UNITED STATES OF AMERICA CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of AMAZON.COM, INC. Respondent.	)	CPSC DOCKET NO.: 21-2

COMPLAINT COUNSEL'S REPLY BRIEF

In its Answering Brief, Amazon continues to seek to avoid its responsibilities and subvert the Commission's authority under the Consumer Product Safety Act ("CPSA") in an effort to frustrate a full remedy for the dangerous products it distributed. First, Amazon wrongly implies that a heightened evidentiary standard applies to the Commission's remedies determination under Section 15, challenging the Commission's clear authority and discretion to order direct consumer notice and social media notice that is appropriately tailored to Amazon's business model. Second, Amazon seeks to narrow the scope of the Subject Products covered by the remedial order by addressing an argument that Complaint Counsel did not raise in its Appeal, and then failing to rebut Complaint Counsel's straightforward request that the Commission's order include all products that are the same as those identified in the Complaint, including products with mere cosmetic differences. Third, Amazon's argument that the Commission lacks the authority to order it to maintain a banner on its "Your Orders" page warning consumers about the hazards presented by the Subject Products fails as a matter of law. Fourth, Amazon's claim that Complaint Counsel failed to present proper evidence to support social media postings is procedurally, factually, and legally incorrect. Finally, Amazon's First Amendment arguments are meritless.

A. Amazon Mischaracterizes the Legal and Evidentiary Standards Applicable to Section 15 Remedies

Throughout its Answering Brief, Amazon incorrectly suggests, based on a misreading of *Steadman v. SEC.,* 450 U.S. 91, 102 (1981), that there is a heightened obligation on Complaint Counsel to present a certain quantity or quality of evidence in support of its choice of remedies in this case. Amazon's Answering Brief, Dkt. No. 128 (hereinafter "Amazon Brief") at 3-4. Under Section 15 of the CPSA, once a substantial product hazard has been established, Congress empowered the Commission to direct the appropriate remedy based on two highly discretionary standards: for Section 15(d) remedies, any actions that the Commission "determines to be in the public interest," and for Section 15(c) notice, where "[t]he Commission determines . . . notification is required in order to adequately protect the public from such substantial product hazard." 15 U.S.C. § 2064(c)-(d). The remedies sought by Complaint Counsel fall well within the bounds of these flexible standards.

Indeed, courts have long recognized that "[a]gency discretion is [] at its 'zenith' when the challenged action relates to the fashioning of remedies." *NTCH, Inc. v. Fed. Commc'ns Comm'n*, 841 F.3d 497, 508 (D.C. Cir. 2016) (citations omitted); *Towns of Concord, Norwood, & Wellesley, Mass. v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) ("The Commission has the primary responsibility for deciding matters concerning enforcement. As to the necessity of refunds to deter violations of the statute, the Act leaves this determination to the Commission's expert judgment. . . . Congress simply directed the Commission to order what it considered 'necessary or appropriate' in each case to carry out the statute's commands."). And in the context of federal court review, an agency's "choice of remedies generally is not to be overturned unless the reviewing court finds that it is unwarranted in law or without justification in fact." *Svalberg v. S.E.C.*, 876 F.2d 181, 184 (D.C.

Cir. 1989) (*citing Butz v. Glover Livestock Comm'n Co.,* 411 U.S. 182, 185 (1973) ("[W]here Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'") (citation omitted)); *see also Louisiana Pub. Serv. Comm'n v. FERC*, 174 F.3d 218, 224 (D.C. Cir. 1999) ("When a federal court of appeals reviews an administrative agency's choice of remedies to correct a violation of a law the agency is charged with enforcing, the scope of judicial review is particularly narrow.") (citations omitted).

Further, Amazon is plainly wrong when it suggests that the *Steadman* Court's reference to the "minimum quantity of evidence"[1] required in administrative adjudications means that the Commission's experience and expertise cannot support appropriate remedies.[2] Amazon's proffered case law only makes clear that federal courts reviewing agency action must consider the record and the agency's articulation of the "'the criteria' employed in reaching their result," rather than "rubber-stamp[ing] the agency decision as correct." *See Am. Petroleum Inst. v. EPA,* 661 F.2d 340, 349 (5th Cir. 1981) (citations omitted)*; CS Wind Vietnam Co., Ltd. v. United States*, 832 F.3d 1367, 1380 (Fed. Cir. 2016) (remanding a case where an agency failed to "explain[] its determination sufficiently to allow [the district court] to conduct [] judicial review"). Thus, here

[1] This phrase in *Steadman* merely refers to the "traditional preponderance-of-the-evidence standard" itself, which both parties agree applied to the substantial product hazard determination in this case. *See* Amazon Brief at 3-4.

