all costs." *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014) (citation omitted). The CPSA authorizes forms of notice that are "required in order to adequately protect the public," 15 U.S.C. § 2064(c)(1); it does not grant carte blanche to mandate every conceivable form of notice that might have an incremental benefit, no matter the cost or circumstances. The Commission also has an obligation to tailor its order to the circumstances of this case

and to consider the whole record in doing so, including the prior notices provided by Amazon and the other forms of notice proposed in Amazon's Notification and Action Plan. *See DHS v. Regents of Univ. of Cal.*, 591 U.S. 1, 16 (2020) (noting that the APA "requires agencies to engage in reasoned decisionmaking" (quotations omitted)); *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring a "rational connection between the facts found and the choice made"). Absent from Complaint Counsel's argument is any evidence showing that social media postings are particularly necessary here.

The risk of recall fatigue—particularly in light of all the other notifications about the Subject Products provided through other channels of communication—further undermines any appreciable benefit of social media postings at this stage in the proceeding and will ultimately harm the public by unnecessarily congesting communication channels with redundant postings, to the detriment of other safety warnings. Dkt 128 at 24; *see also* Dkt. 76 Amazon Ex. 62 at 26. The CPSC's Deputy Director of Communications has admitted that recall fatigue is a risk of redundant notifications, as have former CPSC Commissioners and other government officials. Dkt. 74 at 27–28. Any alleged benefits of additional notice must be weighed against this harm. *Id.* By overlooking that issue, Complaint Counsel's arguments "fai[l] to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

Additionally, the approximately thirty-five million followers of Amazon's primary social media pages and over 500,000 followers of the Amazon Help pages are vastly disproportional to the approximately 400,000 purchasers of the Subject Products. Disseminating the recall notice to such a large population of recipients, the vast majority of whom are not affected, is not required to adequately protect the public and instead

would likely harm the public through additional recall fatigue. Complaint Counsel has provided no evidence to the contrary.

Nor has Complaint Counsel adequately addressed critical practical considerations implicated by its request to commandeer Amazon's social media accounts. To the contrary, it presents essentially the same justification now as it did for the previous social media posts mandate that the Commission vacated. Dkt. 150 at 9. Amazon's social media accounts are a critical business tool for the company. Indeed, the content on Amazon's social media pages is the result of deliberate planning and curation. Dkt. 127 at 61. For that reason, Amazon uses multiple social media accounts, each of which covers distinct topics to facilitate customers' receipt of the information that is most pertinent to their interests. Amazon's primary social media pages are relied on by consumers for updates on the company's core services, and redundant use of those pages for the recall of individual products would undermine their utility to consumers.

Complaint Counsel's social media demands also constitute an impermissible compulsion of a private entity's speech and would thus violate the First Amendment. Dkt. 134 at 33–37. Under the *Central Hudson* standard, Complaint Counsel must show that the requested posts would "directly advance the state interest involved" and that the interest could not be served "by a more limited restriction on commercial speech." *Cent. Hudson*, 447 U.S. at 564. As noted above, Complaint Counsel has not shown why posts to Amazon's social media pages would advance the Commission's interest in protecting the public given the public notice to be published on both the Commission's and Amazon's website, the direct notice that Amazon has already sent to purchasers of the Subject Products, and the subsequent round of direct notice contemplated in Amazon's plan. In other words, the governmental interest has already been achieved through options that

impose less of a burden on Amazon's First Amendment rights, and Complaint Counsel has failed to demonstrate that further imposition is necessary.

