

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)
)
)
AMAZON.COM, INC.)
)
)
)
Respondent.)

CPSC DOCKET NO.: 21-2

COMPLAINT COUNSEL'S OPPOSITION TO
AMAZON'S MOTION FOR SUMMARY DECISION

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I. INTRODUCTION

It is undisputed that the Subject Product children’s sleepwear garments, carbon monoxide detectors, and hair dryers present substantial product hazards. *See* Amazon Mot. at 5 n.1. That means that any consumer can be seriously injured and die from using just one of the 400,000 Subject Products that Amazon distributed in commerce. Although it is undisputed that Amazon has not provided any publicly-available notification about the substantial products hazards to inform the public of these dangers and although it is undisputed that Amazon has not taken any action to incentivize the removal of the products from commerce or to determine if any of the 400,000 Subject Products have been removed from consumers’ hands, Amazon’s Motion for Summary Decision attempts to argue that it is contrary to the public interest to order Amazon, the distributor of these products, to take any action beyond the action it chose unilaterally “before initiation” of this proceeding. Amazon Mot. at 1.¹ Amazon’s argument would let business interests prevail over consumer safety, is unsupported as a matter of law, and is unavailing as a matter of fact.

First, although Amazon argues that a Section 15 order to cease distribution is not in the public interest based upon Amazon’s proclamation that it has “stopped selling”² the Subject

¹ Without citation and without support, Amazon represents that its actions “before initiation” of this proceeding were taken “in consultation with the Commission.” Amazon Mot. at 1. Complaint Counsel respectfully disagrees and refers the Court to the Complaint, which was filed on July 14, 2021. *See* Complaint, Dkt. No. 1, at ¶ 49 (explaining that “Amazon also unilaterally, and without CPSC involvement or input concerning the content of the notices or its other actions” sent an email to original purchasers of the Subject Products); *id.* ¶ 50 (explaining that Amazon’s unilateral actions included an Amazon gift card credited to the accounts of original purchasers); *id.* ¶ 50 (stating that “Amazon’s unilateral actions are insufficient to remediate the hazards posed by the Subject Products and do not constitute a fully effectuated Section 15 mandatory corrective action ordered by the Commission”); *id.* ¶ 51 (“A Section 15 order requiring Amazon to take additional actions in conjunction with the CPSC as a distributor is necessary for public safety.”).

² Amazon Mot. at 44.

Products and “does not intend to list for sale”³ any of the Subject Products, a mandatory order is required to protect consumers from a voluntary business decision that may change in the future absent an order imposing a binding legal obligation and corresponding enforcement authority. Second, although Amazon asserts that notification of the substantial product hazards is not in the public interest, a mandatory Section 15 notification order is required here given the undisputed absence of public notification by Amazon and lack of confirmation that any original purchasers received, read, and understood Amazon’s unilateral email. Third, contrary to Amazon’s claim, promoting the permanent removal of the Subject Products from consumers’ homes and from the stream of commerce is central to CPSC’s mission and a critical element of CPSC’s recall practices. Fourth, although Amazon argues that promoting the return and destruction of the Subject Products is not in the public interest because Amazon provided a gift card to original purchasers of the Subject Products, the issuance of a gift card does not remedy a substantial product hazard or protect consumers from the unreasonable risk of injury and death. Fifth, contrary to Amazon’s claim, it is in the public interest for Amazon to remove “functionally equivalent” products from the stream of commerce, particularly where Amazon claims to have already identified on Amazon.com more than 1,000 products “as potentially posing the same hazard as the Subject Products.”⁴ Sixth, Amazon’s attempt to evade reporting on its compliance with a Section 15 order is contrary to the tenets of the Consumer Product Safety Act (“CPSA”). Finally, Amazon’s last-resort constitutional and Administrative Procedure Act arguments are premature, procedurally improper, and substantively without merit.

³ See, e.g., Amazon’s Statement of Undisputed Material Facts (“A.S.”) at II.A.1.iv., II.A.2.iv., II.A.3.iv., II.A.4.iv., II.B.4., II.C.4.

⁴ A.S. ¶¶ 12, 25, 32, 39, 44, 58, 63, 76, 84, 93, 98, 106.

In this mandatory recall proceeding, Amazon claims that its self-selected business-motivated actions are good enough, but those actions are far less than the actions required by CPSC to adequately protect the public from substantial product hazards even in *voluntary* recalls. Amazon’s business-motivated actions do not accomplish the consumer protection goals of the Consumer Product Safety Act and do not remediate the substantial product hazards that continue to pose a threat to consumer safety. Because Complaint Counsel’s requests are supported by the plain language of the CPSA, its implementing regulations, the Commission’s guidance, the Commission’s past practice, and the record before the Court, Amazon has not met its burden for Summary Decision.

II. THE UNDISPUTED FACTUAL RECORD

Although Amazon attempts to stray into the realm of minutia and immaterial content that is misrepresented and contested, the material facts of this matter are not in dispute.⁵

First, Amazon’s Motion for Summary Decision confirms that the Subject Product children’s sleepwear garments, carbon monoxide detectors, and hair dryers meet the requirements for a substantial product hazard under the Consumer Product Safety Act. *See* Amazon Mot. at 5 n.1.

Second, Amazon sent one – and only one – email to the last known email address of each original purchaser of the Subject Products. *See* A.S. ¶¶ 17, 37, 50, 70, 86, 100.⁶ Amazon does

⁵ To the extent that Amazon, in support of its Motion, attempts to mischaracterize the deposition testimony of CPSC staff and the facts presented in various documents or attempts to present expert or other opinion as fact, Complaint Counsel’s Response to Amazon’s Statement of Undisputed Material Facts (“C.C. Response to A.S.”) disputes such characterizations, paragraph by paragraph. For the sake of brevity, those disputes will not be repeated in full here.

⁶ Amazon’s representation that the unilateral emails were sent to the original purchaser’s “last known email address” begs the question of whether any original purchasers had changed their email addresses prior to distribution of Amazon’s email. *See* Amazon’s Declaration of Lauren Ann Shrem (Sept. 23, 2022), at ¶ 28.

not claim to have confirmed if any original purchasers received, read, understood, shared, or acted upon the content of the email.

Third, Amazon provides the content of the unilateral email that Amazon sent to original purchasers of the Subject Products. *See* A.S. ¶¶ 19, 52, 71, 87, 101. Notably, it is undisputed that the unilateral e-mail:

- did not include the word “recall,”
- did not state that CPSC had determined that the Subject Products presented a substantial product hazard and that the safety issue was of sufficient importance that Amazon was taking corrective action in conjunction with CPSC, the nation’s consumer protection agency,
- did not request or provide information to incentivize consumers to return the Subject Products or provide proof of their destruction,
- did not inform consumers that the risks presented by the Subject Products can be fatal,
- did not even explain what carbon monoxide is in Amazon’s email concerning the defective Subject Product carbon monoxide detectors and did not explain what happens as a result of exposure to carbon monoxide,
- did not provide the number or description of any injuries or deaths associated with the Subject Products,
- did not provide any specific contact information for consumer inquires related to the Subject Products (no email address, telephone number, or dedicated webpage for safety messages related to the Subject Products),
- did not include a photograph of the Subject Products,

- did not include the number of Subject Products at issue,
- did not identify the manufacturers of the Subject Products and the country of manufacture,
- did not provide the price of the Subject Products, and
- did not identify the dates between which the Subject Products were manufactured and sold.

See A.S. ¶¶ 19, 52, 71, 87, 101.

Fourth, Amazon provided an automatic Amazon gift card to “valid Amazon accounts” of original purchasers, while expressly telling original purchasers that “[t]here is no need for you to return the product.” *See* A.S. ¶¶ 19, 52, 71, 87, 101.⁷

Fifth, Amazon has the capability of identifying additional products available for purchase on Amazon.com that pose the same hazard as the Subject Products. Specifically, to date, Amazon expressly claims that there are:

- “387 additional products Amazon identified as potentially posing the same hazard” as the Taiycyxgan Subject Products listed in the Complaint, A.S. ¶ 12,
- “38 additional products Amazon identified as potentially posing the same hazard” as the Home Swee Subject Products listed in the Complaint, A.S. ¶ 32,
- “10 additional products Amazon identified as potentially posing the same hazard” as the IDGIRLS Subject Products identified in the Complaint, A.S. ¶ 44,

⁷ Amazon’s representation that gift cards were issued to “valid Amazon accounts” begs the question of whether any original purchasers no longer had “valid Amazon accounts” at the time of Amazon’s gift card issuance. *See* Amazon’s Declaration of Lauren Ann Shrem (Sept. 23, 2022), at ¶ 28.

- “706 additional products Amazon identified as potentially posing the same hazard” as the HOYMN Subject Products identified in the Complaint, A.S. ¶ 63,
- An unidentified number of “additional products Amazon identified as potentially posing the same hazard” as the Subject Product hair dryers identified in the Complaint, A.S. ¶ 84, and
- An unidentified number of “additional products Amazon identified as potentially posing the same hazard” as the Subject Product carbon monoxide detectors identified in the Complaint, A.S. ¶ 98.

Sixth, Amazon has not jointly issued a public recall notice with CPSC, although Amazon acknowledges that “[t]he Commission’s policy and practice is to issue one of two recall notices: (1) recall alerts and (2) recall press releases.” A.S. ¶ 137.

Seventh, Amazon acknowledges and agrees that “[t]he Commission’s practices [are] summarized in its handbook.” A.S. ¶ 125.

III. LEGAL STANDARDS

A. Amazon Has Not Met Its Burden for Summary Decision.

Amazon filed its Motion for Summary Decision pursuant to Commission Rule of Practice 1025.25(a), which allows a party to file a motion, with supporting memorandum, seeking summary decision on all or any part of the issues before the Commission. 16 C.F.R. § 1025.25(a). Such a motion can be granted only if “the pleadings and any depositions, answers to interrogatories, admissions, or affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to a Summary Decision and Order as a matter of law.” 16 C.F.R. § 1025.25(c). As the standard in § 1025.25 is substantially similar to Rule 56(a) of the Federal Rules of Civil Procedure, judicial interpretation of that rule may guide the Presiding

Officer's decision-making. *See, e.g., In re Spring Grove Resource Recovery, Inc.*, 1995 EPA ALJ LEXIS 28, at *2 (Sept. 8, 1995) (noting that Federal Rules "often guide decision making in the administrative context" and relying upon the Federal Rules of Civil Procedure where the EPA's Rules of Practice merely stated that amendments were available only upon motion granted by the Administrative Law Judge with no further guidance).

Accordingly, as the moving party, Amazon bears the initial burden of identifying those portions of the record that demonstrate there is no genuine dispute as to any material fact and that Amazon is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A "material" fact is one that "affect[s] the outcome of the suit under the governing law. . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). The court must view the record in the light most favorable to the party opposing the motion, giving the non-movant the benefit of all favorable inferences that can reasonably be drawn from the record and the benefit of any doubt as to the existence of any genuine issue of material fact. *Def's. of Wildlife v. Dep't of Agric.*, 311 F. Supp. 2d 44, 53 (D.D.C. 2004) (*citing Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970)).

To support its Motion for Summary Decision, Amazon must establish that there is no dispute as to any material facts that would affect the outcome of this case. Amazon must therefore show that Complaint Counsel is not entitled to the remedies sought in this matter to redress the substantial product hazards presented by the Subject Products. Because Amazon's limited unilateral actions fail to adequately protect consumers, as evidenced, by among other things, the undisputed material facts that show its actions are not even close to commensurate with the standard remedies to protect the public in voluntary recalls firms undertake with CPSC,

Amazon has failed to make this threshold showing. Many of Amazon's alleged facts are incorrect (and disputed) or are immaterial, and Amazon's arguments are wrong as a matter of law. Accordingly, Amazon's Motion for Summary Decision fails both as a matter of fact and law.

B. Amazon's Proposed Interpretation of the "Public Interest" Standard Contradicts the Plain Language of the Statute and its Legislative History.

Although Amazon attempts to impose a cost-benefit analysis into the "public interest" concept in 15 U.S.C. § 2064(d) to allegedly limit the Commission's remedial authority, Amazon's argument is wholly without merit as it ignores the plain language of the statute, the purposes of the CPSA, and the legislative history.

