UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of **Amazon.com, Inc.**	CPSC Docket No. 21-2 May 8, 2023

Order on Summary Decision Motions

I. Introduction

The Consumer Product Safety Commission's Complaint Counsel and Respondent Amazon.com, Inc., each moved for summary decision on the issue of what actions should be ordered in relation to certain consumer products that present substantial product hazards, based on what notice adequately protects the public and what other actions are in the public interest. Amazon contends it is entitled to a ruling that no remedial action is authorized—other than those it already unilaterally elected and executed. Complaint Counsel seeks multiple remedies. This order denies Amazon's motion, and grants in part, but denies in part, Complaint Counsel's motion. Amazon will be ordered to cease distributing the products, and the parties will submit additional briefing on the scope of the notice, refund or replacement, and monitoring remedies.

II. Procedural History

On July 14, 2021, the Consumer Product Safety Commission initiated an administrative enforcement proceeding against Amazon.com, Inc. ("Amazon"), under the Consumer Product Safety Act (CPSA) Sections 15(c)–(d), 15 U.S.C. §§ 2064(c)–(d), seeking public notification and remedial action to protect the public from the substantial product hazards presented by certain consumer products ("Subject Products") distributed by Amazon through its Fulfilled by Amazon program. Complaint, Dkt. 1.

In October 2021, Complaint Counsel moved for partial summary decision that Amazon is a "distributor" of the Subject Products under the CPSA. Complaint Counsel's Mot. for Partial Summ. Dec., Dkt. 9; *see* Dkt. 10–13. That November, Amazon moved to dismiss or for summary decision on three grounds: (i) that it is a third-party logistics provider rather than a distributor, (ii) expanding the definition of distributor would impermissibly impose retroactive liability in violation of the Administrative Procedure Act (APA) and Due Process Clause, and (iii) the proceeding is moot due to the actions Amazon

already took to resolve the issue. Amazon's Mot. to Dismiss and Mot. for Summ. Dec., Dkt. 14; *see* Dkt. 15–19. In January 2022, the presiding officer denied Amazon's motion to dismiss, finding that it is a distributor, and granted Complaint Counsel's motion for partial summary decision on substantially the same basis. Order on Mot. to Dismiss and Mot. for Summ. Dec. 5–14, 21–27 (Jan. 19, 2022), Dkt. 27. That decision rejected retroactivity arguments as both premature—because there had been no final CPSC action—and without merit because if Amazon is a distributor under the statutory language itself, the agency's acknowledgment of such is not impermissibly retroactive. *Id*. at 14–18. Finally, the decision rejected assertions of mootness, except with respect to the issue of providing full refunds, which it directed the parties to account for in the remedies phase. *Id*. at 18–21. Following the decision, the parties conducted discovery on remedies issues, including requests by Amazon to the CPSC and the Government Accountability Office (GAO). Dkt. 30–34 (GAO), 47–49, 66–67 (CPSC).

On September 23, 2022, the parties filed motions for summary decision on the issue of remedies. Dkt. 74–77 (Amazon), 78–81 (Complaint Counsel).[1] Amazon contends that no further action is in the public interest in light of steps it already took to protect customers, including alerting all purchasers of the hazards, providing full refunds, and removing Subject Products from its online marketplace. Amazon Mot. 12–28, 43–44. Amazon contends the requested remedies would violate the APA and Constitution. *Id*. at 31–37, 45–50. Amazon also moved to exclude an expert report produced by Complaint Counsel. Dkt. 71–73 (Sept. 22, 2022). I deny this requested relief because this decision does not rely on that expert report.[2]

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[1] Amazon's Motion for Summary Decision and Memorandum in Support of Motion for Summary Decision, docket number 74, is cited as "Amazon Mot." Complaint Counsel's Memorandum of Points and Authorities in Support of Motion for Summary Decision, docket number 79, is cited as "CC Mot." The parties' oppositions are cited as "Amazon Opp'n" (docket number 89) and "CC Opp'n" (docket number 86), and the parties' replies are cited as "Amazon Reply" (docket number 94) and "CC Reply" (docket number 93).

[2] Unlike jury trials where the judge serves as the gatekeeper, evidentiary determinations are typically inclusive in administrative proceedings. "[L]ittle harm can result from the reception of evidence that could perhaps be excluded" where, as here, this order does not rely on the report. *Multi-Med. Convalescent & Nursing Ctr. of Towson v. NLRB*, 550 F.2d 974, 977 (4th Cir. 1977); *see also* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2885 (3d ed. Apr. 2023 update).

Complaint Counsel argues that, because the Subject Products present substantial product hazards that can cause serious injury or death, it is entitled to an order to protect the public from these dangers. That order should, Complaint Counsel argues, require Amazon to cease distribution, provide notification to the public, and offer refunds or replacements to consumers in possession of a Subject Product, regardless of what actions Amazon already took voluntarily. CC Mot. 4–10, 25–50. The parties filed oppositions on October 21, 2022. Dkt. 86–88 (Complaint Counsel); Dkt. 89–92 (Amazon). Briefing was complete on November 21, 2022. Dkt. 93–95. The parties declined the opportunity to present live testimony during the summary decision phase but agreed that presenting oral argument would be helpful. Oral argument was held on March 28, 2023, and the parties submitted post-argument letters on April 6. Complaint Counsel moved for leave for an amended proposed order to be filed, which was granted on April 12. Amazon replied on April 19. The pending motions pertaining to remedial actions are now ripe for decision.

III. Constitutional Challenge to Commissioners' and Presiding Officer's Removal Protections

Amazon argues that this proceeding must be dismissed because limitations on the President's power to remove Commissioners and the presiding officer violate Article II of the U.S. Constitution. Amazon Mot. at 45–50. By statute, the President may remove commissioners only for cause. 15 U.S.C. § 2053(a). The presiding officer, an administrative law judge, may be removed only for cause "established and determined" by the Merit Systems Protection Board, and board members may themselves be removed only for cause. 5 U.S.C. §§ 1202(d), 7521(a). Amazon acknowledges that it is raising a facial challenge to these statutes. Oral Arg. Tr. 150.

Congress created these removal protections, and the "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 16 (2012) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994)). As the Supreme Court has observed, "agency adjudications are generally ill suited to address structural constitutional challenges." *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 905 (2023) (quoting *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021)). Although the Supreme Court has not ruled on whether the "oft-stated principle" that administrative agencies lack jurisdiction is correct, *Elgin*, 567 U.S. at 16, I decline to challenge that consensus view here and thus will not rule on these claims. I understand that Amazon has raised these issues to preserve them if it seeks review before an Article III court. Amazon Reply 39–40. They are so preserved.

IV. Legal Standards

As provided by CPSC rule, "[a] Summary Decision and Order shall be granted if the pleadings and any depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a Summary Decision and Order as a matter of law." 16 C.F.R. § 1025.25(c).

Because the Commission's Rules of Practice are "patterned on the Federal Rules of Civil Procedure" and the summary decision rule in particular closely matches Rule 56 of the Federal Rules, I look to decisions interpreting that rule additional guidance. Rules of Practice for Adjudicative Proceedings, 45 Fed. Reg. 29,206, 29,207 (May 1, 1980). The Supreme Court explained that a fact is material when it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine when a reasonable factfinder could find for the nonmoving party. *See id.* Thus, the evidence must "be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

Amazon's suggestion that this decision should employ the standards that an Article III court would employ under the APA (at different points Amazon recommends either the arbitrary and capricious or substantial evidence standards) for review of an agency action is not supported by controlling law. 5 U.S.C. § 706.

V. Facts

The parties are in agreement that the cross motions are appropriate for summary decision, as the contested issues, which are primarily matters of law, would not be beneficially informed by an evidentiary hearing as to the material facts. Oral Arg. Tr. 170–73. I agree, and this decision finds that there is no genuine issue as to the following facts.

The three categories of Subject Products at issue in this case were sold by third-party sellers on Amazon.com through its Fulfillment by Amazon ("FBA") program. Amazon's Response to Complaint Counsel's Statement of Undisputed Material Fact ¶¶ 1, 13, 22, 27, 44, 48, Dkt. 92. Consumers purchased over 400,000 units of the Subject Products from Amazon.com. Dkt. 92, ¶ 2.

Children's sleepwear garments, consisting of nightgowns and bathrobes intended for children primarily for sleep-related activities (hereinafter, the "children's sleepwear garments"), make up the first category of Subject

Products. Dkt. 92, ¶ 1.[3] The children's sleepwear garments are consumer products. *See* Amazon's Response to Complaint Counsel's Statement of Undisputed Material Facts and Amazon's Statement of Undisputed Material Facts ¶ 34 (Nov. 2, 2021), Dkt. 16. CPSC staff obtained samples of the children's sleepwear products (identified in footnote 1) by purchasing them from Amazon.com. Dkt. 92, ¶ 15. CPSC tested the samples purchased from Amazon.com and found they did not meet the flammability requirements for children's sleepwear as required under the Flammable Fabrics Act (FFA), 15 U.S.C. §§ 1191–1204 and 16 C.F.R. Parts 1615–16. Dkt. 92, ¶16.[4]

Carbon monoxide detectors equipped with alarms intended to alert consumers to the presence of harmful carbon monoxide gas (hereinafter, the "carbon monoxide detectors") constitute the second category of Subject Products. Dkt. 92, ¶ 22.[5] The carbon monoxide detectors are consumer products. *See* Dkt. 16, ¶ 37. Carbon monoxide is a "colorless, odorless, toxic gas" produced by burning gasoline, wood, propane, charcoal, or other fuel. Dkt. 92, ¶ 38. Improperly ventilated appliances and engines, particularly in a sealed or enclosed space, may allow carbon monoxide to accumulate to dangerous levels. *Id*. Carbon monoxide gas may cause severe injury, including death. Dkt. 92, ¶ 41. Continued exposure to 400 ppm carbon monoxide concentration can hinder an individual's ability to self-rescue as they become increasingly disoriented, drowsy, and ill. *Id*. According to the Underwriters Laboratories

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[3] The children's sleepwear garments include: (a) HOYMN Little Girl's Lace Cotton Nightgowns, Kids Long-Sleeve Sleep Shirts Princess Sleepwear for Toddlers 2-15 Years; (b) IDGIRLS Kids Animal Hooded Soft Plush Flannel Bathrobes for Girls Boys Sleepwear; (c) Home Swee Boy's Plush Fleece Robe Shawl Skull and Hooded Spacecraft Printed Soft Kids Bathrobe for Boy; and (d) Taiycyxgan Little Girl's Coral Fleece Bathrobe Unisex Kids Robe Pajamas Sleepwear. Dkt. 92, ¶ 3.

[4] For the purpose of this litigation, Amazon "does not contest that the Subject Product children's sleepwear garments … were tested by the CPSC and did not meet the current flammability requirements for children's sleepwear under the Flammable Fabrics Act." Stip. of Parties, ¶ 1 (Apr. 26, 2022), Dkt. 35.

[5] The carbon monoxide detectors include: (a) CD01 carbon monoxide detector manufactured by WJZXTEK; (b) ME2-CO carbon monoxide detector manufactured by Zhenzhou Winsen Electronics Technology Company, LTD; (c) ME2-CO and ss4 carbon monoxide detector manufactured by Zhenzhou Winsen Electronics Technology Company, LTD; and (d) carbon monoxide detector manufactured by BQQZHZ. Dkt. 92, ¶ 23.

("UL") Standard for Single and Multiple Station Carbon Monoxide Alarms, UL 2034 (4th ed. 2017), an alarm must sound within 15 minutes before an individual experiences "a loss of ability to react to the dangers of carbon monoxide exposure." CC Ex. 1-N, at CPSC_AM0014345, 14387.[6] If a consumer installs a carbon monoxide detector that does not provide an alert to the presence of carbon monoxide the consumer will not be warned of the presence of this harmful gas. *Id.* All four models of the Subject Product identified (see footnote 4) were tested. *See* CC's Ex. 5 (Aff. of Benjamin Mordecai), Ex. B, at CPSC_AM0017342–43). For the purpose of this litigation, the parties stipulated that, "according to testing conducted by the CPSC," the Subject Product carbon monoxide detectors "failed to alarm within 15 minutes when subjected to 400 ppm of CO." Stip. of Parties, ¶ 2.

Hair dryers that do not provide integral immersion protection are the third category of Subject Products ("hair dryers"). Stip. of Parties, ¶ 3.[7] The hair dryers are consumer products. Dkt. 16, at ¶ 40. The CPSC obtained samples of the hair dryers by purchasing them from Amazon.com. Dkt. 92, ¶ 50. Immersion protection standards have "been very effective in reducing deaths and electric shock injuries due to hair dryer immersion or contact with water." Substantial Product Hazard List: Hand-Supported Hair Dryers, 76 Fed. Reg. 37,636, 37,640 (June 28, 2011); Dkt. 92, ¶ 53. For the purpose of this litigation, Amazon has stipulated that the Subject Product hair dryers were "found not to contain an immersion protection device integral to the power cord." Stip. of Parties, ¶ 3. These hair dryers present a significant electric shock and electrocution hazard to users. Dkt. 92, ¶ 54.