[2] *See Alaska v. Bernhardt,* 500 F. Supp. 3d 889, 921 (D. Alaska 2020) ("[a] lack of empirical data does not render an otherwise reasonable conclusion based on agency experience arbitrary or capricious." (citing *Sacora v. Thomas*, 628 F.3d 1059, 1069 (9th Cir. 2010) (explaining that "it was reasonable for the [agency] to rely on its experience, even without having quantified it in the form of a study")); *see Nasdaq Stock Market LLC v. S.E.C.,* 38 F.4th 1126, 1142 (D.C. Cir. 2022) (stating that "an agency 'need not – indeed cannot – base its every action upon empirical data' and may, 'depending upon the nature of the problem, . . . be 'entitled to conduct . . . a general analysis based on informed conjecture'").

the Commission can rely on its experience and expertise in crafting a Section 15 Order, so long as it provides a reasoned explanation for its determinations that a substantial product hazard exists, that notice is required to adequately protect the public, and that the remedies are in the public interest. *See CS Wind*, 832 F.3d at 1377 (noting that an agency's "experience and expertise . . . enable the agency to provide the required explanation [of] 'why its methodology comports with the statute,'" in a particular matter) (citation omitted).

B. Amazon Misconstrues Complaint Counsel's Appeal Brief and Incorrectly Argues That the Commission Lacks the Authority to Issue a Final Order Covering Products That Are the Same As Those Identified in the Complaint

Amazon misconstrues the scope of products Complaint Counsel proposes be covered in the Commission's final order and instead confronts a position that Complaint Counsel does not advance. Contrary to Amazon's assertions, Complaint Counsel does not seek a final order addressing products that are *similar* or *equivalent* to the products identified in the Complaint. *See* Amazon Brief at 8, 9. Rather, Complaint Counsel merely proposes to define "Subject Products" to encompass the products identified in the Complaint, regardless of ASIN, including cosmetic variations of the *same* products that present the same substantial product hazard. Complaint Counsel's Appeal Brief (hereinafter "CC Appeal Brief"), Dkt. No. 125 at 13. This is a common sense approach to the scope of the remedial order and well within the Commission's authority. Further, Amazon incorrectly claims that the Commission must conduct a substantial product hazard analysis for products that have mere cosmetic differences to the products identified in the Complaint, ignoring the proposed scope of Complaint Counsel's order, which makes clear that "Subject Products" include only cosmetically different products if they present the same hazard. Amazon Brief at 9, 10. Under Section 15 of the CPSA, these products are the same as the products

identified in the Complaint; and, given that they pose substantial and life-threatening hazards to consumers, they can and should be subject to the Commission's final order.

1. Amazon Misconstrues Complaint Counsel's Appeal Brief and the Scope of Products Covered by the Proposed Final Order

Amazon devotes much of its Answering Brief to a fundamental mischaracterization of Complaint Counsel's Appeal Brief, portraying it as seeking a final order that extends beyond the products at issue in the administrative adjudication to an undefined category of similar, like, or equivalent products. *See* Amazon Brief at 5-9. But Amazon's argument that Complaint Counsel improperly asks "the Commission to utilize its adjudicative authority to declare that an entire class of products constitutes a substantial product hazard," Amazon Brief at 7, is a strawman. Complaint Counsel merely seeks to ensure that the remedial order is not limited to the products explicitly identified in the Complaint by product listing, but also covers the underlying products themselves, including those with mere cosmetic variations that present the same substantial product hazard. Such products are all the same "product" under Section 15 of the CPSA.[3] Amazon's arguments that the statutory language of the CPSA and the Commission's decision in *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Order (Oct. 27, 1976) (hereinafter "*Relco*") preclude an order extending to "similar" products, Amazon Brief at 14-15, are therefore both inapposite and, as it relates to the same products, incorrect.

[3] This position comports with ALJ Patil's initial reasoning in his May 8, 2023, Order, regarding the children's sleepwear garment Subject Products, where he noted that they "should include products that are but 'a mere alteration' of a [children's sleepwear] Subject Product: '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 . . . .'" Dkt. No. 109 at 30.

