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.COM, INC.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, CROSS-MOTION FOR SUMMARY DECISION AND REPLY IN SUPPORT OF COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

Complaint Counsel, in accordance with the briefing schedule agreed upon by counsel and memorialized in Judge Grimes' October 19, 2021 (Doc. No. 13) Order Following Prehearing Conference (October 19, 2021), submits this Opposition to Respondent Amazon.com, Inc.'s Motion to Dismiss or, in the Alternative, Cross-Motion for Summary Decision, and this Reply in Support of Complaint Counsel's Motion for Partial Summary Decision, which have been consolidated into a single brief.

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I. INTRODUCTION

In its Motion and Responsive Brief, Respondent Amazon.com, Inc. ("Amazon") advances three arguments, none of which provides a legal basis for Amazon to avoid its responsibilities under the Consumer Product Safety Act ("CPSA") as a distributor of consumer goods through its "Fulfillment by Amazon" ("FBA") program.

First, Amazon claims that it is not a distributor under the CPSA because it does not take title to FBA products. Instead, Amazon argues that it is a "third-party logistics provider." But the CPSA does not require a distributor to take title, and Amazon does not fit within the narrow statutory definition of "third-party logistics provider" because its extensive FBA activities take it far outside the bounds set by this limited definition. Second, Amazon mischaracterizes this adjudicative action as rulemaking under the Administrative Procedure Act ("APA"). Rather, this case seeks mandatory remedial action from a distributor of hazardous consumer products through a properly-instituted adjudicatory proceeding involving three categories of consumer products. It does not constitute improper rulemaking of any kind. Third, Amazon wrongly contends its voluntary actions with respect to the consumer products identified in the Complaint moot the case. The CPSC is empowered by the CPSA to seek a mandatory order to oversee Respondent's remedial actions and, if necessary, enforce Amazon's compliance with such order. Amazon cannot avoid a mandatory remedial order through voluntary cessation and limited actions concerning the FBA products at issue. Indeed, absent a remedial order, Amazon would be free to evade its legal responsibilities in connection with hazardous products distributed through its FBA program in the future.

II. LEGAL AND PROCEDURAL STANDARD

Amazon's Motion fails to identify which of its arguments fall under which provision of Federal Rule of Civil Procedure 12(b). Where Amazon's arguments do not rely on additional

facts beyond those contained in the pleadings, the court, in evaluating Amazon's motion to dismiss, must "take all of the material allegations in the complaint as true and construe them in the light most favorable to the nonmoving party." *Scheuer v. Rhodes*, 416 U.S. 232, 235–37, 94 S.Ct. 1683, 1686–87, 40 L.Ed.2d 90 (1974); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1208 (9th Cir. 2020) (discussing the standard of review for a motion to dismiss for failure to state a legal claim pursuant to Federal Rule of Civil Procedure 12(b)(6)). To the extent the court views any of Amazon's proffered facts in its Statement of Undisputed Material Facts as necessary to resolve Amazon's motion to dismiss, the court may weigh the evidence presented and satisfy itself as to its assertion of jurisdiction. *United States v. Richie*, 15 F.3d 592, 598 (6th Cir.1994) cert. denied. 513 U.S. 868, 115 S.Ct. 188, 130 L.Ed.2d 121 (1994).[1]

Amazon also asks this court to construe its Motion as one for summary decision "in the alternative," i.e., if the court denies it as a motion to dismiss. In the event this court decides to view and decide Amazon's Motion under the summary decision standard set forth at 16 C.F.R. § 1025.25(a), the same legal standard for summary decision articulated in Complaint Counsel's Motion for Partial Summary Decision will apply. *See* Compl. Counsel Mem. of Points and Authorities in Support of Motion for Partial Summary Decision, at 3-5.

[1] Amazon also references Fed. R. Civ. Pro. 12(b)(2), which sets the standard for dismissing a proceeding for lack of personal jurisdiction. When a court rules on a challenge to personal jurisdiction without conducting an evidentiary hearing on the issue, as here, the complainant may present a *prima facie* case that the court has jurisdiction over the respondent, and is entitled to have its allegations taken as true and all factual disputes drawn in its favor. *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir. 2004). Personal jurisdiction exists where a party has had sufficient minimum contacts with a jurisdiction. Amazon has not advanced a cogent argument that it lacks sufficient contacts for the court to exercise jurisdiction. Moreover, Complaint Counsel has demonstrated in the pleadings and in its Statement of Undisputed Material Facts accompanying its Motion for Partial Summary Decision that Amazon's actions subject it to the jurisdiction of this court.

Regardless of the legal standard applied to Amazon's Motion, it should be denied. Amazon cannot prevail on the law, and there is no genuine dispute as to the material facts showing that Respondent Amazon is a "distributor" of the Subject Products under the CPSA. Accordingly, this court should grant Complaint Counsel's Motion for Partial Summary Decision.

III. THE UNDISPUTED FACTUAL RECORD

Amazon's response to Complaint Counsel's Statement of Undisputed Material Facts ("SUMF") confirms the following undisputed material facts. Amazon:

- operates Amazon.com, an online storefront (SUMF ¶ 1),
- possesses the contractual authority to sell returned FBA products and did so for 28 of the carbon monoxide detectors and 4 of the hair dryers identified in the Complaint (SUMF ¶¶ 3-4, 17),
- receives, stores, tracks, moves, ships, and delivers or arranges for delivery of FBA products to consumers (SUMF ¶¶ 7-8),
- processes consumer returns of FBA products (SUMF ¶ 8),
- provides 24/7 customer support as part of the FBA program (SUMF ¶ 14),
- controls how third-party sellers communicate with consumers (SUMF ¶ 15),[2]
- processes consumer payments and remits agreed-upon monies to third-party sellers minus FBA program fees (SUMF ¶ 20),
- controls the prices charged by third-party sellers using the FBA program (SUMF ¶ 21), and
- possesses the authority to compel third-party sellers to notify Amazon of any safety alerts, recalls, or potential recalls of FBA products (SUMF ¶ 22).

In addition, Amazon admits the following with respect to the Subject Products:

- The Subject Products are consumer products (SUMF ¶¶ 34, 37, 40), and

[2] As previously stated in Complaint Counsel's Motion, Complaint Counsel uses the term "third-party sellers" because this is the term Amazon uses in its Answer to describe the merchants that list products on Amazon.com.

- The Subject Products were sold on Amazon.com and fulfilled through Amazon's FBA program (SUMF ¶¶ 35, 36, 38, 39, 41, 42).

These undisputed facts support a finding that, as a matter of plain language statutory interpretation, Amazon is a "distributor" of the Subject Products through its FBA program. The additional facts Amazon sets forth in its own Statement of Undisputed Material Facts do not compel a contrary conclusion.

IV. AMAZON'S ARGUMENT THAT IT IS A THIRD-PARTY LOGISTICS PROVIDER AND NOT A DISTRIBUTOR OF FBA PRODUCTS FAILS UNDER THE PLAIN LANGUAGE OF THE CPSA

Amazon's contention that it is a third-party logistics provider and not a distributor boils down to two arguments: (1) it does not take title to the FBA products, and (2) the word "solely" should not be afforded its plain meaning. Neither argument reflects a fair reading of the statute or applicable case law.

A. Distributors Do Not Need to Take Title Under the CPSA

Amazon argues that because it does not take title to FBA consumer products it cannot be a "distributor." *See* Amazon Mem. at 10. The plain language of the statute, however, refutes Amazon's argument. The plain language of the CPSA broadly defines a "distributor" as a "person to whom a consumer product ***is delivered*** or sold for purposes of distribution in commerce, except that such term does not include a manufacturer or retailer of such product." 15 U.S.C. § 2052(a)(7) (emphasis added). As commonly understood, to "deliver" something is "to take (something) to a person or place." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/deliver (last visited Nov. 12, 2021). The CPSA does not require a transfer of title for an entity to be classified as a distributor. *See* 15 U.S.C. § 2052(a)(7).