Amazon's proffered interpretation of the "public interest" language in Section 15(d) cherry-picks two subsections from 15 U.S.C. § 2051(b) – "to protect the public against unreasonable risks of injury" and "to assist consumers in evaluating the comparative safety of consumers products" – to wrongly suggest that these purposes, read together, restrict the Commission's authority to take any action beyond what is minimally necessary, based on a cost-benefit analysis, to simply notify consumers about risks associated with product hazards. Amazon Mot. at 9-10. As the case law cited by Amazon makes clear, however, "[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510 (1981). Here, the plain language of the statute says exactly the opposite of what Amazon argues. Section 15(h) is unambiguously titled "Cost-Benefit Analysis of Notification or Other Action Not Required." 15 U.S.C. § 2064(h) ("Nothing in this section shall be construed to require the Commission, in determining that a product distributed in commerce presents a substantial product hazard and that notification or other action under this section should be taken,

to prepare a comparison of the costs that would be incurred in providing notification or taking other action under this section with the benefits from such notification or action.”). No amount of tortured interpretation by Amazon can change the plain language of the statute.⁸ Accordingly, Amazon’s argument that the “public interest” language mandates a cost-benefit analysis, despite plain statutory language to the contrary, is wholly without merit.

The legislative history of Section 15(h), which was added to the CPSA as part of the Consumer Product Safety Improvement Act of 1990, Pub. L. 101-608, is also instructive. Section 15(h) was added to the statute after several hearings where Congress considered whether to add a cost-benefit analysis requirement to Section 15.⁹ Congress ultimately took precisely the opposite approach, citing concerns that “the CPSC has used analysis of costs and benefits from

⁸ Amazon misleadingly cites dicta from *Donovan*, 452 U.S. at 510 n.30, to suggest that the Supreme Court has interpreted the CPSA as requiring the Commission to perform a “generalized balancing of costs and benefits.” Amazon Mot. at 9. The dicta in *Donovan*, however, refers only to 15 U.S.C. § 2056(a), a provision of the CPSA concerning promulgation of consumer product safety standards that is not relevant to this litigation. *See Donovan*, 452 U.S. at 510 n.30. Notably, § 2056(a) does not contain any language analogous to Section 15(h), which expressly clarifies that no cost-benefit analysis is required under Section 15. Furthermore, the Commission has rejected this line of argument in the past and made clear that the kind of analysis required in rulemakings does not apply in the Section 15 context. *See In re Zen Magnets, LLC*, CPSC Dkt. No. 12-2, Opinion and Order Denying Respondent’s Motion to Disqualify, 2017 WL 11778211, at *13 (Sept. 1, 2016) (“The regulatory analysis concerning ‘unreasonable risk’ in the rulemaking context is not applicable in an adjudicatory proceeding seeking an order to address a ‘substantial product hazard.’ Where rulemaking is primarily concerned with a balancing of the hazard and economic impact of the proposed regulations, adjudications under Section 15 require no such balancing.”); *In re Dye and Dye*, CPSC Dkt. No. 88-1, Opinion and Order, 1989 WL 435534, *22 n.9 (July 17, 1991) (“The existence of a defect or substantial product hazard does not depend on a cost-benefit analysis.”).

⁹ *See* S. Hrg. 100-142 (May 13, 1987) (“Should the CPSA be modified to address use of Cost/benefit analysis in Section 12 and/or Section 15 proceedings?”) (Question Submitted by Senator McCain to Chairman Scanlon); House Serial No. 100-47 (June 4, 1987) (“Let me ask all of the Commissioners their view on . . . section 15 on recalls, whether you feel the need, as a matter of policy, to have a requirement that someone goes through a formal cost-benefit analysis operation before making decisions that something . . . should be recalled?”) (Question of Rep. Florio).

corrective action to justify inaction,” and amending the CPSA to “clarify[] the current law that such analysis is not required [T]he CPSC retains the discretion to utilize this analysis where it is appropriate.” 135 Cong. Rec. S10049-01, 1989 WL 193553 (Aug. 3, 1989) (Statement of Sen. Bryan). The notion that Congress specifically amended the statute to renounce a proposal for mandatory cost benefit-analysis in Section 15, only to later incorporate the requirement *sub silentio* through reference to “the public interest,” is not tenable and can only be viewed as an attempt by Amazon to “justify inaction” as to the Subject Products. *See id.*

Amazon’s assertion that CPSC’s corrective action remedies are confined to a narrow CPSA goal of informing consumers about product risks is similarly ahistorical and incorrect. The language and history of the Consumer Product Safety Act make clear that Congress granted CPSC broad authority to remove dangerous products from commerce, including powers that go far beyond simply notifying the public: implementing mandatory safety standards (15 U.S.C. § 2056), banning hazardous products (15 U.S.C. § 2057), filing action to condemn and seize imminently hazardous products (15 U.S.C. § 2061), mandating repair, replacement and refund of a defective product (15 U.S.C. § 2064), and filing action to restrain the manufacture, sale, or distribution of violative products (15 U.S.C. § 2071). As discussed further in Section IV.C., the legislative history makes clear that Congress also empowered CPSC to remove dangerous products from commerce under Section 15(d), through product return or other means. *See also* 15 U.S.C. § 2051(a)(5) (finding that prior to the CPSA “existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury [was] inadequate”).

As explained in Complaint Counsel’s Memorandum in Support of its Motion for Summary Decision, federal courts have generally interpreted the “public interest” phrase as an

expression of an agency's discretion to take action consistent with the aims of its regulatory statute. *See* Complaint Counsel's Memorandum in Support of its Motion for Summary Decision at 24. Here, the CPSA and its legislative history reflect a clear Congressional intent to place the Commission, as the entity best positioned to evaluate a corrective action plan in light of the statutory goals of the CPSA, in charge of the determination of remedy.

This intended authority is especially clear given the legislative history of 15 U.S.C. § 2064(d), which originally contained a provision allowing businesses to elect their own corrective action remedies before shifting to a Commission-directed process following the 2008 amendments to the statute. *Compare* Pub. L. No. 92-573 at Sec. 15(d) (“[t]he Commission . . . may order the manufacturer or any distributor or retailer of such product to take whichever of the following actions the person to whom the order is directed elects”) (emphasis added), *with* 15 U.S.C. § 2064 (“[t]he Commission . . . may order the manufacturer or any distributor or retailer of such product . . . to take any one of more of the following actions it determines to be in the public interest”) (emphasis added). As it appears in Section 15(d), the phrase “in the public interest” is not a cost-benefit test, but instead directs the Commission to select the appropriate remedy in a given case. Here, Complaint Counsel's filings reflect substantial descriptions of how each of the remedies sought is necessary to promote the goals of the CPSA given the facts of the case and is therefore “in the public interest.” *See* Complaint Counsel's Memorandum of Points and Authorities in Support of Motion for Summary Decision at §§ III, V, VII, VIII, IX.

In sum, given the Commission's broad statutory power and important mandate to protect consumers from unreasonable hazards, it would be an absurdity to read the phrase “in the public interest” as limiting the Commission to doing nothing more than “assisting” consumers in “exercising independent judgment.” *Amazon Mot.* at 10.

IV. ARGUMENT

A. **Contrary to Amazon’s Argument, a Section 15 Order Requiring Amazon to Cease Distribution is in the Public Interest to Ensure Consumers Are Protected from a Voluntary Business Decision that May Change in the Future Absent Any Threat of Enforcement.**

Amazon does not dispute that the Subject Products meet the requirements for a substantial product hazard under the CPSA. *See* Amazon Mot. at 5 n.1. Remarkably though, Amazon contends that “Ensuring that the ASINs ‘Remain Removed,’ and that the Subject Products Are Not Distributed by Amazon, Is Not In the Public Interest.” Amazon Mot. at 43. Amazon’s only argument in support of this contention is that Amazon has voluntarily taken these steps. But that does not demonstrate that a mandatory, enforceable order under Section 15 is not in the public interest.

For example, in *In re Dye and Dye*, CPSC Dkt. No. 88-1, Opinion and Order, 1989 WL 435534, *22 (July 17, 1991), the respondents in a Section 15 administrative litigation proceeding had recently been “discharged in bankruptcy,” and they “no longer manufactured worm probes,” the product at issue in the proceeding. The Commission nevertheless determined that the worm probes presented a substantial product hazard and that it was in the public interest to order the respondents to “refrain from the following actions with respect to worm probes: manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States.” *Id.* at *23. With the Commission’s order, it ensured the public would be adequately protected from the substantial product hazard even if the respondent’s circumstances changed in the future.

Similarly here, whether or not Amazon presently intends to distribute the Subject Products in the future does not adequately protect consumers. *See, e.g.*, A.S. at II.A.1.iv., II.A.2.iv., II.A.3.iv., II.A.4.iv., II.B.4., II.C.4. (stating that Amazon “does not intend to list for

sale any” of the Subject Products). Where Subject Products present an unreasonable risk of injury or death to consumers, consumers are not adequately protected from these hazards by good intentions. Rather, as in *Dye*, the Commission issues enforceable orders to protect consumers now and in the future when remediating substantial product hazards. *See, e.g., In re Zen Magnets, LLC*, CPSC Dkt. No. 12-2, Final Decision and Order, 2017 WL 11672449, at *45 (Oct. 26, 2017) (finding “that because of the substantial risk of injury such magnets pose to children, it is in the public interest that Respondent cease from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States, the Subject Products”), *vacated on other grounds*, 2018 WL 2938326 (D. Colo. June 12, 2018), *amended in part*, 2019 WL 9512983 (D. Colo. Mar. 6, 2019), *aff’d in part, rev’d in part* 968 F.3d 1156 (10th Cir. 2020) (“*Zen Magnets* Final Decision and Order”).

With the hundreds of thousands of products that are available on Amazon.com through Amazon’s FBA program, the safety of the public should not be dependent on a voluntary business decision that may change or be laxly executed. Without a mandatory, enforceable order under Section 15, Amazon – and others in the distribution chain – are positioned to resume distribution at any time without the consequence of the enforcement of a mandatory order. That is not in the public interest.

B. Amazon’s Assertion that Notification of the Substantial Product Hazards is Contrary to the Public Interest is Disingenuous and Disproven by Amazon’s Failure to Provide Any Public Notification of the Substantial Products Hazards and by Amazon’s Inability to Demonstrate that Original Purchasers Read, Understood, or Acted on Amazon’s Unilateral Email.

Amazon raises five arguments in an attempt to assert that notification of the substantial product hazards is contrary to the public interest. All five arguments fail. First, because Amazon has not provided any public notification of the substantial products hazards in the form

of a press release issued in conjunction with CPSC, in the form of a recall website posting on Amazon.com, or in the form of a safety recall message on its social media platforms (all of which are routinely required in even voluntary corrective actions), public notification is “required to adequately protect the public” from the substantial product hazards. 15 U.S.C. § 2064(c)(1). Second, Amazon’s sole unilateral email failed to satisfy the statutory recall notice content requirements, the CPSA’s corresponding regulations, and Commission practice for recall notifications. Third, Amazon’s argument that it has a 100% consumer correction rate is misguided, where, in reality, Amazon’s unilateral email to original purchasers “corrected” nothing. Fourth, Amazon’s attempt to deprive consumers of information based upon a speculative concept of recall fatigue is inconsistent with the CPSA. And fifth, ordering Amazon to adequately inform consumers of the hazards posed by the Subject Products does not violate the First Amendment. Contrary to Amazon’s general protestations, where Amazon has failed to take even minimal notification steps that are required by CPSC in voluntary corrective actions to adequately protect the public from substantial product hazards, a Section 15 order requiring notifications in this mandatory corrective action proceeding is fully justified by the undisputed materials facts.

- 1. Contrary to Amazon’s Argument, Because Amazon Has Made No Public Announcement of the Substantial Product Hazards, Public Notification of the Substantial Product Hazards is in the Public Interest.**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See* Complaint Counsel’s Statement of Undisputed Material Facts

(“SUMF”) ¶¶ 90, 96 (Sept. 23, 2022). Yet Amazon attempts to argue that it is not in the public interest for the public to have access to information about the substantial product hazards that the Subject Products present because Amazon sent one unilateral email to original purchasers. Amazon’s disingenuous argument is not compelling and is contrary to the Commission’s guidance and practice, which reiterates the necessity of providing comprehensive notice of substantial product hazards, beyond mere issuance of a unilateral email. In fact, Amazon itself acknowledges that “the agency guidelines entail issuance of public notice in addition to direct notice.” Amazon Mot. at 27 n.21; *see also* Sept. 23, 2022 Declaration of John Eustice (attached as Ex. 1 to Complaint Counsel’s SUMF), Ex. S, Recall Handbook at 15-16 (CPSC_AM0011478-79) (explaining that even in voluntary recalls, companies prepare a “comprehensive communications plan” for communicating the recall, including, among others, notice through a press release, through direct notice, on social and digital media, and on the firm’s website); SUMF ¶¶ 144, 147, 155 [REDACTED]

[REDACTED]

[REDACTED] 16 C.F.R. § 1115.26(a)(5) (“At least two of the recall notice forms listed in subsection (b) should be used.”).