Amazon misconstrues the definition of "Subject Products" in Complaint Counsel's proposed order and wrongly suggests that an order incorporating that definition would violate the CPSA. As an initial matter, Amazon's suggestion, *see* Amazon Brief at 6-7, that Complaint Counsel's proposed order would run afoul of the definition of "consumer product" under the CPSA, 15 U.S.C. § 2052(a)(5), is misplaced, as there is no dispute that the Subject Products are all "consumer products" under the CPSA.[4]

Amazon's citation to Section 15(d) of the CPSA, which authorizes the Commission to order a firm to "replace [a hazardous] product with a like or equivalent product which complies with the applicable rule," 15 U.S.C. § 2064(d)(1)(B), is likewise inapposite. Amazon claims that this provision shows that the Commission's authority is limited to "only those products which it has actually determined to pose a substantial product hazard, not 'like or equivalent' products." Amazon Brief at 8. But Complaint Counsel does not argue in its Appeal Brief that the remedial order in this case should include "like or equivalent" products. Indeed, the Proposed Order that Complaint Counsel submitted with its Appeal Brief did not use the words "like" or "equivalent" when describing the Subject Products. Instead, Complaint Counsel proposed the following definition for the Subject Products covered by the Commission's final order:

> The "Subject Products" include all children's sleepwear garments, carbon monoxide detectors and hair dryers ***that are the same*** as those identified by ASINs in the Complaint, including but not limited to those listed in Amazon Exhibit 130,[5] regardless of ASIN or other distribution mechanism,

[4] Indeed, Amazon admitted that each category of the Subject Products—children's sleepwear garments, hair dryers, and carbon monoxide detectors—are "consumer products." *See* Amazon's Response to Complaint Counsel's Statement of Undisputed Material Facts, Dkt. No. 16, at ¶¶ 34, 37, 40.

[5] Complaint Counsel includes Exhibit 130 and the products listed by ASIN therein under the belief that those products are the same products as those listed in the Complaint, with only cosmetic variations.

> distributed by Amazon in commerce. The Subject Products include those products with cosmetic variations in size, color or style that present the same hazard.

Complaint Counsel's Proposed Order (hereinafter "CC Proposed Order"), Dkt. No. 126 at 1 (paragraph 2) (emphasis added). Nothing in this straightforward definition extends the order beyond the products at issue in this administrative adjudication.

Amazon also claims that Complaint Counsel relies on the Commission's decision in *Relco* to "extend the Commission's forthcoming order to 'similar' products." Amazon Brief at 14. Once again, however, Amazon combats an argument that Complaint Counsel did not make. The *Relco* decision demonstrates that the Commission's authority is not strictly limited to the products at issue as identified in a complaint and may extend to such products that differ only cosmetically. *Relco* at 1.[6]

Amazon's invocation of ALJ Patil's distinguishing of *Relco* likewise misses the mark. ALJ Patil reasoned that the Commission's rationale in that case should not apply here, since, unlike the manufacturer in *Relco*, Amazon has not designed or manufactured products at issue in this case. Amazon Brief at 15 (citing Dkt. No. 109 at 31). However, ALJ Patil's concerns related to the practicality of a remedial order as applied to Amazon as a distributor, and not to the Commission's authority to issue an order covering products that are the same as those identified in the Complaint. Moreover, ALJ Patil's practicality concerns are unfounded. While Amazon is not the manufacturer of the Subject Products, it is a distributor and responsible party subject to the CPSA. Amazon's chosen business model, through which it distributed the Subject Products, and its decision to scale

[6] To the extent the *Relco* decision does, in fact, demonstrate that the Commission's remedial authority extends to products of "similar design or construction," *Relco* at 1, the Commission may determine that such products should be included in its final order.

its distribution activities to its current size, should not enable it to escape its legal obligations under the statute.