Because the court must "assum[e] that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose," *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010), delivery to a distributor is sufficient, and transfer of title is not required. *See also Dodd v. United States,* 545 U.S. 353, 357 (2005) (citation omitted) (explaining that the court must "presume that [the] legislature says in a statute what it means and means in a statute what it says there"). Amazon essentially asks this court to delete the word "delivered" from the definition, but "such a deletion would directly contradict a canon that counsels [the court] to give effect to 'every clause and word'" of a statute. *Pub. Citizen, Inc. v. Rubber Manufacturers Ass'n*, 533 F.3d 810, 817 (D.C. Cir. 2008). The court "must enforce [the] plain and unambiguous statutory language according to its terms." *Hardt*, 560 U.S. at 251.

In arguing that transfer of title is necessary to be a distributor, Amazon misinterprets two Advisory Opinions issued by the CPSC Office of the General Counsel. One opinion addresses a bicycle regulation, and it explains that "manufacture" of a bicycle means "the completion of those construction or assembly operations that are performed by the manufacturer before the bicycle is shipped from the manufacturer's place of production for sale to distributors, retailers, or consumers." Letter from Michael A. Brown, General Counsel, CPSC, to Henry Ota, Mori and Katayama, at 1 (Apr. 9, 1976) (Advisory Op. 238). Contrary to Amazon's argument, this opinion does not hold that "transfer of title is a key characteristic of distribution." Amazon Mem. at 11. The opinion does not interpret the term "distributor" and says nothing about the necessary characteristics of distribution. Instead, the letter merely mentions, in reference to the term "manufacture," the non-controversial proposition that products can be sold to "distributors, retailers, or consumers."

Similarly, the second opinion fails to support the assertion that transfer of title is necessary for a distributor. Instead, while opining on the General Conformity Certification requirements under Section 14(a) of the CPSA, 15 U.S.C. § 2063(a), the letter addresses two hypothetical situations involving architectural glazing materials, as the hypotheticals were posed by the incoming inquiry. *See* Letter from Theodore J. Garrish, General Counsel, CPSC, to Kim Mann, Turney & Turney (Nov. 4, 1977) (Advisory Op. 255). The advisory opinion took no position on whether a transfer of title was a requirement of distribution. In fact, in reciting the law, the opinion states that CPSA Section 14 requires a certificate of compliance to "accompany the product or otherwise be furnished to any distributor or retailer to whom the product ***is delivered***." *Id.* at 1 (emphasis added). This is in accord with the CPSA's statutory language, which expressly states that consumer products may be "delivered or sold" to a distributor. *See* 15 U.S.C. § 2052(a)(7). Because the Subject Products were "delivered" to Amazon, it is irrelevant whether or not the Subject Products were "sold" to Amazon.

Amazon makes a general complaint that remedial statutes should not be interpreted beyond the statute's text and structure.[3] However, Complaint Counsel merely asks the court to interpret the CPSA's plain statutory text and recognize, like other courts, that the statutory terms are broad and expansive. *See Consumer Prod. Safety Comm'n v. Chance Mfg. Co.*, 441 F. Supp. 228 (D.D.C. 1977); *Consumer Prod. Safety Comm'n v. Anaconda Co.*, 593 F.2d 1314 (D.C. Cir.

[3] Amazon's case citations are readily distinguishable from the matter at hand. In *CTS Corp v. Waldburger*, 573 U.S. 1 (2014), the court was being asked to interpret the Comprehensive Environmental Response, Compensation, and Liability Act of 1980's (CERCLA's) preemption of statutes of limitations to also include statutes of repose, which are not mentioned in CERCLA's statute at all. Similarly, in *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184 (11th Cir. 2019), the court declined to extend the Equal Credit Opportunity Act's definition of "applicant" to include guarantors, where congressional language and dictionary meaning of "apply" and "applicant" indicated that the ordinary meaning of the term applied, and the Act unambiguously excluded guarantors.

1979); *United States v. One Hazardous Product Consisting of a Refuse Bin*, 487 F. Supp. 581, 586-88 (D.N.J. 1980) (recognizing that "distribution" under the CPSA encompasses a wide variety of transactions, including even rental or lease transactions). A straightforward read of the statutory text and an appreciation for the wide variety of transactions that fall under the umbrella of "distribution" support the argument that Amazon is a "distributor" of FBA products. This plain language-based conclusion is only further buttressed by the CPSA's "expansive interpretation[s] of the concepts of 'commerce' [and] 'distribution in commerce,'" *One Hazardous Product Consisting of a Refuse Bin*, 487 F. Supp. at 588.

Finally, Amazon's admissions to Complaint Counsel's Statement of Undisputed Material Facts buttress this conclusion. Are consumer products delivered to Amazon? Yes, they are. The Subject Products are consumer products that were delivered to Amazon through its FBA program. SUMF ¶¶ 4, 34, 37, 40. Were the consumer products delivered to Amazon for distribution in commerce? Yes, they were. Among other actions, Amazon held and stored the Subject Products in its warehouses before distributing the Subject Products to consumers, SUMF ¶¶ 2, 4, 8, 10, 35, 38, 41, which means Amazon held the products for distribution as plainly stated in the statutory language of the CPSA. *See* 15 U.S.C. § 2052(a)(8) (defining "distribution in commerce" to include, among other things, "holding" for distribution). These undisputed actions, along with Amazon's complete control over the management of the sales venue (SUMF ¶¶ 1-2), payment processing (SUMF ¶¶ 20, 27), providing 24/7 customer service (SUMF ¶¶ 14-

15, 30-32), imposing pricing restrictions (SUMF ¶ 21), and processing customer returns (SUMF ¶¶ 16, 32), place Amazon squarely within the definition of "distributor."[4]

B. Amazon Is Not a Third-Party Logistics Provider

Amazon next contends that it is a "third-party logistics provider" under the CPSA. *See* Amazon Mem. at 15. Amazon asserts that "Congress added the 'third-party logistics provider' exception to the statute in 2008, at a time when the e-commerce market and third-party logistics services were experiencing substantial growth," Amazon Mem. at 9, so Amazon contends that Congress must have intended to identify Amazon as a "third-party logistics provider" and to include it in the "third-party logistics provider exception." Amazon Mem. at 17. But that is not what the statute says, and Amazon fails to provide any legislative history to counter the statute's plain meaning.

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[4] Additionally, Amazon acts as a consignee for foreign FBA products and therefore plays a role in bringing and distributing foreign products into the U.S. market. *See* Amazon.com's Seller Central web portal (https://sellercentral.amazon.com/gp/help/external/200280280) at "Ultimate consignee" (Amazon "may be listed as ultimate consignee on your customs entry documentation — but only if in care of FBA is listed before the name of the Amazon entity. […] Your shipment should be physically delivered to the Amazon fulfillment center identified on the bill of lading."); *see also* U.S. Customs and Border Protection Directive 3550-079A, "Ultimate Consignee at Time of Entry Release" at 6.3 ("If at the time of entry or release the imported merchandise has not been sold, then the Ultimate Consignee at the time of entry or release is defined as the party in the United States to whom the overseas shipper consigned the imported merchandise."). Amazon's instrumental role in bringing foreign products into the U.S. market and in setting pricing policies that govern the sale of FBA products further supports the conclusion that Amazon is a distributor. *See* 15 U.S.C. § 2052(a)(8) (defining "distribution in commerce" to include "to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce"); *cf. United States v. Dotterweich*, 320 U.S. 277, 284 (1943) (explaining that a Federal Food, Drug, and Cosmetic Act offense is committed "by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs").

