

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)
)

AMAZON.COM, INC.)
)

) CPSC DOCKET NO.: 21-2
)

) Respondent.)
_____)

COMPLAINT COUNSEL’S RESPONSE TO RESPONDENT AMAZON.COM, INC.’S
STATEMENT OF UNDISPUTED MATERIAL FACTS

Complaint Counsel hereby responds to Respondent Amazon.com, Inc.’s (“Amazon’s”) Statement of Undisputed Material Facts. Complaint Counsel contends that there “is no genuine issue as to any material fact,” 16 C.F.R. § 1025.25(c), showing that Amazon is a “distributor” of the Subject Products under the Consumer Product Safety Act, but Complaint Counsel does take issue with several of Amazon’s characterizations and lacks information to confirm or deny certain statements.

I. AMAZON’S “FULFILLMENT BY AMAZON” PROGRAM

1. As used in this statement of undisputed material facts, “Third-Party Products” refers to products identified in Paragraphs 21, 30, and 39 of the Complaint, except for approximately 32 units sold through the Amazon Warehouse program (consisting of approximately 28 carbon monoxide (“CO”) detectors and approximately 4 hair dryers). Declaration of Lauren Shrem (“Shrem Decl.”) ¶ 6; Answer ¶¶ 36, 45.

RESPONSE: Undisputed as to Amazon’s choice to refer to the Subject Products as “Third-Party Products.” However, Complaint Counsel objects to Amazon’s characterization of the Subject Products as “Third-Party Products.” As Complaint Counsel set forth in its Statement of Undisputed Material Facts (Doc No. 10) and

Amazon admitted, all of the Subject Products were sold on Amazon.com and fulfilled by Amazon through its FBA program. *See* Complaint Counsel Statement of Undisputed Material Facts, ¶¶ 34-42.

2. As used in this statement of undisputed material facts, “Third-Party Sellers” refers to the sellers of the Third-Party Products. Shrem Decl. ¶ 7.

RESPONSE: Undisputed as to Amazon’s choice to refer to the sellers of the Subject Products as “Third-Party Sellers.”

3. The participation of the Third-Party Sellers in the FBA logistics service is governed by the Business Services Agreement, the Fulfillment By Amazon (“FBA”) Service Terms, and program policies. Respondent Amazon.com, Inc.’s Answer to Complaint (“Answer”) at ¶ 8; Ramirez Decl., ¶ 4, Ex. A.

RESPONSE: Undisputed as to the referenced agreements and policies. However, Complaint Counsel objects to Amazon’s characterization of its services as “logistics service[s].”

4. Under the Amazon FBA Service Terms, third-party sellers hold title to their products while the products are in the FBA logistics program. Declaration of Shrem Decl. ¶ 9, Ramirez Decl. ¶ 4, Ex. A (Sections F-3.3, 6.2, and 7.3 of FBA Service Terms).

RESPONSE: Undisputed as to the referenced FBA Service Terms. However, Complaint Counsel objects to Amazon’s characterization of its services as a “logistics program.”

5. Amazon identifies products, including the Third-Party Products, by Amazon Standard Identification Number (“ASIN”). Shrem Decl. ¶ 12.

RESPONSE: Undisputed.

II. THE THIRD-PARTY PRODUCTS

6. A total of approximately 418,818 units of the Third-Party Products were sold by Third-Party Sellers on Amazon.com to approximately 376,009 Amazon.com purchaser accounts. Shrem Decl. ¶ 8.

RESPONSE: Undisputed, though the CPSC is without sufficient information to confirm or deny the truth of this statement.

7. Amazon did not manufacture, sell, or hold title to the Third-Party Products. The Third-Party Sellers retained title to the Third-Party Products, subject to Sections F-3.3, 6.2, and 7.3 of the FBA Service Terms. Shrem Decl. ¶ 9; Complaint ¶ 14; Answer ¶¶ 3, 14, 36.

RESPONSE: Undisputed that the FBA Service Terms drafted by Amazon and agreed to by the Third-Party Sellers state that Amazon did not manufacture, sell, or hold title to the Subject Products.

8. Amazon informed customers on its website that the Third-Party Products were “sold by” the Third-Party Seller and “shipped by Amazon.” Shrem Decl. ¶ 11; Renee Morelli-Linen Aff. ¶¶ 5, 7, Ex. A.

RESPONSE: Undisputed that, in small print below the “Buy Now” link, Amazon identifies the Third-Party Sellers next to “sold by” and indicates that the products are “shipped by Amazon.”