Even if social media posts were necessary, the "Amazon Help" accounts, which enable consumers to communicate directly with Amazon's customer service team, would be a more appropriate channel for the notices at issue here. Dkt. 134 at 33 n.30; *see also* Amazon Help (@AmazonHelp), https://x.com/amazonHelp (last visited Sept. 24, 2024) (numbering 524,500 followers). Requiring posts on Amazon's primary social media pages, as opposed to providing public notice solely through accounts designed for that purpose, would only exacerbate the First Amendment violation described above. The Commission has a duty not to "burden substantially more speech than is necessary to further [its] legitimate interests," *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 478 (1989), and to demonstrate that "less restrictive means would fail," *United States v. Philip Morris USA, Inc.*, 855 F.3d 321, 327 (D.C. Cir. 2017). Beyond making the same limitless argument that posting on Amazon's primary accounts would expand the "reach" of the notices, which is unjustified for the reasons noted above, Complaint Counsel does not even attempt to make these showings. For example, Complaint Counsel has not shown that postings to the "Amazon Help" pages or the CPSC's own social media pages would be unsuccessful.[11] Moreover, Amazon's Help pages are designed specifically to answer consumers' questions and address targeted product issues such as the recall at issue in this proceeding, *see* Dkt. 112 at 12; Dkt. 127 at 63; Dkt. 134 at 33, making them a much better fit than the main accounts. For that reason and the others given above,

[11] The CPSC has more than 170,000 followers on X, *see* U.S. Consumer Prod. Safety Comm'n (@USCPSC), https://x.com/USCPSC (last visited Sept. 24, 2024), and 69,000 followers on Facebook, *see* U.S. Consumer Prod. Safety Comm'n, https://www.facebook.com/USCPSC/ (last visited Sept. 24, 2024).

Complaint Counsel has not offered a valid reason why posting on Amazon's main social media accounts is necessary.

E. Amazon Disputes Complaint Counsel's Assertion that Amazon Should Issue More than One Round of Additional Direct Recall Notices.

The Commission ordered Amazon to issue further direct notice to purchasers, but it did not require multiple rounds of notice. Dkt. 142 at 72. Amazon's Proposed Notification and Action Plan provides for one round of additional direct notifications to original purchasers of the Subject Products within ten days of the publication of the Recall Alert on the CPSC website and one round of additional direct notifications to the Third-Party Sellers.

Complaint Counsel's Position: Complaint Counsel's proposed order would require Amazon to issue two rounds of additional direct notices to consumers—a first round of email notifications to original purchasers and a second round of the email notifications two weeks later—as well as two rounds of additional direct notice to the Third-Party Sellers.

Amazon's Position: One round of additional direct notices is more than sufficient; two rounds would be unwarranted. The CPSA authorizes the Commission to order notice of substantial product hazards only if "required in order to adequately protect the public." 15 U.S.C. § 2064(c)(1). Complaint Counsel has failed to show, as the CPSA requires, that *any* additional direct notice, much less more than one additional direct notice, is "required in order to adequately protect the public." *Id.*

Three years ago, prior to this adjudication, Amazon directly notified every purchaser of the Subject Products by email about the potential hazards. Dkt. 127 at 54. Amazon's voluntary and direct notice to every Subject Product purchaser described the

potential hazards associated with the products, provided instructions for disposal, and confirmed that a full refund had been applied to purchasers' Amazon accounts. Dkt. 76 Amazon Ex. 62 at 6. In addition, Amazon made this information available to every purchaser on their Amazon.com account. Dkt. 89 at 16. Every purchaser's Amazon.com account contains a "Your Orders" page where purchasers can view identifying information about the Subject Product, including a photograph, its name, the order ID, and when it was ordered. *Id.*

Just like Amazon's first round of direct notice to customers, the additional round of direct notice contemplated by the Decision and Order would fully describe the product hazards and provide instructions on how to destroy the product and obtain a refund. Dkt. 148, Apps. B-1, B-2, B-3. Amazon will also make this information available to consumers on their private "Your Orders" pages.

Complaint Counsel has not shown that yet *another* round of additional direct notice is *required* in order to adequately protect the public. *See* 15 U.S.C. § 2064(c)(1). Neither the CPSA nor its implementing regulations require that multiple rounds of direct notices be sent to consumers. Amazon has already provided direct notice to all purchasers, which the CPSA regulations describe as "the most effective form of a recall notice," and Amazon's Proposed Notification and Action Plan contemplates a second round of direct notice to all purchasers. 16 C.F.R. § 1115.26(a)(4); *see also* 83 Fed. Reg. 29,102, 29,102 (June 22, 2018) ("Direct notice recalls have proven to be the most effective recalls.").