The "inquiry into the Congress's intent proceeds, as it must, from 'the fundamental canon that statutory interpretation begins with the language of the statute itself.'" *Goldring v. Dist. of Columbia*, 416 F.3d 70, 77 (D.C. Cir. 2005) (citation omitted). Accordingly, "job one is to read the statute, read the statute, read the statute." *Id.* (citation omitted). "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Dodd*, 545 U.S. at 359. Here, the plain language of the statute sets out a broad definition of distributor (where Amazon fits) and a narrow definition for third-party logistics provider (where Amazon does not).

Although Amazon advances that it qualifies as a "third-party logistics provider" based on messaging to trade journals and other outlets, those sources have no bearing on this matter. *See* Amazon Mem. at 16-17. None of these materials analyze the statute at issue, and trade journals do not equate to legislative history.[5]

[5] Amazon overstates how many of the articles describe its activities, as some do not address the FBA program and others merely muse about Amazon's general role in the marketplace. For example, in the 2014 survey of twenty-five CEOs, only six of the twenty-five CEOs identified Amazon as a third-party logistics provider—none with reference to the CPSA. *See* Robert C. Lieb & Kristin J. Lieb, *Is Amazon a 3PL?*, CSCMP'S SUPPLY CHAIN Q., Oct. 27, 2014, at 5-6. The bulk of the CEOs described Amazon as doing more, calling it a "fourth-party logistics company" and an "industry disruptor." *Id.* at 6. Further, most of the articles Amazon lists simply parrot Amazon employees or nomenclature when describing the FBA program as providing "logistics" services. *See, e.g.*, Isaac Rounseville, Comment, *Drawing a Line: Legislative Proposals to Clarify the CDA, Reinforce Consumer Rights, and Establish a Uniform Policy for Online Marketplaces*, 60 JURIMETRICS J. 463, 479 (2020); Louise Matsakis, Amazon Warehouses Will Now Accept Essential Supplies Only, WIRED (Mar. 13, 2020); John Herrman, *Amazon's Big Breakdown*, N.Y. TIMES MAG. (May 27, 2020). Others do not even mention Amazon's FBA program. *See, e.g.*, Emily Hessenthaler, Note, *Promoting Expedited Progress: The Case for Federal Sexual Assault Kit Software*, 98 U. DET. MERCY L. REV. 261, 262 (2021); Laura Stevens, *Amazon Expands into Ocean Freight*, WALL ST. J. (Jan. 25, 2017). Similarly, the Postal Service document merely discusses Amazon's entry into the "logistics market," citing information provided by Amazon without reference to the FBA program. *See* Rpt. No. RARC-WP-16-015, The Evolving Logistics Landscape and the U.S. Postal Service,

Put simply, Amazon cannot squeeze its outsized portfolio of activities into the CPSA's narrow statutory definition for a "third-party logistics provider." That is because under the CPSA, a "third-party logistics provider" is "a person who ***solely*** receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product." 15 U.S.C. § 2052(a)(16) (emphasis added). The key word in the statute is "solely," and the meaning of this word is clear-cut. "Solely" means "to the exclusion of all else" and "without another." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/solely (last visited Nov. 9, 2021) (noting that synonyms include "alone, exclusively, just, only"). As Amazon admits, it does not exclusively "receive, hold, or otherwise transport" consumer products. It does far more; thus, it is not a "third-party logistics provider" under the CPSA.

The Supreme Court's interpretation of "solely" in *Helvering v. Southwest Consol. Corp.*, 315 U.S. 194 (1942), reinforces this conclusion. In *Helvering*, the Supreme Court considered dueling interpretations of what qualified as a "reorganization" under the Revenue Act of 1934. Under the terms of the statute, to qualify as a "reorganization," an acquisition by a corporation had to be "in exchange solely for all or a part of its voting stock." *Id.* at 196. While interpreting the statute, the Supreme Court explained, "'Solely' leaves no leeway. Voting stock plus some other consideration does not meet the statutory requirement." *Id.* at 198. Similarly, the CSPA's statutory language leaves no leeway. A third-party logistics provider "solely receives, holds, or otherwise transports a consumer product." 15 U.S.C. § 2052(a)(16).

Office of the Inspector Gen., U.S. Postal Srv. (Aug. 15, 2016). In short, none of these journals or articles aids the court's analysis of the statutory language of the CPSA or its legislative history.

Because Amazon admittedly acts well beyond the scope of that definition—by, among other things, orchestrating and maintaining its mammoth online marketplace, empowering third-party firms to list products on its website, providing templates for product listings, holding the power to reject listings for products it deems illegal or obscene, imposing a Fair Pricing Policy for sales, providing 24/7 customer service for all consumers, processing product returns, processing consumer payments, and remitting the agreed-upon monies to the third-party seller, *see* SUMF ¶¶ 1, 2, 5, 14, 16, 20-23—Amazon does not meet the narrow statutory definition of a "third-party logistics provider" and cannot fit under what Amazon calls the "third-party logistics provider exception" in 15 U.S.C. § 2052(b).[6]

Amazon, without citing any legislative history, erroneously asserts that this straightforward interpretation is illogical and at odds with Congressional intent. Not so. The 2008 amendments to the CPSA were passed to expand the agency's authority and to enhance consumer safety, not to create a giant loophole for entities that play a substantial role in the distribution of potentially hazardous products to American consumers. In 2007, CPSC had recalled an exceptionally large number of hazardous toys that had been manufactured in foreign countries, and Congress sought to strengthen CPSC's ability to respond and protect consumers. *See* 154 Cong. Rec. S7867, 7876 (statement of Sen. Pryor) (explaining that in 2007 "there were 45 million toys that were recalled" and "[e]very single toy was made in China that was recalled"); 154 Cong. Rec. H7577, 7585 (statement of Rep. Eshoo) ("It's become glaringly obvious that we can't rely on manufacturers to police themselves, we need to give the chief

[6] Amazon complains that Complaint Counsel's reading of the statutory language would "render the 'third-party logistics provider' exception a nullity." Amazon Mem. at 19. Amazon is incorrect. Amazon's failure to fall within the CPSA's definition of "third-party logistics provider" does not prevent other entities that do meet the definition from falling within its scope.

consumer regulatory agency the authority and the resources necessary to get unsafe products off the shelves and stop them from coming into the country.").

The 2008 Consumer Product Safety Improvement Act ("CPSIA"), which amended the CPSA, was acknowledged as one of "the most significant pieces of pro-consumer legislation in many years." Statement of the Honorable Thomas Hill Moore on the Historic Passage of the Consumer Product Safety Improvement Act of 2008 (July 31, 2008), https://web.archive.org/web/20080917195602/https:/www.cpsc.gov/pr/Moore073108cpsia.pdf. As Senator Levin summarized on the floor of the Senate:

> This bill will: increase overall funding for the CPSC; increase CPSC staffing; prohibit the use of dangerous phthalates in children's toys and child care articles; streamline product safety rulemaking procedures; ban lead beyond a minute amount in products intended for children under the age of 12 and require certification and labeling; increase inspection of imported products so we are not allowing recalled or banned products to cross our borders; increase penalties for violating our product safety laws; strengthen and improve recall procedures and ban the sale of recalled products; require CPSC to provide consumers with a user-friendly database on deaths and serious injuries caused by consumer products; and ban 3-wheel all-terrain vehicles, ATVs, and strengthens regulation of other ATVs, especially those intended for use by youth.