A. FBA

Amazon provides 24/7 customer service to FBA program participants. Dkt. 92, ¶ 98. Amazon is also "responsible for all customer service issues relating to packaging, handling and shipment, and customer returns, refunds, and adjustments related to Amazon Fulfillment Units," which are products sold by

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[6] Exhibit 1 to Complaint Counsel's motion for summary decision is the Declaration of John Eustice, attached to which are Exhibits A through EE. These exhibits are cited as "CC Ex.1-[exhibit letter]."

[7] The hair dryers include three dozen models from 33 distinct sellers/manufacturers: Admitrack, ADTZYLD, Aiskki, BEAUTIKEN (2), Bongtai, Bownyo, Bvser Store, BZ, Dekugaa Store, ELECDOLPH, GEPORAY, LANIC, LEMOCA, KENLOR, KIPOZI, LetsFunny, Miswerwe, Nisahok, Ohuhu, OSEIDO, OWEILAN, Raxurt Store, Romancelink, SARCCH, Shaboo Prints, Songtai, SUNBA YOUTH Store/Naisen, Surelang Store, Techip (2), TDYJWEEL, tiamo airtrack, VIBOOS (2), and Xianming. Dkt. 92, ¶ 45.

third-party sellers through Amazon's FBA program. Dkt. 92, ¶ 99. Amazon's FBA Service Terms provided that Amazon has the right to "determine whether a customer will receive a refund" and that Amazon "will require" the seller to reimburse Amazon where it determines the seller has responsibility under the FBA agreement. Dkt. 92, ¶ 100.

If a product is sold under the FBA program, customers return their product to Amazon, not the third-party seller. Dkt. 16, ¶ 16. After a product sold by third-party sellers through the FBA program is returned to Amazon, it may be returned to the third-party seller, handled by Amazon in accordance with the third-party seller's instructions, or transferred by the third-party seller to Amazon for later sale through the "Amazon Warehouse" program. *See id*.

Amazon is capable of tracking the movement of products sold through the FBA program, including tracking destruction of inventory by Amazon or as requested by third-party sellers. Dkt. 16, ¶¶ 8, 10, 16.

Amazon notified all third-party sellers of Commission notices regarding the Subject Products that Amazon received. CC's Resp. to Amazon's Statement of Undisputed Material Facts, ¶ 122, Dkt. 87.

B. Amazon's remedial actions

1. Children's sleepwear Subject Products

Prior to the filing of the Complaint in this matter, Amazon had removed the children's sleepwear Subject Products from Amazon.com. Dkt. 87, ¶ 5. None are currently listed or available for purchase on Amazon.com. Dkt. 87, ¶ 6. Amazon prohibits anyone from listing them for sale on Amazon.com based on their corresponding ASIN ("Amazon Standard Identification Number," a unique identifier assigned to each product). Dkt. 87, ¶ 7. Amazon is capable of stopping the sale of, suppressing, and quarantining products. Dkt. 92, ¶ 107.

Between June 11, 2021 and August 1, 2021, Amazon sent all consumers who purchased a Taiycyxgan Subject Product an email with the subject line "Attention: Important safety notice about your past Amazon order." Dkt. 87, ¶¶ 17, 18. Amazon retains email address information for purchasers of the Subject Products. Dkt. 87, ¶ 110.

The body of the email began as follows:

> We have learned of a potential safety issue that may impact your Amazon purchase(s) below:

> Order ID: [omitted] Item: [omitted][8]

Dkt. 87, ¶ 19. The "Order ID" number included in the email appeared as a clickable hyperlink in blue text, which purchasers could click, taking them to a web page showing "an icon photograph of the Subject Product, the order ID, the date of the purchase, the amount paid, the shipping address, and the title of the product." Declaration of Lauren Ann Shrem ("Shrem Decl.") ¶¶ 9–10 (Oct. 21, 2022), Dkt. 91.[9]

The body of the email to each purchaser of the Taiycyxgan Subject Product continued:

> The product listed above is either a product that the U.S. Consumer Product Safety Commission (CPSC) has informed us about, or our Product Safety team has identified, that may fail to meet the federal standard for flammability of children's sleepwear, posing a risk of burn injuries to children.

Dkt. 87, ¶ 19. A CPSC notice from 2022 for a children's sleepwear product stated: "The children's robes fail to meet the federal flammability standards for children's sleepwear, posing a risk of burn injuries to children." Dkt. 87, ¶ 152.

The body of the email from Amazon continued as follows:

> If you still have this product, we urge you to stop using it immediately and dispose of it. If you purchased this product for someone else, please notify the recipient immediately and let them know they should dispose of it. There is no need for you to return the product.
>
> Amazon is applying a refund in the form of a gift card to Your Account.

Dkt. 87, ¶ 19. The email provided a hyperlink in blue text and instructions for purchasers to view their available gift card balance and verify that the refund

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[8] The "Item" information reflected both the ASIN, and a descriptive product name, for example, "Taiycyxgan Little Girl's Coral Fleece Bathrobe, Pink Cat, 130:6T." Dkt. 87, ¶ 19.

[9] In addition, a purchaser's order history and information found under the "Your Orders" section of the Amazon.com website is available at all times to that purchaser upon logging in to Amazon.com. Shrem Decl. ¶ 12.

for the Subject Product purchase price plus shipping and tax had been applied to their Amazon account. Shrem Decl. ¶ 13.[10] Amazon provided refunds to all consumers who purchased the Taiycyxgan Subject Products. Dkt. 87, ¶ 25. The email also advised that "[t]he safety and satisfaction of our customers is our highest priority." Dkt. 87, ¶ 19. Contact information for the Amazon customer service team was, and remains, available on Amazon.com, and purchasers may contact the Amazon customer service team at any time. Shrem Decl. ¶ 17.

None of the Taiycyxgan Subject Products have been listed for purchase on Amazon.com since January 29, 2020. Dkt. 87, ¶¶ 26, 27. Amazon prohibits anyone from listing any of the Taiycyxgan Subject Products on Amazon.com. Dkt. 87, ¶ 28. By December 2020, Amazon had destroyed all its inventory of the Taiycyxgan Subjects Products. Dkt. 87, ¶ 16.

Amazon followed the same procedures when it stopped selling, quarantined, notified customers, and refunded purchases of the Home Swee, IDGIRLS, and HOYMN children's sleepwear Subject Products. Dkt. 87, ¶¶ 32–42, 44–61, 63–69.

2. Hair dryer Subject Products

On or about March 3, 2021, Amazon quarantined all units, and stopped selling from Amazon.com, the hair dryer Subject Products. Dkt. 87, ¶¶ 84–85.

Between June 11, 2021, and August 1, 2021, Amazon sent all consumers who purchased the hair dryer Subject Products, an email like the one it sent regarding the children's sleepwear Subject Products, *compare* Dkt. 87, ¶¶ 86–88, *with* Dkt. 87, ¶¶ 18–19, with the following difference:

> The product listed above is either a product that the U.S. Consumer Product Safety Commission (CPSC) has informed us about, or our Product Safety team has identified, that may fail to have mandatory immersion protection, posing a risk of electric shock if the hair dryer comes in contact with water.

Dkt. 87, ¶ 87. A Commission notice from 2020 for a hair dryer product stated: "The hair dryers do not have an immersion protection device, posing an electrocution or shock hazard if the dryer falls into water when plugged in." Dkt. 87, ¶ 153. Amazon provided refunds to all consumers who purchased the hair dryer Subject Products along with the email. Dkt. 87, ¶ 93.

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[10] In addition, a purchaser's gift card balance and activity are available at all times to that purchaser upon logging in to Amazon.com. Shrem Decl. ¶16.

Prior to the filing of the Complaint in this matter, Amazon had removed the hair dryer Subject Products from Amazon.com and none are currently listed or available for purchase on Amazon.com. Dkt. 87, ¶¶ 94–95. Amazon prohibits anyone from listing any of the hair dryer Subject Products on Amazon.com. Dkt. 87, ¶ 96.

3. Carbon monoxide Subject Products

On or about August 13, 2020, Amazon quarantined, and stopped selling from Amazon.com, the carbon monoxide Subject Products. Dkt. 87, ¶¶ 98–99, 107–08. Amazon prohibits anyone from listing those products for sale on Amazon.com. Dkt. 87, ¶ 109.

Between June 11, 2021, and August 1, 2021, Amazon sent all consumers who purchased the carbon monoxide Subject Products an email with the subject line: "Attention: Important safety notice about your past Amazon order." Dkt. 87, ¶ 100. The language of the email is similar to the one Amazon sent to purchasers of the children's sleepwear Subject Products, *compare* Dkt. 87, ¶¶ 100–02, *with* ¶¶ 18–19, with the exception of the following language specific to carbon monoxide detectors:

> The product listed above is either a product that the U.S. Consumer Product Safety Commission (CPSC) has informed us about, or our Product Safety team has identified, that may fail to alarm on time, posing a risk of exposure to potentially dangerous levels of Carbon Monoxide.

Dkt. 87, ¶ 101.

A Commission notice from 2022 for a carbon monoxide product stated: "The alarms can fail to alert consumers to the presence of a hazardous level of carbon monoxide, posing a risk of carbon monoxide poisoning or death. Carbon monoxide (CO) is an odorless, colorless, poisonous gas." Dkt. 87, ¶ 154. Amazon provided refunds to all consumers who purchased the carbon monoxide Subject Products. Dkt. 87, ¶ 106.

4. Product destruction

Amazon's fulfillment centers destroy products in the order they are received. Dkt. 87, ¶ 117. The process of destroying products can take time due to the large number of products that require destruction. Dkt. 87, ¶ 118. Amazon has destroyed 45,785 units of the Subject Products identified in the Complaint. Dkt. 87, ¶ 119. Amazon has destroyed all but 6 units of the Subject Products (all of them hair dryers) at its fulfillment centers. Dkt. 87, ¶ 120. All

Subject Products, or the additional products Amazon identified as potentially posing the same hazard as the Subject Products that are awaiting destruction, cannot be sold or shipped to customers. Dkt. 87, ¶ 121.

C. Recalls

When products present substantial product hazards to consumers, CPSC works with firms to conduct product recalls to prevent deaths and injuries. CC's Statement of Undisputed Material Facts ¶¶ 116–17, Dkt. 80. CPSC makes available on its website a Recall Handbook, among other resources, that walks companies through the process of conducting a recall and providing remedies to consumers. Dkt. 80, ¶ 116.[11] The objectives of a recall, as set forth in the Recall Handbook, include locating recalled products expeditiously, removing them from the distribution chain and from the possession of consumers, and communicating accurate and understandable information about the products, the hazard, and the corrective action. *Id*.

1. Recalls involving like products

In all 77 recalls of children's sleepwear garments, hair dryers, and carbon monoxide detectors since 2015, CPSC posted notice on its public website. CC Ex. 1-Z, at 1–13; Dkt. 92, ¶ 120. Among those 77 recalls, CPSC: obtained notice on a recalling firm's website and/or social media in 76; instructed firms to notify companies in their distribution chain to cease distribution in 66; and conditioned a refund or replacement of the hazardous product on its return or confirmed destruction in 51. *Id*. Recalling firms submitted monthly progress reports in 44 of those recalls, including 39 of the 50 most recent. *Id*.

2. Direct notice

A direct recall notice is the most effective form of a recall notice. Dkt. 87, ¶ 162. It has a substantial impact on consumer return rates. Dkt. 87, ¶ 163. CPSC admitted that "direct notification of a recall to all purchasers can be one part of an acceptable manner of providing notice of a recall to the public depending upon the particulars and adequacy of the notice." Dkt. 87, ¶ 165. The CPSC admits that media assistance is not as important when a recalling company can directly contact all or nearly all of the purchasers of a recalled product. Dkt. 87, ¶ 166. The preceding findings must be qualified to the following extent: direct notice is less effective with respect to Subject Products

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[11] Amazon concedes that CPSC's Recall Handbook (as of 2012), Corrective Action Plan Template, and Office of Communications Content Guides accurately represent the CPSC's practices and guidelines for handling recalls. Dkt. 92, ¶¶ 115–61.

that are not in the hands of the original purchasers, who would not receive direct notice unless an initial purchaser passed it along. Oral Arg. Tr. 39.

3. Correction rate

The Commission uses "correction rate" to assess the effectiveness of a recall. A correction is a refund, replacement, repair, or combination of those. Amazon Ex. 66 at CPSC_AM0009644. Correction rate is "determined by comparing the number of reported corrections made to the number of reported products distributed." *Id.* at CPSC_AM0009638.

Based on data analyzed for closed cases that had a Corrective Action Plan between FY 2013 and FY 2016, the Commission's overall correction rate was 65 percent. Dkt. 87, ¶ 135. As of 2017, cases that involved a Commission Press Release as the only corrective action had a consumer correction rate of approximately 6 percent. Dkt. 87, ¶ 138. As of 2017, for cases that involved a Commission Recall Alert, where the recalling firm was able to directly contact at least 95 percent of consumers, the correction rate was approximately 50 percent. Dkt. 87, ¶ 144.