Complaint Counsel offers no evidence that multiple additional rounds of direct notices are necessary or would meaningfully increase the likelihood that purchasers would respond to the recall notice. Instead, Complaint Counsel's Statement of Disputed

Issues merely asserts—yet again—that it is "agency practice" to "requir[e] . . . two direct notices to consumers." Dkt. 150 at 10. But, as discussed in Amazon's prior briefing, amorphous references to "agency practice and policy" are insufficient. The question is whether a second round of additional notice is necessary to protect the public; on the record in this proceeding, the answer is no.

To the extent that Complaint Counsel seeks to invoke its reliance in prior briefings on informal agency documents, the guidance offered in staff-prepared documents on which Complaint Counsel relies, such as the 2021 Product Safety Planning, Reporting, and Recall Handbook ("Recall Handbook") and Corrective Action Plan Template ("CAP Template"), merely reflect CPSC staff's preferences when negotiating corrective action plans in the voluntary recall context. These guidance documents are unsupported by empirical or documentary evidence. *See* Dkt. 134 at 30. Moreover, neither the 2021 Recall Handbook nor the CAP Template went through notice-and-comment procedures. *See* Dkt. 127 at 59–61. Indeed, the 2012 version of the Recall Handbook (which was in effect when Amazon issued its direct notices) makes no reference to repeat direct notices, and the Commission offers no acknowledgement of or justification for the change in guidance in the 2021 Recall Handbook. *Id.*; *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009) (failure to acknowledge and provide justification for a change in agency policy renders such a change arbitrary and capricious).[12]

[12] Complaint Counsel cites Amazon's 2023 Annual Report and "capabilities," Dkt. 150 at 10, but those factors are not relevant to whether a second additional round of direct notice is "required … to adequately protect the public." 15 U.S.C. § 2064(c)(1). The question is not whether sending multiple additional rounds of direct notice would be "burdensome," as Complaint Counsel suggests, Dkt. 150 at 10, but whether such notice is necessary under the circumstances. For the reasons given above, the answer to that question is "no."

Complaint Counsel ignores the fact that additional notice would have significant downsides—most notably a significant contribution to recall fatigue. Dkt. 89 at 17. Constantly bombarding consumers with safety and other notices exhausts their mental bandwidth to receive, process, and act on safety messaging. Dkt. 89 at 17. In the second quarter of 2024 alone, the Commission ordered 86 recalls, affecting 454,342 units. Sedgwick, *Recall Index 2024 Edition 2: Product Safety and Recall United States Edition* 32 (2024).

An order requiring more than one additional direct recall notice would also violate Amazon's First Amendment rights by unlawfully compelling the company's speech. Under *Central Hudson*, Complaint Counsel must show that the additional notice would "directly advance the state interest involved" and that the state's interest could not be served "by a more limited restriction on commercial speech." 447 U.S. at 564–66. In other words, there must be a sufficient "fit" between the agency's "ends and the means chosen to accomplish those ends." *United States v. Edge Broad. Co.*, 509 U.S. 418, 427–28 (1993) (quoting *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986)). Although the Commission need not identify and consider all potentially less restrictive impositions on commercial speech or every "conceivable alternative," the regulation must "not burden substantially more speech than is necessary to further the government's legitimate interests." *Fox*, 492 U.S. at 478. The Commission must also demonstrate that "less restrictive means would fail." *Philip Morris*, 855 F.3d at 327.

The Commission may not rely on "mere speculation or conjecture"; rather, it "must demonstrate that the harms it recites are real and that [the speech it mandates] will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993).

The compelled speech likewise cannot offer only "ineffective or remote support" for the agency's interest. *Cent. Hudson*, 447 U.S. at 564.