154 Cong. Rec. S7867, 7870 (statement of Sen. Levin). In sum, the legislation "increased funding and expanded authorities for the CPSC to accomplish their mission." 154 Cong. Rec. S7867, 7869 (statement of Sen. Sununu); *see* 154 Cong. Rec. S7867, 7870 (statement of Sen. Levin) (explaining that the legislation will "reassure consumers that there will be more oversight of the marketplace in the future"); *see also* 154 Cong. Rec. E1709-01 (statement of Rep. Holt) (stating that the passage of the CPSIA "would help empower the CPSC to become a more effective force for regulating the consumer marketplace by increasing its budget and regulatory authority"). The legislative history confirms that the 2008 amendments expanded the agency's authority to regulate the marketplace and protect consumers from risks of injury posed by

hazardous consumer products. Amazon's restrictive interpretation is inconsistent with the plain language of the statute and would directly undermine Congress's expansion of CPSC's authority.

Moreover, Amazon is undoubtedly distinct from the types of entities identified in the statutory exception Amazon cites, 15 U.S.C. § 2052(b). Pursuant to 15 U.S.C. § 2052(b), a "common carrier, contract carrier, third-party logistics provider, or freight forwarder" shall not be "deemed to be a manufacturer, distributor, or retailer of a consumer product solely by reason of receiving or transporting a consumer product in the ordinary course of its business ***as such a carrier or forwarder***." *Id.* (emphasis added). While this provision addressed "common carriers, contract carriers, and freight forwarders" in 1972, when Congress modernized the CPSA in 2008, Section 235 of the legislation (titled Technical and Conforming Changes) added the definition for a "third-party logistics provider" and added "third-party logistics provider" to the list of entities identified in 15 U.S.C. § 2052(b). *See* Pub. L. 110-314 (Aug. 14, 2008).

But Amazon does not qualify for the exception set forth in the statute above because the exception is grounded in the identified entities' limited actions in commerce as carriers or forwarders. In contrast, Amazon's role within commerce for FBA products is far more expansive and transactionally comprehensive. Amazon has admitted that it engages in extensive activities for FBA products well-beyond those limited carrier functions, such as orchestrating the mammoth online marketplace where FBA products are sold, imposing a Fair Pricing Policy for sales of FBA products, and holding FBA products listed on Amazon.com until consumers purchase the products. SUMF ¶¶ 1, 2, 5, 14, 16, 20-23. Amazon does far more than simply "receiving or transporting" FBA products as a "carrier or forwarder" under the language of 15 U.S.C. § 2052(b). As a result, this is not a close call. Congress crafted a narrow definition of "third-party logistics provider," and Amazon is not remotely close to fitting within it.

Hindered by the plain language of the statute, Amazon engages in a tortured statutory argument, essentially seeking a rewrite of the CPSA's language as follows:

> The term "third-party logistics provider" means a person who ~~solely~~*, regardless of other activities,* receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product.
>
> A common carrier, contract carrier, third party logistics provider, or freight forwarder shall not, for purposes of this Act, be deemed to be a manufacturer, distributor, or retailer of a consumer product ~~solely~~ by reason of receiving*,* *holding*, or transporting a consumer product *or by providing a myriad of other services related to the sale of the product* ~~in the ordinary course of its business as such a carrier or forwarder~~.
>
> The term "distributor" means a person to whom a consumer product is ~~delivered or~~ sold*, who takes title to the product* for purposes of distribution in commerce, except that such term does not include a manufacturer or retailer of such product.

See Amazon Mem. at 18, 21. But, of course, "[t]he principal problem with [Amazon's] reading is that the italicized words do not appear in the statute," and Amazon cannot delete words that do appear in the statutory text. *Pub. Citizen, Inc.*, 533 F.3d at 816-17 (rejecting the appellant's argument to deviate from the plain language of the statute).

With its attempted statutory rewrite, Amazon seeks to prevent a review of its actions in the FBA program in total. Amazon does not want the Court to comprehensively and logically analyze its control, its power, and its overall role in distributing FBA products to consumers. However, such an analysis is appropriate where those actions place it squarely within the authority of the Commission under the CPSA. Not surprisingly, even where the clear statutory language of the CPSA and the expansive purpose of the Act did not apply, courts examining Amazon's actions as a whole have found it legally accountable for its actions. *See, e.g.*, *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964 (W.D. Wis. 2019) (finding that Amazon was a distributor of a faulty laptop battery sold through the FBA program under Wisconsin products liability law); *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431 (Cal. Ct.

App. 2020) (holding that Amazon met California's definition of distributor for another defective laptop battery sold through Amazon's FBA program); *Loomis v. Amazon.com LLC*, 63 Cal. App. 5th 466, 277 Cal. Rptr. 3d 769 (2021) (finding Amazon liable for a defective hoverboard sold through Amazon's FBA program). In sum, Amazon is a distributor of consumer products in the FBA program and is subject to the jurisdiction of the Commission.

V. NEITHER PRODUCTS LIABILITY CASE LAW NOR PUBLIC POLICY SUPPORTS AMAZON'S ARGUMENT THAT IT IS NOT A DISTRIBUTOR UNDER THE CPSA

Amazon cites a "body of case law holding that Amazon is not a distributor or seller of third-party sellers' FBA products under products liability laws." Amazon Mem. at 12. However, the five cases cited by Amazon are not applicable in the context of the CPSA and its definition of distributor. Three of the cases cited by Amazon involve state products liability laws where a party must take legal title to the product in order to be held liable. *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101 (Tex. 2021); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 140 (4th Cir. 2019); *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393 (S.D.N.Y. 2018). As discussed above, to be a distributor under the CPSA, a party need not obtain legal title to a consumer product, so these cases are of no value in the analysis. *See* 15 U.S.C. § 2052(a)(7). The other two cases relied upon by Amazon involve in-depth analyses of Amazon's specific control over the products themselves, again a component not included in the definition of distributor under the CPSA. *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, 2018 WL 3546197 (D.N.J. July 24, 2018); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.,* 835 F. App'x 213 (9th Cir. 2020). In contrast, the three cases identified by Complaint Counsel involve holistic analyses of Amazon's actions within the FBA program, including its role in distributing products to consumers, without the application of stringent state products liability law criteria tied to ownership or title. *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964 (W.D.

Wis. 2019); *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431 (Cal. Ct. App. 2020); *Loomis v. Amazon.com LLC*, 63 Cal. App. 5th 466, 277 Cal. Rptr. 3d 769 (2021).

Finally, Amazon's attempt to argue that public policy favors its exclusion from responsibility for recalls of FBA products ignores the full gamut of its admitted actions and control within the FBA program. While Complaint Counsel's Motion for Partial Summary Decision should be granted on pure, plain statutory interpretation, public policy favors this routine exercise of CPSC jurisdiction over a distributor.

A. Products Liability Case Law Supports Holding Amazon Responsible as a Distributor of FBA Products Under the CPSA

Amazon's cited cases simply do not compel a finding that its failure to take title exempts it from responsibility under the CPSA. For example, in *Amazon.com, Inc. v. McMillan*, 625 S.W.3d 101 (Tex. 2021), the Texas Supreme Court considered whether Amazon could be held liable under strict products liability law for a television remote control sold through the FBA program. The Court noted that under Texas' common law jurisprudence, a seller in an ordinary sales environment must always relinquish title. *Id.* at 111. As the codified Texas Products Liability Act is more restrictive in its definition of seller than the common law, the Court held that the legislature did not intend for the definition of seller to go beyond ordinary sales and other transactions that would have applied at common law, meaning that even to "distribute or otherwise place" a product in the stream of commerce, a title transfer was required for liability. *Id.* at 109 117. Accordingly, even though the court found that "Amazon controls the process of the transaction and delivery through Amazon's Fulfillment by Amazon program," *id.* at 105, it ruled that Amazon could not be held liable for any products purchased through the FBA program in Texas because the definition of distributor under Texas law coincides with that of a seller, requiring a transfer of title.