First, Amazon argues that “public notice would not provide consumers with meaningful new information.” Amazon Mot. at 25. But that is incorrect for the public, for secondhand users of the Subject Products, and for original purchasers of the Subject Products. For the public and for secondhand users of the Subject Products, Amazon has not notified such consumers that the Subject Product hazards may result in serious injury or death. To state the obvious, consumers who do not have information cannot take any action to protect themselves and their families. For this reason, public notification is an indispensable component of a corrective action plan. *See*,

e.g., In re Dye and Dye, 1989 WL 435534, at *23 (finding that “because of the risk of injury or death by electric shock from such worm probes to persons who use them or who are in the vicinity of their use, public notification pursuant to 15 U.S.C. § 2064(c) is required to adequately protect the public from the substantial product hazard presented by such worm probes”). Here, an untold number of the 400,000 Subject Products may remain in the hands of consumers, and unfortunately, it takes just one product to result in a serious and deadly incident. *See* SUMF ¶ 2. With the factual record here, public notice must be provided to “adequately protect the public” from the substantial product hazards. 15 U.S.C. § 2064(c)(1); *see also Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *42 (acknowledging that one or two hazardous products can lead to catastrophic injuries, that individuals may not appreciate the substantial risk of injuries presented by hazardous products, and that “widespread public notice that the Subject Products present a substantial product hazard is necessary to adequately protect the public”).

To the extent that Amazon is trying to argue that public notice would be of no benefit to original purchasers of the Subject Products, that too is incorrect. [REDACTED]

[REDACTED]. *See* SUMF ¶¶ 91-93.

Public notice would therefore provide valuable information regarding the substantial products hazards for original purchasers, and original purchasers who overlooked or failed to read and understand Amazon’s email would learn information about the Subject Product hazards for the first time.¹⁰ Further, public notice in the form of a press release would be posted on

¹⁰ Amazon’s failure to send at least two rounds of direct notifications to original purchasers increases the likelihood that consumers overlooked Amazon’s unilateral emails. [REDACTED]

[REDACTED] SUMF ¶¶ 144, 145.

www.cpsc.gov and www.SaferProducts.gov, where the information would serve as a useful public resource and public record of the recall for easy access by all consumers, including original purchasers, whenever needed. SUMF ¶ 128. And, because the public notice must be issued in accordance with the content requirements of 15 U.S.C. § 2064(i)(2) and 16 C.F.R. § 1115.27, public notice would provide valuable information for all original purchasers above and beyond the content provided in Amazon’s unilateral email.¹¹

Although Amazon appears to only specifically protest notification through a press release, in today’s world, where consumers gather their information from numerous online sources, firms must use all appropriate channels for public notification, such as websites and social media platforms, to adequately inform consumers. *See, e.g., Zen Magnets Final Decision and Order*, 2017 WL 11672449, at *46 (finding that “because Respondent sold millions of individual magnets and caregivers and medical professionals are not generally aware of the substantial risk of injury that the Subject Products present to children, public notification pursuant to 15 U.S.C. § 2064(c)(1) is required to adequately protect children from the substantial product hazard presented by the Subject Products”); *see also id.* at *50 (determining that the forms of public notice that must be issued included, among others, a joint news release with the Commission, a recall notice on Respondent’s website, and a recall notice on Respondent’s social media platforms); 75 Fed. Reg. 3355, 3360 (Jan. 21, 2010) (“Since at least 2000, the CPSC has provided guidance to firms to post recall notices prominently on the home page of the firm’s Web site.”). It is not in the public interest to allow Amazon to evade public notification of the substantial product hazards on these platforms. Any other conclusion not only fails to

¹¹ As explained below in Section IV.B.2., Amazon’s unilateral email failed to satisfy the statutory and regulatory content requirements of 15 U.S.C. § 2064(i)(2) and 16 C.F.R. § 1115.27.

adequately inform consumers, but would encourage companies to hide the hazards presented by their products from public scrutiny.

Second, Amazon argues that public notice is “unnecessary to alert” one subgroup of consumers – gift recipients of the Subject Products – because Amazon’s unilateral email to original purchasers said, “If you purchased this item for someone else, please notify the recipient immediately and let them know they should dispose of the item.” Amazon Mot. at 26. There are multiple flaws with this argument. Of course, just because Amazon politely asked the original purchaser to “please notify” a gift recipient, there is no guarantee that the original purchaser complied. Amazon has presented no evidence to demonstrate that gift recipients were informed and understood the hazards presented by the Subject Products, nor can Amazon provide such evidence. [REDACTED]

[REDACTED] *See*
SUMF ¶ 94.

In any event, Amazon’s request to original purchasers to pass along information to one subset of gift recipients does not obviate the need for public notice, as clarified in the Federal Register notice that Amazon itself cites. With the issuance of the Final Rule on the Guidelines and Requirements for Mandatory Recall Notices, the Commission acknowledged that purchasers may be well-positioned to notify gift recipients about a recall, but the Commission confirmed that “a direct recall notice should not be the sole form of recall notification” because it may not reach all consumers. 75 Fed. Reg. 3355-01, at 3360. For example, as commenters noted during consideration of the Mandatory Recall Notice Rule, “[c]onsidering the popularity of certain Web sites that sell, re-sell, or auction consumer products,” reliance on one email to original purchasers “could miss a large population of the consuming public.” 75 Fed. Reg. 3355-01, at 3360.

Lastly, Amazon attempts to identify differences between two forms of public notifications: joint press releases and recall alerts. Amazon Mot. at 26-27. But Amazon’s protestations amount to a distinction without a difference. “Recall alerts follow the same format as a recall news release,” as evidenced by the “Recall News Release Template” and the “Recall Alert Template” in the publicly available Recall Handbook. Sept. 23, 2022 Declaration of John Eustice, Ex. S, Recall Handbook at 22, 38, 46 (CPSC_AM0011485, 501, 509). And, both press releases and recall alerts are posted on www.cpsc.gov and www.saferproducts.gov to serve as a permanent record of and public resource for information about substantial product hazards.

SUMF ¶ 128; C.C. Response to A.S. ¶ 137; Amazon Ex. 40, Joseph Williams Dep. Tr. (Aug. 16, 2022) at 82:6-8 ([REDACTED]).

As the Recall Handbook makes clear, CPSC has the discretion to determine which form is appropriate, and both forms may be shared with the media to further publicize the hazards presented by a given product. *See* Sept. 23, 2022 Declaration of John Eustice, Ex. S, Recall Handbook at 22 (CPSC_AM0011485) (“even with a recall alert, CPSC may undertake its own efforts to publicize the recall and effectuate the mission of the agency”); *see also* C.C. Response to A.S. ¶ 143 ([REDACTED]).

[REDACTED]

[REDACTED]

[REDACTED] 12

¹² Complaint Counsel is expressly seeking issuance of a CPSC-approved press release to adequately protect the public from the substantial product hazards presented by the Subject Products. *See* Complaint, XI.3.c (seeking an order under Section 15(c) of the CPSA requiring Amazon to “[i]ssue a CPSC-approved press release”); *see also* Complaint Counsel’s Proposed Initial Order for Motion for Summary Decision, ¶ 3.a. (describing the process for issuance of the joint press release). Because CPSC has the discretion to determine if a press release or recall

In any event, Amazon undercuts its own attempt to forestall public notification here by acknowledging that, regardless of Amazon’s perceived differences in these forms of public notification: “The Commission’s policy and practice is to issue one of two recall notices: (1) recall alerts and (2) recall press releases.” A.S. ¶ 137. It is undisputed that neither has been jointly issued here, which is contrary to the Commission’s practice. Accordingly, Amazon’s argument that public notification is not in the public interest and is somehow contrary to agency policy is unavailing.

2. Contrary to Amazon’s Argument, Amazon’s Unilateral Email Does Not Satisfy the CPSA’s Corresponding Regulations or Commission Practice for Notifications; Amazon’s Unilateral Email Also Fails to Satisfy the Statutory Notice Content Requirements, Which Amazon Does Not Even Address.

In an attempt to evade a Section 15(c) order requiring effective notifications pursuant to the CPSA and its corresponding regulations, Amazon simply ignores the fact that content requirements are set forth in the statute at 15 U.S.C. § 2064(i)(2), titled “Requirements for Recall Notices” and “Content.” *See* 15 U.S.C. § 2064(i)(2) (stating that a “notice shall include the following” with a list of items). Amazon instead focuses on the Mandatory Recall Notice Rule, 16 C.F.R. §§ 1115.23-29, argues that nothing in the Mandatory Recall Notice Rule is legally binding, and contends that, even though Amazon’s unilateral email did not satisfy the Mandatory Recall Notice Rule, Amazon’s unilateral email should essentially be deemed good enough. Amazon Mot. at 15. Amazon is incorrect.

alert is required, Amazon has no basis to contend that issuance of a press release here is a deviation from CPSC policy. *See* Amazon Mot. at 26-27. [REDACTED]

d. at 26. [REDACTED]

C.C. Response to A.S. ¶ 147. [REDACTED]

First, Amazon cannot evade the requirements of the CPSA and its implementing regulations by incorrectly proclaiming the Mandatory Recall Notice Rule requirements to be merely interpretive and non-binding. When Congress amended the CPSA in 2008, as set forth in 15 U.S.C. § 2064(i)(2), the amendments “create[d] requirements for recall notices in order to better inform the public of potential product harms.” H.R. Rep. No. 110-787, at 71 (2008) (Conf. Rep.) (Joint Explanatory Statement of the Committee of Conference, Section 214); *see* 15 U.S.C. § 2064(i). The 2008 amendments also required CPSC to conduct a rulemaking to identify information “to be included in any notice” required under Section 15(c) or (d). *See* 15 U.S.C. § 2064(i)(1).

The Commission thereafter engaged in notice and comment rulemaking, and the proposed rule was announced in 74 Fed. Reg. 11883. The agency considered the comments it received and promulgated its response and the final rule, along with an explanation of the changes made in response to the comments, in 75 Fed. Reg. 3355. Thus, contrary to Amazon’s representation, as a legislative directed rule issued after proper notice and comment, the Mandatory Recall Notice Rule requirements are in fact set forth in a legislative rule and are legally binding. *See Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (“Rules issued through the notice-and comment process are often referred to as ‘legislative rules’ because they have the ‘force and effect of law.’”) (*citing Chrysler Corp. v. Brown*, 441 U.S. 281, 302-303 (1979)).¹³ Furthermore, as the Commission explained when issuing the final rule, “Most

¹³ Amazon appears to attempt to challenge the Mandatory Recall Notice Rule on the basis that the agency “did not rely on quantifiable ‘data’” when promulgating the rule. Amazon Mot. at 14. The agency addressed and rejected a similar comment when issuing the final rule, pointing out that “[t]he requirements for mandatory recall notices set forth in the proposed rule are largely dictated by section 214 of the CPSIA. The proposed rule also includes the Commission’s interpretation and clarification of section 214 of the CPSIA, as well as additional guidelines.” 75

requirements set forth in the final rule are statutorily mandated, and the Commission has the authority to add requirements it determines are appropriate.” 75 Fed. Reg. 3355-01, at 3358; *see also id.* (explaining that “requirements are described in the regulation using the words ‘must’ or ‘shall’”).

The Mandatory Recall Notice Rule requirements establish a *floor* of the minimum content required to adequately inform consumers about substantial product hazards, and the minimum content requirements apply to every notification ordered under Section 15(c) or (d) of the CPSA, including direct notifications to consumers, press releases, and website notices. *See, e.g.,* 16 C.F.R. § 1115.27 (explaining that the content requirements apply to “every recall notice”); *id.* § 1115.25(b) (defining “recall notice” as “a notification required by an order under sections 12, 15(c), or 15(d) of the CPSA”); *id.* § 1115.26(b) (explaining that a recall notice can take many forms, including a press release, direct recall notice, and website recall notice); *Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *42 (“Recall notices required under a Section 15(c) Order shall include the information specified in Section 15(i) of the CPSA (15 U.S.C. § 2064(i)), and the Commission’s corresponding regulations at 16 C.F.R. part 1115, subpart C, unless the Commission determines that one or more of the recall notices requirements is unnecessary or inappropriate.”).