For the reasons noted above, Complaint Counsel has failed to show that there is an adequate "fit" between its interest in protecting consumers and the extensive speech it seeks to compel from Amazon. Amazon already notified every purchaser of the Subject Products years ago, and its Proposed Notification and Action Plan contemplates a second round of direct notice to every purchaser. In arguing for a *third* round of direct notice, Complaint Counsel relies on nothing more than speculation or conjecture: Complaint Counsel does not point to any record evidence showing that additional notice is necessary to protect the public, or address the risk of recall fatigue. Those failures are fatal under *Central Hudson*. Complaint Counsel has also failed to adequately consider less restrictive alternatives—including whether posting the public recall alert on the Commission's and Amazon's websites is itself sufficient given the direct notice already provided.

F. Amazon Disputes Complaint Counsel's Assertion that the Notice Needs to Mention the Risk of Death.

The Commission found that Amazon's messages to customers were insufficient because they "lacked . . . content necessary for consumers to understand the significant risks of injury associated with the products, including personal injury or death." Dkt. 142 at 49. Amazon's proposed notifications clearly describe the hazards presented by the Subject Products in terms that are substantially similar to Commission-approved public notices for similar products. *See* Dkt. 148 Exs. A–D. Adding death to the hazard assessment seems especially unnecessary here. Neither Complaint Counsel nor Amazon have received complaints of any fatalities associated with the Subject Products.

Complaint Counsel's Position: Complaint Counsel argues that Amazon's notices must mention the risk of death. Dkt. 150 at 11.

Amazon's Position: Neither the CPSA nor its implementing regulations require that notices mention death. "A recall notice should provide sufficient information and motivation for consumers and other persons to identify the product and its actual and potential hazards, and to respond and take the stated action. A recall notice should clearly and concisely state the potential for injury *or* death." 16 C.F.R. § 1115.26(a)(1) (emphasis added). This approach comports with an enumerated purpose of the CPSA: "to protect the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. § 2051(b)(1).

Amazon's proposed additional notifications adequately describe the hazard presented by the Subject Products by clearly identifying the risks presented by those products: Carbon Monoxide Detectors: "risk of exposure to hazardous levels of carbon monoxide"; Hair Dryers: "risk of electrocution and shock to the user if the hair dryer comes into contact with water when plugged in"; and Children's Sleepwear: "risk of burn injuries to children." Dkt. 148 Apps. A-1, A-2, A-3.

The Mandatory Recall Rule makes clear that certain recall notice components may be unnecessary if the message conveys the necessary substance. *See* 16 C.F.R. § 1115.29(b). Amazon's proposed notices contain the key elements of an effective corrective action communication and are consistent with relevant Commission guidance and practice. Dkt. 89 at 15–16. The hazard descriptions in Amazon's proposed notices track the descriptions used in other Commission-approved recalls of similar products. *Id.* at 16; Dkt. 127 at 58; Dkt. 148 Exs. A–D. None of the Commission-approved recall notices involving products similar to the Subject Products from 2023 to date have warned of the

risk of death. Dkt. 127 at 58. Departing from those precedents would render the Commission's order arbitrary and capricious. *See Fox Television*, 556 U.S. at 514–15. Complaint Counsel asserts that the product hazards "can lead to death," Dkt. 150 at 11, but it does not identify—and Amazon is not aware of—even a single instance of injury or death related to the stipulated hazards of the Subject Products. Accordingly, Complaint Counsel has not proven that death references in notices are required to adequately protect the public. Dkt. 89 at 4.

For the foregoing reasons, Complaint Counsel's proposed requirement that the notices mention the risk of death would also violate the First Amendment. Complaint Counsel has not demonstrated that mentioning the risk of death would directly advance the Commission's interest in consumer safety, especially given the detailed description of the Subject Products' hazards in Amazon's earlier direct notice and Complaint Counsel's failure to identify instances of death connected to the Subject Products. Complaint Counsel has also not established that the most obvious alternative, namely, tracking the language used in other recent notices (which do not mention risk of death) is substantially—or even any—less effective than expressly mentioning risk of death.

G. Complaint Counsel's Micromanagement of the Draft Notices for the Carbon Monoxide Detectors Is Unwarranted.

Complaint Counsel's Position: Complaint Counsel seeks to (1) include the statement that "the CO detectors can fail 'to alert consumers to hazardous levels of carbon monoxide,'" rather than stating that the detectors fail "to alarm on time," and (2) exclude references to Amazon's prior safety notifications and the "'third-party sellers' who listed the Subject Products on Amazon.com." Dkt. 150 at 29.