Correction rate has some weaknesses in measuring recall effectiveness, however:

> [W]hen a firm recalls, and offers to replace, a product that has a very low dollar value, like a fast food meal toy, consumers aware of the recall may throw away the product rather than take the corrective action (return it for replacement). In this case, the recall is effective in alerting the consumer and removing the hazard, but this would not be reflected in CPSC's correction rate because the consumer did not use the firm-provided remedy.

Dkt. 87, ¶ 172 (quoting Amazon Ex. 61 (Amazon-CPSC-FBA00001566, at 01597 (GAO-21-56 Rep. on CPSC Nov. 2020))).

4. Past recall notices have contained qualifying language like "may" and "should" and did not require confirmation of product disposition

Four recall notices (from 2010, 2011, 2015, and 2017) included the word "may" in the "Hazard" section. Dkt. 87, ¶ 159. The recall notice for Recall No. 11-711 provides a hazard description stating "Vibration from the ignition module *may* cause the trimmer head to loosen and detach from the mounting, posing an injury hazard." Dkt. 87, ¶ 158 (emphasis added). Two 2020 recall notices include the following language in the "Remedy" section: "Consumers

should immediately stop using the recalled" product (emphasis added). Dkt. 87, ¶ 160.

Six recall notices (from 2018–2022) instructed a consumer to dispose of a product or repair it, but did not require the consumer to verify that they completed that action. Dkt. 87, ¶ 161. Two of those recall notices specified that the consumer should either remove the hazardous part or return the product for a full refund. *Id*. For example, Recall No. 21-114 states that "[c]onsumers should immediately take the recalled jacket away from children and remove the drawstrings to eliminate the hazard, or return the jacket to BRAV USA for a full refund, shipping included." Amazon Ex. 85. Recall No. 18-023 states that "[c]onsumers should immediately take the recalled ponchos away from children and remove the drawstring to eliminate the hazard or return the poncho to the firm for a full refund." Amazon Ex. 88.

VI. Conclusions of Law

A. Substantial product hazards

This decision ratifies the parties' agreement that each of the Subject Products present a substantial product hazard, defined as (1) "a failure to comply with an applicable consumer product safety rule … which creates a substantial risk of injury to the public" or (2) "a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public." 15 U.S.C. § 2064(a). For purposes of section 2064(a)(2), a "defect is a fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function." 16 C.F.R. § 1115.4. A product may contain a design defect "if the risk of injury occurs as a result of the operation or use of the product or the failure of the product to operate as intended." *Id*.

1. Children's sleepwear

Congress enacted the Flammable Fabrics Act ("FFA"), 15 U.S.C. §§ 1191–1204, in the 1950s in response to deaths and serious injuries resulting from burns associated with clothing. The Commission enforces the FFA under CPSA Section 15(a)(1), 15 U.S.C. § 2064(a)(1); *see* 15 U.S.C. § 2079(b).

Standards were established to address the ignition of children's sleepwear, such as nightgowns, pajamas, and robes, in the 1970s. *See* Standards for the Flammability of Children's Sleepwear, 16 C.F.R. Parts 1615 and 1616 ("the Standards"). The Standards were required "for young children's sleepwear to protect the public against unreasonable risk of the occurrence of fire leading to death, personal injury, or significant property damage." Notice of Amendment to Flammability Standard to Provide for Sampling Plan, 37

Fed. Reg. 14,624, 14,624 (July 21, 1972). Most burn incidents and deaths do not occur while children are sleeping but while they are awake, unsupervised, and wearing sleepwear garments. Dkt. 92, ¶ 17. The primary hazard is ignition of the sleepwear by contact with hot surfaces or small open-flame ignition sources, such as stove elements, matches, and lighters. *Id*. (citing CPSC Laboratory Test Manual for 16 C.F.R. Parts 1615 and 1616: Standards for the Flammability of Children's Sleepwear 5 (July 2010)).[12]

Children's sleepwear garments must comply with the flammability requirements of the FFA and the Standards. As found previously, the Subject Products failed to meet the flammability requirements. Children's sleepwear garments that fail to meet the flammability requirements create a substantial risk of injury to consumers because of the serious injuries that can occur when such garments ignite while worn by children. *See* Dkt. 92, ¶ 20. Accordingly, the Subject Product children's sleepwear garments present a substantial product hazard within the meaning of Section 15(a)(1) of the CPSA. 15 U.S.C. § 2064(a)(1); *see* Stip. of Parties ¶ 1.

2. Carbon monoxide detectors

The Subject Product carbon monoxide detectors are designed to detect carbon monoxide and to alert consumers when they are exposed to a hazardous concentration of carbon monoxide. Dkt. 92, ¶ 22. As I found, the pertinent standard provides that a carbon monoxide detector shall alarm within fifteen minutes of exposure to a carbon monoxide concentration of 400 ppm, before an individual loses their ability to self-rescue. Dkt. 92, ¶ 41. When tested, the Subject Product carbon monoxide detectors failed to alarm in the presence of hazardous levels of carbon monoxide before consumers would experience serious health consequences and "a loss of ability to react to the dangers of carbon monoxide exposure," Dkt. 92, ¶ 31, demonstrating the Subject Products are defective because a "risk of injury occurs as a result of the operation or use of the product or the failure of the product to operate as intended." 16 C.F.R. § 1115.4; *see* Dkt. 92, ¶ 42. "Even one defective product can present a substantial risk of injury and provide a basis for a substantial product hazard determination under Section 15 of the CPSA if the injury which might occur is serious and/or if the injury is likely to occur." 16 C.F.R. § 1115.12(g)(1)(ii). Together, the defect, the number of products distributed, and the severity of the risk establish the Subject Product carbon monoxide detectors present a

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[12] The laboratory test manual referenced for this undisputed fact is available on the CPSC's website at https://www.cpsc.gov/s3fs-public/Flammability%20of%20Children's%20Sleepwear%20Test%20Manual_1615_1616.pdf.

substantial product hazard within the meaning of Section 15(a)(2); *see* Stip. of Parties ¶ 2.

3. Hair dryers

In 2011, CPSC approved a federal safety rule specifying that hand-supported hair dryers that do not provide integral immersion protection are a "substantial product hazard" under Section 15(a)(2) of the CPSA. 16 C.F.R. § 1120.3(a); *see* 15 U.S.C. § 2064(j)(1) (CPSC "may specify, by rule, for any consumer product or class of consumer products, characteristics whose existence or absence shall be deemed a substantial product hazard under subsection (a)(2)").

The rule aims to reduce the risk of electric shock and electrocution hazards created by hand-supported hair dryers. Dkt. 92, ¶¶ 52–53. When hand-supported hair dryers have integral immersion protection, if the hair dryer "should become wet or immersed in water, enough to cause electrical current to flow beyond the normal circuitry, the circuit interrupter will sense the flow and, in a fraction of a second, disconnect the hair dryer from its power source, preventing serious injury or death to a consumer." 76 Fed. Reg. at 37,637.

The parties stipulate that the Subject Product hair dryers are hand-supported hair dryers that lack integral immersion protection. Stip. of Parties ¶ 3. Without integral immersion protection, "[i]f the uninsulated heating element were to contact water, an alternative current flow path could easily be created, posing the risk of shock or electrocution to the user holding the dryer (or retrieving it after dropping it into a sink, bathtub, or lavatory)." 76 Fed. Reg. at 37,637. Because the hair dryers fail to provide integral immersion protection, they present a significant electric shock and electrocution hazard to consumers. Dkt. 92, ¶ 54. Accordingly, Subject Product hair dryers present a substantial product hazard within the meaning of Section 15(a)(2) and (j) of the CPSA. 15 U.S.C. § 2064(a)(2) and (j); *see* Stip. of Parties ¶ 3.[13]

B. Persuasiveness of CPSC's Recall Handbook

Complaint Counsel frequently cites the Commission's Recall Handbook for evidence of the Commission's past practice and to support various remedial

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[13] At this stage, in the absence of directed discovery to ascertain what injuries have been caused by the Subject Products, with the exception of one past disclosure by Amazon documenting over 100 consumer complaints that the Subject Product hair dryers caught fire, burned, or shocked consumers, this record does not fully and accurately characterize their adverse impact. Dkt. 88 Exh. K, CPSC_AM0001807-11.

actions being in the public interest. Amazon argues that the Recall Handbook is a "non-binding guidance document" that "cannot confer additional statutory powers on the Commission" and is not "entitled to *Chevron* deference." Amazon Opp'n 42. Although the *Chevron* framework does not apply to this administrative proceeding,[14] Amazon is correct that the handbook is not binding legal authority. The Recall Handbook bears this disclaimer on its first page: "This handbook was prepared by CPSC staff, and has not been reviewed or approved by, and may not necessarily reflect the views of, the Commission." Amazon Ex. 89, Consumer Product Safety Commission, Product Safety Planning, Reporting and Recall Handbook 1 (2021) ("2021 Recall Handbook");[15] *see also* Amazon Ex. 60, Consumer Product Safety Commission, Product Safety Planning, Reporting and Recall Handbook 6 n.1 (2012) ("2012 Recall Handbook"). The Commission did not promulgate the handbook under rulemaking authority granted by Congress, and it therefore falls outside the agency determinations given *Chevron* deference by federal courts. For that same reason—the Commission not formally adopting the Recall Handbook—I am not bound to follow it.[16]

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[14] Under *Chevron*, federal courts defer to an agency's reasonable interpretation on questions of statutory ambiguity when Congress has expressly or impliedly delegated interpretive authority to the agency. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). As an agency administrative law judge, however, I am required to follow and apply *all* interpretations the Commission has formally adopted under granted authority, not just the reasonable interpretations. *Wilson v. Comm'r of Soc. Sec.*, 378 F.3d 541, 545 (6th Cir. 2004) ("It is an elemental principle of administrative law that agencies are bound to follow their own regulations.") (citing *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954)).

[15] The 2021 Recall Handbook is also Complaint Counsel's Exhibit 1-S.

[16] By contrast, I am bound to follow the Commission's Guidelines and Requirements for Mandatory Recall Notices, 75 Fed. Reg. 3355 (Jan. 21, 2010) (codified at 16 C.F.R. §§ 1115.23–.29), which "contains the Commission's interpretation of information which must appear on mandatory recall notices ordered by the Commission." *Id.* at 3356. Section 214(c) of the Consumer Products Safety Information Act of 2008 added subsection 15(i) to the CPSA, 15 U.S.C. § 2064(i), which "specifies certain content that must be included in mandatory recall notices" but leaves the Commission "final authority over the form and content of mandatory recall notices" so it "may remove information that is unnecessary or inappropriate under the circumstances, or add additional appropriate information to a mandatory recall notice." 75 Fed Reg. at 3356 (citing 15 U.S.C. § 2064(i)(2), (i)(2)(I)).

Even though the Recall Handbook is not binding authority, its interpretations may still be persuasive. The Supreme Court has explained that nonbinding interpretations such as opinion letters, policy statements, agency manuals, and enforcement guidelines are "entitled to respect" if they have "the power to persuade." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). In determining the level of respect or deference to give these documents, courts have considered "the degree of the agency's care, its consistency, formality, and relative expertness." *Mead Corp.,* 533 U.S. at 228 (footnotes omitted); *see Skidmore*, 323 U.S. at 140 (weighing "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade").

The Commission has a longstanding practice of recognizing the importance of the handbook. In 1989, acting CPSC Chair Graham informed Congress that a Recall Handbook recently "developed by the Commission" was "intended to assist manufacturers in identifying, and taking actions to correct, safety problems." *Consumer Product Safety Commission Reauthorization: Hearing before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the H. Comm. on Energy and Commerce*, 101st Cong. 40 (1989) (statement of Anne Graham, Acting Chair, CPSC).[17] In 1991, Chair Jones-Smith advised that the "detailed recall handbook … guides firms in the development of a program when they face a recall." *Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1992: Hearings before the Subcomm. on VA, HUD and Indep. Agencies of the H. Comm. on Appropriations*, 102nd Cong. 79 (1991) (statement of Jacqueline Jones-Smith, Chair, CPSC & 1992 Budget Request). CPSC Chairs continued to attest to the importance of the Commission's Handbook before Congress throughout that decade,[18] and it continues to serve

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[17] *Authorizations for CPSC: Hearing before the Subcomm. on the Consumer of the S. Comm. on Commerce, Science, and Transp.*, 101st Cong. 53 (1989) (statement of Anne Graham, Acting Chair, CPSC) ("The hazard priority and corrective action guidelines are discussed in a recently published recall handbook").

[18] *E.g., Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 1999: Hearings before the Subcomm. on VA, HUD and Indep. Agencies of the H. Comm. on Appropriations*, 105th Cong. 678–79 (1998) (statement of Ann Brown, Chair, CPSC & 1999 Budget Request) ("Where voluntary action is not forthcoming, the Commission can use its litigation authority. The agency makes presentations at industry seminars and provides CPSC materials, including a

as a benchmark decades later. *Financial Services and General Government Appropriations for 2017: Hearings before a Subcomm. of the H. Comm. on Appropriations, Pt. 5*, 114th Cong. 51 (2016) (response to questions for the record by Elliott F. Kaye, Chair, CPSC) (specifically inviting review the Recall Handbook in order "to provide clarity" on CPSC enforcement).