Similarly, in *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 140 (4th Cir. 2019), Maryland products liability law had been interpreted by courts to require a transfer of title as a prerequisite for liability. Maryland courts have read the definition of "seller" to be "one that offers for sale," and define sale as "the transfer of ownership of and the title to property from one person to another for a price," as per the Maryland Uniform Commercial Code at § 2-103(1)(d). Taken together, Maryland products liability therefore falls on sellers who transfer title to purchasers for a price. Even the definition of "distributor" under Maryland products liability law requires that distributors also be sellers (imposing a title requirement), as the Fourth Circuit explained in *Erie* when it held that Amazon was not liable for a headlamp sold through Amazon's FBA program. *Erie Ins. Co.*, 925 F.3d at 143. Once again, consistent with its purpose, the CPSA has no requirement that a distributor sell a product or take legal title to it.

Amazon's reliance on *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393 (S.D.N.Y. 2018), likewise misses the mark. There, the court evaluated New York cases and found that the term "distributor" was used most often in the context of an entity selling a product or a product having been purchased by the distributor (therefore transferring title). *Id.* at 398. The court concluded that Amazon was not liable as a distributor under New York law for this reason. However, because New York state courts had not yet addressed whether an online marketplace could be subject to strict products liability, the door was left open for a different interpretation based on New York's intent to extend liability to certain distributors and retailers for products sold in their normal course of business, provided those entities fall within the distribution chain of the product. Importantly, a subsequent state court decision held that title is not dispositive to strict liability. *State Farm Fire & Cas. Co. v. Amazon.com Servs., Inc.*, 70 Misc. 3d 697, 703 (N.Y. Sup. Ct. 2020). In *State Farm Fire & Cas. Co*, a New York state court was asked whether

Amazon could fall under New York's strict products liability law when it sold a thermostat through Amazon's FBA program. In denying Amazon's motion for summary judgment, the court stated that there were genuine issues of material fact as to whether Amazon exercised sufficient control to be considered a retailer or distributor under New York law. *Id.* at 704. The court recognized that e-commerce providers, and specifically Amazon, have revolutionized the way Americans shop, displacing brick and mortar storefronts. Products are stored virtually on a website, as well as physically on an Amazon shelf. The court noted that "[w]hile Amazon has disclaimed title, it certainly maintains possession of the subject product." *Id.* at 704.

The courts in *Eberhart*, *McMillan*, and *Erie* all relied on products liability laws where taking title to the product was generally required. Amazon uses these cases to argue that it does not "sell" products where third-party sellers use FBA services, but such an argument misses the point: a distributor need not "sell" products under the CPSA.

The two cases Amazon cites where an explicit title requirement does not exist are also inapposite because they focus more on ownership, selling, and other factors not present in the CPSA. In *Allstate N.J. Ins. Co. v. Amazon.com, Inc.*, 2018 WL 3546197 (D.N.J. July 24, 2018), the court found that Amazon should not be subject to the New Jersey Products Liability Act for FBA products, as the Act limits liability to manufacturers and "product sellers." *Id.* at *6. New Jersey courts have interpreted the "placing a product in the line of commerce" section of the "product sellers" definition as a test of the control a party may exercise over the product itself. *Id.* at *6. New Jersey law requires courts to ask whether Amazon acted as a "facilitator" or as an "active participant" in the transaction, with a focus on whether the party had physical control of the product or had merely arranged the sale. *Id.* at *7. The court found that even though Amazon was part of the chain of distribution, Amazon did not exercise sufficient control over

FBA products—i.e., control over the characteristics, design, or fitness of the products—to be subject to liability under the New Jersey Products Liability Act. *Id.* at *10, 12.

Here, the CPSA has no test for product control once an entity meets the definition of "distributor." This is, in part, because the goal of the CPSA is not to impose strict liability for products that harm consumers, but rather to regulate the overall safety of consumer products by authorizing broad CPSC authority over responsible parties, including distributors (as well as manufacturers and retailers). Courts have analyzed and recognized Amazon's ability to safeguard consumers from harmful products sold through its website, *see State Farm Fire & Cas. Co. v. Amazon.com, Inc.,* 835 F. App'x 213, 216 (9th Cir. 2020), and the CPSA and the CPSC exist to ensure that, as a distributor, Amazon safeguards consumers from harmful products in accordance with the CPSA.

In the fifth and final product liability case relied upon by Amazon, *State Farm Fire & Cas. Co. v. Amazon.com, Inc.,* 835 F. App'x 213 (9th Cir. 2020), a court held in Amazon's favor due to requirements that have no relation to the CPSA and its definition of distributor. The case involved the application of a seven-prong test under Arizona law including aspects of legal title and control over the specific product to determine whether a company should be subject to strict liability. *Id.* at 215.[7] A company must qualify under a majority of the prongs to be held liable. Given that Arizona courts place an emphasis on title transfer and maintain that not providing a warranty indicates an entity does not take responsibility for the product, the holding was not

[7] The seven prongs include whether the entity: (1) has provided a warranty for the product's quality; (2) is responsible for the product during transit; (3) has exercised enough control over the product to inspect or examine it; (4) has taken title or ownership over the product; (5) has derived an economic benefit from the transaction; (6) has the capacity to influence a product's design and manufacture; or (7) has fostered consumer reliance through its involvement. *State Farm Fire & Cas. Co.*, 835 F. App'x at 215.

surprising. *Id.* at 216. Amazon attempts to argue here that it does not influence the design or manufacture of FBA products, a factor which in the *State Farm Fire & Cas. Co.* (9th Cir.) case was weighed against holding Amazon as a "distributor" of FBA products. *See* Amazon Mem. at 5, 13; *State Farm Fire & Cas. Co.* (9th Cir.), 835 F. App'x at 216.[8]

However, Amazon's choice to not proactively use its immense market power to influence the design or manufacturing choices of third-party sellers has nothing to do with Amazon's role as a distributor under the CPSA. This choice likewise has no impact on the CPSC's decision whether to pursue a recall from a manufacturer, retailer, or distributor. The CPSC has the discretion to seek remedial action from any one of those entities. *See* 15 U.S.C. § 2064(b). Amazon would have the CPSC attempt to conduct recalls through hundreds of foreign, often unsophisticated entities rather than protecting American consumers through the actions of the legally responsible domestic distributor of all FBA products.

In contrast to the five cases discussed above, the three cases cited by Complaint Counsel involved reviews of Amazon's actions within its FBA program and, with no title requirement or other inapplicable test to apply, found that Amazon's actions were sufficient to hold it responsible for injuries caused by certain FBA products. *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964 (W.D. Wis. 2019); *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431 (Cal. Ct. App. 2020); *Loomis v. Amazon.com LLC*, 63 Cal. App. 5th 466, 277 Cal.

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[8] Amazon does require third-party sellers using the FBA program to "obtain approval before listing [certain categories of products] for sale." *See* Amazon.com's Seller Central web portal, FBA policies & procedures, Categories and products that require approval (https://sellercentral.amazon.com/gp/help/external/G200333160?language=en_US&ref=efph_G200333160_cont_G201730840). These products include jewelry, music, watches, hoverboards, laser pointers, and more. *Id.* Amazon must approve these product listings before they go live on Amazon.com. *Id.* This is another example of Amazon's overwhelming power in controlling what and how products are sold through its FBA program.