Amazon's Position: Complaint Counsel fails to substantiate any of these semantic preferences with record evidence or show that they are required by the CPSA. *See Balt. & Ohio R.R. Co. v. Aberdeen & Rockfish R.R. Co.*, 393 U.S. 87, 92 (1968) (explaining "[t]he requirement for administrative decisions based on substantial evidence and reasoned findings").

Complaint Counsel's request that the recall notices for the carbon monoxide detectors state that "the CO detectors can fail 'to alert consumers to hazardous levels of carbon monoxide," Dkt. 150 at 12, is unnecessary. Amazon's proposed recall notices already warn consumers of the risk of exposure to "hazardous levels of carbon monoxide" in both the headline and hazard description. Dkt. 148 App. A-2.

Complaint Counsel's proposal to omit references to Amazon's prior safety notifications and the third-party sellers of the Subject Products is unjustified. Perhaps in recognition of the fact that refreshing a consumer's recollection regarding a prior notice might help a consumer identify the relevant product, the CPSC has approved recall notices that reference prior notifications concerning the recalled product at issue. *See, e.g.*, CPSC Recall No. 24-179 (referring to prior recall announcement related to the product); CPSC Recall No. 02-143 (mentioning two prior recall announcements related to the product). The CPSC likewise regularly publishes recall announcements that mention multiple entities associated with a recalled product. *See, e.g.*, Dkt. 148 Amazon Ex. A (noting that the recalled children's sleepwear garments were imported by SWOMOG and "Sold At" Amazon.com);[13] *see also* CPSC Recall No. 24-348 (listing one company as the importer

[13] Contrary to Complaint Counsel's assertion that Amazon did not "explain[]" how the samples of prior CPSC public recall notices appended to Amazon's Proposed Notification and Action Plan "support Amazon's position," Dkt. 150 at 13 n.5, Amazon's Response to

and indicating that the product was "Sold At" another company); CPSC Recall No. 24-358 (listing one company as the importer and stating that the product was "Sold At" five other companies). Complaint Counsel has not provided a basis to depart from these precedents. *See Fox Television,* 556 U.S. at 514–15.

H. Complaint Counsel's Request that Amazon Be Ordered to Provide Specific Contact Information Is Unwarranted.

Complaint Counsel's Position: Complaint Counsel asserts that the Notification and Action Plan must contain details regarding the particular means by which consumers will be able to contact Amazon regarding the Subject Products. Dkt. 150 at 13.

Amazon's Position: There is no requirement for the Plan to include those details. Amazon's proposal states that the company will include "a method for purchasers to contact Amazon [regarding] the Subject Products that complies with the requirements of 16 C.F.R. § 1115.27" in the publication of the recall notice. Dkt. 148 at ii. Amazon reaffirms that commitment here. Amazon is still evaluating whether a toll-free telephone number or an Internet-based approach would be best suited to the circumstances of this recall, and there is no statute or regulation that requires Amazon to make that election at this point. Complaint Counsel's request is therefore unnecessary.

V. Amazon Disputes that It Should Be Required to File Monthly Progress Reports.

Complaint Counsel's Position: Complaint Counsel's proposed order would impose onerous and unnecessary tracking and reporting requirements on Amazon by obligating Amazon to report, on a monthly basis, on information including: (1) the

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the Commission's July 29 Decision and Order states that those materials "reflect[] the Commission's prior approval of the remedies contemplated by the Plan." Dkt. 148 at 3.

"number of website hits that Amazon received on each notice it posts for the recall of the Subject Products during the reporting dates" and (2) "[w]hether Amazon located any additional units of the Subject Products for sale on other platforms, including, but not limited to, online re- sale, auction, and wholesale websites." Dkt. 150 at 21–22.