2. Amazon Incorrectly Argues That the Commission Must Conduct a Substantial Product Hazard Analysis for Each Product with Mere Cosmetic Differences

Amazon next argues that Complaint Counsel's proposed remedial order would improperly extend to products that the Commission has not "determined" present a substantial product hazard, as required under Section 15 of the CPSA. Amazon Brief at 9. This claim ignores that the proposed order is limited to the children's sleepwear garments, carbon monoxide detectors, and hair dryers identified in the Complaint and proven in these proceedings to be substantial product hazards, as well as mere cosmetic variations of the *same* products. Accordingly, having determined that a red hair dryer that lacks immersion protection presents a substantial product hazard, a blue version of the same hair dryer need not be separately tested or analyzed to be subject to the Commission's final order.[7]

Amazon further argues that products with mere cosmetic differences might not present the same hazards as the products identified in the Complaint, and therefore should not be subject to the Commission's final order. Amazon Brief at 10. [redacted]

[7] Amazon misconstrues two cases relied upon in Complaint Counsel's Appeal Brief, both of which support Complaint Counsel's argument that products with slight cosmetic differences should be considered the same. Amazon complains that *JCW Invs., Inc. v. Novelty*, Inc., 482 F.3d 910, 916 (7th Cir. 2007) does not relate to a substantial product hazard finding, but that does not detract from its finding that two products with minor differences could be seen by consumers as the same. And, contrary to Amazon's assertions, the procedural posture of *Beaty v. Ford Motor Co.*, 854 F. App'x 845 (9th Cir. 2021) does not impact its finding that the differences between two car models, as with consumer products, may be "merely cosmetic" such that they are the same. *Id.* at 848-49.

[redacted] at 11. [redacted]

[redacted] *Id.*; *see* 16 C.F.R. §§ 1615.3(b); 1615.4(b)(2).[8] However, the scope of Complaint Counsel's Proposed Order only extends to cosmetic variations of the products identified in the Complaint that present the same hazard. CC Proposed Order at 1 (paragraph 2). Therefore, children's sleepwear garments infused with a different dye that materially impacts flammability would not be encompassed within the definition of Subject Products. Specifically, this type of material difference would not constitute a mere cosmetic difference and, if the dye brought the garment under the flammability threshold, would not present the same substantial product hazard. This does not change the fact that products with mere cosmetic differences that do present the same hazard as the products identified in the Complaint are the same products, and therefore necessarily must be encompassed within "Subject Products" in the Commission's order to adequately protect the public.

Accepting Amazon's argument would allow it to distribute products that are the same as those identified in the Complaint unless and until the CPSC identifies such products, analyzes them, informs Amazon, and requests that Amazon cease distribution.[9] But the remedial order here

[8] Under the sampling procedures set out in the FFA's regulations, different color and print patterns, such as those resulting from different dyes, may only be tested together where those differences would not impact flammability characteristics. 16 C.F.R. § 1615.4(b)(2).

[9] In *United States v. Zen Magnets, LLC*, 104 F.Supp.3d 1277, 1282 (D. Colo. 2015), a federal court rejected a narrow interpretation of the "subject products" covered by a voluntary consent agreement with the CPSC for a similar reason. There, importer Zen Magnets had purchased sets of small magnets from its competitor Star Networks only days before the magnets were the subject of a voluntary recall. Zen attempted to sell these recalled magnets, arguing that, by rebranding and repackaging the magnets, they would no longer constitute "subject products" under the Consent Agreement. The Court rejected this argument, finding that "[s]uch an interpretation would

must fully address the hazardous Subject Products, and having distributed them to consumers via its FBA program, it is Amazon that has the legal responsibility under Section 15 to ensure that it does not distribute the same hazardous products again.[10] Further, to the extent Amazon finds there is any ambiguity about whether a given item is one of the products listed in the Complaint, having taken on this responsibility through its distribution of hazardous products, Amazon now bears the risk if it nonetheless distributes such products.[11] Indeed, this obligation is no different than the obligation imposed on other entities subject to a mandatory corrective action, and also not unlike the obligation every responsible party under the CPSA has to ensure it does not import, sell, or distribute violative products pursuant to Section 19(a)(1), or recalled goods pursuant to Section 19(a)(2).

Ultimately, Amazon created a business model—the FBA program—through which it profits from distributing a large volume of consumer products. Amazon's size and volume of product distribution neither alters its responsibilities under the law nor shields it from those legal

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essentially allow third-party vendors [] to circumvent its prohibitions merely by buying and repackaging dangerous products that are . . . subject to an order issued under the CPSA."