As clarified in the CPSA and its implementing regulations, the Commission has ample reserved authority to require additional content and to determine the final content of a recall

Fed. Reg. 3355-01, at 3357. The agency further explained that it relied on its expertise, which is laid out in the publicly available Recall Handbook, as well as publicly available recall templates and checklists. *Id.* This publicly available material supporting the rule, which sets out detailed explanations of agency positions, makes clear that the Mandatory Recall Notice Rule is, contrary to Amazon’s allegation, based on the summation of the agency’s expertise, available to the public in the Recall Handbook, not just “conclusory references” to agency experience. *Amazon Mot.* at 14 (citation omitted).

notice to meet the purposes of the CPSA. *See* 16 C.F.R. § 1115.27(o) (“A recall notice must contain such other information as the Commission for purposes of an order under section 15(c) or (d) of the CPSA (15 U.S.C. 2064(c) or (d)), . . . deems appropriate and orders.”); *id.* § 1115.29(a) (“The recall notice content required by this subpart must be included in a recall notice whether or not the firm admits the existence of a defect or of an actual or potential hazard, and whether or not the firm concedes the accuracy or applicability of all of the information contained in the recall notice. The Commission will make the final determination as to the form and content of the recall notice for purposes of an order under section 15(c) or (d) of the CPSA (15 U.S.C. 2064(c) or (d)) . . .”).¹⁴ Through its guidance documents, including the public Recall Handbook, the Commission has made clear the content that is necessary to adequately protect the public from substantial product hazards. *See, e.g.*, Sept. 23, 2022 Declaration of John Eustice, Ex. S, Recall Handbook at 21 (CPSC_AM0011484).

Second, after incorrectly arguing that the Mandatory Recall Notice Rule requirements are not legally-binding, Amazon turns to an analysis of the “notice” it provided. Because Amazon only provided one unilateral email to original purchasers, Amazon’s argument in Section I.B. of its Motion is necessarily confined to the content of that unilateral email. It is undisputed that Amazon did not provide any other forms of notification to the public (*e.g.*, press release, website recall announcement, social media recall postings). As a result, it is undisputed that Amazon did

¹⁴ A theme permeating Amazon’s motion is that Amazon should be empowered to decide what content to include and what to exclude in notifications regarding substantial product hazards, based solely on its own business judgment. But that argument is expressly rejected by the language of the statute and its implementing regulations, which unequivocally state that such power resides with the Commission. *See, e.g.*, 16 C.F.R. § 1115.29(a). As Amazon itself acknowledges, there is “flexibility afforded to the Commission in the Mandatory Recall [Notice] Rule to determine the necessary forms of notice to be used in each particular instance.” Amazon Mot. at 27 n. 21 (*citing* 16 C.F.R. § 1115.29).

not comply with 15 U.S.C. § 2064(i)(2) or 16 C.F.R. §§ 1115.23-29 in any publicly available forms of notification about the substantial product hazards presented by the Subject Products. Notably, even for Amazon’s unilateral email, Amazon attempts to claim that the content Amazon provided is adequate, but Amazon does not contend that it provided all of the information required by the statute at 15 U.S.C. § 2064(i)(2), all of the information set forth as a floor in 16 C.F.R. § 1115.27, or all of the information set forth in the Recall Handbook and CAP Template. It is, therefore, undisputed that Amazon’s unilateral emailed failed to meet the requirements of the CPSA, its implementing regulations, and the Commission’s guidance.¹⁵

For example, 15 U.S.C. § 2064(i)(2) requires a notification to include, among other things: “a photograph of the product,” *id.* § 2064(i)(2)(A)(iii); “[t]he number of units of the product with respect to which the action is being taken,” *id.* § 2064(i)(2)(C); “[a]n identification of the manufacturers” of the Subject Product, *id.* § 2064(i)(2)(E); “[t]he dates between which the product was manufactured and sold,” *id.* § 2064(i)(2)(F); “[t]he number and a description of any injuries or deaths associated with the product,” *id.* § 2064(i)(2)(G); and information a consumer needs in order to obtain “information about a remedy, such as mailing addresses, telephone numbers, fax numbers, and emails addresses,” *id.* § 2064(i)(2)(H)(iii).

It is undisputed that Amazon’s unilateral email did not include this statutorily mandated content. Amazon’s unilateral email did not include a photograph of the product, the number of units at issue, or an identification of the manufacturers of the Subject Products. *See, e.g.,* A.S. ¶ 71 (quoting Amazon’s unilateral email with the following Item language: “B0743NKWC –

¹⁵ *See, e.g.,* Amazon Mot. at 16 (acknowledging that 16 C.F.R. § 1115.27(c) instructs a notification to include “the region where the product was sold, the number of units sold, dates of manufacture, or approximate price,” but that Amazon’s unilateral email did not contain that content).

Girls' Lace Nightgowns & Bowknot Sleep Shirts 100 percent Cotton Nightie for Toddler, Purple Lace, 6-7 Years/Tag 140"). Further, Amazon's unilateral email did not provide the product's dates of manufacture and sale, the number and description of any injuries or deaths associated with the product, or Amazon's contact information for consumers to reach out with any questions about the email's content. *See* A.S. ¶¶ 19, 52, 71, 87, 101; *see also* C.C. Response to A.S. ¶ 55 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

The crux of Amazon's argument is that it views the legally deficient information it provided to consumers as being good enough, and Amazon asserts that "the Commission has failed to identify" any incidents of injury or death with the Subject Products that should be included in the notification. Amazon Mot. at 18. But that assertion is backward. Amazon, as the distributor of the Subject Products, has the legal obligation to report incident and injury information to the Commission where, as here, a product fails to comply with an applicable consumer product safety rule, fails to comply with any other rule under any Act enforced by the Commission, contains a defect which could create a substantial product hazard, or creates an unreasonable risk of serious injury or death. *See* 15. U.S.C. § 2064(b); 16 C.F.R. § 1115.12. The Commission is not obligated or equipped to collect that information on Amazon's behalf.

[REDACTED]

[REDACTED]

[REDACTED] SUMF ¶ 110. In fact, in response to CPSC's March 2, 2021 Notice of Non-

Compliance, which stated that the Subject Product hair dryers lacked integral immersion protection, [REDACTED]

[REDACTED] See Oct. 21, 2022 Declaration of John Eustice, Exhibit K, CPSC_AM0001807-11.

[REDACTED] SUMF ¶ 61. In light of Amazon’s legal obligations as a distributor, it must carefully review incident information in its possession regarding the Subject Products and include in all recall notices any appropriate incident and injury information, as determined in conjunction with the CPSC, pursuant to the statute. See 15 U.S.C. § 2064(c) and (i).


In addition to the statutory content requirements that Amazon fails to acknowledge or satisfy, Amazon also failed to satisfy the content requirement floor set forth in 16 C.F.R. § 1115.27. The Mandatory Recall Notice Rule requires a notification to include, among other things: the word “recall” in the heading and text of the notice, *id.* § 1115.27(a); a photograph of the product at issue, *id.* § 1115.27(c)(6); a description of the action being taken, which may include “request return and provide a replacement” or “request return and provide a refund,” *id.* § 1115.27(d); “the approximate number of product units covered by the recall,” *id.* § 1115.27(e); a description of the product’s substantial product hazard that enables consumers to “readily identify and understand the risks and potential injuries or deaths associated with the product conditions,” *id.* § 1115.27(f); identification of “each manufacturer (including importer) of the product and the country of manufacture,” *id.* § 1115.27(h); the dates of manufacture and sale of the product, *id.* § 1115.27(k); the price of the product, *id.* § 1115.27(l); a description of all incidents, injuries, and deaths associated with the product, *id.* § 1115.27(m); all information a

consumer needs to “obtain all information about each remedy,” including “distributor contact information (such as name, address, telephone and facsimile numbers, e-mail address, and Web site address),” *id.* § 1115.27(n)(3), 15 U.S.C. § 2064(i)(2)(H); and any other information as the Commission “deems appropriate and orders,” *id.* § 1115.27(o).

It is undisputed that Amazon’s unilateral email did not include this content. As already discussed above, Amazon’s unilateral email did not include a photograph to help the consumer identify the product at issue. *See* A.S. ¶¶ 19, 52, 71, 87, 101. The email also failed to provide the number of products at issue; the manufacturer and country of manufacture; the dates of manufacture and sale; the price of the product; a description of all incidents, injuries, and deaths associated with the product; and Amazon’s contact information to enable consumers to reach out to Amazon with any questions. *See id.*¹⁶

Further, although Amazon protests that Complaint Counsel merely wants to wordsmith Amazon’s description of the hazard presented by the Subject Products, it is undisputed that Amazon failed to warn consumers that the risks presented by the Subject Products can be fatal, contrary to the requirements of 16 C.F.R. § 1115.27(f), and the Commission’s decision in a recent administrative litigation matter. *See In re Zen Magnets*, CPSC Dkt. No. 12-2, Opinion and Order Approving Public Notification and Action Plan, 2017 WL 11672451, at *7 (Dec. 8, 2017) (concluding that, where applicable, the description of the risk of injury “should state that

¹⁶ It is undisputed that Amazon also failed to identify the action being taken as “request return and provide a replacement” or “request return and provide a refund,” 16 C.F.R. § 1115.27(d), because Amazon did not request return of the product as a condition precedent to issuing a refund. *See* A.S. ¶¶ 19, 52, 71, 87, 101 (“There is no need for you to return the product.”); *see also* C.C. Response to A.S. ¶ 55 (



there is a risk of death, as well as injury, from the Subject Products”) (“*Zen Magnets Opinion and Order*”); *see also* C.C. Response to A.S. ¶¶ 21, 22, 54, 73, 74, 90, 91, 103, 104, 111, 168

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Amazon’s own comparison against CPSC staff-approved press release language for similar products demonstrates that Amazon’s unilateral email did not enable consumers to “readily identify and understand the risks and potential injuries or deaths associated with the product conditions.” 16 C.F.R. § 1115.27(f). For example, the CPSC staff-approved notice that Amazon cites concerning a recalled carbon monoxide detector explained to consumers that “[c]arbon monoxide (CO) is an odorless, colorless, poisonous gas,” and that the recalled product posed “a risk of carbon monoxide poisoning or death.” Amazon Ex. 73. Amazon’s unilateral email does not contain any information explaining what carbon monoxide is and what happens as a result of exposure to carbon monoxide. *See* A.S. ¶ 101.¹⁷ Similarly, the CPSC staff-approved press release that Amazon cites for a recalled hair dryer expressly informed consumers that they could die if the hair dryer falls into the water because the product poses “an electrocution” hazard. Amazon Ex. 72. Amazon’s unilateral email only warns of electric shock but does not

¹⁷ Although Amazon’s Motion misleadingly states that Amazon’s unilateral email concerning the defective Subject Product carbon monoxide detectors identified “CO poisoning” as the potential hazard, the email does not contain that language. *Compare* Amazon’s Mot. at 6 *with* A.S. ¶ 101.

mention the risk of death by electrocution. *See* A.S. ¶ 87. These are undisputed facts regarding critical information, not semantic preferences.¹⁸

Further, Amazon’s unilateral email did not include the word “recall” in the heading and text of the email. *See* A.S. ¶¶ 19, 52, 71, 87, 101. Although Amazon asserts that “the word ‘recall’ is not required by any statute, regulation, or agency policy,” Amazon Mot. at 22, Amazon’s assertion is directly refuted by 16 C.F.R. § 1115.27(a), [REDACTED], and the Recall Handbook. *See* 16 C.F.R. § 1115.27(a) (stating that “[a] recall notice must include the word ‘recall’ in the heading and text”); SUMF ¶¶ 144, 146 ([REDACTED])

[REDACTED] SUMF ¶ 146 (citing the Recall Handbook, which explains that “the consistent use of the term ‘recall’ is currently the best way to ensure consumers’ attention to a safety notice”); *see also* C.C. Response to A.S. ¶ 55 [REDACTED]

In 2009, in the Commission’s notice of proposed rulemaking for this subsection, the Commission directly addressed the word “recall” and stated as follows:

For many years, the Commission staff’s Recall Handbook has directed that this term should be used. The objectives of a recall include locating the recalled products, removing the recalled products from the distribution chain and from

¹⁸ In addition, Amazon’s unilateral email begins with the following sentence: “We have learned of a potential safety issue that may impact your Amazon purchase(s) below.” *See, e.g.*, A.S. ¶¶ 19, 52, 71, 87, 101. [REDACTED]

[REDACTED] SUMF ¶ 142; Sept. 23, 2022 Declaration of John Eustice, Ex. V, at CPSC_AM0011854, and Ex. W, at CPSC_AM0011857.

consumers, and communicating information to the public about the recalled product and the remedy offered to consumers. A recall notice should motivate firms and media to widely publicize the recall information, and it should motivate consumers to act on the recall for the sake of safety. To those ends, the word “recall” draws media and consumer attention to the notice and to the information contained in the notice, and it does so more effectively than omitting the term or using an alternative term. A recall notice must be read to be effective, and drawing attention to the notice through the use of the word “recall” increases the likelihood that it will be read and, therefore, effectuates the purposes of the CPSA and CPSIA.