In promulgating its regulation on Mandatory Recall Notices, the Commission stated "it relied on … more than thirty years of experience conducting recalls, which is summarized in the Recall Handbook." 75 Fed. Reg. at 3357; *see* Oral Arg. Tr. 37–38 (discussing Federal Register notice).[19] The Commission made similar subsequent pronouncements in related rulemaking years later. Voluntary Remedial Actions and Guidelines for Voluntary Recall Notices, 78 Fed. Reg. 69,793, 69,794 (Nov. 21, 2013) (rule "based on … the information contained in agency recall guidance materials, including the Recall Handbook"). The Commission has considerable experience and expertise with the subject matter of consumer product recalls as it conducts hundreds of corrective actions per year. Amazon Ex. 62, at 26.

The Commission has also recently solicited stakeholder feedback on recall effectiveness that it incorporated in the updated version of the handbook. For example, it held a workshop on recall effectiveness in 2017. *See* CPSC Workshop on Recall Effectiveness, 82 Fed. Reg. 27,046 (June 13, 2017) (public notice inviting "interested parties to attend" a "workshop to engage stakeholders to explore ideas for improving the effectiveness of recalls"). "Seventy-nine external stakeholders attended the workshop, including various retailers, manufacturers, law firms, consumer interest groups, third party recall contractors and consultants, testing laboratories, and other interested parties." Recall Effectiveness: Announcement of Request for Information Regarding the Use of Direct Notice and Targeted Notices During Recalls, 83 Fed. Reg. 29,102, 29,102 (June 22, 2018). This gave rise to a public CPSC "Request for Information (RFI) from stakeholders to provide information critical to future work on Recall Effectiveness." *Id.* In 2018, CPSC similarly "organized and hosted a meeting to discuss recall best practices with other

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recall handbook, to help firms become aware of their reporting obligations and recall options.")

[19] *Accord* 75 Fed. Reg. at 3356 ("[T]he final rule is a culmination of the statutory requirements and the Commission's expertise, which is summarized in the Commission's Recall Handbook…" (citation omitted)); Guidelines and Requirements for Mandatory Recall Notices: Notice of Proposed Rulemaking, 74 Fed. Reg. 11,883, 11,883 (Mar. 20, 2009) ("The proposal is also based on related agency expertise and on information contained in agency recall guidance materials, including, but not limited to, the Recall Handbook.")

agencies that conduct recalls." Amazon Ex. 61, GAO Report 29 (2020). The Commission incorporated this feedback and best practices into the updated Handbook. *Id.*; *see* 2021 Recall Handbook 35 & n.22.

Although Amazon points to some differences between the 2012 and 2021 versions of the handbook, Amazon Opp'n 13, those two versions are largely consistent and the changes Amazon identifies are minor alterations to language and timing rather than wholesale changes or conflicting positions. *Cf. Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (stating that an agency interpretation that conflicts with earlier interpretation is "entitled to considerably less deference" than a consistent position). Other than the minute matters addressed by Amazon, the differences between the versions relate primarily to the addition of updated information on best practices, which represent refinements and improvements. 2021 Recall Handbook 32–52. There does not appear to be any meaningful contradictions that would undermine reliance on the persuasive authority of either version of the handbook with regard to determining remedies in this case. The handbook is detailed and shows thoroughness.

The handbook is informal, which weighs against it. *See Mead Corp.*, 533 U.S. at 228 n.9 (according informal guidelines not subject to notice-and-comment rulemaking only "some deference"). However, given that it represents decades of expertise of the agency charged with conducting such recalls, and has been consistently identified an appropriate reference by the Commission itself in rulemaking and Congressional testimony, it is entitled to more deference than typical informal staff guidance. Based on those factors, and the fact that Recall Handbook itself is persuasive, I give it weight in determining what remedial actions are in the public interest.

C. Public interest analysis

1. Legal basis

In order for the Commission to impose remedies under Section 15(d) of the CPSA, it must determine that the action is in the public interest. 15 U.S.C. § 2064(d). The CPSA is one of many statutes instructing agencies to consider the public interest.[20] In some cases Congress has been explicit about what the agency should consider the public interest. But often, as with the CPSA,

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[20] One judge described the statutes requiring an agency to act in the public interest as "innumerable." *Nat'l Coal Ass'n v. Hodel*, 825 F.2d 523, 533 (D.C. Cir. 1987) (Williams, J., concurring).

Congress has not directly articulated the factors to be considered in the public-interest analysis.

In these cases, courts have found the public interest to be broad and allow agency discretion, within limits. The Supreme Court has explained that the "public interest" mandate is a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940). But "[t]his criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power." *Fed. Radio Comm'n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 285 (1933).

Public interest is to be interpreted by its context. *Id.* When Congress uses *public interest* in a regulatory statute, it "take[s] meaning from the purposes of the regulatory legislation" and is not "a broad license to promote the general public welfare." *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976).[21] Congress's intent in a specific statutory provision takes precedence over the "broad purposes of an entire act." *Int'l Bhd. of Teamsters v. ICC*, 801 F.2d 1423, 1430 (D.C. Cir. 1986).

Congress has not provided a specific purpose in 15 U.S.C. § 2064, so it is appropriate to consider the broader purposes of the CPSA. Those purposes are set out in 15 U.S.C. § 2051(b):

> (1) to protect the public against unreasonable risks of injury associated with consumer products;
>
> (2) to assist consumers in evaluating the comparative safety of consumer products;
>
> (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and
>
> (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

It was the first of these that the Commission considered in finding remedies in the public interest in its most recent decision on the issue. *Zen Magnets, LLC*, Docket No. 12-2, 2017 WL 11672449, at *42 (CPSC Oct. 26,

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[21] The parties agree that *NAACP* is the most relevant Supreme Court case for interpreting the "public interest" under Section 15(d). Oral Arg. Tr. 20, 85–86.

2017) (concluding that enjoining the sale, distribution, or importing "the Subject Products is in the public interest because the Subject Products present a substantial product hazard to children that cannot be mitigated by warnings"); *id.* at *45 (removing hazardous products from consumers' hands also in the public interest); *see also Dye & Dye*, Docket No. 88-1, 1989 WL 435534, at *21 (CPSC July 17, 1991) (prohibiting the manufacture and sale of products was in the public interest due to the "serious hazard" and "substantial risk of injury they present to the public").

But where a remedy would be futile or impossible, it is not in the public interest to order it. For example, it is not in the public interest to order repair or replacement if that would not eliminate the product hazard. *Dye & Dye*, 1989 WL 435534, at *22. And if there are no resources to provide refunds, then that "ineffectual alternative also is not in the public interest." *Id.* Similarly, in considering what notice is in the public interest, the Commission found it appropriate to give "some consideration of the circumstances of the respondents, and of their ability to comply with the [notice] order." *Id.* at *21. Because the respondents lacked the assets to issue "extensive public notice," the Commission did not order the respondents to mail the notice or advertise in the media. *Id.* at *21–22.

For these reasons, I have considered the requested remedies' effectiveness in protecting the public against unreasonable risks of injury from the Subject Products in determining whether the remedy is in the public interest.[22]

2. Cost-benefit analysis

Amazon argues that Complaint Counsel cannot establish that any remedy is in the "public interest" because it has not been subject to a generalized cost-benefit analysis that Amazon contends is required. To support this argument, Amazon attacks Complaint Counsel's reliance on CPSA Section 15(h), added in 1990, which provides that:

> *Nothing in this section shall be construed to require the Commission*, in determining that a product distributed in commerce presents a substantial product hazard and that notification or other action under this section should be taken, *to prepare a comparison of the costs that would be*

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[22] Because the statute's purpose limits the Commission's authority when interpreting the public interest to protecting the public from unreasonable risks of injury from consumer products, I reject Amazon's argument that the Commission has "unfettered discretion" that creates a separation-of-powers problem under the non-delegation doctrine. *Cf.* Amazon Opp'n 8.

> *incurred in providing notification or taking other action under this section with the benefits from such notification or action.*

15 U.S.C. § 2064(h) (emphases added); Consumer Product Safety Improvement Act of 1990, Pub. L. 101-608, § 111(a)(2), 104 Stat. 3110, 3114; *cf.* Amazon Reply 3–7. Relying principally on Supreme Court dicta from nine years before the preceding statutory section became law, Amazon insists that the Commission must prepare a generalized assessment of costs and benefits as part of its public interest analysis. Amazon Reply 4–5 (citing *Am. Textile Mfrs. Inst. Inc. v. Donovan*, 452 U.S. 490, 506 n.26, 510 n.30 (1981)) (other citations omitted); Oral Arg. Tr. 88. Yet, the plain language of Section 15(h) refutes just such a requirement, and notably, *Donovan* does not even reference the public interest standard articulated in Supreme Court precedent such as *NAACP v. FPC*. In addition, Donovan's footnote dicta about the CPSA relates not to Section 15, but to rulemaking. In *Zen Magnets*, the CPSC rejected the contention that the "unreasonable risk" standard pertinent to rulemaking applies to Section 15. *Zen Magnets, LLC*, Docket No. 12-2, 2016 WL 11778211, at *13 (CPSC Sept. 1, 2016).[23]

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[23] The CPSC held that:

> The regulatory analysis concerning "unreasonable risk" in the rulemaking context is not applicable in an adjudicatory proceeding seeking an order to address a "substantial product hazard." Where rulemaking is primarily concerned with a balancing of the hazard and economic impact of the proposed regulations, adjudications under Section 15 require no such balancing. …
>
> Additionally, when the Commission issued the Section 15 regulations, [it] specifically declined to adopt the nomenclature "unreasonable risk" when considering the term "defect" under Section 15 of the CPSA. According to the Commission, the term "unreasonable risk" had taken on a "special meaning" within the agency with regard to rulemaking, and "[t]he Commission does not want to give the impression that the extensive cost/benefit analysis in which it engages before promulgating a standard or ban should be undertaken by subject firms before reporting

None of the Supreme Court's public interest jurisprudence discusses cost-benefit analysis. Instead, *NAACP* ties the public interest to ascertainable statutory criteria, which the CPSC satisfies handily in this matter. Amazon's assertion that Complaint Counsel's interpretation of the public interest standard (which mirrors that of *NAACP*) "authorizes unlimited action," is confounding. Amazon Reply 7. Just as in *NAACP*, if CPSC implemented action outside its statutory purview, such as requiring that products be manufactured, distributed, and sold only by companies that implement affirmative action, it would fail the public interest analysis. If Article III courts intended to cancel Section 15(h) and establish a generalized cost-benefit analysis requirement for the public interest under the CPSA, it is almost certain that at least one court would have held as much. It appears none has.

In a related vein, Amazon characterizes Complaint Counsel's request for remedies as an attempt "to ensure the absolute protection of consumers from *any* risk" and achieve the "impossible standard" of "absolute safety" that should be rejected under *Donovan*, 452 U.S. 490. Amazon Opp'n 7. That case turned on a provision of the Occupational Safety and Health Act that authorized OSHA to promulgate standards to eliminate or reduce workplace safety risks relating to toxic chemicals "to the extent feasible." *Donovan*, 452 U.S. at 508. Congress included "feasibility" language to guard against regulations so strict that they might "close every business in this nation" or "forbid employment in all occupations where there is any risk of injury." *Id.* at 517–18. Neither the language of the CPSA nor the narrowly tailored remedies ordered implicate the issues Amazon highlights in *Donovan*. Companies routinely carried out remedial actions in recalls of hair dryers, carbon monoxide detectors, and children's sleepwear over the last several years. CC Ex. 1-Z.

3. "Recall fatigue"

Amazon next claims that a recall of any Subject Product would contribute to so-called "recall fatigue" that "harms the public interest by unnecessarily crowding out other safety warnings … and that the issuance of repetitive public notice long after Amazon provided direct notices and refunds to all consumers would be counter-productive." Amazon Reply 2; *see* Amazon Mot. 27–28. In support of its contention, Amazon relies upon literature that notes that the existence of "recall fatigue" is subject to debate. Anita Bernstein, *Voluntary*

> under Section 15(b) of the CPSA." 43 Fed. Reg. 34,988, 34,991 (Aug. 7, 1978).

2016 WL 11778211, at *13.

Recalls, 2013 U. Chi. Legal F. 359, 395 (Amazon Ex. 97) ("Observers debate the existence of recall fatigue."); *id*. at 396 (mentioning the "question of whether recall fatigue does or does not exist"). There is considerable debate within the academic community concerning whether or not recall fatigue exists. *See* Michael S. Wogalter & S. David Leonard, *Attention Capture and Maintenance*, *in* Warnings and Risk Communication 123, 140 (Michael S. Wogalter et al. eds., 1999) (CC Opp'n Ex. 1-F) ("Although overloading and overwarning are theoretically possible, research has not yet verified their occurrence clearly.").