[10] It is worth noting that Amazon already has a continual and ongoing obligation not to distribute products that violate the FFA, such as the Subject Product children's sleepwear garments, as well as products that violate Section 15(j), such as the Subject Product hair dryers. *See* 15 U.S.C. §§ 2068(a)(1), 2079(b), 16 C.F.R. §§ 1615 and 1616. Pursuant to the proposed order Amazon would also have an obligation under Section 19(a)(2)(C) not to distribute the defective Subject Product carbon monoxide detectors. 15 U.S.C. § 2068(a)(2)(C).

[11] Amazon's citation to testimony provided by the Commission's Rule 30(b)(6) representative does not obviate that burden. [redacted] Dkt. No. 76, Amazon Ex. 30, Rose Dep. 342:4–18. To the extent that is the case, the burden to make that determination remains on Amazon. Of course, should Amazon fail to meet its burden and distribute a Subject Product in violation of the Commission's final order, it would be the government's burden to prove in any Section 19 action seeking civil penalties that Amazon did so.

requirements—put simply, a party cannot outgrow its legal obligations. *Cf. State v. United Parcel Serv., Inc.*, 253 F. Supp. 3d 583, 604 (S.D.N.Y. 2017), *aff'd*, 942 F.3d 554 (2d Cir. 2019) (reasoning, in the context of UPS's failure to comply with laws and agreements prohibiting it from selling untaxed cigarettes to consumers, that "UPS's size is not an excuse to shift responsibility for its business failings to taxpayers who ultimately cover the investigative, healthcare, and other costs associated with . . . cigarettes"); *In re Baker*, 321 B.R. 864, 868 (Bankr. N.D. Ohio 2004) (rejecting a company's lack of notice defense on the grounds that "a company cannot use its large size and complicated internal organizational structure as a shield," explaining that "while an octopus may have eight legs, it is still the same octopus"). And notably, Amazon has demonstrated it has the capability to remediate its distribution of hazardous products, as evidenced in this case by products it voluntarily removed from distribution. *See* Amazon's Statement of Undisputed Material Facts, Dkt. No. 75 ¶¶ 12, 32, 44, 63, 84, 98, 114; Amazon's Response to Complaint Counsel's Statement of Undisputed Material Facts, Dkt. No. 92 ¶ 114.

C. Contrary to Amazon's Arguments, the Commission Possesses the Authority to Order Notification on the Amazon "Your Orders" Page and It Is in the Public Interest to Do So

Amazon wrongly argues that the Commission lacks the authority to order Amazon to publish notice of the recall on its "Your Orders" page via a banner notification.[12] Amazon bases its argument on the fact that the banner is not visible to the general public and thus does not meet

[12] Amazon appears to have initiated its "Your Orders" banner after the Complaint was filed. Amazon did not reference placing a banner on purchasers' "Your Orders" page in either of the two versions of Statements of Undisputed Material Facts that Amazon filed (Dkt. Nos. 16 and 75), or at any time during the discovery process. The "Your Orders" page, on which a consumer logged into their Amazon account can see all their purchases and can reorder products, serves as a technologically effective way to reach consumers by presenting recall information on a potentially frequently visited, product-specific webpage. *See* CC's Reply Brief ISO Amended Proposed Order, Dkt. No. 117 at 6-7.

Amazon's flawed interpretation of "direct notice." In doing so, Amazon, for the first time, elaborates on how it currently utilizes the banner, explaining that the banner remains visible indefinitely until a consumer clicks on the banner. *Id.* at 21. Amazon should be required to maintain that regimen going forward.

1. Amazon Ignores the Language of the CPSA and the Applicable Regulations, as well as the Authority to Account for Changes in Technology When Interpreting such Statutes and Regulations

Amazon incorrectly asserts that the Commission lacks the authority to order notification on Amazon's "Your Orders" webpage. Amazon Brief at 16-17. In doing so, Amazon ignores the plain language of the CPSA and the regulations required by Section 15(i) of the CPSA. Specifically, Section 15(c)(1) of the CPSA states that a Section 15 order "*shall specify the form and content of any notice* required to be given under such order." 15 U.S.C. § 2064(c)(1) (emphasis added). The regulations expand on that notion, explaining that a recall notice ordered by the Commission can be "written, electronic, audio, visual, *or in any other form ordered*." 16 C.F.R. § 1115.26(b) (emphasis added). Here, such "other form ordered" should include a banner on consumers' "Your Orders" pages. In fact, the applicable regulations in the Mandatory Recall Notice Rule specifically discuss the use of several forms of notice that are analogous to the "Your Orders" banner, including RSS feeds, catalogs, and newsletters, which, like the "Your Orders" page, may require a consumer to be logged in or subscribed to receive the notice. *See* 16 C.F.R. § 1115.26(b) (describing possible forms of recall notices).