Amazon's Position: Amazon's Proposed Notification and Action Plan contemplates the submission of monthly progress reports containing the number of consumers notified about the Subject Products during the reporting dates, the number of consumers who contacted Amazon about the Subject Products during the reporting dates, and the number of consumers who received a second refund based on proof of destruction or disposal. Dkt. 148 at iii. Complaint Counsel's insistence that Amazon also provide reports on other metrics is neither authorized by the CPSA nor grounded in agency policy or practice.

As a threshold matter, the Commission lacks statutory authority to require firms to submit monthly progress reports. Section 2064(d) provides only that "[a]n order under this subsection shall . . . require the person to whom it applies to submit a plan, for approval by the Commission, for taking action under whichever of the preceding subparagraphs under which such person has been ordered to act." 15 U.S.C. § 2064(d)(2). But a requirement for a manufacturer, distributor, or retailer to submit a plan for complying with a Commission order does not permit the Commission to require the subject of such an order to issue monthly progress reports. Dkt. 74 at 44.

Instead, where Congress authorized agencies to require periodic progress reports in connection with a recall, it did so explicitly. *See, e.g.*, 21 U.S.C. § 350l(d)(1)(C) (providing that the Secretary of Health and Human Services may "require periodic reports . . . describing the progress of the [food safety] recall"); *id.* § 360bbb-8d(a)(3)(C)

(providing that Secretary of Health and Human Services may include "schedule for updates to be provided. . . regarding [controlled substances] recall"). That Congress did not do so in Section 2064(d) confirms that the Commission lacks authority to order Amazon to produce the requested monthly progress reports. Dkt. 74 at 45. That omission also stands in stark contrast to the authority CPSC regulations provide the agency to monitor *voluntary* recalls. In a voluntary recall, the CPSC regulations require corrective action plans to include "[a]n acknowledgment by the subject firm that the Commission may monitor the corrective action and that the firm will furnish necessary information, including customer lists." 16 C.F.R. § 1115.20(a)(1)(x).

Complaint Counsel's demand that Amazon submit monthly progress reports on unnecessary metrics—such as "the number of website hits that Amazon received on each notice it posts for the recall of the Subject Products" and "whether Amazon located any additional units of the Subject Products for sale on other platforms"—is unduly burdensome and unsupported by substantial evidence that such measures serve the public interest. Complaint Counsel's proposed order would require Amazon to establish—and incur costs relating to—metrics-tracking capabilities in order to collect the data required to prepare such monthly progress reports. For instance, the proposed order would require Amazon to monitor numerous other online marketplaces, including competitors. Yet, Complaint Counsel has not provided any empirical support to show that such measures would serve the public interest.

Instead, Complaint Counsel rests on the purported experience of agency staff in collecting monthly progress reports to "assess the effectiveness of the company's recall." Dkt. 76, Amazon Ex. 89 at 26. But its reliance on such experience "does not add one jot to the record evidence." *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 842 (5th Cir.

1978) (quotation marks and citations omitted). Rather, Complaint Counsel's demands "must be based on something more than trust and faith in [the agency's] experience," as "mere administrative *ipse dixit*s based on supposed administrative expertise" are insufficient. *Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 349 (5th Cir. 1981). Indeed, Complaint Counsel's insistence that these demands serve a legitimate government interest is contradicted by the Government Accountability Office's ("GAO") finding that the CPSC "[d]oes [n]ot [s]ystematically [t]rack" recall effectiveness data submitted through monthly progress reports. Dkt. 76 Amazon Ex. 61 at 25.

VI. Amazon Disputes the Commission's Authority to Impose a Five-Year Records Retention Requirement.

Complaint Counsel's Position: Complaint Counsel's proposed order would require Amazon to "maintain all records of Amazon's actions taken to comply with the Final Order for a period of five years after the service of the Order." Dkt. 150 at 22.