74 Fed. Reg. 11883-01, at 11884. In 2010, with the issuance of the final rule, the Commission confirmed that “[a]s a matter of Commission policy for consistency and uniformity, use of the word ‘recall’ is preferred because consumers and other persons recognize the word ‘recall’ as meaning that a safety issue has arisen that requires action by the consumer. The CPSC’s position on the title of a recall notice has been in the Recall Handbook for many years.” 75 Fed. Reg. 3355-01, at 3362. Thus, Amazon is demonstrably wrong when it contends that use of the word “recall” “would violate the Commission’s recall guidelines and deviate from the Commission’s established practice.” Amazon Mot. at 22. Rather, Amazon’s failure to include the term recall defies the regulatory requirements and the Commission’s established practice.¹⁹

¹⁹ Recall is defined in the Mandatory Recall Notice Rule as “any one or more of the actions required by an order under sections 12, 15(c), or 15(d) of the CPSA.” 16 C.F.R. § 1115.25(a). To the extent that Amazon argues that use of the term “recall” would be inaccurate in this matter, Amazon’s argument is contradicted by its own cited definition, which defines a recall as a public call for the return of a defective product. Amazon Mot. at 23 (citing Amazon Ex. 105). Complaint Counsel is seeking an order under Section 15(d) requiring Amazon to provide refunds or replacements to all consumers in possession of a Subject Product, conditioned on the return of the hazardous product at issue or proof of its destruction. As for the “empirical research” Amazon cites regarding the use of the term “recall,” the cited article does not support Amazon’s argument that the term “recall” should not be used here. See C.C. Response to A.S. ¶ 155. In the cited article, “[t]he results showed that people believed it permissible not to use the term *Recall* for surgically-implanted medical devices, despite the fact that they believed that the term *Recall* should be used in other product defect campaigns.” *Id.* To state the obvious, none of the Subject Products are surgically-implanted medical devices that would be difficult to extract and return.

Amazon’s attempt to point to three press releases from 2017, 2018, and 2022 in support of its argument fares no better. All three press releases cited by Amazon include a heading with the word “recall,” and the word “recall” is included in the text of each announcement. *See* C.C. Response to A.S. ¶ 157; Amazon’s Ex. 75 (No. 17-168) (“Cordless Electric Lawn Mowers *Recalled* Due to Fire Hazard; Made by Hongkong Sun Rise Trading”; “*Recall* Details. Description: This *recall* involves Kobalt and Greenworks brands of cordless electric walk-behind lawn mowers. The *recalled* lawn mowers have four wheels”) (emphasis added); Amazon’s Ex. 76 (No. 18-090) (“Cordless Electric Chainsaws *Recalled* Due to Injury Hazard; Distributed by Hongkong Sun Rise Trading.” “*Recall* Details . . . This *recall* involves Greenworks, Kobalt and Snapper brands of cordless electric chainsaws. The *recalled* chainsaws have a 16 or 18-inch saw and an 80 or 82-volt lithium ion battery.”) (emphasis added); Amazon’s Ex. 77 (No. 22-039) (“Essential Medical Supply *Recalls* Adult Portable Bed Rails Due to Entrapment and Asphyxia Hazard; One Death Reported.” “*Recall* Details . . . The U.S. Consumer Product Safety Commission (CPSC) and Essential Medical Supply Inc., of Orlando, Florida, are announcing the *recall* of four models of the company’s Endurance Hand Bed Rails. This *recall* involves”) (emphasis added).

In sum, Amazon cannot ignore that under Section 15(c) of the CPSA, the Commission is empowered to “specify the form and content of any notice required to be given” as a result of an administrative litigation proceeding, 15 U.S.C. § 2064(c)(1), and Amazon has not provided the statutorily mandated content set forth in 15 U.S.C. § 2064(i)(2) nor the content required by 16 C.F.R. § 1115.27. To effectuate the statutory mandates to protect the public against the unreasonable risk of injury and death associated with consumer products, Complaint Counsel seeks an order requiring notification that meets the legal requirements of the statute and the

regulation “to ensure that every recall notice effectively helps consumers and other persons” to identify the hazardous products, understand the hazards, and seek appropriate remedies. 16 C.F.R. § 1115.23(b). It is undisputed that Amazon has not complied with these requirements.

3. Contrary to Amazon’s Representation, Sending One Email Does Not Establish that Amazon Has a 100% Correction Rate.

Because Amazon has not provided any public notification of the substantial product hazards and because Amazon’s unilateral email did not comply with the content requirements of the CPSA and its implementing regulations, Amazon attempts to misdirect with superficial arguments about the alleged “effectiveness” of its unilateral email and the alleged lack of value in informing consumers that “corrective action is being taken in conjunction with the Commission.” Amazon Mot. at 23. Neither argument has merit.

To begin, Amazon is discussing the alleged “effectiveness” of its unilateral email in terms of its ability to send an email to original purchasers. Amazon applauds itself as being “well-positioned—due to its online ordering system—to ensure 100 percent purchaser notification through direct notice alone.” Amazon Mot. at 13. To be sure, direct notice, where possible, is part of a “comprehensive communications plan.” SUMF ¶ 125. But, having the ability to send an email to all original purchasers does not demonstrate the “effectiveness” of the communication. [REDACTED]

[REDACTED] SUMF ¶¶ 92-94; *see also* 74 Fed. Reg. 11883-01, 11884 (explaining that a “notice must be read to be effective”). And, in any event, sending an email solely to original purchasers does not obviate the need for public notice. *See, e.g.*, 75 Fed. Reg. 3355-01, at 3360 (“The Commission agrees that a direct recall notice should not be the sole form of recall notification because the purpose of a recall notice is to reach the broadest possible audience of consumers

that may have purchased *or received the products*. Sole reliance on direct recall notices ignores the fact that other persons may benefit from receiving recall notices and assist in broad dissemination of recall notices.”) (emphasis added).

Amazon then makes another unjustified leap, asserting that because Amazon notified original purchasers and provided a refund to those consumers, Amazon has achieved a 100 percent “correction rate” for the Subject Products. Amazon Mot. at 2. This assertion is nonsensical. Correction requires the hazardous product to be *corrected*, *i.e.* removed from the stream of commerce. To state the obvious, throwing money at a safety hazard does not remedy or correct the safety hazard. As CPSC’s Recall Handbook explains, the goal of any remedial action “should be to remove or correct as many hazardous products as possible from the distribution chain and from consumers.” SUMF ¶ 122.²⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Amazon Ex. 40, Joseph Williams Dep. Tr. (Aug. 16, 2022) at 134:8-20; *see also*

C.C. Response to A.S. ¶ 55 ([REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

²⁰ [REDACTED] *See* Sept. 23, 2022 Declaration of John Eustice, Ex. X, CPSC AM0011544 (Monthly Progress Report form). [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]
[REDACTED]
[REDACTED] SUMF ¶¶ 92-94. As of now, Amazon cannot demonstrate or confirm if the consumer correction rate from its unilateral email is anything above 0%. Needless to say, therefore, when Amazon claims that its unilateral action exceeded the effectiveness of a Commission-directed recall, Amazon's claim is completely without merit.

Amazon's misunderstanding of "correction rate" undercuts its argument that "[w]hether Amazon is working with the Commission on the remedy is immaterial and inconsequential to the consumer." Amazon Mot. at 24. CPSC has decades of experience guiding companies through the process of conducting an effective recall, which includes accomplishing the objectives, as set forth in the Recall Handbook, of locating all recalled products as quickly as possible, removing the products from the distribution chain and from the possession of consumers, and communicating accurate and understandable information about the products, the hazard, and the corrective action. SUMF ¶ 116.

Further, although Amazon seems to argue that it has a well-known brand and reputation that should inspire consumer trust, nothing Amazon cites identifies it as an expert in consumer product safety or recalls. Because CPSC is the government agency charged with protecting consumers from unreasonable risks of injury and death presented by consumer products, including CPSC in notifications related to consumer product hazards and recalls lends credibility to the messaging, letting the public know that the government agency charged with their protection has evaluated the dangerousness of product and the sufficiency of the remedy at issue. SUMF ¶¶ 115, 126. Amazon does not argue that notification in conjunction with CPSC would

be *less* effective than unilaterally emailing consumers. Nor could it. The academic research cited by Amazon even acknowledges that research has shown “that the inclusion of the name of a government entity enhances warning credibility and compliance intent.” Amazon Ex. 74 at 1702. And this makes sense. As everyone knows, business messaging can be prompted by numerous motivating factors: reducing legal liability, protecting shareholders, enhancing the company brand, etc. By contrast, when CPSC is involved with the messaging, consumers know that the motivating foundation for the message is consumer product safety. *See* C.C. Response to A.S. ¶ 55 ([REDACTED] [REDACTED] [REDACTED]).

For this reason, in previous administrative litigation matters, the Commission has required notification language explaining that CPSC determined the product at issue presented a substantial product hazard and that the firm was acting in conjunction with CPSC to recall the product. *See, e.g., In re Dye and Dye*, CPSC Dkt. No. 88-1, Opinion and Order, 1989 WL 435534, at *23 (ordering that “the notice shall include a statement that the Commission had determined that the design and instructions of the WORM GETT’RS constitute substantial products hazards”); *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Order, at 1-2 (Oct. 27, 1976) (ordering that the respondents’ public notice was to include the following, “The United States Consumer Product Safety Commission has found that the Wel-Dex Electric Arc Welder presents a substantial product hazard which could cause electric shock, burns, or fires.”) (attached as Ex. EE to the Sept. 23, 2022 Declaration of John Eustice).²¹ Notification in this

²¹ Although Amazon argues that the unilateral emails referenced CPSC in some fashion, Amazon’s unilateral emails did not state that the Commission has determined that the Subject

matter requires similar language to inform the public that Amazon is conducting a recall in conjunction with CPSC, the nation’s consumer protection agency. *See* 16 C.F.R. § 1115.27(o).

4. Amazon’s Attempt to Deprive Consumers of Information Based Upon a Speculative Concept of Recall Fatigue is Inconsistent with the CPSA.

In one more failed attempt to evade a Section 15(c) order, Amazon argues that “[g]iven the effectiveness of the actions Amazon has already taken, additional messaging will likely prove a net negative to safety,” based upon the alleged concept of “recall fatigue.” Amazon Mot. at 28. This argument is unavailing for several reasons.

First, the starting premise of Amazon’s argument is that the alleged “effectiveness” of its unilateral email negates the need for notification now. But, as stated above, Amazon cannot demonstrate that its unilateral emails were “effective.” [REDACTED]

[REDACTED] SUMF ¶¶ 92-94. The first portion of Amazon’s argument is therefore pure conjecture.

Second, contrary to Amazon’s assertion, the very existence of recall fatigue is subject to debate. In fact, the literature that Amazon itself cites questions the existence of recall fatigue. *See* Amazon Ex. 97 at 395 (“Observers debate the existence of recall fatigue.”); *id.* at 396 (mentioning the “question of whether recall fatigue does or does not exist”). The second portion of Amazon’s argument is therefore pure conjecture.

Products constitute substantial product hazards, nor did the unilateral emails state that Amazon was recalling the products in conjunction with CPSC. *See, e.g.*, A.S. ¶¶ 19, 71, 87, 101. Amazon’s argument that CPSC staff-approved press releases fail to articulate that the recalling firm is acting in conjunction with CPSC is unavailing, defies common sense, and is contradicted by the very testimony Amazon cites. [REDACTED]

[REDACTED] *See* Amazon Mot. at 24 (citing Amazon Ex. 30, Rose Dep. 125:4-126:9).

Third, even assuming *arguendo* that certain consumers received, opened, read, and understood Amazon’s unilateral email and further assuming *arguendo* that the concept of recall fatigue exists, Amazon merely argues that additional messaging “*will likely* prove a net negative to safety.” Amazon Mot. at 28. This too is pure conjecture. Amazon’s generalized argument regarding this theory fails to concretely articulate how recall fatigue would arise from an effective direct notification to consumers who purchased the product at issue and who have a vested interest in knowing about substantial product hazards presented by the product they own.