Even if recall fatigue exists, none of the statements or exhibits provided by Amazon address the particular question presented here: whether requiring a direct recall notice, supplemented by the tailored online notice contemplated below, following Amazon's one direct email to purchasers would contribute to recall fatigue. For example, Amazon relies on one Senate Hearing where the phrase "recall fatigue" was employed on two occasions in reference to a massive, sometimes confusing recall effort related to airbag defects in roughly 64 million automobiles. *See* Amazon Ex. 100, *Update on the Recalls of Defective Takata Air Bags and NHTSA's Vehicle Safety Efforts*, Senate Comm. On Commerce, 114th Cong. 4, 72 (2015). The recall problems there were so severe that Congress required the relevant Office of Inspector General to audit NHTSA's recall processes. *See* Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94, § 24104(d), 129 Stat. 1312, 1704 (2015).[24] FAST also ordered improvements to increase public awareness of recall information, *id.* § 24103, which directly contradicts the inference Amazon draws from the hearing.

Amazon's speculative assertion that additional messaging "will likely prove a net negative to safety," Amazon Mot. 28, does not give rise to dispute of a material fact, because Amazon's exhibits do not support its assertion that recall fatigue would arise from further direct notification to consumers who purchased a Subject Product.

Furthermore, given that Amazon seems to imply that the problem here is with additional messaging, as opposed to its initial message, it should not benefit from its own wrong. Amazon's arguments seem to be that because it

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[24] The congressionally directed audit does not support Amazon's contention that recall fatigue is pertinent here. *See* U.S. Dep't of Transp. Office of Inspector Gen., NHTSA's Management of Light Passenger Vehicle Recalls Lacks Adequate Processes and Oversight 23, Rep. No. ST2018062 (July 18, 2018), https://www.oig.dot.gov/library-item/36626 (noting that NHTSA's recall procedures called for "follow-up notification" nine months after a recall depending on completion rates and the seriousness of the safety risk).

jumped-the-gun and unilaterally took action that, though not referred to as a recall in its emails—and not brought to the attention of anyone other than the direct purchasers—is enough like a recall that an actual recall, with better-calculated notice and a refund or replacement option would somehow harm the public interest. However, as tailored, rather than a repetition, the remedy will represent an actual recall, with additional information that enhances the public's safety. For companies genuinely concerned about recall fatigue, rather than prematurely proceeding unilaterally with actions that are akin to recalls, they should instead work cooperatively with the CPSC to fashion a unified approach. Also, it is uncontested that the majority of recent recalls feature at least two rounds of direct notice.

D. Remedies

Complaint Counsel seeks an order to cease distribution of the Subject Products, and require various forms of notice, refund or replacement, and progress reports under Section 15(c) and (d) of the CPSA. Section 15(c) provides that if a product

> presents a substantial product hazard and that notification is required in order to adequately protect the public from such substantial product hazard … the Commission may order the manufacturer or any distributor or retailer of the product to take any one or more of the following actions:
>
> (A) To cease distribution of the product.
>
> (B) To notify all persons that transport, store, distribute, or otherwise handle the product, or to which the product has been transported, sold, distributed, or otherwise handled, to cease immediately distribution of the product.
>
> …
>
> (D) To give public notice of the defect or failure to comply, including posting clear and conspicuous notice on its Internet website, providing notice to any third party Internet website on which such manufacturer, retailer, distributor, or licensor has placed the product for sale, …

> (E) To mail[25] notice to each person who is a manufacturer, distributor, or retailer of such product.
>
> (F) To mail notice to every person to whom the person required to give notice knows such product was delivered or sold.

15 U.S.C. § 2064(c)(1). CPSC need not await deaths or serious injuries to arise from substantial product hazards before requiring corrective action. *See Dye & Dye*, 1989 WL 435534, at *14 ("[T]he Commission is not required to have evidence of actual injuries in order to address a risk."); *Zen Magnets, LLC*, 2017 WL 11672449, at *19.[26] The statute specifies that "[a]ny such order shall specify the form and content of any notice required to be given under such order." 15 U.S.C. § 2064(c)(1). Amazon argues that a cease distribution order is moot because it has already ceased distribution of the Subject Products. Amazon Mot. 43–44. Amazon moves for a determination that any additional notice is not authorized as a matter of law. *Id.* at 12–30.

Section 15(d) provides that

> If the Commission determines … that a product distributed in commerce presents a substantial product

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[25] In the absence of a relevant statutory definition, this decision interprets the "mail" requirements to be satisfied by either traditional or electronic mail, in recognition of the increasing reliance on electronic correspondence. This interpretation is supported by the 2021 Recall Handbook 19 ("Where targeted notice is by e-mail or postal mail, the notice should feature prominently, at the top of each e-mail … and/or cover letter … the words: 'Recall Notice,' or 'Safety Recall.'")

[26] *See CPSC Reauthorization: Hearing Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the H. Comm. on Energy and Commerce*, 100th Cong. 125 (June 4, 1987) ("If done right, recalls occur before there are many injuries and before the full potential for injury or death can be calculated.") (statement of former CPSC Commissioner R. David Pittle). A mistaken insistence on empirical evidence of injuries "ignores many of the fundamental nonquantifiable benefits of corrective action" under Section 15, to wit: "[r]ecalls give consumers a chance to take action to protect themselves. This enhances their faith in industry and government … that someone is trying to protect them from injury" and "Section 15 actions may motivate improvements in industry standards." *CPSC Authorization: Hearing Before the Subcomm. on the Consumer of the S. Comm. on Commerce, Science, and Transp.*, 100th Cong. 50 (May 13, 1987) (statement of CPSC Commissioner Anne Graham).

> hazard and that action under this subsection is in the public interest, it may order … any distributor … of such product to provide the notice required by subsection (c) and to take any one or more of the following actions it determines to be in the public interest:
>
> …
>
> (B) To replace such product with a like or equivalent product which complies with the applicable rule, regulation, standard, or ban or which does not contain the defect.
>
> (C) To refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (i) at the time of public notice under subsection (c), or (ii) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs).

15 U.S.C. § 2064(d)(1). Amazon argues that the return and monthly reporting remedies exceed the Commission's authority, Amazon Mot. 31–38, 44, and that it has already refunded the purchase price to all purchasers, making that remedy "illogical and impossible," *id.* at 34.

1. Cease distribution order

a. Amazon's voluntary cessation

Amazon contends its voluntary actions to cease distribution of the Subject Products and its similar communications with third-party sellers render orders to cease distribution and mail notice unnecessary and inappropriate. Amazon Opp'n 21–22. In other words, having already ceased distribution, Amazon maintains that it need not be ordered to cease distribution under Section 15(c)(1)(A)), and that it need not be ordered to notify other relevant parties under Section 15(c)(1)(B).

When queried for authority that supports it position, Amazon cited *United States v. Ford Motor Co.*, 574 F.2d 534 (D.C. Cir. 1978). Oral Arg. Tr. 106. There, the court found that an action to make Ford comply with a National Traffic and Motor Vehicle Safety Act order to remedy a vehicle defect was moot, where Ford, "on its own, initiated action which, if completed in accordance with the requirements of the applicable statutes and regulations, will result in the elimination of the dangerous condition that was the subject of the proceedings … [and] eliminate the very subject of the suit." *Id.* at 539. But, as Complaint

Counsel explained, that case did not involve a cease and desist or stop sale order. Oral Arg. Tr. 134–35; *see Ford Motor Co.*, 574 F.2d at 537–40. While Ford unilaterally undertook the action sought by the government to "eliminate" the defect; here, as will be explained, Amazon's action did not.

Amazon does not claim that it notified third-parties to cease distribution. *Cf.* Amazon Opp'n 22. Amazon's acknowledgment that it resold at least a small number of the Subject Products is evidence that a resale market for such products exists. *See* CC Reply 24 (collecting citations); *see* Answer 23, ¶ 3, Dkt. 2; Amazon's Statement of Undisputed Material Facts 2 nn.6–9, 3 n.11, Dkt. 75. Complaint Counsel reasonably argues that unlike voluntary actions subject to potential rescission, an enforceable order provides superior consumer protection because it can be relied on to remain in effect. *See* CC Opp'n, 12–13 (citing *Dye & Dye*, 1989 WL 435534 (ordering respondent to cease distribution and stop sale even though it no longer sold the product at issue)). Although Amazon correctly contends that CPSC might also bring an action against sellers of the Subject Products children's sleepwear under 15 U.S.C. § 2068(a)(1), the availability of this alternate means of enforcement does not cancel the availability and desirability of a cease distribution order and notice to others to cease distribution under 15(c).

Such an order, specific to the Subject Products, is not an impermissible order to obey the law. *Cf.* Amazon Opp'n 21. Amazon's argument concerning impermissible obey-the-law orders arises from Federal Rule of Civil Procedure 65(d), which requires specificity and detail in an order of injunctive relief, rather than just an unspecific instruction for a party to "obey the law"—which would be too vague to satisfy. *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 240 (2d Cir. 2001) ("Under Rule 65(d), an injunction must be more specific than a simple command that the defendant obey the law." (quoting *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 51 (2nd Cir. 1996)). "The specificity requirement is not unwieldy, however. An injunction must simply be framed so that those enjoined will know what conduct the court has prohibited." *Meyer v. Brown & Root Const. Co.*, 661 F.2d 369, 373 (5th Cir. 1981) (citing *Int'l Longshoremen's Ass'n v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967)). Setting aside that Rule 65(d) does not apply to this proceeding—for the injunctive relief sought is specifically authorized and limited by Section 15(c)—the requirements of specificity are satisfied because Amazon knows precisely what to do. Amazon's claim that this order is impermissibly vague is belied, as a practical matter, because Amazon already voluntarily ceased distribution of the Subject Products, and it is in the best position to know all the entities it

dealt with on each Subject Product.[27] Indeed, if the order sought by Complaint Counsel is impermissible under Amazon's interpretation, then any specific cease and desist order to stop an entity's particular conduct that violates a law or regulation would also be barred. Furthermore, on these facts, the burden of a cease distribution and notice order should be relatively light, and, in any event, it is undisputed that such orders are commonplace in the overwhelming majority of voluntary recalls since 2015. Thus, one is appropriate here.

b. "Functionally equivalent products"

Complaint Counsel requests that any cease distribution order apply not just to the Subject Products, but to so-called "functionally equivalent products" (FEPs)—the latter a term of art seemingly minted by Complaint Counsel, since neither "functionally equivalent" or "functional equivalence" appear in the pertinent law. Amazon argues that the Commission lacks authority to order Amazon to take action on purportedly "functionally equivalent" products. Amazon Mot. 38–42.

The word "functionally" does not appear in the CPSA.[28] The word "equivalent" in 15(d)(1)(B) carries a nearly opposite meaning, being used to discuss a comparable product *without* the defect. 15 U.S.C. § 2064(d)(1)(B). However, "equivalent" in 16 C.F.R. § 1120.3 ("Products deemed to be substantial product hazards") does appear in the context of children's clothing sizes, employing the word "equivalent" eight times to address sizes, including two times to clarify that a garment's actual size, as opposed to what is says on the label, is determinative regarding whether it is children's clothing. *Id.*

Amazon already addresses a somewhat similar issue, providing "if that ASIN [of Children's Sleepwear Subject Product] has a size, color, or style variation, we will look at those variations to see if they pose the same product

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[27] Amazon already claims to have notified the "third-party manufacturers of the Commission's findings regarding the subject products." Amazon Opp'n 22; *see also* Amazon Ex. 113 (telling seller to "share with CPSC that you are writing them to voluntary recall the [Subject Product hair dryer], which you sold on Amazon").

[28] The word "functional" appears in Section 37 of the CPSA, "Information Reporting": "For purposes of this section, a particular model of a consumer product is one that is distinctive in *functional* design, construction, warnings or instructions related to safety, function, user population, or other characteristics which could affect the product's safety related performance." 15 U.S.C. § 2084(e)(2) (emphasis added).

safety hazard." Dkt. 92, ¶ 112. The preceding language and practice lend credence to the argument that a cease distribution order should cover the children's sleepwear Subject Products, and variations in size, color, and style that present the same hazards. Complaint Counsel's argument that the cease distribution order should include products that are but "a mere alteration" of a 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" is persuasive. *See* CC Opp'n 50. The ultimate relief ordered will incorporate those concepts. Although Complaint Counsel contends that Amazon's organizational witness under Federal Rule of Civil Procedure 30(b)(6) did not sufficiently articulate the process by which Amazon determined similar products, Oral Arg. Tr. 128–29, no reason has been offered to doubt the witness's general description of how Amazon proceeded in identifying like products. *Id.* at 153 (citing Amazon Ex. 2, at 262–75).