In addition, when promulgating the Mandatory Recall Notice Rule, 16 C.F.R. § 1115.23-29, the Commission declined to require any one type of notice for every recall, preferring to "retain[] flexibility and creativity to adjust the forms of required recall notices to the specifics of each case and to allow for technological advancements in recall notice forms . . . ." 75 Fed. Reg. 3355, 3361

at Response to Comment 17. Accordingly, the Commission would be well within its authority in ordering that Amazon maintain a banner on consumers' "Your Orders" pages.

Amazon also argues that because the "Your Orders" page is neither a publicly visible part of its website, nor a direct notice sent via mail or email, it is beyond the agency's authority to require it. *See* Amazon Brief at 17-18. The practical outcome of Amazon's argument would be the creation of a loophole in the CPSA and a new form of notice incapable of regulation by the CPSC. However, Section 15(c)(1) specifically states that the Commission may specify the form and content of any notice ordered under Section 15, and agencies are not only permitted to consider technological developments when interpreting their regulations, they are *required* to do so. *See Detsel by Detsel v. Sullivan*, 895 F.2d 58, 64 (2d Cir. 1990) ("agencies must interpret their regulations in light of changing circumstances, particularly in areas characterized by rapid technological development," discussing limits in Medicaid regulations on private-duty nursing that were in place in 1965, and no longer necessarily reasonable given technological advancements by 1990); *see also American Trucking Assns. v. Atchison, T. & S.F. Ry.*, 387 U.S. 397 (1967) (in the context of transportation, stating that agencies needed to adapt their rules and practices and are "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday); *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1565 (D.C.Cir.1987) (discussing need for FCC to make adjustments when new developments arise). Therefore, there is no basis to suggest that this form of notice is somehow beyond the reach of the Commission.

Notably, in the context of direct notice, Amazon concedes that the statutory authorization of "mail notice" authorizes the more modern electronic "form" of email notice. Amazon Brief at 18. Similarly, it is also well within the agency's authority to specify Amazon's "Your Orders" page as

an electronic, modern form of recall notice to warn consumers of the hazardous Subject Products. *See* CC Appeal Brief 16-18.

2. Complaint Counsel Is Amenable to Amazon's Newly Described Timeline for Maintaining the "Your Orders" Banner

For the first time, Amazon elaborates on the "Your Orders" banner in its Answering Brief and explains that the banner currently remains visible indefinitely, until a consumer has clicked on the banner. Amazon Brief at 21. Complaint Counsel has no objection to the Commission adopting Amazon's practice in its final order, such that Amazon would be required to keep the banner for the Subject Products visible indefinitely, until clicked on by a consumer, in lieu of Complaint's counsel's proposed 120 days.[13]

D. Amazon Wrongly Argues That Social Media Postings Are Not Necessary to Protect the Public from the Substantial Product Hazards Posed by the Subject Products

Amazon incorrectly asserts that there is no basis for multiple rounds of social media or featured posts, ignores the Commission's authority to order public notification and specify the form and content of that notice, and mischaracterizes the record related to recall notification on social media. Amazon Brief at 22, 27. Additionally, Amazon ignores the record in asserting that featured posts on social media would not be required to adequately protect the public here. *Id*. at 22-25.

1. Amazon Ignores the Commission's Statutory Authority to Order Social Media Postings and Mischaracterizes the Record

Amazon's assertion that the Commission lacks the authority to order social media postings sidesteps the source of the Commission's authority to order social media posts, and multiple rounds thereof. First, Section 15(c)(1)(D) empowers the Commission to order public notification of a

[13] It follows that Amazon would also be able to track and report, via Monthly Progress Reports, the number of consumers who have clicked on the banner.

mandatory recall, including "clear and conspicuous" notice on a responsible entity's "Internet website." Similarly, social media falls within the realm of "public notice." Further, as noted above, Section 15(c)(1) also grants the Commission authority to specify the form and content of a recall notice. 15 § U.S.C. 2064(c)(1).