[REDACTED]

SUMF ¶¶ 144, 145. Amazon’s generalized argument regarding this theory also fails to acknowledge that Amazon has to date provided no public notification about the substantial product hazards. Amazon cannot concretely argue how recall fatigue would arise from a proper public notification of the substantial product hazards, when there is no existing public notification available. The first public notification – by definition – cannot be a “redundant warning.” Amazon Mot. at 28.

5. Contrary to Amazon’s Claims, Ordering Amazon to Adequately Inform Consumers of the Hazards Posed by the Subject Products Does Not Violate the First Amendment.

In Amazon’s final effort to evade a Section 15 notification order, Amazon raises a new First Amendment argument, never previously raised in its Answer or elsewhere during this proceeding. *See* Amazon Answer, Dkt. No. 2. In its argument, Amazon contends that any

mandatory notification of the substantial product hazards would fail the First Amendment test prescribed by *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), for commercial speech. Because the Consumer Product Safety Act expressly authorizes the Commission to order such notification and because the statute itself sets forth content requirements for such notification, Amazon implicitly challenges the constitutionality of the CPSA.

Sections 15(c) and (d) of the CPSA empower the Commission to order a company to provide notification of a substantial product hazard. *See* 15 U.S.C. § 2064(c), (d). Congress amended the CPSA in 2008 to “create requirements for recall notices in order to better inform the public of potential product harms,” and Section 15(i)(2) of the statute sets forth those content requirements for any notice ordered under Sections 15(c) or (d). H.R. Rep. No. 110-787, at 71 (2008) (Conf. Rep.) (Joint Explanatory Statement of the Committee of Conference, Section 214); *see* 15 U.S.C. § 2064(i). The statute provides that the content in 15 U.S.C. § 2064(i)(2) shall be included in the recall notice unless “the Commission determines with respect to a particular product” that a specific item is “unnecessary or inappropriate.” 15 U.S.C. § 2064(i)(2). As such, Sections 15(c), (d), and (i) give the Commission the authority to prescribe the content to be included in a recall notice ordered under Sections 15(c) or (d).

Contrary to Amazon’s vague assertion that Complaint Counsel is “attempt[ing] to micromanage the wording of Amazon’s safety message,” Amazon Mot. at 29, Complaint Counsel seeks an order pursuant to this clear, longstanding, statutory authority. The constitutionality of this action is therefore grounded in the CPSA itself. Not surprisingly, Amazon does not state that it is challenging the clear authority of the CPSA, nor does it assert that the CPSA’s mandatory recall requirements are unconstitutional. Instead, Amazon provides a

vague statement in support of its First Amendment argument that its unilateral email “satisfied the Commission’s guidelines in every relevant respect,” (which is demonstrably false, as articulated above in Section IV.B.2.).

In any event, even if Amazon attempted to raise a First Amendment challenge to the CPSA, such a challenge would fail. Administrative agencies, and by extension Administrative Law Judges, generally do not possess the jurisdiction or authority to determine the constitutionality of statutes. *See, e.g., Elgin v. Dep't of Treasury*, 132 S.Ct. 2126, 2136 (2012) (citing *Malone v. Department of Justice*, 13 MSPB 81, 83, 14 M.S.P.R. 403 (1983)); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (collecting cases). The Federal Rules of Civil Procedure specifically provide a process for raising a constitutional challenge to a federal statute, and the process includes filing a notice of constitutional question and serving it on the United States Attorney General. Fed. R. Civ. P. 5.1. Amazon has not done so and is not permitted to circumvent this process by challenging the constitutionality of the CPSA in this administrative litigation.

Regardless, courts have long held that “commercial speech” is entitled to less extensive protection under the First Amendment than “noncommercial speech.” *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 637 (1985) (citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983)); *In re R.M.J.*, 455 U.S. 191 (1982); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). Commercial speech is defined in *Central Hudson* as “expression which not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.” *Central Hudson*, 447 U.S. at 561, 562. Notice by Amazon under

Section 15 would stand in the context of a commercial transaction and inform societal interests by providing important safety information regarding a recall of the Subject Products.

To the extent that this court considers the *Central Hudson* factors, even though this is not the proper proceeding for such analysis, the first step under *Central Hudson* asks whether the speech is commercial speech, as it is here. *Central Hudson*, 447 U.S. at 566. The second step is to identify whether the government interest in the compelled speech or speech restriction is substantial. *Id.* at 566. Here, the government interest in effectively notifying the public and consumers about substantial product hazards and recalls is substantial and goes to the underlying purpose of the CPSA: to empower the CPSC “to protect the public against unreasonable risks of injury associated with consumer products.” 15 U.S.C. § 2051(b); *see also* Complaint Counsel’s Memorandum of Points and Authorities in Support of Motion for Summary Decision at 21 (discussing purpose of the CPSA and Congressional findings). The third prong of the *Central Hudson* test, which requires the government to show that the regulation of the commercial speech directly and materially advances the substantial interest, is also satisfied. *Central Hudson*, 447 U.S. at 566. Indeed, Congress clearly recognized the substantial government interest in ensuring that consumers are fully informed of substantial product hazards when enacting the CPSA, and the statute directly advances that government interest in effectively communicating recall information. *Central Hudson*, 447 U.S. at 566.²²

C. Contrary to Amazon’s Claims, Promoting the Permanent Removal of the Subject Products from Consumers’ Homes and from the Stream of Commerce by Incentivizing Consumers to Return the Products or Provide Proof of Their Destruction is Central to CPSC’s Mission and is Consistent with CPSC’s Practices.

²² The cases Amazon cites all involve a regulation or a state or federal statute being challenged, not an administrative adjudication which is not even final. Moreover, all involve requirements or restrictions on entire categories of speech, not an order requiring an entity to craft a safety message in accordance with statutory obligations.

Contrary to Amazon’s artificially constrained interpretation of the Commission’s remedial authority under Section 15, the Consumer Product Safety Act empowers the Commission to promote the permanent removal of hazardous products from the marketplace and from consumers’ homes. *See Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *41 (explaining that the Commission’s mission is “to protect the public against unreasonable risks of injury associated with consumer products” and that the Commission has “statutory authority to remove hazardous products from consumers’ hands”). To fulfill this mandate, the Commission may require a firm subject to a Section 15 order to condition refunds (or replacements) on a consumer’s tender of the hazardous product at issue (or proof of its destruction) and to destroy returned products to ensure the permanent removal of the products from commerce.²³ Amazon’s argument to the contrary ignores the full statutory language, the purpose of the CPSA, and the legislative history.²⁴

²³ The plain meaning of the terms used in Section 15(d) confirms that Congress intended to grant the Commission authority to order actions to remove products from commerce because in the context of consumer product sales, the terms “replace” and “refund” both imply some form of exchange, return, or disposal relating to an original purchase. Indeed, Amazon recognizes this plain meaning. For example, the section on Amazon.com’s customer service webpage concerning “Refunds” expressly conditions refunds on completed returns. *See* Amazon.com, *Refunds* (last visited Oct. 21, 2022), <https://www.amazon.com/gp/help/customer/display.html?nodeId=GKQNFKFK5CF3C54B> (“When we complete processing your return, we issue a refund to the selected payment method”). Likewise, the corresponding webpage on product replacement specifies, “You need to return your item within 30 days to avoid being charged for both the original and replacement items.” *See* Amazon.com, *Replace a Damaged, Defective, or Broken Item* (last visited Oct. 21, 2022), <https://www.amazon.com/gp/help/customer/display.html/?nodeId=GP7Z9RS868ZP5J9F>.

²⁴ Though Amazon points to *Congoleum Industries, Inc. v. CPSC*, 602 F.2d 220 (9th Cir. 1979), as a purported limitation on the Commission’s recall authority here, *Congoleum* interpreted the Flammable Fabrics Act, which contains no express recall or notification provisions. *Id.* at 225-26. By its own terms, the *Congoleum* holding does not apply to Section 15 of the CPSA. *See id.* at 226 n. 8 (“Our holding in the instance case should not prevent the CPSC from effectively dealing with the danger posed by flammable carpet We note that the CPSC . . . may itself

As the legislative history makes plain, because the removal of hazardous products from the marketplace and from consumers' homes is the highest priority, Congress originally contemplated a *mandatory* tender requirement for products subject to a Section 15 order. *See* H. Rpt. 92-1153 at 43 (1972); *see also In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Decision and Order, at 5 (Oct. 27, 1976) (“The legislative history indicates that Congress, while favoring tender, even contemplated a mandatory tender requirement in all refund situations.”) (attached as Ex. EE to the Sept. 23, 2022 Declaration of John Eustice). Congress recognized, however, that due to unique circumstances that could be presented in certain cases, the more desirable outcome would be to increase the discretion and flexibility of the Commission to determine appropriate corrective actions. *See id.* at 4 (explaining that “the legislative history clearly expresses the Congressional intent that the Commission possesses the authority to specify a tender requirement”).

For example, Congress “was concerned that, in some instances, to require the tender of the product might unduly expose consumers and persons within the distribution chain to the hazards associated with the product” (e.g., chemical exposure) and that, in some instances, “the offending product may no longer be in a form which would allow its tender.” H. Rpt. 92-1153 at 43 (1972). To preserve greater authority for the Commission to approve alternative plans for administration of a Section 15 remedy, Congress ultimately “decided against an absolute

order notification and recall, 15 U.S.C. ss 2064”); *see also F.T.C. v. Virginia Homes Mfg. Corp.*, 509 F. Supp. 51 (D. Md. 1981) (distinguishing *Congoleum*, finding that the Federal Trade Commission Act authorized the court to compel public notice of an FTC Act violation, and stating that such power “must be implied from the statute in those circumstances where a permanent injunction without compelled notice could in no way effectively remedy the violation purportedly enjoined”). Further contrary to the situation presented in *Congoleum*, the Commission’s authority to issue an order and require an appropriate action plan under Section 15 conditioning refund on a consumer’s return or proof of destruction is firmly rooted in the statute and its legislative history.

requirement that consumers must tender products” under Section 15(d). *Id.* Instead, “Congress decided on a more flexible approach which allows the Commission discretion to specify such a requirement.” *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Decision and Order, at 5. The legislative history specifically states that “the Commission is intended to have the authority to specify . . . whether the product must be tendered.” H. Rpt. 92-1153 at 43 (1972); *see also id.* (explaining that the Commission has the authority to “control not only who will be entitled to refund but also what proof of claim must be made”); 15 U.S.C. § 2064(d)(2) (“The Commission shall specify in the order the persons to whom refunds must be made if the Commission orders the action described in paragraph (C).”).

Accordingly, for all of the remedies under Section 15(d), a firm must submit a plan for approval by the Commission for providing the remedy ordered. 15 U.S.C. § 2064(d)(2). And, the Commission may require the action plan to detail the process for the tender and destruction of the products to achieve the statutory goal of permanently removing hazardous products from commerce. *See Zen Magnets* Opinion and Order, CPSC Dkt. No. 12-2, 2017 WL 11672451, at *13 (ordering that the respondent’s action plan must include steps for quarantining products in the distribution chain, in the respondent’s inventory, and returned by consumers, along with steps for ensuring destruction of the products because such steps “are necessary to address the hazard posed by the Subject Products by preventing their redistribution”).²⁵ Pursuant to 15 U.S.C. §

²⁵Amazon itself cites to provisions of the CPSA that reference destruction of hazardous products. *See Amazon Mot.* at 32. Contrary to Amazon’s argument that this language is somehow problematic, this language demonstrates that the CPSA places great importance on permanently removing hazardous products from commerce. The language Amazon cites in no way confines or limits the Commission’s authority to determine that destruction of hazardous products is an appropriate element of an action plan to address substantial product hazards under a Section 15 order. Indeed, to *not* require destruction of the Subject Products would be contrary to the purpose of the CPSA to protect consumers from the unreasonable risk of injury and death

2064(d)(3)(B), “If the Commission finds that an approved action plan is not effective or appropriate under the circumstances, or that the manufacturer, retailer, or distributor is not executing an approved action plan effectively, the Commission may, by order, amend, or require amendment of, the action plan.”²⁶

[REDACTED]

[REDACTED]

[REDACTED] See SUMF ¶¶ 123, 165.²⁷ And the Commission’s general practice

associated with consumer products. Failure to ensure permanent destruction would allow the Subject Products to be redistributed in commerce – even if inadvertently. Moreover, Amazon’s assertion that it has destroyed numerous Subject Products within its inventory confirms its capabilities to further destroy products returned by consumers. See Amazon Mot. at 38; A.S. ¶¶ 119, 120.