Rptr. 3d 769 (2021). Indeed, the Wisconsin products liability statute at play in *State Farm Fire & Cas. Co.* (W.D. Wisc.) was intended to be read in a broadly remedial fashion, like the CPSA, allowing for recovery from a seller or distributor of a defective product if the manufacturer is unavailable. *State Farm Fire & Cas. Co.* (W.D. Wisc.), 390 F. Supp. 3d at 970. In creating and expanding California's strict products liability scheme, California's judiciary saw the same purpose as that underlying the CPSA—"[…] the economic and social need for the protection of consumers," and the concern about "the costs of injuries resulting from defective products." *Bolger*, 53 Cal. App. 5th at 605, 612; *see also* 15 U.S.C. § 2051 (b)(1). California's products liability law, similar to the CPSA, places obligations on retailers and distributors. *Bolger*, 53 Cal. App. 5th at 613 (citing *Cronin v. J.B.E. Olson Corp*, (1972)).

Ultimately, Amazon's attempt to rely on "extensive contrary authority" to dispute the weight of the three cases cited in Complaint Counsel's Motion fails due to the significant differences between the CPSA and the state products liability laws applied where Amazon prevailed. And while Amazon rightly notes that the focus in this action must be on interpreting a statute and not on common-law decision-making, the *State Farm Fire & Cas. Co.* (W.D. Wisc.), *Bolger*, and *Loomis* cases all involved extensive review of Amazon's actions in the FBA program and how they relate to statutory definitions of distributor and distribution in commerce. That analysis, while not controlling for this court, is certainly more useful than citations to cases where explicit title requirements or factors without parallel in the CPSA are applied.

B. Public Policy Also Favors Holding Amazon Responsible as a Distributor of FBA Products Under the CPSA

Amazon's attempt to dispense with Complaint Counsel's public policy arguments, which only supplement the statutory analysis, likewise ignores the big picture. The CPSA was enacted to enable the Commission to protect the public against unreasonable risks of injury associated

with consumer products. 15 U.S.C. § 2051(b)(1). Amazon claims that its "only role" in the FBA program is "locating, boxing, and shipping an already packaged and assembled product." Amazon Mem. at 23. But Amazon has already admitted to doing much more, including controlling the terms of its contractual relationships with third-party sellers and giving itself the right to sell returned products as its own. *See, e.g.*, SUMF ¶¶ 1, 3-4, 7-8, 14-15, 20-22.

As Amazon has already admitted, it possesses the capability to message consumers about unsafe FBA products, to provide refunds, and to take other remedial actions. We know further that Amazon already requires merchants using its FBA program to submit approval documentation for certain categories of products. *See supra* Footnote 8. Given Amazon's outsized role in distributing FBA products across the country, public policy compels the same result as the plain language statutory reading—Amazon is a distributor of FBA products and therefore falls within the CPSC's jurisdiction.

VI. AMAZON'S ARGUMENT THAT THIS ADJUDICATIVE ACTION VIOLATES THE APA FAILS ON THE LAW AND THE FACTS

Amazon next claims that this adjudicative action violates the APA. Neither the law nor the facts support this argument. Rather, on its face, this Complaint is a routine adjudicative action seeking remedial action from Amazon with respect to three categories of consumer products—children's sleepwear garments, carbon monoxide detectors, and hair dryers—identified as the Subject Products. The CPSA expressly authorizes the CPSC to use adjudicative proceedings to compel responsible entities to recall hazardous products and take other necessary remedial action. 15 U.S.C. § 2064(d). For this reason alone, Amazon's APA argument fails.

In addition, the CPSC's assertion of jurisdiction over Amazon in this case relies upon a plain reading of the CPSA and its definitions, further vitiating Amazon's claim that this action violates the APA. Finally, the CPSC has not taken a novel approach to statutory interpretation in

this case, has not taken a position contrary to a prior official position, and may bring this action regardless of whether it has retroactive effects.

A. This Adjudicative Action Seeks an Enforceable Order Relating to Three Categories of Consumer Products

The CPSC has brought this adjudicative action to compel the Respondent to take remedial actions with respect to the Subject Products. This case could rightly be described as the *raison d'être* for the creation of the CPSC, as it seeks to compel a responsible party (a distributor) to remove hazardous consumer products from the marketplace: children's sleepwear that can cause serious burn injuries and death to children, a vulnerable population; hair dryers without immersion protection that can cause shock and electrocution hazards to consumers; and defective carbon monoxide detectors that can allow a toxic gas to seriously injure or kill families in their sleep. Amazon mischaracterizes the CPSC's case as a request for a prospective rule or order, but that is not the case. Complaint Counsel here seeks a decision on the merits of this particular action against this particular Respondent for these particular consumer products. To the extent the court's decision in this matter would have precedential value, that is merely a hallmark of many judicial actions and in no way renders them improper.

Accordingly, this case does not represent rulemaking, but a routine exercise of the CPSC's statutorily-granted adjudicative authority. 15 U.S.C. § 2064(d).

B. This Adjudicative Action Relies Upon a Simple Reading of the CPSA

As detailed above and in Complaint Counsel's Motion for Partial Summary Decision, this action relies upon the plain language of the CPSA in asserting that Amazon is a distributor of FBA program products. While the definition of distributor in the CPSA is neither ambiguous nor controversial, even if this court finds interpretation is required, this case is still a proper venue for doing so. *Neustar, Inc. v. Fed. Commc'ns Comm'n*, 857 F.3d 886, 894 (D.C. Cir. 2017)

("Statutory interpretation can be "rendered in the form of an adjudication, not only in a rulemaking.") (citation omitted). Indeed, agency interpretations of statutory language are awarded deference if issued either in a rulemaking proceeding or through formal adjudication. *Mazariegos v. Office of U.S. Attorney Gen*., 241 F.3d 1320, 1327 n. 4 (11th Cir.2001) ("Under *Chevron*, where Congress in a statute has not spoken unambiguously on an issue, the interpretation of the statute by an agency entitled to administer it is entitled to deference so long as it is reasonable. *Chevron* deference may be applied to agency interpretations arrived at through formal adjudication."). It is up to the Commission to determine which tool, or both, should be initiated to address a consumer hazard.

Amazon's allegation that this suit violates the APA by using adjudication instead of rulemaking mischaracterizes the nature of the CPSC as an administrative agency. By Congressional design, CPSC may engage in rulemaking ***or*** adjudication, and it is well-established that agencies may choose which path to take. *See* 15 U.S.C. §§ 2058, 2064; *see also SEC v. Chenery Corp*., 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."). These two functions are similarly separated in the APA itself, where 5 U.S.C. § 553 delineates the procedures for rulemaking and 5 U.S.C. § 554 for administrative adjudication. In 15 U.S.C. § 2058, Congress granted the agency the authority to proceed with notice-and-comment rulemaking, while 15 U.S.C. § 2064 allows the agency to initiate *ad hoc* adjudicatory proceedings. Thus, the fact that the CPSC has not previously promulgated regulations or issued guidance addressing the term "distributor" as applied to Amazon's FBA program in no way precludes the administrative adjudication at hand. To support its argument that the agency may not proceed with an adjudicatory proceeding, Amazon

cites *Doe v. Tenenbaum*, 127 F. Supp. 3d 426 (D. Md. 2012), which is readily distinguishable. In that case, the agency had already promulgated regulations defining the phrase "materially inaccurate," and had a longstanding practice on how it dealt with publications and reports. The agency was initiating unilateral action against the manufacturer of a baby carrier, which sought a Preliminary Injunction. *Doe*, 127 F. Supp. 3d at 431-432. In a later case the same court described the action at question in *Doe* as an "informal adjudication" proceeding, different from the formal action pursuant to 15 U.S.C. § 2064 that has been brought here. *See Jake's Fireworks Inc. v. United States Consumer Prod. Safety Comm'n*, 498 F. Supp. 3d 792 (D. Md. 2020).