In addition, Section 15(b) already requires firms, including Amazon, to report to the Commission when information "reasonably supports the conclusion" that a product fails to comply with a consumer product safety rule or contains a defect. 15 U.S.C. § 2064(b). Relevant information "which a subject firm should study and evaluate in order to determine whether it is obligated to report under section 15(b)" includes "[i]nformation received from the Commission or other governmental agency." 16 C.F.R. § 1115.12(f). To the extent that CPSC did identify some equivalent products in violation of the same safety standards, and advised Amazon, those will also be included in the cease distribution order. *See* Dkt. 92, ¶¶ 166–179 (describing the CPSC's purchase and testing of Subject Products and notification of Amazon of the Subject Products' defects).

Beyond that, it would be difficult, and unreasonable, to saddle a distributor with further obligations to ferret out similar products that represent a substantial product hazard other than those provided for above. Indeed, Complaint Counsel's characterization of its own demand makes clear its excessive scope: "the Complaint makes clear its request for an order requiring Amazon, *as the distributor of hundreds of thousands of FBA products, to engage in a review of its voluminous product offerings* and take remedial action." CC Opp'n 49 n.29 (emphasis added). In support of this sweeping claim, Complaint Counsel relies on *In the Matter of Relco, Inc.*, CPSC Dkt. No. 74-4, Order, at 1 (Oct. 27, 1976) (CC Ex. 1-EE), a Section 15 administrative litigation proceeding that ordered a welder manufacturer "to refrain from manufacturing and distributing … the Wel-Dex Electric Arc Welder, or any other electric welder of similar design or construction, containing any of the defects alleged to create a substantial product hazard in the Notice of Enforcement issued … July 17, 1974." *See* CC Opp'n 50–51. In

Relco, the order was directed at the specific manufacturer of a particular welder with a documented design defect and at other similar products of that company. There, the manufacturer would be well equipped to know if it designed its other welders with the same hazardous defect. Here, because Amazon has not designed and manufactured the hundreds of thousands of products that Complaint Counsel asks it to inspect, it is not equipped, except at tremendous cost (perhaps by instituting a massive consumer products safety department of its own), to inspect and test those products. *Relco's* reach does not extend so far. Thus, other than the additional products referenced above that are just alterations of the Subject Products, the order will not include the language "functionally equivalent products" or similarly sweeping terms.

2. Notice orders

Complaint Counsel seeks the following notice remedies: direct notice to customers, a joint press release with the CPSC, and Internet notice. Under CPSA Section 15(c), the Commission may order notice when it "is required in order to adequately protect the public" from a substantial product hazard. 15 U.S.C. § 2064(c). The Commission may also order notices required by Section 15(c) when "that action … is in the public interest." 15 U.S.C. § 2064(d). Amazon argues that its prior notice makes additional notices unnecessary to protect the public and not in the public interest. Amazon also argues that ordering these notices violates the First Amendment. Amazon Mot. 29–30; Amazon Opp'n 20.

a. Amazon's prior notice

Amazon argues that its unilateral direct notice to purchasers of the Subject Products makes any notice order inappropriate and not in the public interest. Amazon Mot. 12–28; Amazon Opp'n 10–20. Amazon asserts that its notice "language is comparable—and in some instances identical—to Commission-approved messaging regarding similar products and hazards." Amazon Mot. 17.

But Complaint Counsel identified areas where Amazon's notice fell short of the statutory and regulatory requirements. Amazon sent an email notice to direct purchasers and did not provide public notice on its website. *Cf.* 15 U.S.C. § 2064(c)(1)(D) (authorizing the Commission to require public notice, "including posting clear and conspicuous notice on [the distributor's] Internet website"). Amazon's notice did not include mandatory information such as using the word "recall" in the heading and body of the notice, the number of units of the product being recalled, the dates when the product was sold, and contact details for information about the remedy. *See* 15 U.S.C. § 2064(i)(2); 16 C.F.R. § 1115.27. "The description must also enable … persons to readily

identify and understand the risks and potential injuries or deaths … ." 16 C.F.R. § 1115.27(f). The CPSA also requires the notice to include a photograph of the product, and the regulations specify that this photograph "be of high resolution and quality." 15 U.S.C. § 2064(i)(2)(A)(iii); 16 C.F.R. § 1115.27(c)(6). Amazon's direct notice email did not include a photograph, although it contained a clickable hyperlink to the customer's "Your Orders" page that had a photograph. Amazon Letter Following Oral Argument 3, Dkt. 103. A hyperlink to a photograph is not the same as a photograph in the notice. Oral Arg. Tr. 47–48. But even if hyperlinked material could be considered part of the notice, the photograph was only 90 pixels by 90 pixels in size, Amazon Letter 3, which is not high resolution. For these reasons, Amazon's unilateral notice was insufficient, and ordering additional notice is needed to adequately protect the public and is in the public interest.

b. First Amendment issues

Amazon argues that, by requiring specific language to be in Amazon's notifications to the public and consumers, the CPSC is seeking to compel Amazon's speech in violation of the First Amendment.

At the outset, Complaint Counsel makes three arguments that I should not consider Amazon's First Amendment claim, all of which I reject. First, Complaint Counsel notes that Amazon did not raise this argument in its answer or otherwise before now. CC Opp'n 37. The Rules of Practice do not require a respondent to include every possible legal argument or defense in its answer. *See* 16 C.F.R. § 1025.12. At this stage of the proceeding, I will not bar Amazon from raising this argument. Second, Complaint Counsel asserts that Amazon failed to notify the U.S. attorney general about its constitutional claim, in contravention of the notice requirements under Rule 5.1 of the Federal Rules of Civil Procedure. CC Opp'n 39. This argument is frivolous, as these proceedings are not governed by the Federal Rules of Civil Procedure, and, in any event, Rule 5.1 requires such notification only when a party "draw[s] into question the constitutionality of a federal or state statute" and the "parties do not include the United States [or] one of its agencies." Fed. R. Civ. P. 5.1(a). Third, Complaint Counsel asserts that this First Amendment claim is a facial challenge to the constitutionality of the CPSA that is beyond the power of the agency to adjudicate. CC Opp'n 39. Amazon, however, does not argue that the CPSA is facially unconstitutional but that particular relief Complaint Counsel seeks—requiring Amazon to issue a second notice to the public and consumers with agency-dictated language where Amazon has already issued its own notice—would be unconstitutional as applied in this proceeding. Amazon Reply 18. For that reason, it is necessary to address Amazon's First Amendment argument. *See, e.g.*, *Meredith Corp. v. FCC*, 809 F.2d 863, 872–74 (D.C. Cir. 1987) (holding that an administrative agency had

the obligation to address a constitutional challenge to an enforcement proceeding, but only to extent the challenge was to the agency's own policies or an as-applied challenge, because of the "well known principle that regulatory agencies are not free to declare an act of Congress unconstitutional"); *McGrath v. Weinberger*, 541 F.2d 249, 251 (10th Cir. 1976) ("We commit to administrative agencies the power to determine constitutional applicability, but we do not commit to administrative agencies the power to determine constitutionality of legislation." (quoting K. Davis, Administrative Law Treatise § 20.04 (1958))).

The First Amendment may prevent the government from compelling certain speech, just as it may prevent the government from prohibiting speech. *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). Courts generally apply an intermediate level of scrutiny to regulations affecting commercial speech. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980); *id.* at 573 (Blackmun, J., concurring). Commercial speech is "expression related solely to the economic interests of the speaker and its audience" or is "speech proposing a commercial transaction." *Cent. Hudson*, 447 U.S. at 561–62. It is "an area traditionally subject to government regulation." *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 64 (1983). Government regulation of commercial speech is compatible with the First Amendment if it meets the criteria laid out in *Central Hudson*: (1) there is a substantial government interest; (2) the regulation directly advances the substantial government interest; and (3) the regulation is not more extensive than necessary to serve that interest. *Cent. Hudson*, 447 U.S. at 566.

Moreover, compelled disclosure of "purely factual and uncontroversial"[29] information is generally permissible if "reasonably related to the State's interest in preventing deception of consumers" and if not "unduly burdensome." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *see also Milavetz*, 559 U.S. at 249. Multiple courts have applied *Zauderer*'s standard more broadly to factual and uncontroversial disclosures required to serve other government interests—rather than confining *Zauderer*

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[29] In *Zauderer*, the Court did not define the term "uncontroversial," but it distinguished the required factual disclosures in attorney advertising from "prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion or forc[ing] citizens to confess by word or act their faith." 471 U.S. at 651.

to correcting deception. *See, e.g.*, *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 20, 22–23 (D.C. Cir. 2014) (en banc).[30]

Promoting public safety by warning consumers about unreasonable product hazards is a substantial government interest, and Amazon does not argue to the contrary. Oral Arg. Tr. 112; *see Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995) ("[T]he Government here has a significant interest in protecting the health, safety, and welfare of its citizens … .").

Further, the CPSC's proposed notices directly advance the government's interest in warning consumers about unreasonable hazards in consumer products. Amazon argues that the CPSC's notices do not advance the government's interest because Amazon's unilateral notices already "satisfied the Commission's guidelines in every relevant respect," Amazon Mot. 30, but, as discussed below, Amazon's direct notices did not reach the secondary market and two rounds of notification are typical for recalls. Dkt. 92, ¶¶ 144–45. Also, Amazon's notices lacked key information about the hazardous and fatal nature of the products and failed to provide a meaningful incentive to return them.

The CPSC's language would not compel Amazon to issue a false or controversial message. Rather, Amazon premises its First Amendment claim on the fact that it had issued its own voluntarily notices, without the agency's involvement. Amazon Reply 18. Amazon does not want the agency to "micromanage the wording of Amazon's safety message." Amazon Mot. 29. But Amazon's own voluntary speech does not render unconstitutional the agency's exercise of its statutorily mandated role to oversee consumer product safety, including the content of recall notices. "[E]videntiary parsing is hardly necessary when the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait, assuming of course that the reason for informing consumers qualifies as an adequate interest." *Am. Meat Inst.* 760 F.3d at 26;[31] *see also Zauderer*, 471 U.S. at 651 n.14 (rejecting

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[30] *Zauderer* could be "best read simply as an application of *Central Hudson*, not a different test altogether." *Am. Meat Inst.*, 760 F.3d at 33 (Kavanaugh, J., concurring); *see also id.* at 34 ("[T]o the extent that some courts, advocates, and commentators have portrayed a choice between the 'tough *Central Hudson* standard' and the 'lenient *Zauderer* standard,' I see that as a false choice."); *see also* Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know,"* 58 Ariz. L. Rev. 421, 434–42 (2016). Here, the parties agree that the *Central Hudson* test is controlling. Oral Arg. Tr. 112, 164.

[31] The D.C. Circuit then observed that "[t]he self-evident tendency of a disclosure mandate to assure that recipients get the mandated information may in part explain why, where that is the goal, many such mandates have

the contention that government-compelled disclosure requirements should be subject to a strict "least restrictive means" analysis, and explaining that it would not be appropriate to strike down such requirements "merely because other possible means by which the State might achieve its purposes can be hypothesized").

Requiring Amazon to issue further notifications is not more extensive than necessary. Any burden to Amazon is far outweighed by the consumer-product-safety interests advanced by the relief ordered in this proceeding. For these reasons, I reject Amazon's First Amendment argument.[32]

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persisted for decades without anyone questioning their constitutionality." *Am. Meat Inst.*, 760 F.3d at 26; *see also NIFLA v. Becerra*, 138 S. Ct. 2361, 2376 (2018) ("[W]e do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.").

[32] Amazon cites *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), and *National Association of Manufacturers. v. SEC*, 800 F.3d 518, 526 (D.C. Cir. 2015), to support its contention that the notices would violate the First Amendment, but neither is on point.

In *PG&E*, the Court struck down a requirement that a power company provide space in its newsletter accompanying customer's monthly bills to consumer advocacy groups. Because the consumer advocacy groups disagreed with the power company's positions, this requirement forced the power company "to help disseminate hostile views," 475 U.S. at 14 (plurality opinion), and to "be forced either to appear to agree with [the consumer advocacy groups] or to respond," *id.* at 15. That issue is not present here because Amazon, although vigorously disputing the necessity of the notices, agrees that the Subject Products are hazardous. Moreover, the Court did not apply the *Central Hudson* test, finding that the power company's newsletter appears "no different from a small newspaper" and thus "extends well beyond speech that proposes a business transaction." *Id.* at 8–9. Applying strict scrutiny, the Court held that, even if promoting "fair and effective utility regulation" is a compelling government interest, requiring the power company to distribute the consumer advocacy groups' speech was not narrowly tailored to serve that interest. *Id.* at 19. That is not the case here, where distributing the notice directly advances consumer safety and is not more extensive than necessary.