²⁶ Amazon’s claim that the Commission is attempting to “bootstrap its refund authority into further power to require burdensome return-and-destroy remedies” also is unavailing. Amazon Mot. at 34. The first case Amazon cites in support of this position is not at all analogous to the matter at hand. See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (finding that the Department of Labor’s interpretation of a statute was not entitled to *Chevron* deference in a private right of action suit because “Congress has expressly established the Judiciary . . . as the adjudicator of private rights of action [and] . . . it would be inappropriate to consult executive interpretations [] to resolve ambiguities . . .”). The second, *Center for Auto Safety v. Ruckelshaus*, 747 F.2d 1, 4-5 (D.C. Cir. 1984), actually supports the Commission’s position in this case, rejecting an EPA attempt to avoid enforcing a recall and explaining that, “[a]bsent evidence of contrary intent,” the remedial provisions of the Clean Air Act “must be presumed to bear their normal meaning of eliminating, rather than merely providing compensation for the effects of, the condition that is to be ‘remedied.’” Here, it is clear that the refunds Amazon has provided to date only offer consumers compensation and are not sufficient to eliminate the substantial product hazards. *Id.*

²⁷ Amazon cites to four press releases arguing that those four instructed consumers to dispose of, repair, or destroy a product without confirming their compliance and that there can therefore “be no basis to say that the public interest” requires return and destruction of the Subject Products here. Amazon Mot. at 36-37. Amazon is wrong. First, Amazon does not cite the full language of the press releases. C.C. Response to A.S. ¶ 161. For example, Recall No. 20-066 states that “[c]onsumers should immediately take the recalled jacket away from children and remove the drawstrings to eliminate the hazard, or return the jacket to BRAV USA for a full refund, shipping included.” *Id.* Recall No. 18-023 states that “[c]onsumers should immediately take the recalled ponchos away from children and remove the drawstring to eliminate the hazard or return the poncho to the firm for a full refund.” *Id.* Second, the succinct press releases necessarily do not

confirms that the recalling firm must destroy the returned products to prevent their redistribution in commerce. *See, e.g.*, SUMF ¶¶ 119, 125 (explaining that the Recall Handbook instructs companies on the need to “develop a plan to quarantine and correct returned products”); SUMF ¶ 154 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 16 C.F.R. § 1115.20(a)(1)(vi) (providing that a corrective action plan shall include “[a] statement of the corrective action which will be or has been taken to eliminate the alleged substantial product hazard,” including disposition of returned products by reworking them, destroying them, or returning them to a foreign manufacturer).

Further, in attempting to argue that Complaint Counsel’s request here is somehow contradictory to agency practice, Amazon completely mischaracterizes and misstates the language within a 1992 directive, and ignores the record material in this case. [REDACTED]

[REDACTED]

[REDACTED]

Amazon Ex. 65, CPSC_AM0014049 at 14091. [REDACTED]

[REDACTED]

[REDACTED]

contain all of the detail that is described in the complete corrective action plans, which may include tracking the destruction or return of the products. *Id.* Third, whether the Commission has exercised its decision in limited circumstances to not require return and destruction of a product does not undermine the Commission’s clear authority to require return and destruction, which the record evidence demonstrates CPSC has overwhelmingly required in the vast majority of recalls of similar products since 2015. *See* Complaint Counsel’s Memorandum of Points and Authorities in Support of Motion for Summary Decision at 45, 46.

[REDACTED]

See SUMF ¶¶ 119, 125, 154; *see also* SUMF ¶ 153 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Second, the record in this case confirms the agency has acted in accordance with its guidance. As discussed in Complaint Counsel’s Memorandum in Support of its Motion for Summary Decision, the records produced in this matter relating to 77 voluntary recalls of hair dryers, carbon monoxide detectors, and children’s sleepwear since 2015 reflect that refund or replacement was conditioned on product return or proof of destruction in at least two-thirds of the cases. *See* Complaint Counsel’s Memorandum of Points and Authorities in Support of Motion for Summary Decision at 45, 46.

D. Contrary to Amazon’s Claims, Promoting the Return and Destruction of the Subject Products is in the Public Interest.

Amazon also attempts to argue that it is contrary to the public interest to promote the permanent removal of the Subject Products from consumers’ homes and from the stream of commerce with a Section 15(d) order requiring Amazon to refund the Subject Products conditioned on the consumer’s return of the Subject Product or proof of its destruction.

Amazon’s argument is unconvincing.²⁸

²⁸ In Amazon’s introduction, when referring to the Presiding Officer’s January 19, 2022 Order, which rejected Amazon’s mootness argument, Amazon insinuates that its issuance of gift cards should prevent entry of a Section 15(d) order here. *See* Amazon Mot. at 3-4. As explained in

First, Amazon contends that “Amazon’s correction rate is 100 percent” because refunds were allegedly “successfully issued to all purchasers,” and that, as a result, there is “no evidence indicating that an additional instruction to return the Subject Products would result in any further remediation.” Amazon Mot. at 35, 37. But, as discussed above, Amazon’s understanding of “correction rate” is incorrect, and the record currently demonstrates no consumer remediation whatsoever. Indeed, Amazon defies common sense with its attempt to argue that its unilateral issuance of an Amazon gift card to original purchasers constitutes a 100% “correction rate.” In Amazon’s misguided approach to consumer product safety, Amazon appears to believe that gift cards “correct” consumer product safety issues. But a gift card does not remedy a substantial product hazard or protect consumers from the unreasonable risk of injury and death. A gift card merely provides monetary relief by putting credit in a consumer’s account (possibly even without their awareness), while consumers may continue to use the dangerous product or give it or sell it to someone else. [REDACTED]

[REDACTED] SUMF

¶¶91-92.

Although Amazon claims provision of a refund means a corrective action was “successful,” Amazon Mot. at 37, CPSC will only consider a corrective action “successful” if it mitigates the hazard by removing the hazardous products from the stream of commerce. *See* C.C. Response to A.S. ¶ 129; *see also id.* ¶ 55 ([REDACTED])

Complaint Counsel’s Memorandum of Points and Authorities in Support of its Motion for Summary Decision, Amazon’s argument is refuted by the statute and by common sense. *See* Complaint Counsel’s Memorandum of Points and Authorities in Support of Motion for Summary Decision at 46-48. As the distributor of the Subject Products, Amazon has the legal obligation to remediate the substantial product hazards, and Amazon may not escape that obligation by choosing its own unilateral actions, which failed to accomplish the purpose of the CPSA to remove hazardous products from consumers’ hands and from the marketplace.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Without conditioning the gift card on the consumer’s return of the Subject Product or proof of its destruction, Amazon has made no attempt to confirm how many – if any – of the Subject Products have been permanently removed from the hands of consumers and from the stream of commerce. As a result, it is in the public interest to order action to promote the removal of these products from consumers and from the marketplace to remediate the hazards and ensure the Subject Products are no longer a threat to consumer safety.

Second, Amazon argues that “asking consumers to do more makes it less likely they will do anything.” Amazon Mot. at 36. But Amazon’s argument is an example of mixing apples (incentives) with oranges (disincentives). Conditioning a refund on the consumer’s return of the Subject Product or proof of its destruction provides an incentive for the consumer to remove the Subject Products from their homes and from the marketplace. Such an incentive promotes the CPSA’s goals to protect the public and provides a method to verify that the hazard has been eliminated. This incentive to return the Subject Product or provide proof of its destruction does not in any way create a *disincentive* for the consumer to dispose of the product on their own. At all times, a consumer may, of course, choose that course of action.

Amazon’s argument appears to be a disguised excuse for Amazon itself to do less. But putting Amazon’s interest above consumer safety would contravene the objectives of the CPSA. Incentivizing consumers in possession of the Subject Products to remove the Subject Products from commerce through a statutorily authorized tender mechanism is in the public interest to

eliminate and verify elimination of the substantial product hazards. Providing no incentive for permanent removal and providing no method to verify permanent removal means these hazardous products can remain in homes, can be inadvertently donated, can be sold on a secondary market, and can continue to pose hazards in numerous ways. That is not in the public interest.

E. Contrary to Amazon’s Claims, the Commission is Empowered to Promote the Removal of “Functionally Equivalent Products” from the Stream of Commerce, which is in the Public Interest.

Contrary to Amazon’s characterization, the Commission’s request that Amazon cease distribution of functionally equivalent products is well-grounded in the CPSA and consistent with what the Commission has typically achieved in both mandatory and voluntary corrective actions.²⁹

Indeed, the Commission has long recognized its authority under Section 15 to address functionally equivalent products presenting the same hazard. *See In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Order, at 1 (Oct. 27, 1976) (ordering in a Section 15 administrative litigation proceeding that “Respondents are to refrain from manufacturing and distributing in commerce or any manner affecting commerce . . . the Wel-Dex Electric Arc Welder, or any other

²⁹ Amazon offers no legal authority whatsoever for its one sentence suggestion that the Commission has somehow waived its authority to order remedial action with respect to functionally equivalent products by not identifying specific functionally equivalent products in the Complaint. Although framed as a threshold challenge to the contents of the pleadings, the statement is no more than a rephrasing of Amazon’s general argument attempting to limit the Commission’s remedial authority to specific ASINs in the Complaint. But the Complaint makes clear its request for an order requiring Amazon, as the distributor of hundreds of thousands of FBA products, to engage in a review of its voluminous product offerings and take remedial action to protect the public from functionally equivalent products with the substantial product hazards present in the Subject Products. In any case, it is well established that the literal wording of a Complaint does not constrain the appropriate relief in a legal proceeding, since courts “grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” Fed. R. Civ. Proc. 54(c).

electric welder of similar design or construction, containing any of the defects alleged to create a substantial product hazard in the Notice of Enforcement issued herein on July 17, 1974”). As explained in Complaint Counsel’s Memorandum in Support of its Motion for Summary Decision, an assessment of functionally equivalent products is a necessary part of determining the scope of a recall and ensuring that the public is safeguarded from products known to present an identical hazard. *See* Complaint Counsel’s Memorandum of Points and Authorities in Support of Motion for Summary Decision at 49.

And this makes perfect sense. For example, the parties agree that the Subject Products present substantial product hazards, which could result in serious injuries or deaths. To the extent that another ASIN lists that Subject Product with a mere alteration (for example, one is red and the other is blue, or one is a smaller model and one larger - but all presenting the same substantial product hazard), Amazon’s obligation to cease distribution of such “product” must necessarily extend to those products (which may only be known to Amazon). 15 U.S.C. § 2064(d)(2).³⁰

Moreover, to the extent that Amazon is aware of other functionally equivalent products with the same hazards – having been put on notice of those types of hazards in this fully litigated proceeding – here, related to hair dryers, carbon monoxide detectors, and children’s sleepwear garments (like in *Relco*, electric welders), Amazon should be ordered to cease distribution of such products to protect consumers from the unreasonable risk of serious injury or death

³⁰ Amazon is incorrect with its assertion that Complaint Counsel should have to proceed by rulemaking here. *See* Amazon Mot. at 40. It is well-established that an administrative adjudication “is binding only on the parties to a particular proceeding,” in contrast to administrative rulemaking authority, which “sets a standard of conduct for all to whom its terms apply.” *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 418 (1942). Here, the remedial order sought by Complaint Counsel would prevent Amazon from distributing functionally equivalent products.

presented by the *same* substantial product hazards. Amazon cannot escape responsibility by putting blinders on to such hazards.

Notably, Amazon, as the distributor of consumer products, has an affirmative obligation to monitor the products it distributes and to “immediately inform the Commission” if Amazon obtains information that “reasonably supports the conclusion” that a product is defective or violates a consumer product safety rule. 15 U.S.C. § 2064(b).³¹ This requirement applies to all products, including where multiple products present the same hazard because of commonalities like shared component parts, design similarities, or mere cosmetic variations. It is also undoubtedly true that the Commission’s remedial authority under Section 15 is coextensive with the reporting obligations of regulated firms and reaches all products that violate consumer product safety rules or contain defects that create a substantial risk of injury. *See* 15 U.S.C. § 2064(a)-(d). Congress could not have intended to create a regulatory framework whereby firms are statutorily required to report possible substantial product hazards, but the Commission would be powerless to order a firm to remediate unlawful hazards that have already been established through administrative proceedings without initiating a separate mandatory recall action for each individual variation of the “product” that presents the same proven substantial hazard. *See Local Union 36 Intern. Broth. Of Elec. Workers, AFL_CIO v. N.L.R.B.*, 631 F.3d 23, 28 (2d Cir. 2010) (cautioning against overly narrow statutory interpretation when “literal interpretation of the statutory language is absurd, or where the obvious purpose of the statute is thwarted by such slavish adherence to its terms”) (citation omitted).