Although Complaint Counsel does not concede that there is any merit to Amazon's fanciful depiction of this action as a rulemaking, we note that there is an established body of decisions confirming that agencies may engage in rulemaking and adjudication, some of which Amazon also cites. *See Nat'l Labor Relations Bd. v. Bell Aerospace Co.,* 416 U.S. 267, 294 (1974) ("any rigid requirement to that effect [requiring rulemaking] would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise… Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule […] In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order") (citing *Chenery Corp.*). Indeed, the Supreme Court confirmed, in the sentence preceding the one cited by Amazon, that agencies may announce new principles in an adjudicative proceeding. *See Bell* at 294 ("the views expressed in *Chenery* and *Wyman-Gordon* make plain that the Board is not precluded from announcing new principles in

an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion").[9]

With this action, the CPSC is not reversing an official course or advancing a novel interpretation of the CPSA. Rather, the CPSC is bringing a routine adjudicative action to obtain remedial action from a responsible party. Complaint Counsel relies on undisputed and now admitted facts regarding Amazon's actions that support its case and Amazon's status as a distributor of the Subject Products.[10]

Finally, this administrative action is not an extension of the reach of the CPSA or CPSIA, and it does not change any existing law. In *Ford Motor Co. v. Fed. Trade Comm'n*, 673 F.2d 1008 (9th Cir. 1981), the court held that an adjudicatory proceeding would be inappropriate only where the adjudication changed existing law and had widespread application. If this were the case, the court held that it would be better suited to rulemaking. *Id*. at 1009 ("[A]n agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread

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[9] Amazon references *Cities of Anaheim v. Fed. Energy Regul. Comm'n*, 723 F.2d 656 (9th Cir. 1984), for the principle that agencies may not attempt to use adjudication to circumvent the APA's rulemaking procedures. The court in *Cities of Anaheim* held that agencies may generally use adjudication to announce new principles, except for when they are attempting to circumvent rulemaking procedures. *Id.* at 658. However, for that exception to apply, the court stated an agency must be attempting to amend a recently adopted rule or supplant a pending rule-making proceeding. *Id.* Here, the CPSC is not engaged in a rule-making proceeding, or altering any recently adopted rule.

[10] The individual fact-finding undertaken by the agency here is vastly different from the agency action referenced by Amazon in *First Bancorporation v. Bd. of Governors of Fed. Reserve Sys.*, 728 F.2d 434 (10th Cir. 1984). In *First Bancorporation*, the court found that the Board of Governors of the Federal Reserve System did not take any adjudicative facts of particularized relevance to First Bancorporation into account. *See id.* at 438 ("[T]he Board's order contains no adjudicative facts having any particularized relevance to the petitioner.") In holding that the Board had abused its discretion and improperly attempted to propose legislative policy through an adjudicative order, the court reiterated that administrative agencies are not precluded from announcing new principles in an adjudicatory proceeding. *Id*. at 437.

application."). In *Ford Motor Co.*, as opposed to the facts here, the agency already had a pending rulemaking proceeding in place, and was seeking to promulgate a generally applicable requirement applicable to all car creditor practices in its adjudication, while also speculating whether Ford was in violation of an existing Oregon law. The CPSC has not initiated a rulemaking proceeding relating to this action.[11]

C. Amazon's Argument That Adjudicatory Proceedings May Not Have Retroactive Effects Is Incorrect

Amazon's argument that the CPSC is attempting to "extend the CPSIA through adjudication," Amazon Mem. at 28, also fails. First, as noted *supra*, the CPSC seeks only to enforce its authority against an entity that, according to the undisputed facts, is a distributor. Second, the law is clear that, even if the CPSC was seen here as advancing an interpretation that would extend the CPSA and CPSIA, agencies may proceed with adjudicatory proceedings that would have a retroactive effect. *See Chenery Corp.* at 1581 ("Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative

[11] The additional cases cited by Amazon are inapposite, as they do not relate to adjudicative proceedings relying upon simple statutory interpretation. *See Pfaff v. U.S. Dep't of Housing & Urban Dev.*, 88 F.3d 739, 748 (9th Cir. 1996) (agency's reliance on policy articulated in different adjudication and misleading and inconsistent representations were arbitrary and capricious); *Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1339 (Fed. Cir. 2017) (Patent Trial and Appeal Board did not possess statutory authority to issue substantive rule allocating burden of proof through adjudication); *Fed. Commc'ns Comm'n v. Fox Tele. Stations*, 567 U.S. 239 (2012) (FCC's enforcement policy applied to Fox and ABC broadcast were "vague," Commission imposed standard decided in adjudicative proceeding after broadcast at issue on broadcast in enforcement proceedings, broadcasters therefore did not have fair notice of the change in standards and therefore lacked due process); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012) (Department of Labor changed its position from previous interpretations of its own regulations and the term "outside salesmen"); *U.S. v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998) (Agency-issued statement interpreting its own Standard in a Federal Register notice was held to be too general and vague to have provided adequate notice to regulated entities).

agency.") (citation omitted); *see also NLRB v. Gen. Am. Transp. Corp. v. I.C.C.*, 883 F.2d 1029 (D.C. Cir. 1989).

Amazon's cited cases do not support its argument. Amazon cites *Stoller. v. Commodity Futures Trading Comm'n*, 834 F.2d 262, 267 (2d Cir. 1987), as an example where an agency action was disallowed to apply retroactively. In *Stoller*, however, the Commodity Futures Trading Commission had taken a position previously on its definition of a "wash sale" and had acted in an insufficient manner to provide the public with adequate notice that it materially altered this position. *Id.* at 267. Similarly, in *Retail, Wholesale & Dep't Store Union v. Nat'l Labor Relations Bd*., 466 F.2d 380, 390 (D.C. Cir. 1972), the court held that the National Labor Relations Board had improperly amended its position in a previous case, and that position had been a well-settled rule, enunciated and applied by the NLRB previous to that case. *Id.* at 387.

Here, the CPSC is not seeking to apply a newly adopted principle in adjudication; it is asking for the court to apply a common-sense interpretation of its statute. CPSC is also not seeking to change any position iterated by the agency in a previous case. The agency filed an adjudicatory proceeding seeking remedial action from a distributor of consumer goods. The plain language of a statute is the best evidence of its meaning and the most reliable indicator of congressional intent, and this proceeding seeks nothing more than the application of the CPSA to Amazon's actions. *See U.S. v. Ron Pair Enterprises, Inc*., 489 U.S. 235, 109 S.Ct. 1026, 103 L. Ed. 2d 290 (1989) ("Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute").

VII. THE COMPLAINT IS NOT MOOT

Complaint Counsel does not dispute that Amazon has taken unilateral actions to stop sale of certain of the Subject Products, to notify consumers who purchased certain of the Subject

Products of a potential hazard, and to issue refunds. But these voluntary actions, without a mandatory order and without CPSC oversight, do not render the Complaint moot.

A. The Complaint Is Not Moot Because Complaint Counsel Seeks a Mandatory Enforceable Order Capable of Subjecting a Responsible Party to Penalties

Complaint Counsel filed this adjudicative action because the Commission determined that voluntary, unilateral actions are insufficient. Amazon's limited, voluntary actions with respect to the Subject Products do not subject Amazon to CPSC oversight or to agency enforceability. Amazon is free to stop its actions at any time, allowing the Subject Products (or functionally identical hazardous products) to be posted on its online marketplace, sold, and fulfilled through Amazon's FBA program. Furthermore, a mandatory order is required to empower the CPSC to, among other things, obtain information from Amazon regarding how Amazon and consumers are returning and destroying the hazardous Subject Products.