In the face of this statutory authority, Amazon seemingly asserts that Complaint Counsel is under a heightened obligation to present a certain quantity or quality of evidence to justify its social media notice. Amazon Brief at 23. That is not so. As noted above, administrative agencies are at the "zenith of their discretion" when fashioning remedies, *NTCH, Inc.*, 841 F.3d at 508, and here Complaint Counsel has demonstrated why multiple and featured posts are needed to ensure that the public notice achieved through the social media posts are "clear and conspicuous," as required by Section 15(c).[14]

Ironically, Amazon highlights the importance of social media as a tool to communicate with consumers (specifically Amazon customers), even while it seeks to limit its use to warn consumers about the hazards posed by the Subject Products. Amazon Brief at 25 ("Amazon has carefully developed its social media practices . . . in order to facilitate customers' receipt of information that is most relevant to their specific needs . . . ."). Pursuant to this rationale, Amazon should fully utilize its social media accounts to maximize notice.

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[14] As explained in the Appeal Brief, the record contains evidence demonstrating that consumers are more likely to see a recall notice that has been posted multiple times, and that messaging multiple times is more effective than simply sending a notice once. Appeal Brief, Dkt. No. 125 at 19 (citing Recall Effectiveness Workshop, Heiden Report). Posting about the recall multiple times ensures that consumers see the recall notice and respond to it, which is required to adequately protect consumers from the risks of injury and death presented by the Subject Products. *See* CC Appeal Brief, Dkt. No. 125 at 19. [redacted] *See* CAP Template, CC's Exhibit T at CPSC_AM0012127.

Multiple social media posts would also not contribute to the disputed concept of "recall fatigue," as claimed by Amazon. Amazon Brief at 26. Consumers would at most be exposed to four social media posts, one a week, which is distinguishable from the type of exposure discussed in the recall fatigue literature cited by Amazon's expert report, [redacted] Amazon Ex. 62. Amazon's recall fatigue argument is pure conjecture, as even the concept of recall fatigue is unproven, s*ee* Dkt. 109 at 23-24 (citing Amazon Ex. 97 at 395 ("Observers debate the existence of recall fatigue."); *id.* at 396 (the "question of whether recall fatigue does or does not exist")). Amazon also overstates the "congesting" effect that multiple social media posts would have on its social media accounts; Amazon would simply be required to post one notice, once a week, for three weeks after the recall announcement, and pin the recall notice for 120 days.

2. Amazon Incorrectly Claims That Featured or Pinned Posts Are Not Required to Adequately Protect the Public

In arguing that it should not be required to feature or pin a recall notice for 120 days, Amazon asserts it needs to use pinned posts to get other important information to its customers, implicitly conceding the value of featured or pinned posts in reaching consumers. Amazon also frames the featured or pinned posts as "the agency assuming control of Amazon's social media accounts," Amazon Brief at 29, a vast overstatement of a request for a notice to be pinned for 120 days. Amazon would, naturally, not be prohibited from posting other content during that time, and where possible, would also be able to pin other posts.[15]

[15] The practical concerns Amazon raises, such as only being able to "pin" one post at a time on X (formerly known as Twitter), Amazon Brief at 28, do not usurp the Commission's authority to order Amazon to pin a post, and can be mitigated by creating a post referencing all three Subject Products.

As explained above, Section 15(c) of the CPSA empowers the Commission to order remedial action in the form of "clear and conspicuous" public notices. A featured or pinned post on social media is definitively a public notice, is common agency practice, *see* Recall Handbook, CC's Exhibit S at CPSC_AM0011486-11487, and is required to adequately inform the public of the hazards presented by the Subject Products. *See* CC Appeal Brief, Dkt. No. 125 at 19 (citing to record supporting the use of featured posts in social media and explaining that 120 days is the typical period for which a Firm must keep a banner on its website with a link to its recall page).

Finally, Amazon argues that Complaint Counsel cannot seek featured or pinned posts because that remedy was not explicitly listed in the relief sought in the Complaint in this matter. However, the Complaint seeks particular notices "as well as any other public notice documents or postings required by CPSC staff that inform consumers of the hazard posed by the Subject Products and encourage the return or destruction of the Subject Products;" *see* Complaint, Dkt. No. 1. Moreover, the Federal Rules of Civil Procedure, while not binding, provide that 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). S*ee 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).