Amazon's Position: Although a company may elect to preserve documents for a host of litigation-related and other reasons, there is no statutory or regulatory basis for the Commission to require recalling companies to retain records for five years. Section 15 of the CPSA does not impose a recordkeeping requirement. *See* 15 U.S.C. § 2064. While the CPSA provides that "the Commission may, *by rule*" require a "manufacturer, private labeler, or distributor of a consumer product [to] establish and maintain" certain "records" or "reports," *id.* § 2065(b) (emphasis added), the Commission has not promulgated any such rule in the mandatory recall context. Indeed, in promulgating the mandatory recall rule, the Commission made clear that the rule "does not impose any recordkeeping requirements on firms." Guidelines and Requirements for Mandatory Recall Notices, 75 Fed. Reg. 3,355, 3,358 (Jan. 21, 2010); *see also* 16 C.F.R. Part 1115.

Complaint Counsel has not—and cannot—point to any such authority. Instead, Complaint Counsel relies on the 2021 Recall Handbook, a document created by a subset of agency staff after this adjudication was initiated. The 2021 Recall Handbook, which "has not been reviewed or approved by, and may not necessarily reflect the views of, the Commission," merely reflects the preferences of CPSC staff. Dkt. 76, Amazon Ex. 89 at 1. Beyond vague references to the experience of agency personnel, the Recall Handbook does not identify any underlying support—whether legal or empirical—for those preferences. Materials like the 2021 Recall Handbook, which merely reflect CPSC staff's "practice" but have not been ratified by the Commission, "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97 (2015); *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (noting that "interpretations contained in policy statements, agency manuals, and enforcement guidelines . . . lack the force of law"). Even if the Recall Handbook could confer such authority—and it does not—the Recall Handbook does not provide any underlying or empirical support for CPSC staff's "recommend[ation of] keeping all compliance-related records for at least 5 years." Dkt. 76, Amazon Ex. 89 at 36. And "[u]narticulated reliance on Commission 'experience' . . . does not add one jot to the record evidence." *Aqua Slide*, 569 F.2d at 841–42. Further, it is unclear that such empirical support even exists: as the Commission itself has acknowledged, the CPSC has collected "relatively little systematic data" related to agency programs and recalls. 78 Fed. Reg. 49,480, 49,481 (Aug. 14, 2013).

VII. Amazon Disputes that It Should Submit a Plan for Quarantine and Destruction of Returned Subject Products.

The Commission ordered Amazon to propose a quarantine and destruction process in the Proposed Action Plan. Dkt. 142 at 59.

Complaint Counsel's Position: Complaint Counsel's proposed plan would require Amazon to immediately quarantine, segregate, and mark as recalled all Subject Products in its possession, custody, or control, including all Subject Products that are returned from consumers, among other specific reverse logistics actions. Dkt. 150 at 21.

Amazon's Position: Amazon has already taken all of these steps, so the design and implementation of a quarantine and destruction process is moot and does not serve the public interest. Amazon promptly stopped selling the Subject Products and quarantined them (*i.e.*, ensured they could not leave Amazon's control). Dkt. 74 at 44. Indeed, Amazon stopped selling and quarantined the Subject Products within a matter of days of receiving a request from the Commission to do so, well before undertaking any assessment or analysis of the suggested hazard. *Cf.* Dkt. 87 ¶¶ 4–79 (children's sleepwear), 80–96 (hair dryers), 97–109 (carbon monoxide detectors). In addition, Amazon previously took swift steps to destroy all remaining inventory of the Subject Products, *see* Dkt. 77 ¶¶ 19–21, and all units in Amazon's inventory have been destroyed.

Moreover, the Commission did not order Amazon to require purchasers to return the products to Amazon for destruction. *See infra* Section VIII.B (explaining that the Commission lacks authority to condition refunds upon return of products); *see also* Dkt. 148 Exs. A–D (citing prior recalls in which the Commission did not condition refunds or product replacements on product returns). As a result, Amazon will not be receiving any additional Subject Products that need to be quarantined or destroyed.

VIII. Other Disputed Issues

Although Complaint Counsel's Statement of Disputed Issues did not address the following points, for the avoidance of doubt, Amazon includes its position on these aspects of the Commission's Decision and Order.

A. Amazon Disputes the Commission's Authority to Require Duplicative Refunds.

The Commission adopted the ALJ's determination that Amazon must issue a second round of full refunds for the children's sleepwear garments, CO detectors, and hair dryers, conditioned upon return or proof of destruction or, for the CO detectors, Amazon may issue replacement products upon return. Dkt. 142 at 56.