9. The Third-Party Sellers, like other participants in the FBA program, had the right to withdraw their products from the FBA logistics service or request return of the units from Amazon. Ramirez Decl. ¶ 4, Ex. A (Sections F-1 and 7.1 of the FBA Service Terms).

RESPONSE: Undisputed. However, Complaint Counsel objects to Amazon’s characterization of services as “logistics service.”

10. Amazon provided FBA logistics services to the Third-Party Sellers by picking, packing, shipping, and delivering the Third-Party Products to purchasers. Shrem Decl. ¶ 10; Ramirez Decl. ¶ 4, Ex. A (Sections F-4 and F-5 of the FBA Service Terms).

RESPONSE: Undisputed as to the services listed. Complaint Counsel objects to Amazon’s characterization of all such services as “logistics services.”

III. AMAZON’S REMOVAL OF THE THIRD-PARTY PRODUCTS FROM AMAZON.COM

11. Amazon removed the Third-Party Products from Amazon.com after the staff at the U.S. Consumer Product Safety Commission (“CPSC”) contacted Amazon regarding potential product safety or noncompliance issues with the Third-Party Products. Shrem Decl. ¶ 13; Answer ¶¶ 28, 37, 46.

RESPONSE: Undisputed. However, Complaint Counsel objects to Paragraph 11 to the extent it implies that Amazon took action immediately after the CPSC contacted it regarding the Subject Products.

12. Amazon removed from Amazon.com the children’s sleepwear products identified in the Complaint on or about the following dates: January 29, 2020 (Taiycyxgan), February 20, 2020 (IDGIRLS), March 12, 2020 (HOYMN), and March 31, 2020 (Home Swee). Shrem Decl. ¶ 14; Answer ¶ 28.

RESPONSE: Undisputed.

13. Amazon removed from Amazon.com the hair dryers identified in the Complaint on or about March 3, 2021. Shrem Decl. ¶ 15; Answer ¶ 43.

RESPONSE: Undisputed.

14. Amazon removed from Amazon.com CO detectors identified in the Complaint on or about August 13, 2020. Shrem Decl. ¶ 16; Answer ¶ 37.

RESPONSE: Undisputed.

15. None of the Third-Party Products listed in the Complaint are currently listed or available for purchase on Amazon.com. Shrem Decl. ¶ 17.

RESPONSE: Undisputed.

IV. AMAZON’S NOTIFICATIONS TO PURCHASERS, REFUNDS TO PURCHASERS, AND OTHER REMEDIAL ACTIONS WITH RESPECT TO THE THIRD-PARTY PRODUCTS

16. The Third-Party Products in Amazon fulfillment centers have been quarantined, Ramirez Decl., ¶ 4, Ex. E, and have either been destroyed or set aside for future destruction. Shrem Decl. ¶ 18.

RESPONSE: Undisputed, though the CPSC is without sufficient information to confirm or deny this statement.

17. After the CPSC approached Amazon about the Third-Party Products, Amazon informed the Third-Party Sellers of the CPSC outreach. Shrem Decl. ¶ 19.

RESPONSE: Undisputed, though the CPSC is without sufficient information to confirm or deny this statement.

18. After the CPSC approached Amazon about the Third-Party Products, Amazon applied a refund of the purchase price of the Third-Party Products to the accounts of purchasers. Shrem Decl. ¶ 20.

RESPONSE: Undisputed, though the CPSC is without sufficient information to confirm or deny this statement.

19. Amazon retains email address information for purchasers of Third-Party Products on Amazon.com. After the CPSC approached Amazon about the Third-Party Products, Amazon sent a direct consumer safety notification, via email, to all purchasers of the Third-Party Products on Amazon.com. Shrem Decl. ¶ 21.

RESPONSE: Undisputed.

20. Amazon sent these direct consumer safety notifications to purchasers on or about on or about January 21, 2021 (for the children’s sleepwear products) and June 11, 2021 (for the hair dryers and the CO detectors). Shrem Decl. ¶ 22; Ramirez Decl. ¶¶ 5-7, Ex. B-D.

RESPONSE: Undisputed.