E. Amazon's First Amendment Arguments Are Meritless

Amazon's Brief once again wrongly asserts that the notifications sought by Complaint Counsel would violate the First Amendment of the U.S. Constitution. In doing so, Amazon

wrongly argues that the "Your Orders" page banner and the social media posts sought by Complaint Counsel fail to satisfy the third prong of the *Central Hudson* factors: whether the regulation directly advances a substantial government interest. Amazon Brief at 19, 26.[16] Amazon's argument mischaracterizes the applicable constitutional analysis under *Central Hudson* and ignores the clear public safety benefits of notifying consumers of the product hazards through both direct notice in the form of the "Your Orders" banner and public notice in the form of multiple social media posts.

As discussed in Complaint Counsel's Answering Brief, Amazon is wrong to suggest that *Central Hudson* requires the Commission to show how requiring Amazon *in this single case* to provide the requested Section 15 notice will, by itself, "directly advance" the Commission's interest in protecting the public (even though such a requirement clearly does advance such an interest). *See* CC Answering Brief, Dkt. No. 129 at 74-77. Amazon reiterates its self-serving arguments from its Appeal Brief that its unilateral email to original purchasers has somehow diminished the benefits of further notifying consumers, thereby undermining the public safety justification that ordinarily supports Section 15 notice. Amazon Brief at 27. But *United States v. Edge Broad. Co.*, 509 U.S. 418, 427 (1993) articulates that, in the context of an "as applied" constitutional challenge such as the challenge Amazon launches here, *Central Hudson* does not require a showing that the specific banner and social media posts in this single matter will in fact

[16] Both parties agree, and ALJ Patil has confirmed, that the appropriate analysis for compelled commercial speech, as applicable here, is the four-factor test articulated in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980). *See* CC's Answering Brief, Dkt. No. 129 at 73. Those four factors are: (1) the regulated speech concerns lawful activity and is not misleading; (2) there is a substantial government interest; (3) the regulation directly advances the substantial government interest; and (4) the regulation is not more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

materially advance the Commission's interests in informing and protecting consumers (even though they plainly do advance such interests). *Id.* at 429-30. Instead, the "direct advancement" prong of *Central Hudson* considers the overall benefit of the government regulation and is satisfied even if, as applied to Amazon here, the proposed notice would result in "only marginal advancement of [the substantial government] interest." *Id.*; *see* CC Answering Brief, Dkt. No. 128 at 74-77 (discussing *Edge* and applying the Court's holding to the notifications sought by Complaint Counsel in this litigation).

As explained above, both a banner on Amazon's "Your Orders" page and multiple posts on social media are required to adequately protect the public under Section 15(c)(1) of the CPSA in light of the ongoing danger presented by the 400,000 hazardous Subject Products that may remain in consumers' hands. The Commission's substantial interest in notifying consumers about those hazards—in a manner that properly incentivizes the removal of the Subject Products from commerce—would be more than marginally advanced by ordering Amazon to post public notice of the recall once a week for three weeks after the recall is announced on its social media accounts. Through these accounts, Amazon can reach a broad range of consumers, including second-hand purchasers and giftees who are unlikely to be aware of Amazon's unilateral and deficient email to purchasers. *See* CC Appeal Brief, Dkt. No. 125 at 18-19. Pinning or featuring a social media post for 120 days also ensures that consumers who land upon Amazon's social media accounts see the recall notice even when the post has been moved down Amazon's feed by other posts. *Id.* And similarly, maintaining a banner on consumers' "Your Orders" page indefinitely, until they click on the banner, ensures that consumers who have been directly notified of the recall take action and remove the hazardous Subject Products from their homes. CC Appeal Brief at 16-17. The "Your Orders" page banner is also the practice Amazon currently employs to inform consumers if a

product they have purchased has "has been the subject of a recall or a product safety alert," *see* Amazon's Letter to Judge Patil, Dkt. No. 103 at 3 -- meaning there is no dispute that Amazon is capable of implementing the remedy. *See also* Amazon Brief at 27. Requiring Amazon to post a banner on the "Your Orders" page and to issue multiple rounds of social media notice, are therefore fully justified under *Central Hudson* and pose no constitutional concerns.

F. Conclusion

For the foregoing reasons, Complaint Counsel moves the Commission to reject Amazon's arguments and grant the relief requested in Complaint Counsel's Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2023, a copy of the foregoing was served upon all parties and participants of record in these proceedings as follows:

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