Amazon's Position: Amazon already refunded the purchasers of the Subject Products in full—more than $20 million in total—over two years ago. The Commission cannot require the issuance of duplicative refunds. *See* Dkt. 127 at 29–31. The CPSA clearly limits refunds to "the purchase price of [the] product." 15 U.S.C. § 2064(d)(1)(C); *see also Zen Magnets*, 2017 WL 11672449, at 44–45 (acknowledging that the CPSC's refund authority under Section 15(d) is for refunds of "the purchase price of such product," "less a reasonable allowance for use" (quoting 15 U.S.C. § 2064(d)(1)). Because Amazon has already issued full refunds to all purchasers of the Subject Products, as the first Presiding Officer of the adjudication correctly concluded, "Amazon can't be ordered to provide refunds." Dkt. 27 at 21. Moreover, interpreting the statute to permit multiple refunds risks running afoul of the Fifth Amendment's Takings Clause because it would require Amazon not only to make purchasers whole but also to give them a net gain in the form of a second refund. *See* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see also* Dkt. 127 at 34–35.

B. Amazon Disputes the Commission's Authority to Condition Refunds on Product Returns or Proof of Destruction.

The Commission adopted the ALJ's determination that Amazon must issue full refunds for the children's sleepwear garments, CO detectors, and hair dryers, conditioned upon return or proof of destruction or, for the CO detectors, Amazon may issue replacement products upon return. Dkt. 142 at 56.

Amazon's Position: The Commission lacks statutory authority to order firms to make refunds contingent on proof of product destruction or return. Dkt. 127 at 2. Congress set forth three—and only three—remedies for the Commission to choose from when ordering relief under Section 15 of the CPSA, none of which include product returns or proof of destruction. *See* 15 U.S.C. § 2064(d)(1). In particular, the Commission may only order a firm to "repair" the product, "replace" the product, or "refund the purchase price" of the product. *Id*. While the Commission may negotiate with firms to include product returns as part of a *voluntary* recall, that separate category of agency action does not create statutory authority to order product returns or proof of destruction in a mandatory recall. *See Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 389 (1992) (via settlement, parties may agree to do "more than what a court would have ordered absent the settlement"); *see also* Dkt. 127 at 30–31.

The Commission "has no powers except those specifically conferred upon it by statute." *Plaskett v. Wormuth*, 18 F.4th 1072, 1087 (9th Cir. 2021)). Because the Commission "possesses no . . . inherent equitable power," it cannot impose remedies beyond those expressly authorized by Congress. *Id.*; *see also Congoleum Indus. v. CPSC*, 602 F.2d 220, 226 (9th Cir. 1979). Congress fixed the available list of remedies in Section 15(d)(1) to repair, replacement, or refund; thus, the Commission cannot order a firm to

take any action aside from those three enumerated remedies. *See* 15 U.S.C. § 2064(d)(1). The text and structure of the CPSA confirm that these three remedies are exhaustive; the Commission cannot add to the list. *See* Dkt. 127 at 31. Thus, the Commission lacks statutory authority to mandate product returns or condition refunds on product returns.

* * *

For the reasons discussed above, the Commission should reject Complaint Counsel's requested changes to Amazon's Proposed Notification and Action Plan. Amazon has already taken substantial steps to protect the public from the Subject Products by ceasing their distribution and destroying the units in its inventory, notifying consumers of the hazards, instructing them to dispose of the Subject Products, and providing them a full refund. Complaint Counsel's proposals are unnecessary to protect public safety, exceed the Commission's regulatory and statutory authority, and infringe upon Amazon's constitutional rights.

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CERTIFICATE OF SERVICE

I hereby certify that, on September 24, 2024, 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 with the Secretary of the U.S. Consumer Product Safety Commission Alberta Mills at amills@cpsc.gov; and
- served to Complaint Counsel by email at jeustice@cpsc.gov, lwolf@cpsc.gov, sanand@cpsc.gov, fmillett@cpsc.gov, and tmendel@cpsc.gov.

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