In *National Association of Manufacturers*, the D.C. Circuit struck down an SEC rule that required securities issuers to disclose whether they used "conflict minerals" extracted from the Democratic Republic of Congo. The governmental interest in that case was amelioration of the humanitarian crisis in Congo. 800 F.3d at 524. But there was no direct connection between the

c. Direct notice to customers

The Section 15(c)(1)(B) notification to cease distribution can encompass the original purchasers—a subset of "all persons … to which the product has been transported, sold, distributed, or otherwise handled, to cease immediately distribution of the product." 15 U.S.C. § 2064(c)(1)(B). Amazon contends its unilateral email on each Subject Product renders a notification order unnecessary. Yet, the record does not provide any indication of how many original purchasers read Amazon's unilateral email, and thus, how many Subject Products are at risk of being disseminated to other potential victims. A cease distribution order to an original purchaser is similar to a recall notice in that "[a] recall notice must be read to be effective." Guidelines and Requirements for Mandatory Recall Notices: Notice of Proposed Rulemaking, 74 Fed. Reg. 11,883, 11,884 (Mar. 20, 2009). The matter here is somewhat similar to the *Zen Magnets* administrative litigation where the Commission concluded that notification is required to adequately protect the public from the substantial product hazards. *Zen Magnets, LLC*, 2017 WL 11672449, at *42. In *Zen Magnets*, the respondent did not know who bought the products, which made broad public notice necessary. Here, Amazon is aware of the original purchasers, so there is less need for broad public notice, and tailored direct notice is sufficient. *Cf. id.*

With regard to practicality, since Amazon already emailed the original purchasers, it is well situated to send the new notice, including the cease distribution order. Although the provisions regarding notice to cease distribution and mail notice are listed separately (*see* Section 15(c)(1)(B), (E), (F)), they may be executed together. Complaint Counsel argues that two rounds of direct notice are typical, CC Mot. 39; *see* Dkt. 92, ¶¶ 144–45, while Amazon seeks credit for its independent efforts. The specifics of direct notice, with appropriate additional terms and information, will be set following subsequent briefing.

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required disclosures and that aim. *Id.* at 526–27. That differs from this case, where the governmental interest is warning consumers of substantial product hazards and the notices do exactly that. *See Am. Meat Inst.*, 760 F.3d at 26. Indeed, Amazon conceded that if the ordered notice meets the requirements of sections 15(c) and (d), it does not "run afoul of the First Amendment." Oral Arg. Tr. 114–15.

d. Joint press release

Complaint Counsel contends Amazon should be required to provide public notification of the substantial product hazards in a joint press release with CPSC. CC Mot. 34–35. A joint press release was among the items of relief ordered in the *Zen Magnets* litigation. *See Zen Magnets LLC*, 2017 WL 11672449, at *43. Likewise, the Recall Handbook includes "a joint news release from CPSC and the company" among a non-exclusive list of over twenty-four "examples of types of notice that may be appropriate." 2012 Recall Handbook, 18. The next example is "targeted distribution of the news release," *id*. at 19, indicating the potential desirability of focusing and limiting its dissemination. However, the exception to the general need for a joint press release is pertinent here: "Unless a company can identify all purchasers of a product being recalled and notify them directly, the Commission typically issues a news release jointly with the firm." *Id*. at 20. Because Amazon has already identified the purchasers and an established means to provide additional notice directly to each of them, a joint press release is not required. Had Amazon instead opted to issue a press release, or circumstances required it, then it should be joint, but those circumstances do not apply here. *See id*. at 20 (clearance required by Commission communications staff where company issues recall press release).

Yet, where no joint press release is required, the CPSC nonetheless retains its discretion to issue a press release of its own, and may disseminate it in a manner it deems appropriate. *See, e.g., id*. at 21 (CPSC "posts recall news releases on its external website").[33] At oral argument, Complaint Counsel conceded that the most important aspect of any press release is that it is available to the public on the CPSC and Amazon's website for current owners of the Subject Products who are not the initial purchasers, not the fact that it is joint. Oral Arg. Tr. 26. Although Complaint Counsel maintains that a joint release can be important to show the public that a company is working with the CPSC, Complaint Counsel concedes that a release issued pursuant to a litigated order would also signal to the public that the company is complying with the CPSC. *Id.* at 26–27. Here, such a prospective release could include points representing any future final action taken by the Commission in relation to this litigation. It would be premature, and unnecessary, to make findings as to its particular scope and language here. Furthermore, the

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[33] Contrary to Amazon's contention that federal agency recalls outside the CPSC do not involve press releases, Oral Arg. Tr. 120–21, such releases appear from the Food and Drug Administration (https://www.fda.gov/safety/recalls-market-withdrawals-safety-alerts), National Highway Traffic Safety Administration (https://www.nhtsa.gov/press-releases), and Department of Agriculture (https://www.fsis.usda.gov/recalls).

necessity for such a release may be limited by the fact that the direct notices themselves (discussed *infra*) will be posted on Amazon's website and the CPSC's, Oral Arg. Tr. 42–43, in addition to being directly emailed to purchasers. This decision orders the parties to propose language for press releases for the Subject Products that could be ordered, which will help to determine whether such releases, in addition to the notices, are warranted.

e. Internet notice

Given the scope of Amazon.com's web traffic, totaling billions of visits a month, and well over a quarter-billion products sold on its site, Complaint Counsel's request for an order to post the notices concerning the Subject Products on Amazon's home page (as opposed to direct notification) is misplaced: such an extraordinary measure is not "required in order to adequately protect the public"—particularly given the availability of other more narrowly calculated remedial measures. Sufficient public protection can be achieved by posting the pertinent recall notices (or direct links to each notice) on the Amazon.com "Product Safety and Recalls" and "Your Recalls and Product Safety Alerts" pages and the CPSC website. *See* Amazon's Post-Argument Letter 1 (Apr. 6, 2023), Dkt. 103 (describing the recall-related webpages on Amazon.com). With these postings, even though Amazon no longer distributes the Subject Products, a person querying the product on its site will have access to the notice. The appropriate duration of these notices was a point of contention at oral argument, with Amazon asserting that web notices are limited to six months by CPSC practice, Oral Arg. Tr. 95, and Complaint Counsel contending that a website notice is typically posted for at least ten years. *Id.* at 133. If applicable—and to the extent not already notified under the cease distribution and mail notice orders—Amazon will also provide "notice to any third party Internet website on which [Amazon] placed the product for sale." 15 U.S.C. § 2064(c)(1)(D).

Contrary to Amazon's contention that direct notice obviates the need for any additional notice, something more is required to protect members of the public that direct notice does not reach. If a member of the public experiences a problem with one of the Subject Products related to the defect, but was not aware of the recall, it would be prudent to have the means in place that would cause, for example, someone searching the product to be directed to the recall notice. Although that may be a challenge in some cases (like children's sleepwear garments with their labels removed), it will afford at least an additional measure of protection and redundancy to prevent the continued use of these products.

Complaint Counsel's request for action on "social media platforms," is consistent with at least one previous administrative decision, and represents

a minimally burdensome action needed to adequately protect the public, particularly given the need to supplement direct notice to purchasers. On April 6, 2023, Amazon provided a list of its active social media sites. Subsequent to this decision, the parties will have an opportunity to brief the form that internet notice will take, as well as which Amazon-controlled sites the notices are posted on, and for how long.

f. Form and contents

As required by Section 15(c)(2), the order will require that the notice contains the contents specified in Section 15(c)(i)(2)(A)–(H) and 16 C.F.R. §§ 1115.23–.29, including the use of "Recall" within the heading and text of the notice and the risk of death associated with the Subject Products. When it sends the notice to purchasers, Amazon may note that the required contents are being included at the order of the Commission.

3. Refund

Complaint Counsel seeks refunds or replacements of the Subject Products under Section 15(d). 15 U.S.C. § 2064(d)(1). Because all Subject Products present a substantial product hazard, it must be determined whether either form of relief requested is available and in public interest. *See id.*

Complaint Counsel argues that Amazon must provide refunds to all consumers in possession of a Subject Product conditioned upon its return or proof of its destruction. CC Mot. 44–47. Amazon contends that its unilateral decision to issue purchasers gift cards, for the amount they paid for each Subject Product, preempts any further refund order. *See* Declaration of Lauren Ann Shrem ¶ 28, Dkt. 77 (Sept. 23, 2022). Amazon also argues the Commission cannot require confirmation of destruction or return before issuing a refund. Oral Arg. Tr. 69.

Amazon's unilateral, voluntary action to issue gift cards did not cancel Commission authority to order refunds. Although Amazon's actions fell short of a voluntary corrective action plan, that analogy is useful in disproving Respondent's preemption argument for the following reasons:

> The CPSC regulations at issue explicitly state that actions taken in a voluntary corrective action plan have "no legally binding effect," and that the CPSC "reserves the right to seek broader corrective action." 16 C.F.R. § 1115.20(a). … [T]he CPSC is not barred from seeking greater remedies at a later date. … Under the explicit terms of the relevant regulations, the CPSC has the right to seek

> additional remedies beyond those voluntarily provided if it believes that the voluntary plan did not provide an adequate remedy for the problem. Given this, the Court can see little justification in denying additional remedies to the purchasers of the product at issue if they can prove that the voluntary remedy offered by the defendant was inadequate.

In re Mattel, Inc., 588 F. Supp. 2d 1111, 1115–16 (C.D. Cal. 2008); *see Reliable Auto. Sprinkler v. CPSC*, 324 F.3d 726, 729–30 (D.C. Cir. 2003) ("This voluntary corrective action 'has no legally binding effect' … [on] formal administrative proceedings." (citation omitted)). There is no genuine issue of material fact regarding two deficiencies in Respondent's refund scheme: (1) no effort was made to track what number, if any, of each Subject Product was actually disposed; and (2) the scheme did not require any purchaser to take an action to remove any Subject Product from the marketplace before receiving a refund. Instead, refunds in the form of Amazon gift cards were already issued to purchasers' Amazon accounts before they received notice of the refund and regardless of whether they ever reviewed that notice. *Cf.* 16 C.F.R. § 1115.26(a)(1) ("A recall notice should provide sufficient information and *motivation* for consumers … to identify the product … and to respond and take the stated action." (emphasis added)).

Complaint Counsel correctly contends that the Commission's regulations contemplate ordering refunds conditioned on return or confirmed destruction:

> The action [that a firm is taking concerning the product] may include, but are not limited to, one of more of the following: … recall to the distributor, retailer, or consumer level; … request return and provide a replacement; and *request return and provide a refund*.

16 C.F.R. § 1115.27(d) (emphasis).[34] The requirement for mandatory recall notices also provide that:

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[34] The preceding provision was adopted as part of the "guidelines and requirements for mandatory recall notices" as required by Section 15(i) of the CPSA, 15 U.S.C. § 2064(i), as amended, which "set forth the information to be included in a notice required by an order under sections 12, 15(c) or 15(d) of the CPSA (15 U.S.C. § 2061, 2064(c), or 2064(d))." 16 C.F.R. § 1115.23(a). "Unless otherwise ordered by the Commission under section 15(c) or (d) … the

> A recall notice must contain … [a]ll specific actions that a consumer must take to obtain each remedy, including, but not limited to, instructions on how to participate in the recall. These actions may include, but are not limited to … removing the product from use, discarding the product, [or] returning part or all of the product … .

Id. § 1115.27(n) ("Description of remedy"); *cf.* 2021 Recall Handbook 29 ("Work with the recalling company on a plan to return or destroy recalled products via methods approved by the CPSC" and "determine if the recalled product is to be returned or destroyed."). The Handbook provides that a corrective action plan "could … provide for the return of a product … for a cash refund" and "may include multiple measures that are necessary to protect consumers." 2012 Recall Handbook 5; *accord* 2021 Recall Handbook 3–4 (2021). The Handbook encourages "incentives such as money, gifts, premiums, or coupons to encourage consumers to return the product." 2012 Recall Handbook 20. It also specifies that the company should track "requests to return a product" for "replacement or credit" as well as "product repairs or returns." 2021 Recall Handbook 33. The preceding principles do not exist in the abstract. The Commission has ordered refunds conditioned upon the return of products on multiple occasions. *See, e.g.* Opinion and Order Approving Public Notification and Action Plan, *Zen Magnets, LLC*, 2017 WL 11672451, at *8–11 (Dec. 8, 2017) (deciding scope of refunds, returns and additional incentives to encourage returns); *id.* at *14 (relevant orders).[35] In *Relco, Inc.*, the

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content information required"—including that quoted above from section 1115.27(d)—"must be included in every such notice." *Id.* § 1115.23 (a).

[35] Because the *Zen Magnets* decision conditioned refunds upon returns, it did not address consumer confirmed disposition or destruction as the condition. 2017 WL 11672451, at *14. It nonetheless imposed disposal and destruction requirements on the company regarding returns, "because they are necessary to address the hazard posted by the Subject Products by preventing their redistribution." *Id.* at *12; *see id.* at *14. This supports the relief sought by Complaint Counsel that an appropriate remedy should include sufficient confirmation that each product has been permanently removed from the market. *See id.*; *accord* Consent Agreement, *Star Networks, USA LLC*, CPSC Dkt. No. 13-2, 2014 WL 12975551, at *2–3 (Jul. 17, 2014) (like relief approved by consent agreement); Consent Agreement, *Maxfield & Oberton Holdings, LLC*, et al., CPSC Dkt. No. 12-1, 2014 WL 12975552, at *9 (same). Although enforcement proceedings resolved by consent agreement are non-precedential, they demonstrate the CPSC's awareness and endorsement of remedial action

Commission was "concerned with the policy implications of … the refund provisions insofar as they may not require tender of the welder from persons in possession of the product." *Relco, Inc.*, CPSC Dkt. No. 74-4, at 4 (Oct. 27, 1976) (CC Ex. 1-EE). The Commission took issue with the ALJ's decision

> that persons who have possessed the welder for less than one year … are entitled to a full refund *regardless of whether or not they tender the product* or the internal components. The Commission believes that this approach is inconsistent with the statutory intent and … tender should be mandatory for all persons seeking a refund who are in possession of the welder … .