³¹ *See also* 16 C.F.R. § 1115.12(f) (listing “[i]nformation received from the Commission or other governmental agency” as an example of information “which a subject firm should study and evaluate in order to determine whether it is obligated to report”).

Furthermore, despite its initial protestations that “the CPSA says nothing about ‘functionally equivalent’ products,” Amazon later concedes that the concept appears in 15 U.S.C. § 2064(d), the very provision that gives the Commission its remedial authority in this case. *See* Amazon Mot. at 39. Amazon argues that subsection (1)(B) of that provision, which empowers the Commission to order the replacement of a recalled good with “a like or equivalent product which complies with the applicable rule, regulation, standard, or ban or does not contain the defect,” shows that “Congress could readily have provided the CPSC with the authority to issue a Section [15](d) order requiring remediation of any ‘like or equivalent product,’ but did not do so.” Amazon Mot. at 39. To the contrary, Section 15(d)(1)(B) plainly reflects Congress’s grant of authority to the Commission relating to functionally equivalent/like or equivalent products. Indeed, to be able to effectuate an order to a firm to provide consumers with a non-defective “like or equivalent” replacement product, the Commission necessarily must have the authority to order a firm to identify similar product offerings and determine whether they present the same product hazard. If the Commission has the authority to order a firm to provide a safe “like or equivalent product,” it follows that, after a determination of a substantial product hazard in such products, the Commission can order a firm not to distribute such products.³²

Lastly, although Amazon protests that such an assessment for like or equivalent products would be “impossible to administer,” Amazon’s argument is easily refuted by the undisputed factual record in this matter. [REDACTED]

³² While Complaint Counsel’s Proposed Initial Order for Summary Decision uses the phrase “all products that are *functionally equivalent* to the Subject Products,” Complaint Counsel understands the phrase “like or equivalent” to have the same meaning and would have no objection to the use of that term in ordering Amazon’s remedial conduct.

[REDACTED]

[REDACTED] SUMF ¶¶ 112-113. In fact, Amazon has specifically represented in its statement of undisputed material facts that it has itself identified more than 1,000 products as “potentially posing the same hazard as the Subject Products.” A.S. ¶¶ 12, 25, 32, 39, 44, 58, 63, 76, 84, 93, 98, 106. [REDACTED]

[REDACTED] Oct. 21, 2022 Declaration of John Eustice, Exhibit K, at CPSC_AM0001807. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] SUMF ¶¶ 166-179.

In sum, with Amazon’s resources and technological capabilities – and because it is undisputed that it distributed the Subject Products presenting the substantial product hazards at issue in this proceeding – Amazon should be ordered to cease distribution of any “functionally equivalent/like or equivalent” FBA products that present the same substantial product hazards to protect consumers pursuant to Section 15.

F. Amazon’s Attempt to Escape Reporting on Its Compliance with a Section 15 Order is Contrary to the Tenets of the CPSA.

Amazon’s incorrect argument that the Commission lacks authority to order Amazon to provide monthly progress reports is once again based on an overly restrictive interpretation of the CPSA. To ensure the public is protected from unreasonable risks of injury or death presented by the Subject Products, CPSC is empowered to review, approve, and monitor the details of an approved action plan under a Section 15 order. 15 U.S.C. § 2064(d)(3)(B), (C). In spite of Amazon’s unequivocal claim that no statutory authority exists, Section 15(d)(3) clearly contemplates that the Commission may amend an approved action plan if it finds that “the

manufacturer, retailer, or distributor is not executing an approved plan effectively.” 15 U.S.C. § 2064(d)(3)(B). The Commission is further entitled to revoke its prior approval of an action plan where a firm “has failed to comply substantially with its obligations.” *Id.* § 2064(d)(3)(C). Additionally, under Section 27(j)(6), the Commission is required to include “progress reports and incident updates with respect to action plans implemented under section 2064(d)” in its annual report to the President and Congress. 15 U.S.C. § 2076(j)(6). It is difficult to understand how the Commission could effectuate any of these provisions without the authority to require firms to report on the progress of the corrective actions taken.

Contrary to Amazon’s view that monthly progress reports are unnecessary, CPSC needs these reports to determine if a firm is complying with its obligations under a Section 15 order and if the approved corrective actions are effective. For this reason, monthly progress reports are a common feature in both voluntary and mandatory recalls. *See, e.g., Zen Magnets* Final Decision and Order, 2017 WL 11672449, at *47 (ordering that “Respondent shall file with Complaint Counsel monthly progress reports in a format specified by Complaint Counsel, documenting the progress of the recall”); *Zen Magnets* Opinion and Order, 2017 WL 11672451, at *14 (ordering the Respondent to ensure proper quarantine of the products, to notify CPSC of Respondent’s plans to destroy the products so that CPSC staff could approve and witness the destruction, and to “ensure complete destruction of units of the Subject Products” because these steps “are necessary to address the hazard posed by the Subject Products by preventing their redistribution”). In this case, while Amazon asserts that it has provided emails and refunds to original purchasers of the Subject Products, the Commission currently has no visibility into whether original purchasers in fact received those emails or gift cards, or whether the Subject Products were subsequently returned, resold, disposed of, or continue to be used. The

Commission needs this information to carry out its statutory aims to protect the public from the unreasonable risk of injury and death presented by the Subject Products.

G. Amazon’s Constitutional and Administrative Procedure Act Arguments Fail.

Throughout Amazon’s Motion, Amazon attempts to weave in an argument that the Commission is acting in a fashion that is “arbitrary and capricious,” a standard employed by courts when reviewing final agency action under the Administrative Procedure Act (“APA”). Amazon also posits that this case should be terminated and vacated because it allegedly violates the Constitutional Separation of Powers. Amazon’s APA argument is premature and ignores the January 19, 2022 order in this case that ruled in that manner. Similarly, Amazon’s constitutional arguments also fail procedurally, as well as ignore the Rule of Necessity and the longstanding doctrine that administrative agencies cannot hold statutes unconstitutional.

1. Contrary to Amazon’s Arguments, There is No Final Order Subject to Judicial Review Under the APA, and the Record in this Matter Thoroughly Supports the Requested Remedies.

In the January 19, 2022 order, the Presiding Officer indicated that “Amazon’s Administrative Procedure Act [...] arguments are premature.” *See* Order on Motion to Dismiss and Motion for Summary Judgment, Dkt No. 27, at 14. Pursuant to 15 U.S.C. § 2064(f), prior to issuance of an order under Section 15(c) or Section 15(d), an administrative hearing must first be held in accordance with 5 U.S.C. §§ 554 and 556, leading to an initial decision by the Administrative Law Judge under 5 U.S.C. § 557. As such, the Administrative Procedure Act requires that the agency follow the procedures laid out in 5 U.S.C. §§ 554-557 when engaging in a formal hearing.

Amazon, however, points to the statutory provision for and cases involving judicial review of a final agency decision, and also argues, throughout its Motion, that various remedies

sought by Complaint Counsel in this matter violate the APA. *See* Amazon Mot. at 10-11. But the APA does not permit judicial review of interlocutory, non-final agency orders, such as the mere filing of a complaint or pleading. Indeed, as the Supreme Court explained in *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 241-43, (1980), “the issuance of the complaint . . . has no legal force,” and a premature challenge to an agency’s enforcement action risks “piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary.” *See* Complaint Counsel’s Opposition to Amazon.com Inc.’s Motion to Compel, Dkt. No. 48, at 28 (explaining how judicial review of non-final agency action would delay a decision on the ultimate question, whether there exists a statutory violation).

Under 5 U.S.C. § 557(c)(3), the record shall show “the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and (B) the appropriate rule, order, sanction, relief, or denial thereof.” As such, Amazon’s argument that certain proposed remedies – which have been *requested* but not yet *ordered* – violate the APA, is premature and based on a record that is not yet complete.

In any event, even if Amazon were to raise a later APA challenge at an appropriate time in the future, Amazon could not prevail with any argument against the remedies sought by Complaint Counsel in this action. The remedies sought by Complaint Counsel fall squarely within the four corners of the CPSA and reflect the long-standing goals of the agency in executing recalls, including informing consumers about hazardous products and removing such products from the stream of commerce, as shown in agency documents, such as the Recall

Handbook, the CAP Template, and the records produced in this matter relating to 77 voluntary recalls of hair dryers, carbon monoxide detectors, and children's sleepwear since 2015. *See* Complaint Counsel's Memorandum of Points and Authorities in Support of Motion for Summary Decision at 27, 39, 46.

2. The "Rule of Necessity" Requires Denial of Amazon's Request to Vacate These Proceedings.

Amazon ends its Motion with a request to terminate and vacate these proceedings, but the common law "rule of necessity" prohibits a wholesale disqualification that conflicts with a statutory duty and congressional mandate. *See United States v. Will*, 449 U.S. 200, 211–17 (1980) (holding that even though a judge has an interest in the case, they have a duty to hear and decide the case if it cannot otherwise be heard). In short, Amazon cannot seek to disqualify all ALJs and the Commission, because an ALJ must issue an Initial Decision in this case, and the Commission must hear any appeal from the Initial Decision and issue the Final Order in this case. Here, 16 C.F.R. § 1025.51 requires the Presiding Officer to file an Initial Decision with the Commission within sixty (60) days after the closing of the record or the filing of post-hearing briefs, whichever occurs later, and 16 C.F.R. § 1025.53 requires the Commission to hear appeals from the Initial Decision. Similarly, 15 U.S.C. § 2064(f)(1) requires a hearing before an administrative law judge before the Commission may determine that a product presents a substantial product hazard. *See also Zen Magnets, LLC*, CPSC Docket No. 12-2, Opinion and Order Denying Respondent's Motion to Disqualify the Commission or Some of its Members

(Sept. 1, 2016) at 7–8 (ruling that disqualification of Commission to impair its ability to rule is not permissible).³³

3. In Any Event, This is Not the Proper Forum for Amazon’s Request to Vacate These Proceedings.

Similarly, agencies do not possess the jurisdiction to determine the constitutionality of statutes. *See, e.g., Elgin v. Dep’t of Treasury*, 132 S.Ct. 2126, 2136 (2012) (citing *Malone v. Department of Justice*, 13 MSPB 81, 83, 14 M.S.P.R. 403 (1983)); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994)(collecting cases). In *Thunder Basin Coal Co. v. Reich*, the court held that while adjudication of the constitutionality of a statute was generally thought to be beyond the jurisdiction of administrative agencies, an exception could be carved out where the reviewing body was not the agency, in that case the Department of Labor itself, but an independent commission established exclusively to adjudicate Mine Act disputes. 510 U.S. at 201. That scenario is not applicable here, where Amazon is challenging the constitutionality of the CPSA, before the CPSC. Therefore, this court cannot rule on Amazon’s constitutional challenges to the structure of the CPSC or the constitutionality of administrative law judges.

Additionally, the Commission’s Adjudicative Rules of Practice are modeled on the APA, which provides for a mechanism to file a motion to disqualify an officer presiding over an administrative hearing at 5 U.S.C. § 556(b). The Commission’s Adjudicative Rules of Practice provide for that process at 16 C.F.R. § 1025.42(e). Such a motion would be a predicate to any challenge to the appointment of the Presiding Officer. *See* 5 U.S.C. § 556(b). Here, Amazon seeks to bypass that procedure, and to terminate and vacate the proceedings as a whole, both

³³ The Commission’s decision denying the motion to disqualify was affirmed by the United States Court of Appeals for the Tenth Circuit in *Zen Magnets LLC v. Consumer Product Safety Commission*, 968 F.3d 1156 (10th Cir. 2020).

based on its claim that the Presiding Officer is unconstitutional and that the Commission structure as a whole is unconstitutional. In sum, Amazon's motion is procedurally defective, as the relief it requests is not permitted under the APA or the CPSC Adjudicative Rules of Practice, and it ignores the fact that agencies are not empowered to determine the constitutionality of statutes.

V. CONCLUSION

For the reasons stated above, Amazon's Motion for Summary Decision should be denied.

Respectfully submitted,

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October 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2022, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

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