Adjudicative actions are brought by the CPSC pursuant to its authority to ensure that responsible parties do all that is required to remedy the hazards created by consumer products. 15 U.S.C. § 2064. Without a mandatory, enforceable order in this case, the CPSC will be without recourse to make and keep consumers safe.

B. The Complaint Is Not Moot Due to the Voluntary Cessation Doctrine

One exception to mootness is the "voluntary cessation" doctrine, which focuses on whether challenged conduct is likely to recur. *See, e.g.*, *U.S. v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *Princeton Univ. v. Schmidt*, 455 U.W. 100 (1982). Thus, cessation of the challenged activity by the voluntary choice of the person engaging in it will moot the case only if it can be said with assurance "that 'there is no reasonable expectation that the wrong will be repeated.'" *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (quoting *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 448 (2d Cir. 1945)). This amounts to a "formidable burden" of showing

with absolute clarity that there is no reasonable prospect of renewed activity. *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013) at 4 (dismissal of a trademark infringement claim against rival and submittal of an unconditional and irrevocable covenant not to sue satisfied the burden under the voluntary cessation test) (citing *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.W. 167, 190 (2000)). Otherwise, "[t]he defendant is free to return to his old ways" and this fact would be enough to prevent mootness because of the "public interest in having the legality of the practices settled." *U.S. v. W.T. Grant Co.*, 345 U.S. at 632.[12]

Here, the Complaint seeks remedial action from Amazon as a distributor of the Subject Products. Amazon makes clear in its Answer and its Motion to Dismiss that it continues to challenge the assertion that it is a distributor of FBA products and responsible to conduct recalls. Given that the primary issue in this case is whether Amazon is a distributor of the Subject Products, which are FBA products, Amazon's voluntary actions vis-à-vis the Subject Products do

[12] A second exception to mootness in this context may also apply, which involves cases challenging short-term conduct which may recur in the future, denominated as disputes "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Under this analysis, in cases in which (1) the challenged action is too short in its duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again, then mootness will not be found when the complained-of conduct ends. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975); *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). This exception is frequently invoked in cases involving situations of comparatively limited duration, such as elections, pregnancies, and the issuance of injunctions that expire in a brief period. *See, e.g.*, *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *Roe v. Wade*, 410 U.S. 113, 124-25 (1973); *Carroll v. President & Commr's of Princess Anne*, 393 U.S. 175 (1968). In this case, even if full recalls of all of the Subject Products were conducted, the jurisdictional legal issue would still need to be resolved because the CPSC and Amazon are likely to end up back in court the next time an FBA product needs to be recalled and Amazon resists on jurisdictional grounds.

not moot the case. Amazon would be free to reject the CPSC's requests for recalls of FBA products without a legal determination of the threshold jurisdictional issue.[13]

C. The Complaint Is Not Moot Because Amazon's Voluntary Actions Are Insufficient

Amazon notes that it has taken certain actions since being notified by the CPSC of the hazards posed by the Subject Products, such as removal of the Amazon Standard Identification Numbers ("ASINs") for the Subject Products from its online store, sending notifications to consumers, and issuing refunds. Amazon Mem. at 31-38. Complaint Counsel does not dispute that Amazon has taken these actions and, in fact, acknowledged those actions in the Complaint. Compl. ¶¶ 47-49. However, Amazon cannot claim ignorance of the inadequacy of these actions and the additional steps required by simply labeling them as not "in the public interest." Amazon Mem. at 36, 38.

When a product presents a substantial hazard to consumers, the CPSC is empowered to seek remedial action that protects the public. *See* 15 U.S.C. § 2064(c), (d). That remedial action may include notifying consumers, ceasing distribution, providing a repair and/or refunding the purchase price of such product. The notification, whether direct or via public notification, must adequately describe the hazard and prompt the consumer to dispose of the product.[14] Further,

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[13] Amazon cites several agency cases in which courts dismissed an action as moot because of the actions of a recalling entity. *See, e.g.*, *U.S. v. Ford Motor Co.*, 547 F.2d 534 (D.C. Cir. 1978). However, the D.C. Circuit has made clear that where a recalling entity has not completed all that is required by a recall order the case will not be moot. *See U.S. v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998) (rejecting the National Highway Traffic Safety Administration's argument that the case was moot because Chrysler Corp. had not completed all recall actions).

[14] Amazon's notices are inadequate. For example, regarding the carbon monoxide detectors identified in the Complaint, Amazon's notification includes a tepid reference to the hazard, stating that the detectors "may fail to alarm on time, posing a risk of exposure to potentially dangerous levels of Carbon Monoxide." Amazon Mem. at 33. The notification does not incentivize consumers to return the product, instead urging them to "stop using it immediately

refunds may be an adequate remedy for an individual consumer, but they do nothing to remove the product from circulation. A consumer could conceivably receive a refund and then continue to use the product or give it to someone else.[15]

For this reason, the Complaint seeks additional remedial actions from Amazon, including ordering Amazon to "facilitate the return and destruction of the Subject Products, at no cost to consumers, under Section 15(d)(1) of the CPSA, 15 U.S.C. § 2064(d)(1), to adequately protect the public from the substantial product hazard posed the Subject Products . . . ." Compl. at 19. The Complaint also requests an order requiring Amazon to destroy products in its inventory (including proof of such destruction) and to provide monthly progress reports to reflect the products remaining in Amazon's inventory, returned by consumers, and destroyed. *Id.*

Amazon feigns ignorance of how these actions could be "required in order to adequately protect the public," *see* Amazon Mem. at 38, but the need to remove and destroy hazardous products could not be clearer. We live in a global marketplace where any consumer can list any product for sale on a secondary market, and the CPSC is empowered to reduce the number of hazardous products re-circulated in order to protect the public. *See* Section 19 of the CPSA, 15 U.S.C. § 2068 (prohibiting the sale, manufacture for sale, distribution into commerce or import

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and dispose of it." *Id.* This notification is not sufficient for several reasons. First, it lacks the force and effect of a strong statement from the CPSC, the nation's consumer product safety agency, informing consumers that a responsible party is recalling the product at its behest. Second, the description of the hazard is not forceful or persuasive, which may result in a consumer not taking immediate action. Finally, it does nothing to incentivize the consumer to remove the product from the marketplace.

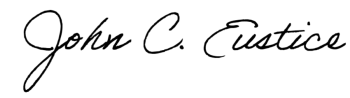
[15] Amazon spins the CPSC's request that refunds be conditioned upon return or proof of destruction of the Subject Products as "prohibit[ing] a company from providing refunds." Amazon Mem. at 36. It is nothing of the sort. Instead, it is a method to incentivize consumers to remove the hazardous product from their homes via destruction or return. Contrary to Amazon's protests, ensuring the removal of a hazardous product is most certainly in the public interest.

into the United States of any consumer product that is not in conformity with an applicable consumer product safety rule, subject to voluntary corrective action in consultation with the Commission or subject to an order issued under section 12 or 15 of the CPSA). Recalled products that are not returned to the manufacturer can remain in homes and continue to pose hazards. Absent proof that hazardous products are destroyed, the threat to the safety of consumers remains and will not be remediated as required by law so long as Amazon's actions are wholly voluntary and not subject to a mandatory, enforceable order.

VIII. CONCLUSION

For the reasons stated above, the Presiding Officer should deny Amazon's Motion and grant Complaint Counsel's Motion for Partial Summary Decision.

Respectfully submitted,



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November 22, 2021

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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