21. The January 21, 2021 direct consumer safety notifications instructed purchasers: “If you still have this product, we urge you to stop using it immediately and dispose of it. If you purchased this product for someone else, please notify the recipient immediately and let them know they should dispose of it.” The June 11, 2021 direct consumer safety notifications instructed purchasers: “If you still have this product, we urge you to stop using it immediately and dispose of the item. If you purchased this item for someone else, please notify the recipient immediately and let them know they should dispose of the item.” Shrem Decl. ¶ 23; Ramirez Decl. ¶¶ 5-7, Ex. B-D.

RESPONSE: Undisputed.

22. The direct consumer safety notifications identified the specific potential risk, stating:

- a. For email notifications to purchasers of the CO detectors: “may fail to alarm on time, posing a risk of exposure to potentially dangerous levels of Carbon Monoxide.” Shrem Decl. ¶ 24(a); Ramirez Decl. ¶ 7, Ex. D.
- b. For email notifications to purchasers of the hair dryers: “may fail to have mandatory immersion protection, posing a risk of electric shock if the hair dryer comes into contact with water.” Shrem Decl. ¶ 24(b); Ramirez Decl. ¶ 6, Ex. C.
- c. For email notifications to purchasers of the children’s sleepwear: “failed to meet the federal safety standard for the flammability of children’s sleepwear, posing a risk of burn injuries to children.” Shrem Decl. ¶ 24(c); Ramirez Decl. ¶ 5, Ex. B.

RESPONSE: Undisputed that Amazon’s direct consumer notifications regarding the Subject Products included the statements contained in Paragraph 22 sub-parts a. through c. However, Complaint Counsel disputes that these notifications sufficiently identify all specific risks posed by the Subject Products that the CPSC would have insisted upon had Amazon worked in conjunction with the CPSC in crafting these messages.

23. The direct consumer safety notifications informed purchasers of the Third-Party Products that Amazon had applied a refund of the purchase price to their account. Shrem Decl. ¶ 25; Ramirez Decl. ¶¶ 5-7, Ex. B-D.

RESPONSE: Undisputed.

V. CPSC’S PAST PRACTICES AND ACTIONS

24. The CPSC has issued no advance notice of proposed rulemaking, notice of proposed rulemaking, proposed final rule, interim final rule, or final rule regarding the scope, meaning, or interpretation of “third-party logistics provider” as that phrase is defined at 15 U.S.C. § 2052(a)(16).

RESPONSE: Undisputed. Complaint Counsel objects to any assertion by Amazon that proposed rulemaking or any other action interpreting “third-party logistics provider” is or was required.

25. The CPSC Office of General Counsel has issued no advisory opinion regarding the scope, meaning, or interpretation of “third-party logistics provider” as that phrase is defined at 15 U.S.C. § 2052(a)(16).

RESPONSE: Undisputed. Complaint Counsel objects to any assertion by Amazon that an advisory opinion interpreting “third-party logistics provider” is or was required.

26. The CPSC has issued no interpretive guidance document regarding the scope, meaning, or interpretation of “third-party logistics provider” as that phrase is defined at 15 U.S.C. § 2052(a)(16).

RESPONSE: Undisputed. Complaint Counsel objects to any assertion by Amazon that interpretive guidance relating to the definition of “third-party logistics provider” is or was required.

27. The CPSC has issued no notice of proposed rulemaking, notice of proposed rulemaking, proposed final rule, interim final rule, or final rule regarding the scope, meaning, or interpretation of the CPSA’s provision that a third-party logistics provider “shall not, for purposes of [the CPSA], be deemed to be a manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business.” 15 U.S.C. § 2052(b).

RESPONSE: Undisputed. Complaint Counsel objects to any assertion by Amazon that proposed rulemaking or any other action interpreting the cited portion of the CPSA is or was required.

28. The CPSC Office of General Counsel has issued no advisory opinion regarding the scope, meaning, or interpretation of the CPSA’s provision that a third-party logistics provider “shall not, for purposes of [the CPSA], be deemed to be a manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business.” 15 U.S.C. § 2052(b).

RESPONSE: Undisputed. Complaint Counsel objects to any assertion by Amazon that an advisory opinion regarding the cited portion of the CPSA is or was required.

29. The CPSC has issued no interpretive guidance document regarding the scope, meaning, or interpretation of the CPSA’s provision that a third-party logistics provider “shall not, for purposes of [the CPSA], be deemed to be a manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business.” 15 U.S.C. § 2052(b).

RESPONSE: Undisputed. Complaint Counsel objects to any assertion by Amazon that interpretive guidance regarding the cited portion of the CPSA is or was required.

Dated this 22nd day of November, 2021,

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

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