Id. (emphasis added). Although Congress elected not to make tender mandatory in exchange for a refund under the CPSA because in some cases "a product may not be in tenderable form or that tender may present a danger to persons in the chain of recall," *id.* at 5, given "the obvious statutory purpose of Section 15, to protect the public by encouraging removal of dangerous products from the marketplace and consumers' homes, the Commission believes that tender should be required whenever practicable and where no danger is presented in the tender process." *Id.* at 6. Like *Relco*, here Amazon has failed to raise any fact issue indicating that tender or confirmation of destruction would be impracticable or present a danger to consumers. *See id.* at 7–8. Thus, a remedial scheme which motivates consumers to remove the dangerous products is appropriate.

Although a "refund" ordered under Section 15 is not to exceed "the purchase price" of the Subject Product, Amazon's issuance of gift cards was not pursuant to that statute and is accordingly not a Section 15 refund. 15 U.S.C. § 2064(d)(1)(C). Indeed, at the time Amazon issued gift cards, it contended it was a third-party logistics provider not subject to that section.[36] Thus, Section 15 refunds, conditioned upon return or suitable proof of disposition, represent an appropriate remedy to remove those Subject Products that remain in the

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similar to that sought by Complaint Counsel here, and are additional points I consider in weighing the reasonableness of requested relief.

[36] A previous presiding officer, when deciding a summary decision motion on a different issue, noted what he perceived as an absence of authority to order refunds. Order on Mot. to Dismiss and Mot. for Summ. Dec. 21 (Jan. 19, 2022), Dkt. 27. That *dicta* has been superseded by the subsequent briefing of the issue and reference to relevant authorities discussed above.

marketplace. The alternative approach of offering replacement of a comparable product that does not present a substantial product hazard, discussed *infra*, represents a similar remedy that may also protect of public interest.[37]

4. Replacement

Complaint Counsel argues that "if the Court … declines to order refunds to those to whom Amazon unilaterally issued a gift card, it remains in the public interest to order Amazon to provide a replacement product conditioned on the return of the Subject Product or proof of its destruction, and this Court may so order." CC Reply 30; *see* CC Mot. 48–49. Amazon argues that a return remedy is beyond the CPSC's statutory authority and not in the public interest. Amazon Mot. 31–34; Amazon Reply 21–23.

Although Amazon also avers product replacement is unavailable as a remedy because the Complaint did not specifically reference it, the Complaint requested an order that Amazon "facilitate the return and destruction of the Subject Products, at no cost to consumers, under Section 15(d)(1)," and to take action "including but not limited to" the issuance of refunds. *See* Complaint 19, Dkt. 1. Section 15(d)(1) includes replacements as an available remedy, and the Complaint further requested an order that Amazon "take other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA and FFA." *Id.* at 20. The Commission routinely provides for replacement conditioned upon return or confirmed destruction in voluntary recalls for products like the Subject Products. *See, e.g.*, *Janex Corp.*, CPSC Dkt. No. 83-3, 1983 WL 167589, at *1 (Nov. 16, 1983); CC Ex. 1-Y, at CPSC_AM0015371–74 (recall announcement involving replacement of an electric hairbrush without immersion protection following confirmed destruction); CPSC_AM0015193–99 (recall announcement involving children's sleepwear garments with replacement option). The "return of a product" in exchange for "a replacement product" is among the principal options contemplated by the Handbook. 2012 Recall Handbook 5.[38] In at least

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[37] In their further briefing, the parties should address whether any refunds should be reduced by "a reasonable allowance for use." 15 U.S.C. § 2064(d)(1)(C).

[38] *See* 2012 Recall Handbook 28 ("The goal of any product recall is to retrieve, repair, or replace those products already in consumers' hands as well as those in the distribution chain."); *see also id.* 17 (asking companies to consider their preparedness to "exchange [defective products] for new products that do not have the problem"). The updated Handbook supports the preceding points. 2021 Recall Handbook 3–4, 15, 30, 33 (regarding "[r]equests to return a product or for replacement").

51 of 77 of analogous voluntary recalls, a refund or replacement of the hazardous product was conditioned on the return or proof of destruction of the product. *See* CC Ex. 1-Z.

Under the Federal Rules of Civil Procedure, which is persuasive authority here, an adjudicator may grant "the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c); *see also* Amazon Opp'n 39 (citing *Santa Clara Valley Water Dist. v. Olin Corp.*, No. C-07-3756, 2009 WL 667429, *2 (N.D. Cal. Mar. 13, 2009) (party not required to list all requested relief in the Complaint)). Here, the Complaint's wording, the statutory authorization, and CPSC practice sufficiently support a remedy of replacement conditioned upon Subject Product return or confirmed destruction.

Amazon avers that there is "no evidence that ordering Amazon to provide additional instructions to consumers for the return or destruction of the Subject Products would have any meaningful safety impact" because "the undisputed evidence shows that Amazon already instructed consumers in its direct notices to discard the Subject Products." Amazon Reply 2; *see* Oral Arg. Tr. 70. Yet, Amazon failed to present evidence establishing how many, if any, purchasers of a Subject Product who received an Amazon gift card without any action on their part actually discarded the Subject Products. Although it is reasonable to assume that at least some read enough of the notice to find out that they should discard the product, it is likewise reasonable to assume that those who did not read that admonition did not discard the product.[39] It also is reasonable to assume that, with no action required on purchasers' part in exchange for the gift card, even among who read the direction to discard the product, some intentionally took no action, some perhaps intended to act but it was crowded out by other priorities or otherwise forgotten, etc. Here, the recall notice incentivizes those who still have the Subject Product to return it, or confirm destruction, in exchange for a replacement or refund as noted above.

The Handbook strongly supports Complaint Counsel's efforts to take additional, carefully calculated steps to remove those Subject Products that were not already disposed of. According to the Handbook, one of the three key objectives of a recall is "[t]o remove defective products from the distribution

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[39] I do not credit Amazon's assertion that, as a matter of law, all recipients of the email are presumed to have read it. *Cf.* Oral Arg. Tr. 101. Although the long-standing rule that a letter properly addressed and delivered is presumed to have been received by the person to whom it was addressed, *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884), can be applied to electronic mail, receipt is different than reading the correspondence and taking the actions it suggests.

chain and from the possession of consumers." 2012 Recall Handbook 18.[40] As discussed below, a determination that "as many products as possible have been removed from the marketplace" is the principal consideration that informs when a company may request that recall monitoring ceases. *Id*. at 26.[41]

This additional imposition of a refund or replacement remedy for Subject Products that have not been disposed of should likewise incentivize Amazon and others to cooperate with CPSC from the outset rather than taking unilateral actions that may fall short of the mark.[42] Neither Amazon, nor another company, should assume it can avoid a remedial order of the type sought by the CPSC through its uncoordinated unilateral action.

5. Progress Reports

Complaint Counsel requests an order requiring Amazon to issue monthly progress reports to enable CPSC to carry out its monitoring authority over the remedial action and evaluate its effectiveness. CC Mot. 50–53; *see* 15 U.S.C. §§ 2064(d)(3)(B), (C), 2076(j)(6). Amazon asserts this is beyond the Commission's authority. Amazon Mot. 44. But this relief has previously been ordered by the Commission in CPSC administrative litigation. *See* Opinion and Order, *Zen Magnets, LLC*, 2017 WL 11672451, at *11. Although Amazon notes that the CPSC does not "systematically track recall effectiveness data" across all of its recalls, Oral Arg. Tr. 159; Amazon Ex. 61, at 25 (GAO Report), the same GAO report observes that CPSC does monitor individual recalls' efficacy

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[40] *Accord* 2021 Recall Handbook 16; *see id*. at 4 ("The goal of a CAP [corrective action plan] should be to remove or correct as many hazardous products as possible from the distribution chain and from consumers … ."); *id.* at 27 ("Removing hazardous consumer products from the marketplace is just one part of a CAP.")

[41] *See also* 2012 Recall Handbook 25 ("Any third party hired to destroy or dispose of recalled products needs to be monitored by the recalling firm to assure they understand the importance of keeping recalled products separate from other returned products and that they take appropriate steps to assure proper disposal of recalled products.")

[42] *Cf. United States v. Zen Magnets, LLC*, 170 F. Supp. 3d 1365, 1377, 1380 (D. Colo. 2016) (ordering defendants to provide refunds conditioned on returns and explaining that return of the products "will reduce the likelihood that such consumers are injured by those products, and it will also deter future violations of the CPSA"); *id.* ("To be sure, the public health is protected not only by halting current violation of the Act, but also by deterring future violations." (quoting *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1061 (10th Cir. 2006))).

and notes the desirability of improving upon those efforts. Ex. 61, at 28. Furthermore, the Recall Handbook has long incorporated such reports into recalls:

> CPSC monitoring of product recalls includes the following:
>
> • Submission of monthly progress reports to the Office of Compliance and Field Operations using a required form so the staff can assess the effectiveness of the firm[']s recall. Information requested includes number of products remedied, number of consumers notified of the recall, and any post recall announcement incidents and injuries.

2012 Recall Handbook 25.[43] Updated CPSC guidance provides that companies now submit the monthly progress reports to the online "Monthly Progress Report System." 2021 Recall Handbook 26.[44] Monthly progress reports were submitted in 78% of the 50 most recent voluntary recalls, reflecting significant effectiveness monitoring. *See* CC Ex. 1-Z. As a practical matter, progress reports would provide relevant information regarding when persons received notice of recall, to what extent they utilized the alternate remedy prescribed, and how many products are removed from consumers' homes.

The Handbook also provides the procedure to bring monthly reporting to a close: "When a firm determines that the corrective action plan has been implemented to the best of the firm's ability and as many products as possible have been removed from the marketplace, it may submit a final progress report requesting that Commission monitoring of the recall be ended." 2012 Recall Handbook 26. "When the staff closes its files on the corrective action plan, the firm should continue to implement the recall plan until as many products as

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[43] *See* 2021 Recall Handbook 5 n.2 ("The company's Recall Coordinator should be responsible for… submitting monthly progress reports to CPSC after the recall announcement."). In formulating a Corrective Action Plan, the 2012 Recall Handbook states that "companies should be prepared to address issues that invariably arise," including how "to monitor the product recall and provide timely reports to the Commission on the progress of the recall." 2012 Recall Handbook 16-17; *accord* 2021 Recall Handbook 15.

[44] Citing Consumer Product Safety Commission, Monthly Progress Report System, https://www.cpsc.gov/Business--Manufacturing/Recall-Guidance/monthly-progress-report-system.

possible have been removed from the marketplace." *Id.*[45] Thus, if a purchaser's refund or replacement request followed the point at which the Commission closed its file, Amazon will still honor that request. *See id.*

VII. Conclusion

Because there is no dispute as to the material facts demonstrating that the Subject Products present substantial product hazards, and no disputes of material fact countenancing against the specific remedies awarded here, this order determines that Section 15(c) cease distribution and notice orders are required to adequately protect the public from those hazards, and select Section 15(d) remedies are in the public interest. Summary Decision for Complaint Counsel is appropriate on the issue of liability as well as on the issue of remedies, the exact contours of which are to be further briefed, as set forth in the following order.

ORDER

1. Amazon will immediately cease distribution of the Subject Products.

2. By May 16, 2023, Complaint Counsel will file a brief, along with an amended proposed order, specifying the desired means of remedial action prescribed by this order. The brief and proposed order should address, inter alia, the specific means, content, location, and duration (if applicable) of notice to original purchasers of the Subject Products as well as online notice. Proposed notices should contain the contents specified in Section 15(i)(2)(A)–(H) and 16 C.F.R. §§ 1115.23–.29, including the use of "Recall" within the heading and text of the notice, the risk of death associated with the Subject Products, and high resolution photographs embedded in each notice. The brief should also address how consumer confirmation of destruction or return should be implemented and whether full refund, partial refund, replacement, or some combination will best effectuate confirmation of destruction. Finally, the brief should address the proposed process for monitoring and progress reports.

3. By May 30, 2023, Amazon will file a brief on the same subject, and may also file its own proposed order. Amazon's brief should discuss the best way to effectuate the remedies contemplated by this order and will not

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[45] The procedures for close out are virtually identical in the updated handbook. 2021 Recall Handbook 26.

be considered a waiver of Amazon's objections to this order and the summary decision order of January 19, 2022.

4. By June 6, 2023, Complaint Counsel may file a reply limited to any new issues raised by Amazon's brief or proposed order.

/s/ Jason S. Patil
Administrative Law Judge